

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 45/2020 OF 20TH MARCH 2020

BETWEEN

ELECTORSERVE LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF KIRINYAGA.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA.....2ND RESPONDENT

AND

TOP CHOICE SURVEILLANCE LIMITED.....2ND RESPONDENT

Review against the decision of the County Government of Kirinyaga with respect to Tender Negotiation No. 761726-2019-2020 For Nominated Sub-Contract Tender for Supply, Installation Testing and Commissioning of CCTV and Access Control System at the Proposed Medical Complex at Kerugoya Level 5 Hospital

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms Robi Chacha | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |

IN ATTENDANCE

1. Mr Philip Okumu

-Holding brief for Secretary

BACKGROUND TO THE DECISION

The Bidding Process

The County Government of Kirinyaga (hereinafter referred to as “the Procuring Entity”) invited interested and eligible firms through an advertisement in the public procurement information portal www.tenders.go.ke as well as its website www.kirinyaga.go.ke on 18th October 2019 to submit bids in response to Tender Negotiation No. 761726-2019-2020 For Nominated Sub-Contract Tender for Supply, Installation Testing and Commissioning of CCTV and Access Control System at the Proposed Medical Complex at Kerugoya Level 5 Hospital (hereinafter referred to as “the subject tender”).

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of four (4) bids which were opened on the tender submission deadline of 23rd December 2019 in the presence of bidders and their representatives as follows: -

Bidder No.	Name	Amount Quoted
1.	Tunnels Technologies Limited	13,726,000.00
2.	Electorserve Limited	11,848,320.00
3.	Top Choice Surveillance Limited	20,231,255.00
4.	Calmape Engineering Limited	17,014,000.00

Evaluation of Bids

Evaluation was conducted in three stages: -

- a) Preliminary Evaluation
- b) Detailed Technical Evaluation
- c) Financial Evaluation

1. Preliminary Evaluation

At this stage of evaluation, bids were evaluated against the mandatory criteria in the Tender Document outlined as follows: -

S/N	Required Documents
1.	Company certificate of incorporation/registration
2.	Current certificate of registration with National Construction Authority (NCA 5 and above) in Telecommunication and CCTV
3.	Current Annual NCA Contractor's Practising License
4.	Current Class of License with Communication Authority of Kenya (CA)
5.	Tender Security of Kshs 140,000 submitted in the format provided and valid for 150 days from tender opening date
6.	Duly filled, signed and stamped form of tender
7.	Duly filled, signed and stamped business questionnaire
8.	Duly signed statement of compliance
9.	Signed pre-tender site visit form
10.	Proof of authorization shall be furnished in the form of a written power of attorney which shall accompany the tender if the signatory to the tender is not a director of the company (provide name and attach proof of citizenship of the signatory to the Tender). Provide also Form CR12 from the Registrar of Companies
11.	Manufacturer's Authorization for CCTV cameras and active components

The results were as follows: -

Responsive firms	B2, B3 & B4
Non-responsive firms	B1

Upon conclusion of preliminary evaluation, Bidders B2, B3 and B4 were found to have met all the preliminary/mandatory requirements of the subject tender and qualified for technical evaluation.

2. Detailed Technical Evaluation

At this stage of evaluation, bids were evaluated against the technical specifications in the Tender Document and scores were awarded based on a bidder's qualification. Only bidders meeting a pass mark of 70% would qualify for financial evaluation.

The results were as follows: -

Bidder	B2	B3	B4
Marks Scored	89%	97%	56%

Upon conclusion of detailed technical evaluation, two (2) bidders attained the set threshold of 70% and thus qualified for financial evaluation.

Bidder No.	Name of Bidder	Amount Quoted (Kshs)	Scores
2	M/s Electorserve Limited	11,848,320.00	89%
3	M/s Top Choice Surveillance Limited	20,231,255.00	97%

3. Financial Evaluation

At this stage of evaluation, an arithmetic error check was conducted based on the price schedules submitted which is summarized as follows:

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Bidder No.	Name of bidder	Amount Quoted (Kshs)	Scores
4	M/s Top Choice Surveillance Limited	20,231,255.00	97%

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to Bidder No. 3 **M/s Top Choice Surveillance Limited** of **P.O. Box 1218 00618 Ruaraka** having submitted a proposal with the lowest evaluated bid at its bid price of **Kshs 20,231,255.00 (Twenty Million Two Hundred and Thirty One Thousand, Two Hundred and Fifty Five Shillings Only.)**

Professional Opinion

The Director Supply Chain Management, in his professional opinion dated 22nd January 2020 concurred with the Evaluation Committee's recommendation of award which was subsequently approved by the Procuring Entity's Accounting Officer.

REQUEST FOR REVIEW NO. 45/2020

M/s Electorserve Limited (hereinafter referred to as “the Applicant”) lodged this Request for Review dated 19th March 2020 and filed on 20th March 2020 together with a Verifying Affidavit sworn on 19th March 2020 and filed on 20th March 2020 (hereinafter referred to as “the Applicant’s Verifying Affidavit”).

In response, the Procuring Entity filed a Response filed on 9th April 2020 (hereinafter referred to as “the Procuring Entity’s Response”).

M/s Top Choice Surveillance Limited (hereinafter referred to as “the 3rd Respondent”) lodged a Memorandum of Response dated and filed on 9th April 2020.

The Applicant sought for the following orders:-

- a) An order annulling the decision of the Procuring Entity’s tender committee;***
- b) An order awarding the Applicant the tender;***
- c) An order condemning the Procuring Entity to pay the costs of the Request for Review to the Applicant***

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").

In compliance with the directions of the Board, the Applicant filed its written submissions on 8th April 2020. No written submissions were filed by the Procuring Entity or the 3rd Respondent by the closing date of pleadings on 9th April 2020.

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 following issues call for determination: -

I. Whether the Request for Review filed on 20th March 2020 was lodged outside the statutory period under section 167 (1) of the Act thus ousting the jurisdiction of this Board;

Depending on the outcome of this issue: -

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

III. Whether the Procuring Entity evaluated the Applicant's bid at Technical Evaluation in accordance with the provisions of the Tender Document, section 80 (2) of the Act as read together with Article 227 (1) of the Constitution;

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

As stated in the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, jurisdiction

is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

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

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

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

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

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

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

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

The Board observes that section 167 (1) of the Act has two limbs within which a candidate or tenderer may file a Request for Review namely;

- **Within fourteen days of notification of award; or**
- **Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process.**

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

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

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

The Procuring Entity invited interested and eligible bidders to submit bids in response to the subject tender. By the tender submission deadline of 20th December 2019, the Procuring Entity received a total of four (4) bids which were evaluated by the Procuring Entity's Evaluation Committee.

Upon conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award of the subject tender to the

successful bidder, that is, M/s Top Choice Surveillance Limited for being the lowest evaluated bidder.

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

In its submissions, the Procuring Entity challenged the jurisdiction of this Board to entertain the Request for Review on the basis that the said application was filed forty one (41) days after the date of delivery of the letter of notification of unsuccessful bid to the Applicant and thus filed out of time contrary to section 167 (1) of the Act.

The Procuring Entity submitted that the letters of notification of unsuccessful bid were signed by the Head of Supply Chain Management Services on 7th February 2020 and dispatched to the Procuring Entity's registry for posting and delivery on the same date. The Procuring Entity thereafter conducted follow up phone calls to all unsuccessful bidders on the same date prior to the posting of the notification letters through the Post Office as evidenced in its 'Regret Letters Call Register'. It was therefore the Procuring Entity's view that any delay that may have occurred in delivery of the letter of notification to the Applicant was not occasioned by the Procuring Entity.

On its part, the Applicant submitted that it received its letter of notification of unsuccessful bid dated 7th February 2020 on 11th March 2020 as evidenced by the certificate of post from the Postal Corporation of Kenya, which it attached to its Request for Review application. The Applicant therefore contended that it filed its Request for Review within fourteen days from 11th March 2020 in accordance with section 167 (1) of the Act.

In its determination of this issue, the Board first studied section 87 of the Act which states as follows:-

- "(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.**

- (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***

- (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders**

were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.” [Emphasis by Board]

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

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

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

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

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

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

(a) publication of notices;

(b) submission and opening of tenders;

(c) tender evaluation;

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

(e) dissemination of laws, regulations and directives;

(f) digital signatures; or

(g) as may be prescribed by regulations.

Accordingly, all communications and enquiries between parties on procurement and asset disposal proceedings should be in writing and Internet and Communication Technologies (ICT) may be used with respect to publication of notices, submission and opening of tenders, tender evaluation, requesting for information on the tender or disposal process, dissemination of laws, regulations and directives and digital signatures.

The Board examined the Procuring Entity's Tender Document and notes that the procedure for notification of award is provided for under Clause

28 Instructions to Tenderers on page A-12 of the Tender Document which reads as follows: -

"28.1 Prior to the expiration of the period of tender validity prescribed by the Employer, the Employer will notify the successful tenderer by cable, telefax or telex and confirmed in writing by registered letter that its tender has accepted. This letter (hereinafter and in all contract documents called "Letter of Acceptance") shall name the sum (hereinafter and in all contract documents called "the Contract Price) which the Employer will pay to the Contractor in consideration of the execution and completion of the works as prescribed by the Contract.

28.2 Notification of award will constitute the formation of the Contract.

28.3 Upon the furnishing of a Performance Security by the successful tenderer, the unsuccessful tenderers will promptly be notified that their tenders have been unsuccessful.

28.4 Within twenty eight (28) days of receipt of the form of Contract Agreement from the Employer, the successful tenderer shall sign the form and return it to the Employer."

Accordingly, prior to the expiration of the tender validity period, the Procuring Entity shall notify the successful tenderer by cable, telefax or telex and further confirm in writing by registered letter, that its tender has been accepted. Further, upon furnishing of a performance security by the successful tenderer, the unsuccessful tenderers shall be promptly notified that their tenders were unsuccessful.

It is important to note that this provision in the Tender Document runs contrary to section 87 (3) of the Act which requires a procuring entity to notify the successful bidder and unsuccessful bidders of the outcome of their bids at the same time. Moreover, notification of unsuccessful tenderers should not be pegged upon the furnishing of a performance security by the successful tenderer, but should be done simultaneously to the notification of award to the successful bidder.

In this instance, the Procuring Entity submitted that it issued letters of notification dated 7th February 2020 to unsuccessful bidders, including the Applicant herein, which letters were dispatched to its Registry for posting and delivery on the same date. Nevertheless, the Procuring Entity submitted no proof to substantiate its assertion that the letter of notification of unsuccessful bid addressed to the Applicant was posted and delivered to it on 7th February 2020.

Where the service of a letter of notification is disputed by a bidder, a procuring entity is under an obligation to provide evidence to establish that the said letter was either personally served upon the bidder or

produce an email of the notification or a copy of the cable, telefax or telex sent to the bidder's address or a certificate of posting as proof of service.

The Procuring Entity however submitted that it called all unsuccessful bidders, including the Applicant herein, prior to posting of the said letters through the Post Office on 7th February 2020 and submitted a 'Regret Letters Call Register' in support of its assertion.

The Board perused the Procuring Entity's 'Regret Letters Call Register' and observes therein the date '8/2/2020' against the name, and details of three bidders listed therein. Further, details of each of the three bidders are provided which include each bidder's contact person, mobile phone information and their respective email addresses.

From this 'Regret Letters Call Register', we note that it appears phone calls were made to bidders by the Procuring Entity on 8th February 2020 and not 7th February 2020, as alleged by the Procuring Entity.

At the same time, the Board is cognizant of section 64 (1) of the Act which provides that: -

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

Accordingly, all communication and enquiries between a procuring entity and bidders should be in writing. In this regard therefore, the Board cannot rely on the Procuring Entity's submission that it called all the unsuccessful bidders including the Applicant herein, prior to posting of the letters of notification to all unsuccessful bidders on 7th February 2020 in order to ascertain when the Applicant received its letter of notification of unsuccessful bid.

The Board is therefore left with the Applicant's submission that it received its letter of notification of unsuccessful bid on 11th March 2020 as evidenced by the certificate of post annexed to its Request for Review application.

The Board examined the Applicant's certificate of post and notes, the same was issued by the Postal Corporation of Kenya and addressed to the Applicant herein, informing the Applicant that it should arrange for collection of a letter addressed to it which was awaiting delivery at its Jumia branch. Further, the Board observes, the said certificate of post is stamped received by the Applicant on 11th March 2020.

In this regard therefore, and in the absence of any evidence to the contrary, we can only conclude that the Applicant received its letter of notification of unsuccessful bid on 11th March 2020. The Board observes that the fourteen (14) day period started running on 12th March 2020 and lapsed on 25th March 2020. Notably, the Applicant lodged its

Request for Review on 20th March 2020, prior to the lapse of the fourteen (14) day period.

In view of the foregoing, it is the finding of this Board that the Request for Review was filed within the statutory period imposed under section 167 (1) of the Act. The Board therefore finds it has the requisite jurisdiction to entertain the substantive issues raised in the Request for Review and proceeds to address the second issue for determination.

On the second issue for determination, the Applicant contended that the Procuring Entity in its letter of notification of unsuccessful bid failed to disclose the successful tenderer as required under section 87 (3) of the Act.

The Board examined the Applicant's letter of notification of unsuccessful bid dated 7th March 2020 which read as follows: -

"Reference is made to the above-mentioned tender in which you participated.

Your bid for provision of the above services was unsuccessful because of the following reason: -

- ***Your technical score of 89% was lower than that of the most responsive evaluated bid of 97%.***

We take this opportunity to thank you for showing interest in this tender and look forward to working with you in future”

From the foregoing, it is clear that the Procuring Entity did not disclose the identity of the successful bidder of the subject tender.

The Board is cognizant that section 87 (3) of the Act as cited hereinabove, requires a procuring entity to disclose the identity of the successful bidder in a tender, in order to afford the 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 to participate in the subject tender and challenge the same if need be.

The obligation of a procuring entity to disclose the identity of a successful bidder in addition to the amount the tender was awarded is central to the principle of transparency as outlined in Article 227 of the Constitution provides that: -

“When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.” [Emphasis by the Board]

This means that all processes within a procurement system, including notification of unsuccessful bid, must be conducted in a fair, equitable and transparent manner.

However, the Board notes that despite the Procuring Entity's omission, the Applicant was able to approach this Board within the statutory period imposed under section 167 (1) of the Act to challenge the Procuring Entity's decision given that the reason why the Applicant's bid was disqualified was disclosed therein, hence suffered no prejudice.

This does not mean that a procuring entity is at liberty to choose whether or not to comply with express provisions of the Act.

The Board finds that the Procuring Entity's letter of notification of unsuccessful bid issued to the Applicant does not meet the threshold of section 87 (3) of the Act since the Procuring Entity failed to disclose the successful bidder of the subject tender.

On the third issue for determination, the Applicant submitted that during evaluation of the subject tender, its bid was found to have complied with all the mandatory requirements of the tender and further awarded a score of 89% at technical evaluation, thus qualifying for financial evaluation.

However, the Applicant submitted that according to its letter of notification of unsuccessful bid dated 7th March 2020, its bid was found unsuccessful since its technical score of 89% was lower than that of the most responsive evaluated bid of 97%.

Moreover, the Procuring Entity in its Response to the Request for Review, submitted that the Applicant's bid was disqualified on the basis that the Applicant had submitted evidence of other ongoing projects which would have compromised the quality, completion timing and administration of works to be undertaken by the tenderer and that the Procuring Entity's rights under the subject tender would be adversely affected if the subject tender was awarded to the Applicant.

The Applicant contended that these reasons as proffered by the Procuring Entity were farfetched, speculative and an afterthought and more importantly un-supported by any cogent evidence. In the Applicant's view, it provided the most competitive tender price of Kshs 11,848,320, which tender price was lower than that of the successful bidder and thus it was the Applicant's submission that it ought to have been awarded the subject tender.

On its part, the Procuring Entity submitted that tenders received in response to the subject tender were evaluated in accordance with the criteria set out in the Tender Document and in accordance with section 80 (1), (2) and (3) of the Act. However, despite the provision under section 86 (1) of the Act which provided that the successful tender shall be the tender with the lowest evaluated price, the Procuring Entity referred the Board to the requirement on page A-20 of the Tender Document with respect to the Financial Evaluation of the subject tender which stipulated that a non-award may be recommended '*based on the*

response provided and the available demonstrable evidence that the scope, quality, completion timing, administration of works to be undertaken by the tenderer, would adversely be affected or the rights of the employer or the tenderers obligations would be limited in a substantial way.

The Procuring Entity submitted that its Evaluation Committee observed that the Applicant had submitted evidence of other ongoing projects, which was a requirement under technical evaluation, that could have compromised the quality, completion timing and administration of works to be undertaken by the tenderer which clearly demonstrated that the rights of the Employer and the tenderer would be limited in a substantial way.

Having considered parties' submissions, the Board examined the Applicant's letter of notification of unsuccessful bid dated 7th March 2020, cited hereinbefore, and notes that the Applicant's bid was found unsuccessful for the following reason: -

"Your technical score of 89% was lower than that of the most responsive evaluated bid of 97%."

Accordingly, the Applicant's bid was disqualified at technical evaluation since its technical score of 89% was lower than that of the most responsive evaluated bid at 97%.

The Board then studied the Procuring Entity’s Tender Document and observes under the Technical Evaluation Criteria, that points/marks would be awarded for compliance with the technical specifications stipulated in the Tender Document, as follows: -

"The award of points considered in this section shall be as shown below:

<i>Parameter</i>	<i>Maximum</i>
<i>Points</i>	
<i>i. Compliance with Technical Specifications</i>	<i>40</i>
<i>ii. Tender Questionnaire</i>	<i>3</i>
<i>iii. Key Personnel</i>	<i>12</i>
<i>iv. Contract Completed in the last five (5) years</i>	<i>9</i>
<i>v. Schedules of ongoing projects</i>	<i>4</i>
<i>vi. Schedules of contractors equipment</i>	<i>12</i>
<i>vii. Audited Financial Report for the last 3 years</i>	<i>6</i>
<i>viii. Evidence of financial resources</i>	<i>9</i>
<i>ix. Name, Address and Telephone of Banks (Contractor to provide)</i>	<i>3</i>
<i>x. Litigation History</i>	<i>2</i>
 <i>TOTAL</i>	 <i>100</i>

The pass-mark under the Technical Evaluation is 70 percent."

From the above provision in the Tender Document, the Board observes the pass mark under technical evaluation was 70 percent.

Upon examination of the Procuring Entity’s confidential documents with respect to the subject tender submitted in accordance with section 67 (3) (e) of the Act, the Board observes therein the Professional Opinion dated 22nd January 2020 prepared by the Director Supply Chain Management. From the Professional Opinion, the Board observes the following remarks from the Evaluation Committee, captured in the Professional Opinion on page 12 and 13 as follows: -

"Two bidders attained the set threshold of 70% at the detailed technical evaluation and are thus recommended for the next stage of financial evaluation."

Bidder No.	Name of Bidder	Amount Quoted (Kshs)	Scores
2	M/s Electorserve Limited	11,848,320.00	89%
3	M/s Top Choice Surveillance Limited	20,231,255.00	97%

From the above excerpt, it is evident that the Applicant attained a score of 89% at technical evaluation and thereby attained the set threshold of 70%, thus qualifying for financial evaluation.

However the Board observes the following remarks made by the Evaluation Committee on Financial Evaluation as captured in the Professional Opinion on page 13 as follows: -

"3. Financial Evaluation

Any bidder who scored 70% and above was considered for financial evaluation which entailed:

a) Arithmetic error check: Whereby arithmetic errors were verified on the price schedule

Table 4: Financial Evaluation can be summarized by the table below:

<i>Bidder No.</i>	<i>Name of bidder</i>	<i>Amount Quoted (Kshs)</i>	<i>Scores</i>
4	<i>M/s Top Choice Surveillance Limited</i>	20,231,255.00	97%

Accordingly, although the Applicant attained the set threshold of 70% with a score of 89%, its bid was not evaluated at financial evaluation.

The Board notes the Procuring Entity's submission that it disqualified the Applicant's bid at technical evaluation on the basis that it submitted evidence of other ongoing projects required under the technical specifications in the Tender Document, which could have compromised the quality, completion timing and administration of works to be undertaken by the tenderer which clearly demonstrated that the rights of the employer or the tenderers obligations would be limited in a substantial way.

In support of its submission, the Procuring Entity referred the Board to Item No. (iii) of Comparison of rates under Stage 3 - Financial Evaluation which read as follows:-

"(iii) Recommend non-award based on the response provided and the available demonstrable evidence that the scope, quality, completion timing, administration of works to be undertaken by the tenderer, would adversely be affected or the rights of the employer or the tenderers obligations would be limited in a substantial way."

It is however evident that this submission by the Procuring Entity was not captured in the Procuring Entity's confidential documents submitted before the Board including the Procuring Entity's Professional Opinion dated 22nd January 2020 and therefore there is no proof to substantiate the Procuring Entity's assertion that this is the reason why its Evaluation Committee disqualified the Applicant's bid.

Notably, Item No. (iii) of Comparison of rates under Stage 3 - Financial Evaluation which informed the Procuring Entity's disqualification of the Applicant's bid at technical evaluation was not a criterion outlined for technical evaluation under the Tender Document but was a criterion to be applied at financial evaluation.

Having established from the Procuring Entity's Professional Opinion dated 22nd January 2020 that the Applicant's bid met the set threshold of 70% required to qualify for financial evaluation, this Board is of the

view that the Procuring Entity could not on its own volition disqualify the Applicant's bid at technical evaluation after it had met the set threshold of 70% as stipulated in the Tender Document, using a criteria which did not apply at that stage of evaluation.

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

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

It is therefore the finding of this Board that the Procuring Entity did not evaluate the Applicant's bid at Technical Evaluation in accordance with the provisions of the Tender Document, section 80 (2) of the Act as read together with Article 227 (1) of the Constitution.

In determining the appropriate orders to issue in the circumstances as the last issue for determination, the Board observes the Applicant's prayer (b) which reads as follows:

"Award the Applicant the tender"

The Board however notes, the Applicant was not evaluated at financial evaluation and thus there is no basis for award of the tender. Moreover, the Board cannot assume the role of an evaluation committee and proceed to award the Applicant the subject tender.

Notably, one of the powers of this Board as stipulated under section 173 (b) of the Act, is as follows:-

“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...”

This Board has established that the Procuring Entity failed to evaluate the Applicant’s bid at Technical Evaluation in accordance with the provisions of the Tender Document, section 80 (2) of the Act as read together with Article 227 (1) of the Constitution. However, the Board notes that from the Procuring Entity’s Professional Opinion dated 22nd January 2020, the Applicant’s bid attained the set threshold of 70% with a score of 89% which was the threshold necessary to qualify for financial evaluation.

It is therefore the Board’s considered view that the most appropriate order in these circumstances is to direct the Procuring Entity to re-admit the Applicant’s bid at financial evaluation, noting that it had attained the necessary pass mark of 70% and proceed to conduct a financial evaluation of the Applicant’s bid, taking into consideration the findings of this Board and proceed with the procurement process to its logical conclusion.

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

FINAL ORDERS

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

- 1. The Procuring Entity's Letter of Notification of Award for Tender Negotiation No. 761726-2019-2020 For Nominated Sub-Contract Tender for Supply, Installation Testing and Commissioning of CCTV and Access Control System at the Proposed Medical Complex at Kerugoya Level 5 Hospital dated 7th March 2020, addressed to M/s Top Choice Surveillance Limited be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Unsuccessful Bid with respect to Tender Negotiation No. 761726-2019-2020 For Nominated Sub-Contract Tender for Supply, Installation Testing and Commissioning of CCTV and Access Control System at the Proposed Medical Complex at Kerugoya Level 5 Hospital dated 7th March**

2020, addressed to the Applicant be and is hereby cancelled and set aside.

3. The Procuring Entity is hereby directed to re-admit and evaluate the Applicant's bid at Financial Evaluation, taking into consideration the findings of this Board and proceed with the procurement process to its logical conclusion, including the making of an award within fourteen (14) days from the date of receipt of the signed decision of the Board.

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

Dated at Nairobi, this 14th Day of April, 2020

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CHAIRPERSON

PPARB

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SECRETARY

PPARB