

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 139/2020 OF 18TH NOVEMBER 2020

BETWEEN

EXPRESS AUTOMATION LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

AND

XRX TECHNOLOGIES LIMITED.....1ST INTERESTED PARTY

THE COPY CAT LIMITED.....2ND INTERESTED PARTY

Review against the decision of Kenya Ports Authority in respect of Tender No. KPA/172/2019-2020/ICT for Provision of Lease for Multifunctional products (Photocopying, Printing and Scanning).

BOARD MEMBERS

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

IN ATTENDANCE

- | | |
|---------------------|----------------------------------|
| 1. Mr. Philip Okumu | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) invited sealed bids from tenderers to demonstrate their technical and financial competence in providing services to the Procuring Entity in respect of Tender No. KPA/172/2019-2020/ICT for Provision of Lease for Multifunctional products (Photocopying, Printing and Scanning) (hereinafter referred to as “the subject tender”). To that end, the Procuring Entity published an advertisement in the Standard Newspaper and its Website (www.kpa.co.ke) on 18th June 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 7 bids by the bid submission deadline of 6th August 2020. The same were opened shortly thereafter by a Tender Opening Committee at the Procuring Entity’s Procurement Conference Room and recorded as follows: -

No.	Name of Bidder	Financial Proposal	No. of copies	No. of Pages Submitted	
		Bank			
1.	M/s Manage IT	Tausi Insurance Co. Ltd	1	3 Copies	478
2.	M/s Copy Cat Ltd	Stanbic Bank Ltd	1	3 Copies	431
3	M/s Express Automation	I & M Bank	1	3 copies	514

4	M/s MFI Limited	Stanbic Bank	1	3 copies	642
5	M/s CIT	I & M Bank	1	3 copies	209
6	M/s Bititec Systems and suppliers	Corporative Bank	1	3 copies	245
7	XRX Technologies	The Mornach Insurance	1	3 copies	1454

Evaluation of Bids

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

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

Preliminary Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.7 of the Appendix to Instructions to Tenderers of the Tender Document and found four firms [M/s Manage IT, M/s Express Automation, M/s Bititec Systems and Suppliers & M/s CIT] non-responsive and thus ineligible to proceed to Technical Evaluation. On the other hand, M/s Copy Cat Limited, M/s XRX Technologies Limited and M/s MFI Limited were responsive and thus proceeded to Technical Evaluation.

Technical Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.22 of the Appendix to Instructions to Tenderers of the Tender

Document, which required tenderers to demonstrate compliance to technical specifications of the Tender Document and to achieve an overall minimum technical score of 85% to qualify for Financial Evaluation. At the end of Technical Evaluation, it is only M/s XRX Technologies and M/s Copy Cat Ltd who were responsive and thus eligible to proceed to Financial Evaluation.

Financial Evaluation

At this stage, the Evaluation Committee considered the prices quoted by tenderers with a view of determining the lowest evaluated tender price for award of the subject tender in accordance with Clause 2.25 of the Appendix to Instructions to Tenderers of the Tender Document. At the end of Financial Evaluation, the Evaluation Committee found that M/s XRX Technologies Limited submitted the lowest tender price in the 5 items bidden for as can be seen in the table below: -

	DESCRIPTION	MONTHLY RENTAL KSHS	CHARGES PER PRINT/COPY			
			M/s XRX Technologies			
			A4 COLOR KSH	A3 COLOR KSH	A4 B/W KSH	A3 B/W KSH
Item 1	High Volume Color MFP	9,120.00	7.98	15.96	0.90	1.80
Item 2	High Volume B/W MFP	9,427.80	N/A	N/A	0.90	1.80
Item 3	Medium Volume Color MFP	8,486.62	7.98	15.96	0.90	1.80
Item 4	Medium Volume B/W MFP	8,008.06	N/A	N/A	0.90	1.80
Item 5	Single Function Printer		N/A	N/A	1.37	2.74

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s XRX Technologies Limited based on the prices outlined hereinbefore.

Due Diligence

In letters dated 11th October 2020, the Procuring Entity contacted six clients of M/s XRX Technologies Limited to confirm and verify whether the said tenderer provided similar services as the ones procured in the subject tender and whether such clients were satisfied by the tenderer's performance. The clients of M/s XRX Technologies Limited confirmed the nature of services provided by M/s XRX Technologies Limited and that the services were satisfactory.

Professional Opinion

In a Professional Opinion dated 22nd October 2020, the Procuring Entity's Head of Procurement and Supplies reviewed the subject procurement process and expressed his satisfaction that the same met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") read together with Article 227 of the Constitution. He therefore urged the Procuring Entity's Managing Director to consider awarding the subject tender to M/s XRX Technologies Limited for being the lowest evaluated tenderer in the 5 items bidden for as recommended by the Evaluation Committee. The said professional opinion was approved on 30th October 2020.

Notification to Tenderers

In letters dated 4th November 2020, the Procuring Entity notified the successful tenderer and all other unsuccessful tenderers of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Express Automation Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 17th November 2020 and filed on 18th November 2020 together with a Supporting Affidavit sworn on 17th October 2020 and filed on even date, through the firm of Otwal & Manwa Associates Advocates, seeking the following orders: -

- a. An order declaring the decision of the Procuring Entity cancelling the Applicant’s bid on the grounds set out in the letter of notification dated 4th November, 2020 addressed to the Applicant, null and void and the same be set aside;***
- b. An order declaring the decision of the Procuring Entity awarding the tender to the successful tenderer, null and void and the same be set aside;***
- c. An order cancelling the entire procurement process in Tender No. KPA/172/2019-2020/ICT (including notification of award dated 4th November, 2020 addressed to the Applicant and other unsuccessful bidders);***
- d. An order directing the 1st Respondent to comply with the provisions of Section 60 of the Public Procurement and***

Disposal Act 2015, to publish technical specifications that allow fair and open competition among tenderers, to re-evaluate the submitted tenders based on those revised technical specifications and if need be re-invite new bids from tenderers who participated in the procurement exercise upon publication of the revised technical specifications; and
e. An order awarding Costs of this Request for Review to the Applicant.

In response, the 1st and 2nd Respondents lodged a Response to the Request for Review, dated 23rd November 2020 and filed on 25th November 2020 together with an Affidavit in Support of the Response to the Request for Review, sworn on 23rd November 2020 and filed on 25th November 2020 through Addreya Dena Advocate. The 1st Interested Party's Managing Director addressed a Letter dated 30th November 2020 to the Board Secretary in response to the Request for Review while the 2nd Interested Party's Managing Director addressed a letter dated 30th November 2020 to the Board Secretary in response to the Request for Review.

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

presidential directives on containment and treatment protocols to mitigate against the potential risks of the pandemic.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. However, none of the parties to the Request for Review lodged written submissions.

BOARD'S DECISION

The Board has considered parties' pleadings including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -

- I. Whether the Applicant satisfied the requirement of serialization of bids as outlined in Clause 2.7 (2) & Clause 2.22 (i) of the Appendix to Instructions to Tenderers of the Tender Document Section 74 (1) (i) of the Act read together with Regulation 74 (1) (b) of the Public Procurement and Asset Disposal Regulations, 2020.**

II. Whether the Technical Specifications in the Tender Document met the threshold of section 60 of the Act read together with Article 227 (1) of the Constitution.

III. Whether the Procuring Entity can be faulted for returning the Applicant's Financial Bid/Proposal unopened.

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

On the first issue for determination, the Board notes that at paragraph 10 of its Request for Review, the Applicant reiterates the contents of its letter of notification of unsuccessful bid dated 4th November 2020 and further states at paragraph 23 of the Request for Review that it numbered all the pages of its bid and was therefore unfairly evaluated. On the other hand, the Respondents aver at paragraphs 1 and 2 of their Response to the Request for Review that Clause 2.7 of the Appendix to Instructions to Tenderers set out the mandatory requirements applicable to the Technical Proposal and Financial Proposal submitted by tenderers, including the requirement for tenderers to allocate page numbers to the entire bid [i.e. the Technical Proposal & the Financial Proposal] submitted to the Procuring Entity. According to the Respondents, section 74 (1) (i) of the Act read together with Regulation 74 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") make serialization of bid a mandatory requirement. The Respondents further state

that the Appendix to Instructions to Tenderers of the Tender Document also required bidders to serialize the entire bid document in a proper sequence including all appendices and attachments. In the Respondents' view, the Applicant was non-responsive to the said mandatory requirement and its bid rejected in accordance with section 79 (1) of the Act.

Having considered parties' pleadings, the Board observes the Applicant received a letter of notification of unsuccessful bid dated 4th November 2020 which contains the following details: -

"Reference is made to your participation in the above captioned tender

This is to notify you that pursuant to section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, your bid was not successful because your page numbering was not in the correct sequence i.e. front page was not numbered and between page 8 and 11..."

Turning to the Tender Document, it is worth noting that Clause 2.7 (2) of the Appendix to Instructions to Tenderers thereof states that: -

"The Technical and Financial Bids: -

(1);

(2) Shall have pages in the whole document numbered in the correct sequence including all appendixes and attachments [Mandatory]

Clause 2.22 (i) of the Appendix to Instructions to Tenderers of the Tender Document further provides that: -

"The Authority shall evaluate and compare tenders which have been determined to be substantially responsive as follows: -

i) Preliminary Evaluation (adherence to ALL mandatory requirements – Only bidders who meet all mandatory requirements shall proceed to detailed technical evaluation)

(ii) Detailed Technical Evaluation based on the requirements in the Tender Document

(iii) Financial Evaluation"

The Tender Document required tenderers to have pages in the whole bid document numbered in the correct sequence including all appendixes and attachments. This was a mandatory requirement as shown in Clause 2.7 (2) of the Appendix to Instructions to Tenderers. The Applicant's letter of notification dated 4th November 2020 states that the Applicant did not paginate the Front Page and the pages between Page 8 and 11.

Before the Board determines whether the Applicant satisfied the requirement of serialization, the Board deems it necessary to address the meaning of serialization and its purpose in procurement and asset disposal proceedings.

The Oxford Dictionary of English, 9th Edition, defines the term **“serialization”** as: -

“to arrange or publish in serial form”

On the other hand, the word **“serial”** is defined in the same dictionary as:

-

“consisting of, forming part of, or taking place in a series”

The Board further considered the ordinary meaning of the word **“series”** which we note is also explained in the Oxford Dictionary of English as follows:

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“A series of things or events is a number of them that come one after the other”

The word **“sequence”** is explained in the same dictionary as follows: -

“a series of related things or events, or the order in which things or events follow each other

A Sequence is a list of things (usually numbers) that are in order.”

From the above definitions, the Board observes the word **"sequence"** and **"series"** may be used synonymously in relation to the order in which things or events and in this case, numbers following each other in a given document. Therefore, when a document attached to a bid is numbered page "1", it would be expected that the next document of that bid would be allocated page "2", then "3" until the end, thus forming a sequence/series, without omitting some numbers so that a proper sequence or series is created. Thus, the action of allocating page numbers to a document in order to form a sequence/series is called **serialization**. In doing so, the maker of the document must be careful not to omit/skip some numbers because the moment any of the numbers are omitted, then there would be no proper sequence or series. Subsequently, there would be no proper serialization. As a result, it is expected that if the maker of a document chooses numerical series where figures are used, the author of the document would begin serialization as "1", then continue serialization of the document as "2", "3", "4" up to the end of the document, without omitting some numbers and without changing the manner of serialization.

In public procurement and asset disposal procedures, section 74 (1) (i) of the Act recognizes that the accounting officer of a procuring entity has the obligation of preparing an invitation setting out serialization of pages by a bidder for each bid submitted. The said provision states as follows: -

"74 (1) *The accounting officer shall ensure the preparation of an invitation to tender that sets out the following*

(a) ;

- (b);
- (c);
- (d);
- (e);
- (f);
- (g);
- (h);
- (i) ***requirement of serialization of pages by the bidder for each bid submitted"***

On its part, Regulation 74 (1) (b) of Regulations 2020 provides as follows: -

"Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether-

- (a);
- (b) ***the tender has been submitted in the required format and serialized in accordance with section 74 (1) (i) of the Act"***

This was captured as a mandatory requirement under Clause 2.7 (2) & Clause 2.22 (i) of the Appendix to Instructions to Tenderers of the Tender Document outlined hereinbefore.

In Judicial Review Miscellaneous Application No. 312 of 2018, Republic v. Public Procurement Administrative Review Board, Nairobi City Water & Sewerage Company Limited & Another (Interested Parties) Ex parte Fourway Construction (2019) eKLR, (hereinafter referred to as "the Fourway Construction Case") the Court while considering the import of section 74 (1) (i) of the Act held as follows: -

"For a purposive interpretation of the provisions of the law regarding serialization of the pages of bid documents, one needs to consider the principles and objectives underlying public procurement law, which are stipulated under both the Constitution and the Act. Article 227(1) of the Constitution in this regard 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. Section 3 of the Act provides for the guiding principles of public procurement as follows...

Two key principles and objectives come to play in the requirement for serialization of every page of a bid document. The first is that following laid down rules of procedure is an important aspect of fairness, non-discrimination and equal treatment of bidders.

Non-conformity with this requirement will be open to abuse by procuring entities and bidders, who can deliberately plant documents, and use the opportunity for correction to advance

their own interests. In addition, the possibility of accepting non-conforming tenders as regards serialization of every page will require that discretion is given to procuring entities or reviewing bodies to judge whether or not to waive or allow correction of the particular non-conformity, and such discretion can be abused to favour certain bidders”

The Court in the Fourway Construction Case explained the importance of serialization of bids and the main reason has been to ensure that the integrity of a procurement process is maintained, such that there is no opportunity for a bidder, or a procuring entity in collusion with a bidder to engage in any corrupt practices.

Turning to the circumstances of the instant Request for Review, the Board observes that there are two limbs regarding the reason why the Applicant’s bid was found non-responsive. The first limb relates to the Front Page of the Applicant’s original bid, which the Board notes is a Cover Page with the following details: -

TECHNICAL PROPOSAL

ORIGINAL

[Applicant’s Company Logo]

Tender NO. KPA/172/2019-20/ICT

**PROVISION OF LEASE FOR MULTI-FUNCTIONAL PRODUCTS
(PHOTOCOPYING, PRINTING AND SCANNING)**

[The Procuring Entity's Receiving Stamp] [The Procuring Entity's Logo]

The Board studied the Cover Page of the blank Tender Document and notes that the same has common features with the Cover Page of the Applicant's original bid save that the Applicant added its Company Logo, the words **"TECHNICAL PROPOSAL-ORIGINAL"**. The Procuring Entity's Receiving Stamp was also affixed on the said Cover Page to show that the Applicant's original bid was received by the Procuring Entity on 6th August 2020, which was the tender submission deadline. However, the said Cover Page is not serialized.

This Board has had occasion to address the purpose of a Cover Page in **PPARB Application No. 74 & 77 of 2020 (Consolidated), FCM Travel Solutions t/a Charleston Travel Limited & Another vs. The Accounting Officer, Kenya Ports Authority & 3 Others** (hereinafter referred to as "the FCM Travel Solutions Case") where it was held as follows:

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"The Board studied the 1st Applicant's original bid and notes that the 1st Applicant's bid is tape bound and the first page is a Cover Page containing a photograph. The said Cover Page bears the Procuring Entity's Official Stamp and the following details: -

"ORIGINAL

Kenya Ports Authority

Provision of Air Travel Agency Services

Tender No. KPA/111/2019-20/PSM

TECHNICAL PROPOSAL

March 2020

*FCM
Travel
Solutions"*

The next page is numbered "1" and contains a Confidentiality Statement. Thereafter, the 1st Applicant's original bid is numbered "2", "3", "4", "5" and so on, up to the last page which is numbered "191". In essence, the 1st Applicant's bid is numbered "1" (i.e. where the Confidentiality Statement can be found) up to "191" (i.e. where a section of a document known as "Financial Ratios" is found). However, the 1st Applicant did not allocate a page number to the Cover Page mentioned hereinbefore.

It is therefore important at this point to address our minds on the importance of a Cover Page and whether or not the same ought to be allocated a Page Number.

The Oxford Dictionary of English, 7th Edition, defines a Cover Page as: -

"a page of a book, article, dissertation and other literary writing or any other document bearing the title and usually the names of the author and publisher and the place and sometimes date of publication"

Joan Lambert in his Book "The Use of Microsoft Word" (Oxford University Press, 2014), explains that: -

"You can configure the position, alignment, and format of page numbers, and whether the page number is shown on the first page. When a document has a cover page, it is standard practice to omit the page number from that cover page."

It is worth noting, in preparing documents, there are features provided in computer applications for formatting a document and one of these features include "Page Numbers". It is standard practice that a Cover Page is not given a page number. In the instant Request for Review, the 1st Applicant provided a Cover Page only for purposes of giving the Procuring Entity an overview of what the Applicant company is all about. This is one way that a Client (i.e. a procuring entity) can get a first impression of the kind of Supplier (i.e. a bidder) that such procuring entity is likely to get into business with. Thereafter, the 1st Applicant provided page numbers in a proper sequence of all documents required in the Tender Document.

.....In addition to this, the 1st Applicant never introduced a different method of serialization of its bid and was consistent in the manner in which it numbered its bid document to the end, therefore creating a proper sequence.

The 1st Applicant serialized its bid document in a sequential manner up to the last page and there was no need for it to allocate a page number to the Cover Page of its bid.

Accordingly, the Board finds that the Procuring Entity unfairly evaluated the 1st Applicant's bid since all the pages containing the documents required by the Procuring Entity were numbered by the 1st Applicant in the correct sequence."

In the FCM Travel Solutions Case, the Board addressed its mind on the purpose of a Cover Page and found that a Cover Page gives an overview of what a document contains and in that case, the Cover Page of the 1st applicant gave an overview of the 1st applicant's company thus apprising the procuring entity of the kind of company it was likely to get into business with, should the company be awarded the tender. The Board also found it to be standard practice for a Cover Page to lack a page number. In essence, the Board observed that the 1st applicant serialized its bid document in a sequential manner up to the last page and there was no need for it to allocate a page number to the Cover Page of its bid.

Having considered the finding in the foregoing case, the Board maintains the position that there was no need for the Applicant in the instant Request for Review to allocate a page number to the Cover Page of its bid, thus ought not to be one of the reasons why the Applicant's bid was found non-responsive.

In addressing the second limb of the reason why the Applicant in the instant Request for Review was declared non-responsive, the Board notes that the Respondents state that the pages between **"Page 8 and 11"** of the Applicant's bid are not serialized. Having studied the Applicant's original bid, the Board notes that the Respondents allegations are true. The 1st applicant in the FCM Travel Solution Case provided page numbers in a proper sequence of all documents of its bid. This specific scenario is not similar to the instant Request for Review because the Applicant herein did not serialize the documents between **"Page 8 and 11"**. In essence, it was expected that the Applicant would serialize its bid as "1", "2", "3", "4", "5", "6", "7" and "8", and then proceed with the same sequence/series for the next page as **"9"** and for the next page after that as **"10"**. Instead, the Applicant attached a Power of Attorney, which the Board notes runs in three pages, two of which are not allocated page numbers then proceeded to allocate a page number **"11"** to a letter dated 6th July 2020 addressed to the Procuring Entity, appearing immediately after the Power of Attorney. In the Board's view, since the Applicant's Power of Attorney runs through three pages, and since the first page of the Power of Attorney is already serialized as **"8"**, it ought to have proceeded with this manner of serialization for the next page

of the Power of Attorney as “9” and then proceed to the next page of the Power of Attorney and serialize the same as “10”.

Strangely enough, the Power of Attorney attached to the Applicant’s original bid is not the only document that runs through several pages. Having studied the Applicant’s original bid, the Board notes the following: -

- *The Applicant’s Company Profile runs through 7 pages (page 16 to 22) which are all serialized;*
- *The Applicant’s duly Completed Confidential Business Questionnaire Form runs through 7 pages (37-38) which are all serialized;*
- *The Equipment Lease Agreement dated 23rd May 2017 between the Applicant and Coulson Harney LLP runs through 27 pages (pages 119-145) which are all serialized;*
- *The Curriculum Vitae & Certificates of Key Personnel run through pages 236 to 277) which are all serialized, etc.*

In essence, nothing could have been easier than to serialize all pages where the Power of Attorney can be found as the Applicant did to the documents listed hereinbefore. Therefore, in so far as serialization of the Applicant’s original bid in a proper sequence is concerned, it is evident that the Applicant has failed to meet the test of Clause 2.7 (2) & Clause 2.22 (i) of the Appendix to Instructions to Tenderers of the Tender Document read together with section 74 (1) (i) of the Act and Regulation 74 (1) (b) of Regulations 2020, having failed to allocate page numbers to two documents forming part of its

Power of Attorney, which appear between page 8 and 11 of the Applicant's original bid. The overriding objective of serialization of bids as was held by the Board in the FCM Travel Solution Case and the High Court in the Fourway Construction Case is to avoid instances where there is removal of some pages from a tenderer's bid, or insertion of new pages into such tenderer's bid, by the Procuring Entity or by the Procuring Entity in collusion with the tenderer, in order to give the tenderer an unfair advantage over other tenderers. The Applicant's failure to serialize the pages between 8 and 11 made its bid susceptible to manipulation and such omission is not justifiable in law having failed to meet the threshold of Clause 2.7 (2) & Clause 2.22 (i) of the Appendix to Instructions to Tenderers of the Tender Document read together with section 74 (1) (i) of the Act and Regulation 74 (1) (b) of Regulations 2020.

Having established that the Applicant failed to meet the threshold of serialization of bids in accordance with section 74 (1) (i) of the Act and Regulation 74 (1) (b) of Regulations 2020 and Clause 2.7 (2) & Clause 2.22 (i) of the Appendix to Instructions to Tenderers of the Tender Document, the Board is cognizant of the fact that compliance with eligibility and mandatory requirements goes to the heart of responsiveness of tenders. The Respondents made reference to section 79 (1) of the Act which states as follows: -

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

Having found that it is standard practice that a Cover Page is not numbered, the Board is of the considered view that if the pages between 8 and 11 of the Applicant's original bid are taken into account, the Applicant still failed to meet an eligibility and mandatory requirement considered during Preliminary Evaluation and expressly provided in law and thus the Evaluation Committee had no option but to find the Applicant's bid non-responsive.

Accordingly, the Board finds that the Applicant failed to satisfy the requirement of serialization provided in Clause 2.7 (2) & Clause 2.22 (i) of the Appendix to Instructions to Tenderers of the Tender Document read together with section 74 (1) (i) of the Act and Regulation 74 (1) (b) of Regulations 2020.

On the second issue for determination, the Board observes that at paragraph 11 of the Request for Review, the Applicant avers that when it obtained the Tender Document, it noted several anomalies and unfair specifications tailored to assist and accord unfair advantage over other bidders. In the Applicant's view, the technical specifications of the Tender Document favoured the brand supplied by the 1st Interested Party. At paragraph 13 of the Request for Review, the Applicant states that the 1st Interested Party is the exclusive distributor/supplier of Xerox Products and that this information can be confirmed through the 1st Interested Party's website. According to the Applicant, having compared the technical specifications of the Tender Document and the ones of Xerox Product distributed/supplied by the 1st Interested Party, the technical specifications in the Tender Document are

similar and specific to Xerox Products. To that end, the Applicant states the Respondents failed to conduct the subject procurement process in a fair and competitive manner as required by section 60 of the Act and Article 227 (1) of the Constitution.

In response to these averments, the Respondents state at paragraphs 6 to 8 of the Response to the Request for Review that the technical specifications of the Multifunctional Products were outlined in Section VI of the Instructions to Tenderers of the Tender Document giving specific requirements and descriptive features of products being procured by the Respondents. In the Respondents' view, the said specifications conform with functionality and performance of the products required by the Procuring Entity, are based on international standards and no exclusive trademark, brand or patent of any specific origin are listed in the Tender Document. The Respondents further state that clarifications were sought by prospective bidders and modifications given by the Procuring Entity through Addendum No. 2 dated 16th July 2020 stating that alternative brands were responsive on condition that functionality and performance were at par with specifications in the Tender Document. On its part, the 1st Interested Party states that the technical specifications in the Tender Document were generic as some of the specifications in Xerox Products distributed/supplied by the 1st Interested Party are found in different brands of Multifunctional Devices distributed/supplied by other companies. The 1st Interested Party further states that several addenda were issued by the Procuring Entity wherein the question of technical specifications were addressed. On the other hand, the

2nd Interested Party took the view that the Procuring Entity may have overlooked some critical issues in the subject procurement process such as the failure of the technical specifications to have different options thus leaving gray areas in pricing.

In addressing the issue under consideration, the Board observes that section 60 of the Act which deals with requirements, including technical specifications set out in a tender document provides as follows: -

- "(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.***
- (2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.***
- (3) The technical requirements shall, where appropriate—***
- (a) conform to design, specification, functionality and performance;***
- (b) be based on national or international standards whichever is superior;***

- (c) factor in the life of the item;**
 - (d) factor in the socio-economic impact of the item;**
 - (e) be environment-friendly;**
 - (f) factor in the cost disposing the item; and**
 - (g) factor in the cost of servicing and maintaining the item.**
- (4) The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless—**
- (a) there is no other sufficiently precise or intelligible way of describing the requirements; and**
 - (b) the requirements allow equivalents to what is referred to."**

Section 60 of the Act gives the accounting officer of a procuring entity an obligation to prepare specific requirements relating to goods, works or services being procured by such procuring entity. According to the said provisions, such requirements must be clear, give a correct and complete description of what is to be procured and allow fair and open competition among those who may wish to participate in the procurement proceedings. In determining whether a procuring entity failed to comply with the requirement of section 60 of the Act, the Board must bear in mind that a procuring entity is better placed to know the goods and/or services required from potential suppliers. Therefore, the obligation of coming up with specific

requirements including technical specifications of a tender should be left with the procuring entity, so long as the procuring entity ensures the specifications comply with section 60 of the Act and the principles set out in Article 227 (1) of the Constitution which states as follows: -

"Whenever a State organ or public entity contracts for goods and services, it must do so in a system that is fair, equitable, transparent, competitive and cost-effective"

Whereas the Applicant alleged that the technical specifications in the Tender Document were tailored to favour the 1st Interested Party, two tenderers, that is, the 1st Interested Party and the 2nd Interested Party met the technical specifications in the Tender Document at the end of Technical Evaluation as can be seen in the Evaluation Report received on 11th September 2020 by the Procuring Entity's Head of Procurement and Supplies. The Technical Evaluation Stage is the stage where compliance to technical specifications of a tender is considered and if it is true the said specifications were tailored to fit the technical specifications Xerox Products distributed/supplied by the 1st Interested Party to the exclusion of other products, then the products proposed by the 2nd Interested Party [i.e. RICOH IM C5500 (A), RICOH MP 5055SP, RICOH C300 & (A), RICOH MP 3055SP at pages 000092, 000101 & 00123 of the 2nd Interested Party's original bid respectively] would not have met the technical specifications in the Tender Document for purposes of proceeding to the Financial evaluation stage.

In the Board's view, there is no evidence that the technical specifications in the Tender Document were tailored to fit Xerox Products that are

distributed/supplied by the 1st Interested Party because the technical specifications of the products proposed by the 2nd Interested Party met the requirements in the Tender Document. As a result, the 1st Interested Party's product was not the only product that satisfied the technical specifications in the Tender Document.

This Board also takes cognizance of the fact that the Procuring Entity issued Addendum No. 1 dated 14th July 2020 and Addendum No. 2 dated 16th July 2020 in response to queries by tenderers. If such clarifications failed to address the Applicant's alleged anomalies in the Tender Document, the Applicant ought to have raised such anomalies as opposed to subjecting itself to the procurement process. The Applicant did not provide evidence to the satisfaction of the Board of having sought clarification whether or not the Procuring Entity desired a specific product with specific technical specifications neither did the Applicant approach this Board within 14 days after the last addendum of 16th July 2020 was issued. The Applicant participated in the subject procurement process and has only raised this issue so late in the day because its bid was found non-responsive. That notwithstanding, the Applicant's allegations that the technical specifications in the Tender Document were tailored to fit Xerox Products distributed/supplied by the 1st Interested Party have not been substantiated.

Having established that two tenderers qualified at the end of Technical Evaluation, the Board finds that there is no proof that the Procuring Entity

violated section 60 of the Act read together with Article 227 (1) of the Constitution.

On the third issue for determination, the Board observes that at paragraph 24 of its Request for Review, the Applicant avers that the Respondents illegally, unfairly and without regard to procedure and reference to the Applicant's financial bid, purported to cancel the Applicant's Financial Bid because the same was returned to the Applicant unopened. In response, the Respondents at paragraph 3 of the Response to the Request for Review aver that pursuant to Clause 2.22 of Instructions to Tenderers, it is only bids that were substantially responsive to Technical Evaluation that would be considered for Financial Evaluation. According to the Procuring Entity, since the Applicant's bid fell short at the Preliminary Evaluation Stage, no further consideration was made for Technical Evaluation and subsequently for Financial Evaluation.

The starting point in addressing this issue is to reiterate the finding of the Board on the first issue addressed hereinbefore that, the Applicant failed to satisfy the requirement of serialization of bids provided for in Clause 2.7 (2) & Clause 2.22 (i) of the Appendix to Instructions to Tenderers of the Tender Document read together with section 74 (1) (i) of the Act and Regulation 74 (1) (b) of Regulations 2020. With that in mind, the Board takes cognizance of the fact that Clause 2.7 of the Appendix to Instructions to Tenderers of the Tender Document gave tenderers clear instructions that: -

"Tenders shall be submitted in a two-enveloped system (Envelope A- Technical Submission and Envelope B- Financial Submission. Envelope A and B shall be sealed in two separate envelopes clearly marked Envelope "A" and Envelope "B"

On its part, Regulation 120 (1) of Regulations 2020 provides as follows: -

"Pursuant to section 120 of the Act, technical proposals shall be opened first before the opening of financial proposals where the tender document requires submission of separate technical and financial bids"

Clause 2.7 of the Appendix to Instructions to Tenderers of the Tender Document further provided that: -

Only tenders that are responsive to the mandatory requirements and have attained the pass mark of 80% in the technical evaluation shall have their financial submissions opened"

Having studied provisions of the Tender Document and Regulations 2020 outlined hereinbefore, the Board notes that where a procuring entity instructs tenderers to submit separate technical and financial bids, the Technical Bid/Proposal is opened first before opening the Financial Bid/Proposal. In usual practice, the Technical Bid/Proposal would contain documents in support of requirements in the Tender Document considered

during Preliminary and Technical Evaluation. On the other hand, the Financial Bid/Proposal would contain requirements considered during Financial Evaluation. It is the Board's considered view that the underlying principle behind opening the Technical Bid/Proposal first before opening of the Financial Bid/Proposal in a two-enveloped system is two-fold, that is; (i) the Evaluation Committee should first determine tenderers' responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is made at the Financial Evaluation Stage and (ii) to avoid instances where a procuring entity may rush to open Financial Bids/Proposals to determine the tenderer that may have submitted the lowest price before determining such tenderer's responsiveness to eligibility and mandatory requirements (including technical specifications).

It is the Board's considered opinion that there is no harm in returning a non-responsive tenderer's financial bid unopened if such tenderer never made it to either Technical Evaluation or Financial Evaluation.

In the circumstances, the Board finds no fault in the Procuring Entity's action of returning the Applicant's financial bid unopened because the Applicant failed to satisfy a requirement at the Preliminary Evaluation Stage, did not proceed to Technical Evaluation and thus its Financial Bid/Proposal could not be considered for evaluation.

The upshot of the foregoing findings is that the Request for Review lacks merit and the same is hereby dismissed.

FINAL ORDERS

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

- 1. The Request for Review filed by the Applicant on 18th November 2020 in respect of Tender No. KPA/172/2019-2020/ICT for Provision of Lease for Multifunctional products (Photocopying, Printing and Scanning), be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 8th day of December 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB