

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 78/2020 OF 11TH JUNE 2020

BETWEEN

SKY WORLD LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER (CEO)

KENYA TRADE NETWORK AGENCY.....1ST RESPONDENT

KENYA TRADE NETWORK AGENCY.....2ND RESPONDENT

Review against the decision of Kenya Trade Network Agency with respect to Tender No. KTNA/OT/06/2019-2020 for the Provision of Payment Gateway Services for the Kenya TradeNet System

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Arch. Steven Oundo, OGW | -Member |
| 3. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

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

The Bidding Process

The Kenya Trade Network Agency (hereinafter referred to as "the Procuring Entity") advertised Tender No KTNA/OT/06/2019-2020 for the Provision of Payment Gateway Services for the Kenya TradeNet System (hereinafter referred to as "the subject tender"), on its website www.kentrade.go.ke/index.php/procurement/tenders and on the Public Procurement Information Portal.

Bid Submission Deadline and Opening of bids

A total of four (4) firms/bidders submitted bids and the same were opened on 15th April 2020 in the presence of bidders and their representatives who chose to attend, which bids were recorded as follows:

Bidder No.	Bidder Name
1.	M/s Cellulant Kenya Limited in Joint Venture with Ecobank Limited and Gainde 2000
2.	M/s Tracom Services Limited
3.	M/s Sky World Limited in Joint Venture with Interswitch East Africa Limited
4.	M/s Web Tribe Limited in Joint Venture with Anova Communications Limited

Evaluation of Bids

The Evaluation Committee conducted evaluation of bids in the following three stages:-

- Technical Responsiveness (Mandatory Requirements);
- Technical Specifications;
- Financial bids.

1. Technical Responsiveness (Mandatory Requirements)

At this stage of evaluation, bids were evaluated against the following mandatory requirements: -

NO.	REQUIREMENTS
1.	Valid Tax Compliance Certificate (TCC)
2.	Registration Certificate/Certificate of Incorporation
3.	Valid Trade License
4.	CR12 Certificate issued by Registrar of Companies
5.	Audited financial accounts for the past three years
6.	A valid authorization certificate from Central Bank of Kenya
7.	Communications Authority of Kenya License (Content Provider License)
8.	Anti-corruption affidavit
9.	Confidential Business Questionnaire duly filled and signed
10.	The document must be paginated

The Evaluation Committee observed as follows: -

a) Bidder 2 – M/s Tracom Services Limited

- The bidder attached an invalid Tax Compliance Certificate, whose expiry date was on 12th February 2020.

b) Bidder 4 – Web Tribe Limited in JV with Anova Communications Limited

- The lead bidder did not attach a copy of a valid tax compliance certificate.
- The lead bidder did not attach a copy of a valid trade license for year 2020

The Evaluation Committee observed as follows: -

a) All the bidders had disclosed their financial proposals in the technical response despite having submitted separate technical and financial proposals as per the tender submission instructions. This was discussed and the Evaluation Committee agreed to do away with the instructions and proceed to the Technical Evaluation Stage since this was not a major deviation from the tender terms.

b) The Evaluation Committee also deliberated on the issue of pagination as some bidders had not serialized their documents sequentially. This was discussed and agreed on that the Evaluation Committee proceeds to the other evaluation stage as this requirement was taken as minor deviations that do not materially depart from the requirements set out in the Tender Document.

Upon conclusion of preliminary evaluation, only one bidder, Bidder 2 and Bidder 4 did not meet some of the set mandatory requirements and therefore did not proceed to the Technical Evaluation Stage.

Bidder 1 and Bidder 3 met all the mandatory requirements as per the Tender Document and proceeded to the Technical Evaluation Stage.

2. Technical Evaluation Stage

This stage of evaluation entailed a scrutiny of the response provided on a clause by clause basis to the technical requirements.

The evaluation was structured as follows: -

1. PART A: Compliance to technical specifications (Mandatory Requirements) in which bidders had to meet ALL the requirements in order to proceed to PART B of the technical evaluation.

2. PART B: Additional Technical Requirements – Whereby bidders had to respond to ALL the requirements on how their solution meets the requirements and also score a minimum of 85 marks in order to proceed to the financial evaluation stage.

Bidders were required to conform to ALL the requirements on compliance to technical specifications in order to proceed to PART B of the technical evaluation.

PART A Technical Specifications were as follows: -

No.	Requirements
1.	PG to facilitate acknowledgement and error handling capabilities in form of messages to the customer where transactions are successful/unsuccessful N/B Successful/Unsuccessful transaction messages should be displayed to the users
2.	PG to provide a payment cancellation process where a need arises. N/B Possibility to void, cancel and refund a transaction.
3.	PG to provide a User Interface (UI) dashboard for use by KENTRADE and Agencies to generate reports. N/B PG should provide useful administration panel for reporting and management
4.	PG to provide dashboard to show payment timeline for a specific payment. This should include date submitted, date collected, date paid etc
5.	PG should support at a minimum the following payment options system to i.e. over the bank counter (cash), merchants cards, RTGS, Mobile money, Online Banking
6.	PG should be integrated with at least 2 MNOs
7.	PG to be able to integrate with Kenya TradeNet work billing system JAVA & Oracle 12C platforms
8.	PG to have a 24/7 support center to handle customer notifications/queries et cetera N/B Support center to support both technical and business issues
9.	PG to have capabilities to configure different Revenue Codes/Sources for the PGAs. This should be scalable to accommodate any new PGAs and new permits that come on board.
10.	PG to have a mechanism for providing alerts in the event of downtime
11.	PG to have reporting functionalities N/B capabilities to generate summary/detailed daily/monthly/yearly reports based on set parameters e.g. by payment types
12.	PG to have a mechanism for providing alerts at every stage in the payment work flow <ul style="list-style-type: none"> • Bank payment confirmation alerts • Bank payment failure alerts • Bank payment refund alerts
13.	PG to have a TEST/Quality Assurance platform to conduct integration and User Acceptance Tests (UAT) when the need arises
14.	PG to provide an Audit Trail functionality. N/B Keep all records, generated images, post and after each intervention.
15.	PG solution should have information security safeguards to check for URL tampering and common security breaches while the requests are sent. Security frameworks or standards e.g. ISO 27001, NIST cyber security framework, COSO frameworks and others
16.	PG should be able to support multi-currency usage i.e. USD, KSHS, EUR

Upon conclusion of Technical Specifications Evaluation, both Bidder 1 and Bidder 3 proceeded to Part B of the Technical Evaluation having conformed to all the requirements on compliance to technical specifications.

PART B Additional Technical Requirements were as follows: -

No.	Requirements	Score
1.	Proof of Technical Competence a) Project Team Leader with at least 5 years' experience in implementing integrated payment solutions. (5 marks – 1 mark for each year) Bidder to provide relevant certifications in Project Management & CVs	5
2.	b) Two project team members with at least 3 years' experience in implementing payment solutions (6 marks – 3 marks for each and 1 mark for every year) Bidder to provide relevant certifications and CVs	6
3.	c) Two project teams' members with at least 3 years in implementing integrated solutions. (6 marks – 3 marks for each and 1 Mark for every year) Bidder to provide relevant certifications and CVs	6
4.	d) One of the project team members to be from the disadvantaged categories i.e. Youth, Women or Persons with Disability (2 marks)	2
5.	Solution Provider overall number of years in provision of integrated payment services solutions.	20

No.	Requirements	Score
	<p>5 years and above – 20 marks (4 marks for every year)</p> <p>Bidders to provide evidence of services LSOs or signed contracts including the duration of the project</p>	
6.	PG to have a redundant site (Secondary site) in case of system failure	10
7.	PG service provider should provide a mobile app for smart phones and gadgets	6
8.	<p>PG to be integrated to banks in Kenya (5 of which should be Tier 1 banks)</p> <p>15 banks and above (5 Tier I) – 20 marks 12-14 banks (3 Tier I) – 15 marks 10-11 banks (2 Tier I) – 10 marks 8-9 banks (1 Tier I) – 5 marks Less than 8 – 0 marks</p>	20
9.	<p>Reference Sites in Kenya relevant to this project (at least three and include a brief of work done or services rendered, value of contracts, duration of project and contact person with both reachable phone number and email). (5 marks for each site)</p> <p>Bidders to provide evidence of serviced LSOs or signed contracts or reference letters</p>	15
10.	<p>Detailed implementation plan in the form of a Gantt chart (including activities, resources required, tasks & timelines)</p> <p>a) Activities b) Resources required</p>	5

No.	Requirements	Score
	c) Timelines	
11.	Presentation of a detailed training plan	5
Compliance to Technical Specifications (bidders must score at least 85 marks here)		100

Upon conclusion of PART B Additional Technical Requirements Evaluation, both Bidder 1 and Bidder 3 proceeded to the Financial Evaluation Stage having met the set minimum score of 85 marks, scoring **97.6** and **91.6** marks respectively.

3. Financial Evaluation

At this stage of evaluation, the bidder with the lowest financial cost would be recommended for award of the subject tender provided they have conformed to the technical specifications and scored a minimum of 85 marks in the additional technical requirements.

Requirement	Bidder 1	Bidder 3
Duly filled and signed form of tender	Yes	Yes

The Evaluation Committee noted the following: -

- a) Both Bidder 1 and Bidder 3 did not include duly filled and signed forms of tender in their financial proposals and only included summarized costs for the PG solution implementation.

b) The filled forms of tender that were on their technical proposals had differing bid sum amounts from the sums on their financial proposal cost summaries; for Bidder 1 the sum was at the amount of Twenty Thousand Shillings (20,000) whereas the figure on their financials was Sixteen Million and Two Hundred Thousand Shillings only (16,200,000).

c) Bidder 3 bid sums also only captured the one off set up fees of Kshs 15,982,800.00/- for the payment gateway solution and left out annual running costs of Kshs 26,083,200.00/- with terms of upfront quarterly payments which is also against the provisions of section 146 of the Act.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee noted that the subject tender was non-responsive since none of the tenderers conformed to the tender requirements.

Professional Opinion

The Head of Procurement Function reviewed the Evaluation Report and stated as follows in her Professional Opinion dated 20th May 2020: -

"The CEO is requested to note the following: -

1. The procurement was carried out through Open Tendering Method and complies in every respect with the procedure prescribed by the Public Procurement and Asset Disposal Act, 2015 under sections 96, 97 and 98;

2. The evaluation was conducted in compliance with the evaluation criteria provided in the Tender Document and the finding that the tender is non-responsive is justified.

3. The finding is in line with the requirements of section 63 (1) (f) of the Public Procurement and Asset Disposal Act, No 33 of 2015 which states that: -

"An accounting officer of a procuring entity, may at any time prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies –

(f) all evaluated tenders are non-responsive

Recommendation

Taking into consideration the Evaluation Committee's report and the professional opinion above, the CEO is requested to approve the termination of this tender in line with the provisions of section 63 (1) (f) as indicated above."

The Professional Opinion was approved by the Manager - Supply Chain Management on behalf of the Accounting Officer on 20th May 2020.

Letters of Notification of Outcome of Bids and Termination of the Subject Tender were issued to all bidders dated 29th May 2020.

REQUEST FOR REVIEW NO. 78 OF 2020

M/s Sky World Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 11th June 2020 (hereinafter referred to as "the Request for Review") together with a Statement in Support of the Request for Review dated and filed on even date (hereinafter referred to as "the Applicant's Statement"), through the firm of A.E. Kiprono & Associates.

In response, the Procuring Entity lodged a Memorandum of Response dated and filed on 16th June 2020 (hereinafter referred to as "the Procuring Entity's Response") together with a Replying Affidavit sworn on 15th June 2020 and filed on 16th June 2020 (hereinafter referred to as "the Procuring Entity's Affidavit") through its Legal Counsel, Mr. Bernard Milewa.

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

- i. An order annulling the Respondent's letter to the Applicant dated 29th April 2020;***
- ii. An order annulling the Respondent's decision to terminate Tender No. KTNA/OT/06/2019-2020;***
- iii. An order directing the Respondents to re-instate the Applicant's tender and re-evaluate the same taking into***

consideration the Board's directions/determination on the grounds for review;

iv. In the alternative, an order declaring the Applicant the lowest evaluated tenderer in view of the Respondent's declaration that none of the bids received were responsive;

v. Costs of the Request for Review to the Applicant;

vi. Any other relief that the Review Board deems fit to grant under the circumstances.

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").

The Applicant lodged Written Submissions dated and filed on 23rd June 2020 but 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 terminated the subject procurement process in accordance with section 63 as read together with section 3 of the Act and Article 227 (1) of the Constitution;***
- II. Whether the Procuring Entity evaluated the Applicant's bid at Financial Evaluation Stage in***

accordance with section 80 (2) of the Act, as read together with Article 227 (1) of the Constitution

The Board will now address the issues framed for determination as follows: -

A brief background to the Request for Review is that the Procuring Entity, invited interested and eligible tenderers to submit their bids with respect to the subject tender. By the tender closing date of 15th April 2020, the Procuring Entity received a total of four (4) bids, including the Applicant's herein, which were evaluated by the Procuring Entity's Evaluation Committee.

Through an Evaluation Report dated and signed on 12th May 2020, the Procuring Entity's Evaluation Committee found that the subject tender was non-responsive since none of the tenderers conformed to the tender requirements. In view of this finding by the Evaluation Committee, the Procuring Entity's Manager - Supply Chain Management recommended termination of the subject tender in line with section 63 (1) (f) of the Act, which was subsequently approved on behalf of the Accounting Officer by the Manager – Supply Chain Management on 20th May 2020. All bidders were duly notified of the outcome of their bids including the termination of the subject tender vide letters dated 29th May 2020.

On 29th May 2020, the Applicant received a letter of notification via email from the Procuring Entity, which read as follows: -

"On behalf of KenTrade, I regret to inform you that your tender for the above requirement was unsuccessful since your bid did not meet the following requirements:

- You did not include a duly filled and signed form of tender with your financial proposal, and only included summarized costs for the payment gateway solution implementation;***
- You had differing bid sum amounts on your technical and financial proposals;***
- Your request to be paid in advance for the annual payment gateway running costs is in contravention of the tender requirements.***

The tender was further terminated as none of the other bids received were responsive.

Please make arrangements to pick your bid security from our offices at Embankment Plaza in Upper Hill on any weekday during working hours between (0800-1700 hours).

Thank you for taking time to participate in the tendering exercise and hope that we shall still get an opportunity to continue working together in future."

Aggrieved by the decision of the Procuring Entity, the Applicant moved the Board through the Request for Review.

The Applicant contended that the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act for the following reasons: -

Firstly, the Procuring Entity's letter of notification issued to the Applicant dated 29th May 2020 was in breach of section 63 (4) of the Act and section 87 (3) of the Act on the basis that the said letter was not issued by the Accounting Officer of the Procuring Entity thus null and void.

Secondly, the Applicant contended that although the Procuring Entity indicated in its letter of notification that the subject tender was terminated on the ground that all evaluated tenders were found non-responsive, the Procuring Entity failed to state the reasons why the tenders were found non-responsive and thus did not fully comply with section 63 (4) of the Act.

Thirdly, it was also the Applicant's submission that the Procuring Entity had also failed to demonstrate compliance with the procedural requirements for termination of a tender as set out under section 63 of the Act, particularly submission of a written report on the termination of the subject tender to the Public Procurement Regulatory Authority, giving reasons for the termination thereof, within fourteen days from the date of the termination.

In support of its submission, the Applicant in its Request for Review referred the Board to Article 227 (1) of the Constitution read together with section 3 of the Act to support its view that the foregoing provisions dictate that, procurement processes must be carried out in a manner that promotes transparency, accountability and public confidence. It was therefore the Applicant's submission that the Procuring Entity did not terminate the subject tender in accordance with section 63 of the Act and was therefore in gross violation of the provisions of the Act and the Constitution.

On its part, the Procuring Entity submitted that the Tender Evaluation Committee, upon conclusion of evaluation of tenders, noted that none of the tenders submitted by bidders in response to the subject tender were responsive thus the Procuring Entity's Head of Supply Chain Management recommended termination of the subject tender in line with section 63 (1) (f) of the Act.

According to the Procuring Entity, the Accounting Officer issued letters of regret to all bidders, including the Applicant herein, dated 29th May 2020, via delegated authority to the Supply Chain Manager in accordance with section 69 (4) of the Act.

Contrary to the Applicant's submissions, the Procuring Entity contended that it disclosed to all bidders the reason why their respective tenders were not successful in accordance with section 87 (3) of the Act, and

further the reason for the termination of the tender in accordance with section 63 (4) of the Act.

It was therefore the Procuring Entity's submission that it terminated the subject tender in accordance with section 63 of the Act and thus the Request for Review lacked merit and ought to be dismissed with costs to the Procuring Entity.

The Board has considered submissions by both parties and in its determination of this issue, observes that the questions that arise in this regard is whether the Applicant was afforded specific and sufficient reasons for the disqualification of its bid and termination of the subject tender, whether the Procuring Entity's Letter of Notification of Unsuccessful bid and Letter of Termination of the subject tender was issued by the Procuring Entity's Accounting Officer in accordance with section 87 (3) and section 63 (4) of the Act respectively, and whether the Procuring Entity submitted a written report on the termination of the subject tender to the Public Procurement Regulatory Authority, giving reasons for the termination thereof, within fourteen days from the date of the termination.

In its determination of the first sub-issue, the Board studied section 63 of the Act which reads as follows: -

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings

without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days

of termination and such notice shall contain the reason for termination. [Emphasis by the Board]

According to this provision, a tender is terminated by an accounting officer who is mandated to terminate any procurement process at any time, prior to notification of tender award. This means that before an award is made with respect to a subject tender, an accounting officer may terminate a tender. Further, a tender may only be terminated by a procuring entity in the specific instances as highlighted under section 63 (1) of the Act, cited hereinbefore.

Section 63 further stipulates that a procuring entity is obliged to submit a report to the Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") stating the reasons for the termination within fourteen days of the termination of the tender. The procuring entity must also notify all bidders who participated in the subject procurement process of the termination, including the reasons for the termination, within fourteen days of termination of the tender.

In its interpretation of section 63 of the Act, the Board considered the decision of the High Court in **Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR** where it held as follows: -

"in a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to

terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act". [Emphasis by the Board]

Accordingly, a procuring entity invoking section 63 must put forward sufficient reason for termination and evidence to justify and support the ground of termination of the procurement process relied on. Further, a procuring entity must demonstrate that it has complied with the substantive and procedural requirements set out under section 63 of the Act.

Turning to the instant case, the Board examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that in the Procuring Entity's Professional Opinion dated 30th March 2020, the Head of Procurement Function made the following remarks on page 3 of the said opinion: -

"The CEO is requested to note the following: -

1. The procurement was carried out through Open Tendering Method and complies in every respect with the

procedure prescribed by the Public Procurement and Asset Disposal Act, 2015 under sections 96, 97 and 98;

2. The evaluation was conducted in compliance with the evaluation criteria provided in the Tender Document and the finding that the tender is non-responsive is justified.

3. The finding is in line with the requirements of section 63 (1) (f) of the Public Procurement and Asset Disposal Act, No 33 of 2015 which states that: -

"An accounting officer of a procuring entity, may at any time prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies –

(f) all evaluated tenders are non-responsive

Recommendation

Taking into consideration the Evaluation Committee's report and the professional opinion above, the CEO is requested to approve the termination of this tender in line with the provisions of section 63 (1) (f) as indicated above."

From the above excerpt, the Board observes that the Procuring Entity upon conclusion of the evaluation process concluded that all evaluated tenders were non-responsive. In view of this finding, the Procuring Entity's Head of Supply Chain Management requested the Accounting Officer to approve the termination of the subject tender in accordance with section 63 (1) (f) of the Act.

The Board notes that section 63 (1) (f) of the Act, as cited hereinbefore stipulates that one of the grounds that a procuring entity may rely on to justify its termination of a tender is that 'all evaluated tenders are non-responsive.'

The Board then examined the Procuring Entity's Letter of Notification issued to the Applicant dated 29th May 2020 as cited hereinbefore and observes that the Procuring Entity informed the Applicant that its bid was found unsuccessful since it did not meet three requirements as follows: -

- ***" You did not include a duly filled and signed form of tender with your financial proposal, and only included summarised costs for the payment gateway solution implementation***
- ***You had differing bid sum amounts on your technical and financial proposals***
- ***Your request to be paid in advance for the annual payment gateway running costs is in contravention of the tender requirements."***

Moreover, the Procuring Entity's letter of notification informed the Applicant that the subject tender was terminated '*as none of the other bids received were responsive.*'

In the Board's considered view, no harm is occasioned by a procuring entity issuing a letter of notification of the outcome of a bid together with a letter of notification of termination of a tender in one letter of notification, so long as a procuring entity complies with the requirements as stipulated under section 87 and section 63 (4) of the Act respectively, in the issuance of the said notification.

Section 87 of the Act is instructive on the manner in which notification ought to be carried out which provides 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]

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.

The Board observes, 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.

As mentioned hereinbefore, section 63 (4) of the Act requires a procuring entity to notify all persons who submitted tenders of the termination within fourteen days of termination and in such notification stipulate the reason for termination of the tender.

From the foregoing, the Board notes from the Procuring Entity’s Letter of Notification issued to the Applicant and to all bidders that participated in the subject procurement process, that each bidder was informed of

the reasons why its bid was found unsuccessful and furthermore that the subject tender was terminated on the ground that no bids were found responsive in line with section 63 (1) (f) of the Act.

In this regard therefore, the Board finds that the Procuring Entity's Letter of Notification dated 29th May 2020 provided the Applicant with specific and sufficient reasons why its bid was found unsuccessful in accordance with section 87 (3) of the Act and further provided a reason for the Procuring Entity's termination of the subject tender in accordance with section 63 (4) of the Act.

On the second sub-issue for determination, the Board observes that the Procuring Entity issued letters of notification dated 29th May 2020, to all bidders, including the Applicant herein, informing bidders of the outcome of their bids and in the same letter therein, informed them of the termination of the subject tender.

The Board observes that section 87 of the Act as cited hereinbefore is instructive on the manner in which notification of bidders ought to be carried out and clearly stipulates that the accounting officer of a procuring entity issues notification letters to successful and unsuccessful bidders.

The Board further studied section 63 (4) of the Act as cited hereinbefore and observes that the accounting officer of a procuring entity issues

notification letters informing bidders who submitted bids of the termination of a particular tender.

As to whether an accounting officer can delegate his/her authority to issue notification letters of the outcome of bids and notification of termination of a tender, this Board referred to its decision in **PPARB Application No. 9 of 2020 Internet Solutions (K) Limited v. Kenya Airports Authority** where it held that an accounting officer of a procuring entity may delegate his/her authority to issue letters of notification to successful and unsuccessful bidders alike due to his/her inability to act in certain circumstances. Nevertheless, as a public officer, an accounting officer is bound by principles of leadership and integrity under the Constitution and other relevant legislation and therefore remains accountable for acts performed by persons to whom he has delegated authority to act on his behalf.

Moreover, in order to ensure that any delegated authority is not exercised in order to undermine an accounting officer, it is necessary for the delegated authority to be in writing and specific, in that the accounting officer should specify the tender for which the delegated authority is given as such delegated authority may be prone to abuse and exercised contrary to the manner in which the accounting officer had specified.

Turning to the circumstances of the case, the Board studied the Procuring Entity's Internal Memo dated 4th October 2016 addressed to

the Manager Procurement from the Procuring Entity's Chief Executive Officer which reads as follows: -

"AUTHORIZATION TO SIGN COMMUNICATION LETTERS TO SUPPLIERS

With effect from the date of this memo, you are hereby authorized to sign all communication and/or letters going out to suppliers with regard to procurement related process. These shall include the following: -

- 1. Notification of Award letters to successful bidders.***
- 2. Regret letters to unsuccessful bidders.***
- 3. Letters of Recommendation.***
- 4. Communication on clarifications sought by suppliers during tender processing.***

For any other form of communication not covered under the above categories, you shall be required to liaise with the undersigned for further guidance."

From the above letter, the Board observes that the Procuring Entity's Accounting Officer authorized the Manager Procurement to sign all communication and/or letters to suppliers with respect to procurement processes, which shall include notification of award letters, regret letters, letters of recommendation and communication on clarifications sought by suppliers during processing of tenders.

The Board examined the Procuring Entity's Letter of Notification issued to the Applicant dated 29th May 2020 as cited hereinbefore and observes that the tail end of the Applicant's letter appears as follows: -

"...Thank you for taking time to participate in the tendering exercise and hope that we shall get an opportunity to continue working together in future.

Joanne Kweyu

Manager, Supply Chain Management

FOR: CHIEF EXECUTIVE OFFICER"

From the above excerpt, the Board observes that the said letter of notification was issued to the Applicant on behalf of the Chief Executive Officer of the Procuring Entity, by one Ms Joanne Kweyu, Manager Supply Chain Management.

The Board further examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that the Professional Opinion dated 20th May 2020 was prepared and issued by the Manager – Supply Chain Management, Ms Joanne Kweyu and was approved by the same Ms Joanne Kweyu on the same date. Further that notifications sent to all bidders dated 29th May 2020 were issued on behalf of the Chief Executive Officer of the Procuring Entity, by the same Ms Joanne Kweyu.

From the foregoing, we note that the internal memo was issued by the Procuring Entity's Chief Executive Officer to the Manager, Procurement on 4th October 2016 whilst the subject procurement process was initiated almost four years later, in 2020. In this regard therefore, it is the Board's considered view that the fact that the said memo was considered by the Procuring Entity to be applicable to tenders initiated four years later is untenable as any delegated authority ought to be in writing and specific to a particular tender or the same may be prone to abuse and exercised contrary to the manner in which the accounting officer had specified.

Furthermore, the internal memo did not specify the tender for which the delegated authority was given and more so, did not delegate approval of termination of the subject tender.

As mentioned hereinbefore, an accounting officer remains accountable for acts performed by persons to whom he has delegated authority to act on his behalf and it is therefore vital that an accounting officer delegates any authority bestowed upon him by law in writing and specific to not only the tender in question, but the action to be taken with respect to the tender in question and specific to the person who is to act on his/her behalf.

Notably, the preparation of the Professional Opinion, its approval, including the issuance of notification letters to bidders was undertaken by one and the same person, Ms Joanne Kweyu.

The Board is cognizant of section 84 of the Act which states that:-

- "(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)."**

Section 84 of the Act demonstrates that a professional opinion is a central aspect between tender evaluation and award recommendations. The professional opinion emanates from the Head of Procurement and offers guidance or what may be referred to as an overview of the entire procurement process to the accounting officer. The Head of Procurement function reviews the Evaluation Report and offers his/her

opinion/advice/views to the Accounting Officer on the appropriate decision to make with respect to a procurement process.

It is important to note that any challenge raised with respect to a procurement process is lodged against the decision of an accounting officer, being the person responsible for overseeing the entire procurement process.

In this instance however, the professional opinion which provides an overview of the entire procurement process, was prepared and considered by the same person who allegedly had delegated authority to consider the same in her approval of termination of the subject tender. In this regard therefore, it is evident the Accounting Officer did not approve the said professional opinion, contrary to section 84 of the Act.

As mentioned hereinbefore, an accounting officer is accountable for any decision made in a procurement process and remains responsible for overseeing the entire procurement proceedings.

The Board notes, the Accounting Officer ought to have approved the professional opinion as prepared by Ms Joanne Kweyu, the Manager – Supply Chain Management and delegated to Ms Kweyu in writing the authority to sign the said document, including issuance of letters of notifications to bidders, which delegated authority ought to have been specific to the subject tender.

In view of the foregoing, it is the finding of this Board that Ms Joanne Kweyu who issued notification letters to bidders on behalf of the Accounting Officer acted without authority in doing so, since the memo dated 4th October 2016 did not delegate such authority to her.

Hence, the Letters of Notification containing the reasons of unsuccessful bid and termination of the procurement proceedings issued to bidders (including the one issued to the Applicant herein) dated 29th May 2020 signed and issued on behalf of the Procuring Entity's Accounting Officer, are hereby null and void.

In totality of the second sub-issue therefore, the Board finds that the Procuring Entity failed to issue the Applicant with a Letter of Notification of Unsuccessful bid and Letter of Notification of Termination of the subject tender that meets the threshold under section 87 (3) of the Act and section 63 (4) of the Act respectively.

On the third sub-issue for determination, the Board studied section 63 (2) and (3) of the Act which stipulates as follows: -

"(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination."

From the above provisions, we observe that an accounting officer who terminates procurement or asset disposal proceedings is required to submit a written report on the termination within fourteen days to PPRA, which report should include reasons for the said termination.

The Board examined the Procuring Entity's confidential file and observes that termination of the subject tender was approved by the Manager, Supply Chain Management, Ms Joanne Kweyu on 20th May 2020.

Upon further examination of the Procuring Entity's confidential file, the Board observes therein a report dated 12th June 2020 prepared by one Mr David Maina, Supply Chain Management Officer, which reads as follows: -

"

PE NAME: KENTA TRADE NETWORK AGENCY	
Tender No.	KTNA/OT/6/2019-2020
Description of Tender	PROVISION OF PAYMENT GATEWAY SERVICES FOR THE KENYA TRADENET SYSTEM
Nature (Goods, Works, Services)	Services
Stage of Tender Processing at time of Termination	Award Stage
Date of Termination	20.05.2020
Reasons for Termination as prescribed under section 63 (1) (a) to (i) of the Act	(f) all evaluated tenders are non-responsive

Attachments:

- 1. Copy of Approved Procurement Plan FY 2019-2020**
- 2. Signed Recommendation for Termination by the Head of Procurement Function**
- 3. Approval for termination by the Accounting Officer**

4. Notification to bidders on Termination.

Prepared by:

Name: David Maina

Designation: SCMO

Date of Report: 12.06.2020"

From the above report, the Board observes that there is no proof of the said report being submitted to PPRA. Further, we observe that the said report was prepared on 12th June 2020, more than fourteen days after termination of the tender on 20th May 2020.

The Board observes that the Procuring Entity offered no submissions on whether a written report on termination of the subject tender was submitted to PPRA within fourteen days from the date of termination of the tender.

The Board is therefore left with the averments of the Applicant, who submitted that the Procuring Entity had failed to demonstrate that a written report on termination of the subject tender was submitted to PPRA within fourteen days from the date of termination of the tender.

In the absence of any response from the Procuring Entity, and noting from the Procuring Entity's confidential file that the written report on termination of the tender was prepared on 12th June 2020, more than fourteen days after termination of the subject tender, the Board considers the averments of the Applicant to be unchallenged and finds that the Procuring Entity did not submit a written report to PPRA on the

termination of the tender within fourteen days, contrary to section 63 (2) of the Act.

In totality of this issue, the Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act as read together with section 3 of the Act and Article 227 (1) of the Constitution, rendering the said termination of the subject procurement process null and void.

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

The Applicant's Letter of Notification dated 29th May 2020 outlined three reasons why its bid was found unsuccessful by the Procuring Entity as follows: -

- ***" You did not include a duly filled and signed form of tender with your financial proposal, and only included summarised costs for the payment gateway solution implementation***
- ***You had differing bid sum amounts on your technical and financial proposals***
- ***Your request to be paid in advance for the annual payment gateway running costs is in contravention of the tender requirements."***

In determining whether or not the Procuring Entity fairly evaluated the Applicant's bid at Financial Evaluation, the Board addressed its mind to

each of the above reasons the Applicant's bid was found unsuccessful as follows: -

- i. ***The Applicant did not include a duly filled and signed form of tender with its financial proposal, and only included summarised costs for the payment gateway solution implementation***

The Applicant contended in its submissions that it was not a requirement under the Tender Document that a bidder's form of tender should be submitted together with its financial bid as it submitted its Form of Tender together with its Technical Proposal. It was therefore the Applicant's submission that the Procuring Entity's decision to find the Applicant's bid unsuccessful on this ground was an afterthought and in breach of the Act and the Tender Document.

In response, the Procuring Entity submitted that the Applicant failed to include a duly filled and signed form of tender in its financial proposal and only included a summarized cost for the Payment Gateway Solution Implementation. The Procuring Entity submitted that in a two envelope tender, a bidder is expected to indicate in the form of tender the total summation of costs and include this in its financial proposal, since this is the amount that is to be read out during the opening of the financial proposal.

Having considered parties' submissions, the Board examined the Procuring Entity's Tender Document and observes Clause 2.8 Section II

Instructions to Tenderers on page 26 of the Tender Document, outlines the documents comprising a tender as follows: -

"2.8.1 The tender prepared by the tenderers shall comprise the following components

(a) Tender Form and a Price Schedule completed in accordance with paragraph 2.9, 2.10 and 2.11 below

(b) documentary evidence established in accordance with paragraph i that the tenderer is eligible to tender and is qualified to perform the contract if its tender is accepted;

(c) documentary evidence established in accordance with paragraph 2.2 that the goods and ancillary services to be supplied by the tenderer are eligible goods and services and conform to the tender documents ; and

(d) tender security furnished in accordance with paragraph 2.14 "

Accordingly, a tender form is one of the documents comprising a bidder's bid documents.

Clause 2.9 Section II Instructions to Tenderers on page 26 of the Tender Document provides as follows with respect to the 'Form of Tender': -

"2.9.1 The tenderers shall complete the Form of Tender and the appropriate Price Schedule furnished in the tender document, indicating the services to be performed."

Further, Section VII Standard Forms on page 37 of the Tender Document provides as follows: -

"8.1 Form of Tender – The form of tender must be completed by the tenderer and submitted with the tender documents, It must also be duly signed by duly authorized representatives of the tenderer."

According to the above two provisions, a bidder was required to complete its form of tender and submit it together with its tender documents.

The Tender Document further provided a sample of a Form of Tender under Clause 8.1 Section VIII Standard Forms on page 38 of the Tender Document to guide bidder in completing the said form.

With respect to the sealing, marking and submission of tenders, the Board observes Clause 2.17 of Section II Instructions to Tenderers on page 11 of the Tender Document which reads as follows: -

"2.17.1 The original and duplicate copy of the Technical proposal shall be placed in a sealed envelope clearly marked "TECHNICAL PROPOSAL" and the original and duplicate copy of the financial proposal in a sealed envelope clearly marked "FINANCIAL PROPOSAL" and warning "DO NOT OPEN WITH THE TECHNICAL PROPOSAL". Both envelopes shall be placed into an outer envelope and sealed."

From the foregoing, we note, the Procuring Entity's Tender Document did not specify which documents should be included in the technical and the financial proposal. Furthermore, the Tender Document did not specify that the Form of Tender should be included in the Financial Proposal.

The Board examined the Procuring Entity's Evaluation Report dated 12th May 2020 and observes the following remarks of the Evaluation Committee upon conclusion of Financial Evaluation: -

"1. The Committee findings at this stage were that both Bidder 1 and 3 (the Applicant) did not include duly filled and signed forms of tender in their financial proposals and only included summarised costs for the PG solution implementation."

According to the above excerpt, we observe that one of the reasons the Applicant's bid was found non-responsive at Financial Evaluation was on the basis that the Applicant did not include a duly filled and signed form of tender in its financial proposal.

The Board is cognizant of section 80 (2) of the Act which provides as follows: -

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

Accordingly, a procuring entity is required to evaluate and compare bids using the procedures and criteria set out in its tender document.

The Board has established that the Tender Document did not specify that the Form of Tender should be included in the Financial Proposal. In this regard therefore, the Board finds that the Procuring Entity unfairly disqualified the Applicant's bid on this basis at Financial Evaluation, noting that the Tender Document did not specify that the Form of Tender should be submitted with a bidder's Financial Proposal.

ii. The Applicant had differing bid sum amounts on its technical and financial proposal

On 4th June 2020, the Applicant sought clarification on why the Procuring Entity disqualified the Applicant's bid on this basis and the Procuring Entity responded through an email dated 5th June 2020 as follows: -

"What this means is that there were 2 figures on the form of tender that was attached on your technical proposal which was at 15,982,800 whereas on the financial one there were 2 figures for the one off setup fee at 15,982,800.00 and the annual costs of Kshs 26,083,200.00, the correct position is usually that the form of tender captures the summation of all costs applicable for the implementation of the solution..."

The Applicant challenged the Procuring Entity's decision and contended that the Form of Tender did not make provision for the tenderer to incorporate the annual costs therein but gave room for other costs that

could be ascertained from the Schedule of Prices attached and made part of the tender.

According to the Applicant, a plain reading of the format of the form of tender shows that the only amount to be transferred from the Schedule of Prices to the Form of Tender is the price required in the supply, delivery, installation and commissioning of the payment gateway services, that is, the one off set up fee of Kshs 15,982,800/-. The annual costs of Kshs 26,083,200/- could only be captured in the Schedule of Prices attached and made part of the tender.

On its part, the Procuring Entity submitted that the sum of tender in the Applicant's tender form differed with the summary of the price schedule. The Procuring Entity contended that the Applicant's tender sum in the Form of Tender, only captured the one-off set up fees of Kshs 15,982,800/- for the payment gateway solution and the Applicant left out the annual running costs of Kshs 26,083,200/-. As a result, the Applicant's Price Schedule amounted to a total of Kshs 42,066,000/- which differed with the sum of Kshs 15,982,800/- indicated in the Applicant's Form of Tender.

Having considered all parties' submissions, the Board shall first address the question what is a 'tender sum' or the 'amount indicated in a form of tender'?

The Act defines a "tender" under section 2 in the following terms: -

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

Further, section 82 of the Act states that: -

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity"

Having compared the above provisions, the Board notes, in a procurement process, bidders submit a tender, that is, ***an offer in writing to supply goods, services or works at a price pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.***

In that offer, bidders quote a tender sum, i.e. the price at which they undertake to execute or implement the tender if found successful. Pursuant to section 82 of the Act, this tender sum, that is quoted in a bidder's Form of Tender is absolute and final and is not subject to any correction, adjustment or amendment.

The question that now arises is what amounts to a correction, adjustment or amendment by a procuring entity?

Once a bidder has submitted its bid including its financial proposal to a procuring entity, it may contain arithmetic errors or discrepancies that may be identified by a procuring entity during financial evaluation. As explained hereinbefore, section 82 of the Act expressly prohibits any alterations or corrections to the tender sum which remains absolute and final and is not subject to any correction, adjustment or amendment.

Accordingly, any corrections made by a procuring entity to a bidder's tender sum would therefore serve no purpose because the procuring entity cannot use such corrections to rank the bidders or amend the tender sum in the form of tender, which remains absolute and final in accordance with section 82 of the Act.

It is worth noting, that the Board has consistently held in its previous decisions that the tender sum is absolute and cannot be changed. In **PPARB Application No. 42 of 2017, Surestep Systems and Solutions Limited vs. Industrial and Commercial Development Corporation**, concurred with its decision in **PPARB Application No. 38 of 2019, Alfatech Contractors Limited vs. Kenya National Highways Authority**, where the Board stated the importance and the primacy of the form of tender in any tender process in the following words: -

"The Board holds that the form of tender is the document which the offer is communicated to specified employer. It is the offer that the procuring entity would consider an either accept or reject. The Board finds that the form of tender is a very vital document which communicates every essential information based on which a contract is created.

The provision of section 82 of the Act, are couched in mandatory terms and leaves no room for any other interpretation. The tender sum for the successful bidder as read out and as recorded at the tender opening was Kshs. 34,166,398.13/- and was not subject to any variation whatsoever pursuant to the prohibition contained in section 82 of the Act."

Turning to the circumstances of the case, the Board examined the Procuring Entity's Tender Document and observes that the subject tender was '*For Provision of Payment Gateway Services for the Kenya TradeNet System*'

The Introduction of the Tender Document on page 3 thereof provides a description of the services to be procured under the subject tender as follows:-

"KenTrade seeks to integrate the Kenya TradeNet System with an operational payment gateway to provide a reliable payment facility in order to ensure a smooth end to end execution of trade transactions."

Further, Clause 5.2.3 Financial Evaluation on page 34 of the Tender Document broke down what the Procuring Entity required of the bidder with respect to the costs of provision of the services in the subject tender which were: -

"a) A one-off setup fee for the PG solution

b) Any other annual costs applicable to running of the PG solution"

In order to understand what the Procuring Entity required a bidder to provide as costs in the subject tender, the Board notes, a bidder ought to read the entire Tender Document conjunctively and not disjunctively.

It is evident from an examination of the service description of the subject tender, the Schedule of Prices Form and the Financial Evaluation Criteria as mentioned hereinbefore, that a bidder was required to provide a cumulative amount in its tender which comprises two components, that is, a one-off setup fee for the PG solution and any other annual costs applicable to running of the PG solution.

Accordingly, the services to be procured by the Procuring Entity under the subject tender were for the integration of the Kenya TradeNet System with an operational payment gateway to provide a reliable payment facility to ensure smooth end to end execution of trade transactions which in essence comprised of the following services, that is, setting up of the PG solution and the running of the PG solution for a year.

The Board observes Clause 2.9 Section II Instructions to Tenderers on page 26 of the Tender Document which provides as follows with respect to the 'Form of Tender': -

"2.9.1 The tenderers shall complete the Form of Tender and the appropriate Price Schedule furnished in the tender document, indicating the services to be performed."

The Board then examined the Clause 8.1 Form of Tender of Section VIII Standard Forms on page 38 of the Tender Document and observes as follows: -

"....Having examined the tender documents including Addenda Nos.....[insert numbers] the receipt of which is hereby duly acknowledged, we, the undersigned, offer to supply, deliver, install and commission(insert equipment description) in conformity with the said documents for the sum of.....(total tender amount in words and figures) or such other sums as may be ascertained in accordance with the Schedule of Prices attached herewith and made part of this Tender....."

From the above excerpt of the sample Form of Tender in the Tender Document, a bidder was required to indicate the total tender amount in word and figures for the 'supply, delivery, installation and commission' of the services/equipment with respect to the subject tender or such other sums as may be ascertained in accordance with the schedule of prices.

As mentioned hereinbefore, the tender sum, which is quoted in a Form of Tender is absolute and final, and is not subject to any correction, adjustment or amendment, pursuant to section 82 of the Act.

This means that the proviso in the Form of Tender that the sum in the form of tender shall also be determined in accordance with '*such other sums as may be ascertained in the schedule of prices*' runs contrary to section 82 of the Act and the said proviso is null and void.

The Board then examined the Applicant's original bid and observes in its Technical Proposal, its Form of Tender which reads as follows; -

"...Having examined the tender documents including Addenda Nos 1, 2 3 and 4 the receipt of which is hereby duly acknowledged, we, the undersigned, offer to supply, deliver, install and commission PAYMENT GATEWAY SERVICES FOR THE KENYA TRADENET SYSTEM in conformity with the said documents for the sum of KES 15,982,800, Fifteen Million, Nine Hundred, Eighty Two Thousand, Eight Hundred Kenyan Shillings Only (total tender amount in words and figures)....."

From the above excerpt, the Board observes that the Applicant quoted a total tender sum/amount of KES 15,982,800, Fifteen Million, Nine Hundred, Eighty Two Thousand, Eight Hundred Kenyan Shillings Only.

The Board then examined the Applicant's Schedule of Prices dated 14th April 2020 in its Financial Proposal which consisted of two components which were priced as follows: -

a) One off setup fees – Total (Tax Incl) KES 15,982,800.00

b) Annual Costs – Total (Tax Incl) KES 26,083,200.00

As mentioned hereinbefore, the tender sum as indicated in a Form of Tender is absolute and final. In this regard therefore, the tender sum/amount in the Form of Tender should contain/comprise the total cost of services with respect to the subject tender, that is, the total cost for integration of the Procuring Entity's System with an operational payment gateway to provide a reliable payment facility to ensure smooth end to end execution of trade transactions.

However, from a comparison of the Applicant's Form of Tender in its Technical Proposal and Schedule of Prices in its Financial Proposal, we observe, the Applicant only indicated the **one off set up fees** of Total (Tax Incl) KES 15,982,800.00 in its Form for Tender whereas in its Schedule of Prices, it indicated its **one off set up fees** of Total (Tax Incl) KES 15,982,800.00 and **Annual costs** of Total (Tax Incl) KES 26,083,200.00

The question that now arises is what recourse is available to a procuring entity where there is a discrepancy between the amount indicated in a bidder's Form of Tender and its Schedule of Prices?

Section 81 of the Act states that: -

"(1) A procuring entity may, in writing request a clarification of a tender from a tenderer to assist in the evaluation and comparison of tenders.

(2) A clarification shall not change the terms of the tender" [Emphasis by the Board]

According to the above provision, a Procuring Entity may seek clarifications from a tenderer to assist in the evaluation and comparison of tenders, but such a clarification should not change the terms of the tender.

Furthermore, this clarification from a procuring entity should be made in writing and the response from the tenderer be received by the procuring entity in writing. This is in line with 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]

The Board observes Clause 2.21 Clarification of Tenders Section II Instructions to Tenderers on page 13 of the Tender Document which reads as follows: -

"2.21.1 To assist in the examination, evaluation and comparison of tenders the Procuring Entity may, at its discretion, ask the tenderer for a clarification of its tender. The request for clarification and the response shall be in

writing and no change in the prices or substance of the tender shall be sought, offered or permitted.

2.21.2 Any effort by the tenderer to influence the Procuring Entity in the Procuring Entity's tender evaluation, tender comparison or contract award decisions may result in the rejection of the tenderer's tender."

The Board finds, a clarification was needed in this instance in order for the Procuring Entity to clearly establish whether the Applicant would be bound by the total amount indicated in its Form of Tender, that is, KES 15,982,800, Fifteen Million, Nine Hundred, Eighty Two Thousand, Eight Hundred Kenyan Shillings Only for the provision of the services that the Procuring Entity sought to procure under the subject tender which were: setting up of the PG solution and the running of the PG Solution for a year.

This clarification would be sought by the Procuring Entity with the understanding that the Applicant would not be offered an opportunity to change the amount as quoted in its Form of Tender and thus the Applicant would be bound by the tender sum as is.

If the Applicant agrees to be bound by the amount as indicated in its Form of Tender, the Procuring Entity would proceed with Financial Evaluation of the Applicant's bid as outlined under Clause 5.2.3 Financial Evaluation under Section V Technical Specifications on page 34 of the Tender Document which clearly states that: -

"The lowest evaluated bidder shall be recommended for award of this tender provided they have met all preliminary, compliance to Mandatory Technical Requirements and attained 85 marks in the Technical Evaluation.

	Requirements	Response
1.	One off Set up fee for the PG solution 1) Cost to Ken Trade Kshs_____	
2.	1) Any other annual costs applicabile to running of the PG solution	

If the Applicant is found to be the lowest evaluated bidder, based on the Applicant's evaluated price, an award of the subject tender would be made to it at the amount quoted in the Form of Tender that is Kshs 15,982,800/- for setting up of the PG solution and running the same for a year.

If the Applicant does not agree to be bound by the total amount as indicted in its Form of Tender, the Procuring Entity shall proceed to consider the next lowest evaluated bidder and follow the procedure for financial evaluation as outlined hereinabove.

Upon conclusion of financial evaluation, the Procuring Entity ought to make an award, subject to a due diligence exercise as provided under Clause 2.27 Award of Contract of Section II Instructions to Tenderers on page 14 and 15 of the Tender Document which reads as follows: -

"(a) Post-qualification

2.27.1 In the absence of pre-qualification, the Procuring Entity will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily.

2.27.2 The determination will take into account the tenderer's financial, technical and production capabilities. It will be based upon an examination of the documentary evidence of the tenderer's qualifications submitted by the tenderer, pursuant to paragraph 2.12.3 as well as such other information as the Procuring Entity deems necessary and appropriate.

An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative determination will result in rejection of the Tenderer's tender in which event the Procuring Entity will proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily."

Accordingly, the Procuring Entity is required to conduct a due diligence of the tenderer identified as the lowest evaluated responsive bidder, in order to determine to its satisfaction that the said bidder is qualified to perform the contract satisfactorily. This due diligence or post-qualification exercise shall involve an examination of the documentary

evidence of the tenderer's qualifications submitted by the tenderer, as well as such other information as the Procuring Entity may deem necessary and appropriate.

In view of the foregoing, the Board finds that the Procuring Entity unfairly disqualified the Applicant's bid at Financial Evaluation on this basis, noting that the Procuring Entity failed to seek clarification with respect to the differing sums between the Applicant's Tender Sum in its Technical Proposal and its Schedule of Prices in its Financial Proposal in accordance with Clause 2.21 Clarification of Tenders Section II Instructions to Tenderers on page 13 of the Tender Document and section 81 of the Act.

iii. The Applicant's request to be paid in advance for the annual payment gateway running costs is in contravention of the tender requirements

The Applicant contended that no provision in the Tender Document prohibited advance payment by the Procuring Entity and it was the Applicant's submission that the Procuring Entity's decision to find the Applicant's bid unsuccessful on this basis was unfounded.

The Board first studied section 146 of the Act which provides as follows:

"No works, goods or services contract shall be paid for before they are executed or delivered and accepted by the accounting officer of a procuring entity or an officer authorized by him or her in writing except where so

specified in the tender documents and contract agreement. Such an advance payment shall not be paid before the contract is signed.

Accordingly, no contract for works, goods or services shall be paid for by a procuring entity except where specified in a tender document and contract agreement, which advance payment shall not be paid before a contract is signed.

The Board then proceeded to examine the Procuring Entity's Tender Document and observes the note therein with respect to Clause 8.5 Bank Guarantee for Advance Payment Form of Section VIII Standard Forms on page 37 of the Tender Document which states as follows: -

"8.5 Bank Guarantee for Advance Payment Form – When Advance Payment is requested for by the successful bidder and agreed by the procuring entity, this form must be completed duly signed by the authorized officials of the Bank"

From the above note, we observe that where an advance payment is requested for by the successful bidder and agreed to by the Procuring Entity, a Bank Guarantee Form should be duly completed and signed by the authorized officials of a bidder's bank.

Upon a further examination of the Tender Document, the Board observes no restriction therein that prohibited advance payment with respect to the subject tender.

The Board then examined the Applicant's Schedule of Prices in its Financial Proposal and observes on page 5 therein the following statement: -

"1.2 Annual Costs

The following fees are payable annually and shall be billed quarterly upfront. The fees include costs required to meet recurrent fees....."

From the above excerpt, the Board observes, the Applicant in its Schedule of Prices indicated that the annual costs as outlined therein would be billed by the Applicant quarterly and would be payable upfront or 'in advance'.

The Board then examined the Procuring Entity's Evaluation Report dated 12th May 2020 and observes the following remarks of the Evaluation Committee upon conclusion of Financial Evaluation: -

"3. Bidder 3 (the Applicant) bid sums also only captured the one off set up fees of Kshs 15,982,800.00 for the payment gateway solution and left out annual running costs of Kshs 26,083,200 with terms of upfront quarterly payments which is also against the provisions of section 146 of the PPDA 2015..."

According to the above excerpt, we observe that one of the reasons the Applicant's bid was found non-responsive at Financial Evaluation was on the basis that the Applicant indicated terms of upfront quarterly payments for its annual running costs as outlined in its Schedule of Prices.

As mentioned hereinbefore, section 80 (2) of the Act clearly provides that the **"evaluation and comparison shall be done using the procedures and criteria set out in the tender documents..."**

Accordingly, a procuring entity is required to evaluate and compare bids using the procedures and criteria set out in its tender document.

In this regard therefore, the Board finds that the Procuring Entity unfairly disqualified the Applicant's bid at Financial Evaluation, noting that the Tender Document did not prohibit advance payments with respect to the subject tender but instead allowed conditional advance payments.

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

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..."

The Board has established that the Procuring Entity did not terminate the subject tender in accordance with section 63 of the Act, and that the Procuring Entity did not evaluate the Applicant's bid at Financial Evaluation Stage in accordance with Tender Document, section 80 (2) of the Act, as read together with Article 227 (1) of the Constitution.

This Board is of the considered view that the Procuring Entity ought to re-admit the Applicant's bid at the Financial Evaluation Stage and conduct a re-evaluation of the Applicant's bid at the Financial Evaluation Stage taking into consideration the findings of this Board and in accordance with the provisions of the Tender Document, the Act and the Constitution.

In totality, the Request for Review succeeds 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, No. 33 of 2015, the Board makes the following orders in the Request for Review: -

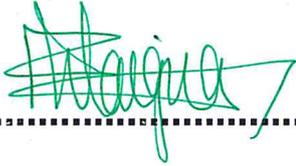
- 1. The Procuring Entity's Letter of Notification of Unsuccessful Bid and Letter of Notification of Termination of Tender No. KTNA/OT/06/2019-2020 for the Provision of Payment Gateway Services for the Kenya TradeNet System dated 29th May 2020 addressed to the Applicant, be and is hereby cancelled and set aside.**

- 2. The Procuring Entity's Letters of Notification of Unsuccessful Bid and Letters of Notification of Termination of Tender No. KTNA/OT/06/2019-2020 for the Provision of Payment Gateway Services for the Kenya TradeNet System dated 29th May 2020 addressed to all bidders, be and are hereby cancelled and set aside.**

- 3. The Procuring Entity is hereby directed to re-admit the Applicant's bid at the Financial Evaluation stage and conduct a re-evaluation of the Applicant's bid at the Financial Evaluation Stage taking into consideration the Board's finding herein.**

4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 2nd Day of July 2020



A handwritten signature in green ink, appearing to be 'A. Angira', written over a horizontal dotted line.

CHAIRPERSON

PPARB



A handwritten signature in black ink, appearing to be 'G. M. K.', written over a horizontal dotted line.

SECRETARY

PPARB

