REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 65/2020 OF 22ND MAY 2020

BETWEEN

PRESTIGE MANAGEMENT SOLUTIONS LIMITED.....APPLICANT

AND

COUNTY SECRETARY,

COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

Review against the decision of the County Government of Kiambu with respect to Tender No. KCG/YASC/ICT/T/001/2019-2020 for Provision of Hospital Management Information Systems across Kiambu Health Facilities

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson
2. Ms. Robi Chacha -Member
3. Dr. Joseph Gitari -Member

IN ATTENDANCE

1. Mr. Philip Okumu -Holding brief for Secretary

BACKGROUND TO THE DECISION

The Bidding Process

The County Government of Kiambu (hereinafter referred to as "the Procuring Entity") advertised Tender No. KCG/YASC/ICT/T/001/2019-2020 for Provision of Hospital Management Information Systems across Kiambu Health Facilities (hereinafter referred to as "the subject tender"), in the Daily Nation Newspaper and Business Daily on 10th February 2020. Bidders were instructed to download tender documents from the Procuring Entity's website or at www.supplier.treasury.go.ke.

All interested and eligible bidders were required to submit their duly completed tenders through the Integrated Financial Management System (IFMIS) supplier portal and one copy to be enclosed in a plain sealed envelope marked with the tender name and tender number.

Bid Submission Deadline and Opening of bids

A total of thirteen (13) firms/bidders submitted their bids through the IFMIS supplier portal and further submitted a physical copy of their bid documents which were opened on 7th April 2020 and recorded as follows:

Bidder No.	Bidder Name
1.	M/s Compufix Technologies Limited
2.	M/s System Partners Limited
3.	M/s Softcom Business Solutions Limited
4.	M/s MFI Technology Solutions Limited
5.	M/s Elephant Healthcare

Bidder No.	Bidder Name
6.	M/s Ceresoft Technologies Limited
7.	M/s Fortis Innovations Limited
8.	M/s Smart Applications International Limited
9.	M/s Conann Communications Limited
10.	M/s Prestige Management Solutions Limited
11.	M/s Sybyl Kenya Limited
12.	M/s Sytam Technologies Limited
13.	M/s Telepyne Enterprises Limited
14.	M/s Netpaq Business Systems Limited
15.	M/s Wilcom Systems Limited

The Procuring Entity's Tender Opening Committee noted that the following bidders submitted a physical copy of their bid documents but did not submit their bids through the IFMIS platform as indicated in the mandatory requirements in the Tender Document: -

a) M/s Elmas Ventures Limited

b) M/s Unumed Limited

REQUEST FOR REVIEW NO. 65 OF 2020

M/s Prestige Management Solutions Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 21st May 2020 and filed on 22nd May 2020 (hereinafter referred to as "the Request for Review") together with a Supporting Affidavit sworn on 21st May 2020 and filed on 22nd May 2020 (hereinafter referred to as "the Applicant's Affidavit"), through the firm of Akanga Matende and Company Advocates.

In response, the Procuring Entity lodged a Response to the Request for Review dated and filed on 8th June 2020 (hereinafter referred to as "the Procuring Entity's Response) through its Legal Counsel, Ms. Keziah Mbugua.

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

i. ***An order declaring that the 1st & 2nd Respondents breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Articles 47 and 227 of the Constitution;***

ii. ***An order directing the Respondent to notify the Applicant of the current status of the procurement process;***

iii. ***An order cancelling/setting aside the notification issued to the Applicant on 15th May 2020 communicating its regret/disqualification of the Applicant;***

iv. ***An order substituting the decision of the Procuring Entity with an order confirming compliance of the Applicant with the requirements contained in the Tender Document following a review of all the records of the procurement process (particularly the preliminary evaluation thereof) relating to Tender No. KCG/YASC/ICT/T/001/2019-2020;***

v. ***An order directing the 1st & 2nd Respondent to evaluate the Applicant's tender document herein and confirm that the same was accessible and communicate its decision to the Applicant as per the Public Procurement and Asset Disposal Act, 2015;***

vi. ***Further and/or in the alternative, and without prejudice to any of the other prayers sought herein, an order directing the 1st and 2nd Respondents to reconstitute the evaluation committee and undertake a fresh evaluation of all bids received in the tender in accordance with the Public Procurement and Asset Disposal Act, 2015 and Articles 47 and 227 of the Constitution;***

vii. ***Such other or further relief or reliefs as the Board shall deem just and expedient.***

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan

to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

Both the Applicant and the Procuring Entity did not file any Written Submissions.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") together with the written submissions by parties.

The issues that call for determination are as follows:-

I. ***Whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation in***

accordance with section 80 (2) of the Act, as read together with Article 47 and 227 (1) of the Constitution with respect to the following mandatory requirement: -

a) MR11: Duly completed tenders should be submitted online through the Integrated Financial Management System (IFMIS) Supplier Portal AND one copy should be enclosed in a plain sealed envelope marked with the tender name and tender number

II. Whether the Procuring Entity issued the Applicant with a letter of notification of unsuccessful bid that meets the threshold under section 87 (3) of the Act;

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

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

A brief background to the Request for Review is that the Procuring Entity, through a Request for Proposals, invited interested and eligible bidders to submit their bids through the Integrated Financial Management Information System (IFMIS) supplier portal in addition to one copy of their bid document in response to the subject tender.

By the bid submission deadline of 7th April 2020, a total of thirteen (13) bidders submitted their bids, including the Applicant herein.

On 15th May 2020, the Applicant received an email notification from the Procuring Entity which stated as follows: -

> ***".....Reason for disqualification:***
>
> ***THE DOCUMENT WAS A WEB PAGE SO IT WAS NOT ACCESSIBLE"***

Aggrieved with the Procuring Entity's decision, the Applicant moved the Board through this Request for Review.

The Applicant contended that it duly submitted its bid document in strict adherence to the Tender Document which provided for submission of bids through the IFMIS supplier portal and also submission of one copy of a bidder's bid document enclosed in a plain sealed envelope.

It was the Applicant's submission that it submitted its bid document through the IFMIS supplier portal in the form of a web page data type in compliance with the criteria stipulated by the Procuring Entity in its Tender Document which bid document was successfully acknowledged by the Procuring Entity. The Applicant contended that a document submitted in the form of a web page data type is in the form of an attachment, which document is accessible by clicking on the HTML link provided.

To support its submission, the Applicant in its Request for Review referred the Board to section 80 of the Act, in addition to Article 47 and Article 227 of the Constitution to support its view that the foregoing provisions dictate that, procurement processes must be carried out in a manner that promotes fairness, accountability, competition and transparency. It was therefore the Applicant's submission that the Procuring Entity's disqualification of its tender was not only malicious and in bad faith but in gross violation of the provisions of the Tender Document, the Act and the Constitution.

On its part, the Procuring Entity submitted that in the subject tender, all bidders were required to submit their bid documents through the IFMIS supplier portal. However, during the process of evaluation, the Procuring Entity's Evaluation Committee observed that the Applicant had submitted a link through the IFMIS supplier portal which the Procuring Entity could not use to access the Applicant's bid documents. It was therefore at this stage of evaluation that the IFMIS supplier portal sent an auto generated notification to the Applicant that its bid document was not accessible.

The Procuring Entity contended that the responsibility of ensuring that a bidder's bid documents were accessible through the IFMIS supplier portal rested entirely with the bidder in question and thus the Applicant's bid was disqualified for its failure to submit an accessible link to its bid documents.

In its determination of the first issue, the Board first examined the Procuring Entity's Tender Document and observes Mandatory Requirement No. 11 of the Evaluation Criteria under the Appendix to Instructions to Tenderers on page 23 of the Tender Document which reads as follows: -

> ***"Dully completed tenders should be submitted online through the Integrated Financial Management System (IFMIS) Supplier Portal <u>AND</u> one copy should be enclosed in a plain sealed envelope marked with the tender name and tender number. (THE TENDER SHALL BE STRICTLY ON THE E-PLATFORM; PHYSICAL DOCUMENTS THAT WE MAY REQUEST TO BE PROVIDED SHALL BE USED TO CONFIRM YOUR E-PLATFORM BID; THEY SHALL NOT BE USED TO EVALUATE IN ANY WAY. EVALUATIONS AND RECOMMENDATIONS SHALL BE STRICTLY ON THE E-PLATFORM.)"***

The Board observes from the above provision that the subject procurement process is an e-procurement. Accordingly, all bidders were required to submit their duly completed tender documents to the Procuring Entity in two ways. Firstly, bidders were required to submit their bids online through the IFMIS supplier portal. Secondly, bidders were also required to submit a physical copy of their bids to the Procuring Entity in a plain sealed envelope marked with the tender name and tender number.

Further, the Procuring Entity clearly stipulated that evaluation of tenders would be strictly on the e-platform and the physical copies of the bid

documents would not be evaluated but would only be used to confirm the bid documents submitted on the IFMIS supplier portal.

The Board observes from parties' pleadings and the documentation before it that the Applicant submitted its bid documents in response to the subject tender to the Procuring Entity through the IFMIS supplier portal in the form of a HTML or web page link.

The question that now arises before the Board is what is a HTML or webpage link?

The TechTerms Computer Dictionary defines 'HTML' as follows:-

> ***"HTML Stands for 'Hypertext Markup Language.'***
>
> ***HTML is the language used to create webpages. Hypertext" refers to the hyperlinks that a HTML page may contain.***
>
> ***'Markup language' refers to the way tags are used to define the page layout and elements within the page."***

It further defines a webpage as follows: -

> ***"Web pages are what make up the World Wide Web. These documents are written in HTML (Hypertext Markup Language) and are translated by your Web browser. Web pages can either be static or dynamic. Static pages show the same content each time they are viewed. Dynamic***

pages have content that can change each time they are accessed. These pages are typically written in scripting languages such as PHP, Perl, ASP, or JSP. The scripts in the pages run functions on the server that return things like the date and time, and database information. All the information is returned as HTML code, so when the page gets to your browser, all the browser has to do is translate the HTML."

From the above definition, we observe that HTML or 'Hypertext Markup Language' is a computer language which is used to create a webpage and defines the layout and elements within that webpage. A computer through its internet browser therefore translates HTML language or HTML code which is contained in a HTML link in order for it to access the information on a webpage , which may either be static (same content is displayed each time it is viewed) or dynamic (content changes each time a webpage is accessed).

Jim Elferdink and David Reynolds in their book **AppleWorks 6: The Missing Manual (2000)** explained the term 'HTML' as follows: -

"HTML which stands for Hypertext Markup Language, is a computer language that describes to other computers how webpages should look. HTML documents are merely text documents made up of what are known as tags. These tags describe how elements are aligned on the page, how text is formatted, what links in the page link to and so on."

HTML is therefore the means through which one computer communicates to another computer how a webpage should look, that is, how text on the webpage looks or how it's formatted and any other information on the webpage in question.

Zhengxin Chen in his book **Intelligent Data Warehousing: From Data Preparation to Data Mining (2001)** explains how HTML language is interpreted by a computer as follows: -

> ***"The Web makes it possible to access a file (identified by a universal resource locator, or URL) anywhere on the Internet. The file is a document formatted using hypertext markup language (HTML) and contains links to other files. The formatting commands are interpreted by a Web browser to display the document and users can navigate to other related documents by choosing links. A collection of such documents at a website is managed using a program called a Web server, which accepts URLs and returns the corresponding documents. The World Wide Web (WWW) is the collection of web sites accessible over the internet.***
>
> ***An HTML link contains a URL which identifies the site containing the linked file. When a user clicks on a link, the web browser connects to the web server at the destination web site using a connection protocol called HTTP and submits the link's URL. When the browser receives a file***

from a web server it checks the file type by examining the extension of the file name. HTML is a simple language used to describe a document. It is a markup language because HTML works by augmenting regular text with "marks" that hold special meaning for a web browser handling the document."

From the above excerpt, we observe that a HTML link identifies a particular site or webpage. When a user clicks on a HTML link, the computer's internet browser connects to the destination webpage identified in the link in question. Once the webpage loads, a user can then navigate to other documents by choosing links displayed on the webpage in question.

Having established what a HTML link is, the Board makes the following observations: -

Firstly, Mandatory Requirement No. 11 of the Evaluation Criteria under the Appendix to Instructions to Tenderers on page 23 of the Tender Document required bidders to submit their bid documents through the IFMIS supplier portal.

From this requirement, it is evident that bidders were required to submit their bid documents through the IFMIS portal and not submit a webpage link through the IFMIS portal.

As explained hereinbefore, a webpage or HTML link connects or leads to a specific web page which may either be static, that is the information or content on the page remains the same each time it is viewed or dynamic, that is, the information or content changes each time a webpage is accessed. It is therefore possible to assume that a bidder who provides a webpage link whereby the content or information therein is dynamic, may still be able to access or manipulate information or content on that specific webpage including its respective bid document even after submitting the webpage link to the Procuring Entity, thus bringing into question the integrity of its respective bid document.

Secondly, noting that the Applicant submitted a webpage link through the IFMIS Supplier portal, we observe from the Procuring Entity's submissions that even upon clicking the said link, the Procuring Entity was unable to access the Applicant's bid documents on the webpage that the Procuring Entity was directed to.

The Board observes that the onus of ensuring that the Applicant's bid document was accessible by the Procuring Entity on the IFMIS supplier portal rests with the Applicant. The Board notes, this onus was not discharged by the Applicant in this instance given that the Applicant's bid documents could not be accessed by the Procuring Entity through the webpage link that the Applicant provided in the IFMIS supplier portal.

In this regard therefore, the Procuring Entity could not evaluate bid documents that were not accessible on the IFMIS portal, noting that Mandatory Requirement No. 11 clearly stipulated that only bid documents submitted through the IFMIS supplier portal would be evaluated and therefore the Procuring Entity had no option but to disqualify the Applicant from further evaluation for its failure to meet a mandatory requirement.

From the foregoing, we find that the Applicant did not satisfy Mandatory Requirement No. 11 of the Evaluation Criteria under the Appendix to Instructions to Tenderers on page 23 of the Tender Document.

It is therefore the finding of this Board that the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation in accordance with section 80 (2) of the Act, as read together with Article 47 and 227 (1) of the Constitution.

The Board will now proceed to the second issue for determination.

The Board observes that on 15th May 2020, the Applicant received an email notification from the Procuring Entity which stated as follows: -

> ***"From:*** *Workflow Mailer supplier@ifmis.go.ke*
>
> ***Sent:*** *Friday, May 15, 2020 11:01 AM*
>
> ***To:*** *WILLIAM NDUNGU*

Subject: *FYI: Disqualified: Quote 857823 for RFQ 786861 (Open Tender – National – 786861 – 2019-2020)*

Attachments: *Notification Detail.html*

From ***ITUMO, JUDY*** *Company* ***GOK IFMIS DEPARTMENT***

To ***WILLIAM NDUNGU***

Title ***Open Tender–National 786861-2019/2020***

ID ***37840397*** *Number* ***786861***

Negotiation Preview ***March 10, 2020 09:31 am***

Negotiation Open ***March 10, 2020 09:31 am***

Negotiation Close ***April 07, 2020 10:00 am***

Date Disqualified ***May 15, 2020 10:58 am***

Supplier ***PRESTIGE MANAGEMENT SOLUTIONS LIMITED***

Supplier Site

Reason for disqualification

THE DOCUMENT WAS A WEB PAGE SO IT WAS NOT ACCESSIBLE"

If not logged in, please go to ***Login and view Response Details*** *page or if already logged in, please go to* ***Response Details*** *page to view the disqualified quote, from where you can optionally create a fresh quote."*

The Applicant contended that the above notification did not disclose the identity of the successful bidder contrary to section 87 (3) of the Act.

On its part, the Procuring Entity submitted that at the time of filing of the Request for Review application before the Board, the Procuring Entity was still engaged in the evaluation process and the Head of Procurement function was yet to write his professional opinion with respect to the same. As such no award letter or regret letters had been issued by the Procuring Entity. It was therefore the Procuring Entity's submission that the Request for Review application was prematurely before the Board.

In its determination of the second issue, the Board 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]**

According to section 87 of the Act 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 notify other bidders who participated in the subject tender that their respective bids were not successful when notifying the successful bidder that its tender was 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.

It is important to note that the requirement to disclose the successful bidder of a subject tender as stipulated under section 87 (3) of the Act,

affords unsuccessful bidders the opportunity to establish if the successful bidder satisfied the eligibility criteria as set out in the Tender Document, that is, whether the successful bidder was qualified for award of the tender and challenge the same if need be.

Section 87 (3) of the Act further imposes a mandatory obligation on a procuring entity to outline the reasons why a bidder's bid was unsuccessful. The Board is cognisant that providing a bidder with reasons why its bid was found unsuccessful is an issue that goes to the root of the rules of natural justice, one of them being, "the right to a fair hearing" including the right to have adequate time and facilities to prepare a defence as stated under Article 50 (c) of the Constitution. A bidder cannot adequately exercise this right when specific reasons are not afforded to it by a procuring entity. In contrast, providing a bidder with specific reasons why its bid was unsuccessful enables such bidder to have clear grounds that form its request for review lodged before this Board, if it wishes to do so.

The Board examined the Procuring Entity's confidential file submitted in accordance with section 67 (3) of the Act and observes that it does not contain an evaluation report prepared upon conclusion of an evaluation process making a recommendation of award or a professional opinion prepared by the Procuring Entity's Head of Procurement, reviewing a recommendation of award by the Evaluation Committee or approval of such award by the Procuring Entity's Accounting Officer.

However, the Board observes that an IFMIS Evaluation Matrix Report dated 2nd June 2020 generated the results of the Preliminary Evaluation, the scores awarded to bidders at Technical Evaluation and the ranking of bidders at Financial Evaluation.

In its examination of this report, the Board notes, the said report does not provide a clear indication of when the evaluation process commenced. Further, there is no indication if the evaluation process has been concluded and a recommendation of award made by the Procuring Entity's Evaluation Committee.

The Board further examined the notification received by the Applicant dated 15th May 2020 with the subject heading as "*Open Tender – National -786861-2019/2020*". The Board observes that the said notification does not provide details of the award made in the subject procurement process, in terms of the award of the successful bidder and the amount at which the award was made, if that was the case.

On further interrogation, the Board observes that at the tail end of the notification, it is stated as follows:

> ***"If not logged in, please go to*** *Login and Response Details* ***page or if already logged in, please go to*** *Response Details* ***page to view your quote"***

This in the Board's view is an indication that the notification received by the Applicant dated 15th May 2020 is an automatic generated statement

by IFMIS to users of the system to guide users when they receive IFMIS notifications from the Procuring Entity.

In this regard therefore, the Board notes that the IFMIS Evaluation Matrix Report dated 2nd June 2020 together with the IFMIS notification received by the Applicant dated 15th May 2020 do not conclusively demonstrate that an evaluation process has been concluded by the Procuring Entity, noting the absence of a recommendation and approval of award in the Procuring Entity's confidential documents.

The Board is therefore persuaded by the Procuring Entity's submissions that it is yet to conclude the evaluation process and therefore no notification of intention to enter into a contract in accordance with section 87 (3) of the Act, has been sent to successful or unsuccessful bidders alike.

Having established the ingredients of a notification of intention to enter into a contract and owing to the Procuring Entity's admission that by the time it received a notification of the existence of the Request for Review from the Board Secretariat, it had not concluded evaluation, this leads the Board to find that the automatic IFMIS notification dated 15th May 2020, issued to the Applicant was not a notification of unsuccessful bid as envisaged under section 87 (3) of the Act, since the Procuring Entity could not issue the said notification as it was yet to conclude evaluation of bids in the subject tender.

In totality, the Request for Review hereby fails and the Board makes the following specific orders:-

FINAL ORDERS

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

1. **The Request for Review filed on 22nd May 2020 with respect to Tender No. KCG/YASC/ICT/T/001/2019-2020 for Provision of Hospital Management Information Systems across Kiambu Health Facilities be and is hereby dismissed.**

2. **In view of the fact that the procurement process is still ongoing, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 11th Day of June, 2020

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**