

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 86/2020 OF 25TH JUNE 2020

BETWEEN

MFI DOCUMENT SOLUTIONS LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA LITERATURE BUREAU.....1ST RESPONDENT

VIVID PRINTING EQUIPMENT

SOLUTIONS LIMITED.....2ND RESPONDENT

Review against the decision of the Managing Director, Kenya Literature Bureau with respect to Tender No. KLB/T/30/19-20 for Supply, Delivery, Installation, Testing Training and Commissioning of a Book Binding Line Machine

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Nicholas Mruttu | -Member |
| 3. Mr. Ambrose Ogeto | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philemon Kiprop | -Holding brief for Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

The Kenya Literature Bureau (hereinafter referred to as "the Procuring Entity") advertised Tender No. KLB/T/30/19-20 for Supply, Delivery, Installation, Testing Training and Commissioning of a Book Binding Line Machine (hereinafter referred to as "the subject tender"), in MyGov publication on 7th April 2020.

Bid Submission Deadline and Opening of bids

A total of four (4) firms/bidders submitted bids and the same were opened on 7th May 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 Spicers E.A. Limited
2.	M/s Achelis Kenya
3.	M/s Vivid Printing Equipment Solutions Limited
4.	M/s MFI Document Solution

Evaluation of Bids

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

- Mandatory Requirements Checklist Stage;
- Technical Specifications Stage;
- Financial Evaluation Stage.

1. Mandatory Requirements Checklist Stage

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

NO.	REQUIREMENTS
MR 1	Must submit a copy of Certificate of Incorporation/Registration, PIN VAT Certificate
MR 2	Must submit a copy of a Valid Tax Compliance Certificate
MR 3	Must fill the Price Schedule in the format provided
MR 4	Must provide relevant equipment brochures/catalogues
MR 5	Must provide at least three (3) local clients reference letters (original copies)
MR 6	Must provide Tender security Kenya Shillings Two Million Six Hundred Thousand Only (Kshs 2,600,000) Valid for 120 days after bid opening (Bid Bond)
MR 7	Must submit a duly filled Confidential Business Questionnaire in format provided
MR 8	Submit two tender documents well paged, securely bound and clearly marked (original and copy)
MR 9	Audited Accounts for the last two years
MR 10	Submit original stamped/scanned manufacturers authorization letter
MR 11	Must fill the Anti-Corruption Declaration Form

Upon conclusion of preliminary evaluation, two bidders, Bidder No. 3 and Bidder No. 4 were found responsive, having met all the mandatory requirements.

2. Technical Specifications Stage

At this stage of evaluation, bidders were evaluated against the technical specifications as outlined in the Tender Document.

Upon conclusion of this stage of evaluation, Bidder No. 3 was found technically responsive and hence qualified for financial evaluation.

4. Financial Evaluation

At this stage of evaluation, the Evaluation Committee was expected to conduct ranking of the tender sums for the responsive bidders from the lowest to the highest.

NO	BID NO	NAME OF FIRM	TENDER FORM SUM	PROPOSED BINDING LINE MODEL	RANK
1	3	Vivid Printing Equipment Solutions Limited	US \$ 1,150,000.00	Horizon (CABS 4000S)	1

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended that award is made to **M/s Vivid Printing Equipment Solutions Limited** subject to undertaking due diligence having met all the technical specifications at a total cost of **US \$ 1,150,000.00**.

Due Diligence

The Evaluation Committee pursuant to section 83 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, conducted a due diligence exercise to verify the proposed local after sales support and the references provided by **M/s Vivid Printing Equipment Solutions Limited** before making any final decision.

The Evaluation Committee conducted a site visit on 26th May 2020 to Modern Lithographic Limited and Print Arts Limited being references cited by M/s Vivid Printing Equipment Solutions Limited.

The findings were as follows: -

- i. M/s Vivid Printing Equipment Solutions Limited is the authorized Horizon International Inc Supplier in the country;
- ii. The companies confirmed that M/s Vivid Printing Equipment Solutions Limited is known to them having supplied the gathering, trimming and binding machines;
- iii. The supplier confirmed availability of competent trained local engineers on a 24/7 basis;
- iv. The supplier has stock of the essential spare parts and accessories for the various equipment sold and maintained by it. This was confirmed by the clients that the team visited;
- v. The company supports known book printing companies locally who acquired equipment similar to the proposed equipment to KLB. Among the companies are English Press Limited, Printing Services

Limited, RAMCO Limited, Government Press, Icons Limited, Print Arts Limited and Modern Lithographic among others.

In view of these findings, the Evaluation Committee recommended award of the subject tender to **M/s Vivid Printing Equipment Solutions Limited** at **US \$ 1,150,000.00** having duly passed the post qualification exercise.

Professional Opinion

The Head of Procurement Function reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee which was approved by the Accounting Officer on 7th June 2020.

REQUEST FOR REVIEW NO. 86 OF 2020

M/s MFI Technology Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 24th June 2020 and filed on 25th June 2020 (hereinafter referred to as "the Request for Review") together with a Supporting Affidavit sworn and filed on even date (hereinafter referred to as "the Applicant's Affidavit"), through the firm of Mwamuye, Kimathi & Kimani Advocates.

In response, the Procuring Entity, lodged a Response to the Request for Review dated 30th June 2020 and filed on 2nd July 2020 (hereinafter referred to as "the Procuring Entity's Response"), through the firm of

Munyao Muthama & Kashindi Advocates. The Procuring Entity further lodged a Notice of Preliminary Objection dated 30th June 2020 and filed on 1st July 2020

M/s Vivid Printing Equipment Solutions Limited (hereinafter referred to as "the 2nd Respondent") lodged a Response to the Request for Review dated and filed on 3rd July 2020.

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

- i. An order cancelling or setting aside the award of tender to the successful tenderer and to award the tender to the Applicant;***
- ii. In the alternative, an order cancelling the award of tender to the successful tenderer and directing the 1st Respondent to comply with the provisions of section 60 of the Public Procurement and Asset Disposal Act, 2015 and publish technical specifications that allow for fair and open competition among tenderers and re-evaluate the submitted tenders based on those revised technical specifications and if need be re-invite for new bids from the tenderers who participated in the procurement exercise upon the publication of the revised technical specifications;***

iii. An order directing the Respondent to provide a summary of the evaluation and comparison of tenders to the Applicant;

iv. An order for costs of the Request for Review.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (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 6th July 2020 on 7th July 2020 whereas the Procuring Entity filed written submissions dated 8th July 2020 on 9th July 2020. The 2nd Respondent 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 arise for determination are as follows:-

I. Whether the contract dated 26th June 2020 with respect to the subject tender signed between the Procuring Entity and Vivid Printing Equipment Solutions Limited ousts the jurisdiction of this Board;

Depending on the outcome of the first issue: -

II. Whether the Applicant's allegation that the technical specifications in the Tender Document referred to a particular brand contrary to section 60 (4) of the Act, has been raised within the statutory period under section 167 (1) of the Act to lawfully invoke the jurisdiction of this Board;

Depending on the outcome of the second issue: -

III. Whether the technical specifications in the Tender Document referred to a particular brand contrary to section 60 (4) of the Act,

IV. Whether the Applicant's allegation that the Procuring Entity ought to have extended the tender submission deadline to allow the Applicant obtain digitally signed or scanned copies of reference letters as directed by the Procuring Entity's letter dated 6th May 2020, has been raised within the statutory period under section 167 (1) of the Act to lawfully invoke the jurisdiction of this Board;

Depending on the outcome of the fourth issue: -

V. Whether the Procuring Entity ought to have extended the tender submission deadline to allow the Applicant obtain digitally signed or scanned copies of reference letters as directed by the Procuring Entity's letter to the Applicant dated 6th May 2020;

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

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

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

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

"The Procuring Entity and the successful bidder having entered into a binding contract in accordance with section 135 of the Act, the Public Procurement Administrative Review Board lacks jurisdiction to entertain the present Request for Review pursuant to section 167 (4) (c) of the Act."

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** it was stated that 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 of the Act which states as follows: -

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

(2).....;

(3).....;

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

(a) the choice of a procurement method;

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

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

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

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

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

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

The Board notes that the notification referred to under section 135 (3) of the Act is issued pursuant to 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.

It is important to note that once a procuring entity issues a letter of notification of award to a successful bidder under a subject tender, this notification marks the beginning of the fourteen (14) day stand still period within which a procuring entity and a successful bidder are precluded from entering into a written contract pursuant to the right to administrative review afforded to an aggrieved candidate or tenderer under section 167 (1) of the Act.

This is in line with the public procurement principles as espoused under Article 227 (1) of the Constitution which states 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]

Hence, a public procurement system must be seen to be fair and equitable to all bidders, including unsuccessful bidders, by protecting their right to administrative review of public procurement proceedings.

Turning to the circumstances of the case, the Procuring Entity submitted that it entered into a contract with the 2nd Respondent on 26th June 2020 with respect to the subject tender which submissions were reiterated and confirmed by the 2nd Respondent. It was therefore the Procuring Entity's submission that in view of this contract, the Board lacked jurisdiction to hear and determine the Applicant's Request for Review in accordance with section 167 (4) (c) of the Act.

The Board examined the Procuring Entity's confidential file submitted to it in accordance with section 67 (3) (e) of the Act and observes that the Procuring Entity issued a letter of notification of award to the successful bidder, that is, the 2nd Respondent herein, on 9th June 2020, which read as follows: -

"Reference is made to Tender No. KLB/T/30/19-20 for Supply, Delivery, Installation, Testing, Training and Commissioning of a Binding Line Machine. This is to inform

you that your tender was successful for award at US \$ 1,150,000.00.

Please acknowledge your acceptance of this offer within seven (7) days. We shall prepare a formal contract which will be signed after fourteen days from the date of this letter.”

Accordingly, the Procuring Entity notified the 2nd Respondent that a contract would be signed between the two parties after fourteen (14) days from the date of this notification, that is, from 9th June 2020, upon the successful bidder's acceptance of the award.

However it is not clear when the 2nd Respondent received its letter of notification of award.

The Board further examined the Procuring Entity's confidential file and observes that the 2nd Respondent signified its acceptance of the award of the subject tender via a letter dated 15th June 2020. Moreover, a contract was signed between the Procuring Entity and the successful bidder on 26th June 2020, more than fourteen days from the date of the letter of the notification of award to the successful bidder dated 9th June 2020.

It is worth noting that, the Applicant herein lodged its Request for Review on 25th June 2020. The Procuring Entity was then notified of the existence of the Request for Review application on 26th June 2020, on the same day it entered into a contract with the 2nd Respondent with respect to the subject tender.

However it is not clear when the Applicant received its letter of unsuccessful bid to determine when the stand-still period under section 167 (1) of the Act started running. The Board notes, no challenge has been raised as to the time at which the Applicant ought to have approached this Board and thus the Request for Review is properly before this Board.

In view of the foregoing, it is the Board's considered view that it cannot fault the Procuring Entity for entering into a contract with the 2nd Respondent under the subject tender, noting that it executed the said contract on the same date it was served with a notification of review and suspension of proceedings under section 168 of the Act.

However, the Board notes, once a request for review application is lodged before the Board, all procurement proceedings are suspended.

This was explained by the Honourable Lady Justice Nyamweya in her decision in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power**

& Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR where she opined as follows: -

"...section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period."

This means that upon filing of a request for review application, an automatic stay of procurement proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken with respect to the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review application has been heard and determined by the Board.

In this regard therefore, the Board finds that the contract dated 26th June 2020 was entered into by the Procuring Entity and the 2nd Respondent after a Request for Review Application had been filed before the Board which filing stayed any further steps being taken with respect to the subject procurement as from the 25th June 2020 and thus has no effect in law.

Accordingly, it is the finding of this Board that it has jurisdiction to hear the Request for Review application filed on 25th June 2020.

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

As mentioned hereinabove, the jurisdiction of this Board flows from section 167 (1) of the Act which states as follows: -

"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 to invoke the jurisdiction of this Board, a party must file its request for review within the timelines specified in section 167 (1) which is 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.**

In determining whether this Board has jurisdiction to entertain the question whether the technical specifications in the Tender Document referred to a particular brand contrary to section 60 (4) of the Act, the Board considered parties submissions as follows:

The Applicant submitted that the technical specifications in the Procuring Entity's Tender Document were in its view, strategically calculated to accommodate one particular brand, that is, Horizon Brand Model CABS4000S/V. The Applicant submitted that it addressed various letters of complaint to the Procuring Entity but despite these letters the Procuring Entity failed to address the Applicant's concerns thus giving an unfair advantage to the 2nd Respondent who according to the Applicant, is the only sole distributor of the brand in the country.

The Applicant submitted that the Procuring Entity in its letters of response to the Applicant and Addendum No. 1 and Addendum No. 3 to the Tender Document failed to provide the required clarity on the

technical specifications to enable bidders participate on a fair and equitable basis.

In response, the Procuring Entity submitted that the technical specifications in the Tender Document conformed to section 60 (3) of the Act as they were laid out in universal and general terms and did not refer to any brand or manufacturer. According to the Procuring Entity, the description of the technical specifications in the Tender Document were common terminologies in the industry and not in any way specific to the Horizon Brand Model CABS4000S/V. Moreover, in the Procuring Entity's view there were a wide range of machines that would satisfy the technical specifications in the Tender Document given their general nature and thus the technical specifications did not preclude other bidders' products from meeting the said specifications.

On its part, the 2nd Respondent submitted that it is not a sole distributor and does not have a written contract of exclusive distribution with Horizon International Incorporated but in this instance was authorized to submit, negotiate and sign a contract with the Procuring Entity for the delivery, installation, testing, training and commissioning of the book binding line machine. It was therefore the 2nd Respondent's submission that it should not be prejudiced for being authorized to sell the specific model of the book binding line machine as the Applicant had also entered into similar arrangements.

Having considered parties submissions, the Board observes that the Applicant is challenging the contents of the Tender Document, specifically the technical specifications outlined therein.

The Board observes in paragraph 17 of the Applicant's Request for Review that the Applicant noted several anomalies relating to the technical specifications on page 26 and 27 of the Procuring Entity's Tender Document upon receiving the said Tender Document and thus on 14th April 2020, the Applicant wrote to the Procuring Entity seeking clarification on the said specifications.

The Board observes that on 16th April 2020, the Procuring Entity issued '*Addendum Notice No. 1 of 4/2020*' with respect to the Tender Document and *Addendum Notice No. 2* extending the closing date of the tender from 21st April 2020 to 7th May 2020.

Further, on 28th April 2020, the Procuring Entity issued '*Addendum No. 3: Review of the Mandatory and Technical Specifications Requirements on page 25 and 28 of the Tender Document*'.

The Board observes from paragraph 22 of the Request for Review, it was the Applicant's view that Addendum No. 3 did not resolve its earlier concerns and thus it wrote another letter to the Procuring Entity dated 4th May 2020.

The Applicant in paragraph 27 of its Request for Review avers that it received a response to its letter dated 4th May 2020, on 7th May 2020, which was the closing date of the tender, after it had submitted its bid document to the Procuring Entity.

The Board observes that the Applicant in its letter dated 4th May 2020 informed the Procuring Entity that its Addendum No 3 issued on 28th April 2020 had not addressed the anomalies in the technical specifications in the Tender Document and thus requested the Procuring Entity to reconsider the same. The Applicant received a response from the Procuring Entity dated 6th May 2020 on the closing date of the tenders, that is 7th May 2020, stating that the Addendum No 3 was issued to provide clarity on the bid and to ensure fair and equitable participation by interested bidders.

It therefore follows that by 7th May 2020, this being the date the Applicant received the letter from the Procuring Entity; the Applicant was in a position to lodge a request for review with respect to the occurrence of an alleged breach of duty by the Procuring Entity touching on the technical specifications in the Tender Document. Simply put, if the Applicant was dissatisfied with the technical specifications in the Tender Document, it ought to have challenged the same within fourteen (14) days from 7th May 2020. Further, if the Applicant was dissatisfied with the response it received on the closing date of the tender, it ought to have challenged the same before this Board within fourteen days from 7th May 2020.

In this regard therefore, the fourteen-day period imposed under section 167 (1) of the Act started running a day after the 7th of May 2020 and thus the Applicant's right to approach this Board with respect to the technical specifications in the Tender Document, lapsed on 21st May 2020.

Notably, the Applicant lodged the Request for Review on 25th June 2020.

Accordingly, the Board finds that this ground for review was raised outside the statutory period of 14 days contrary to section 167 (1) of the Act and this Board lacks the jurisdiction to entertain the same. The effect of this finding is that the Board lacks the jurisdiction to entertain the third issue for determination.

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

In determining whether this Board has jurisdiction to entertain the question whether the Procuring Entity ought to have extended the tender submission deadline to allow the Applicant obtain digitally signed or scanned copies of reference letters as directed by the Procuring Entity's letter dated 6th May 2020, the Board considered parties' submissions as follows:

The Applicant submitted that the Procuring Entity issued Addendum No. 3 on 28th April 2020 which *inter alia* required bidders to provide original references from at least three local clients.

The Applicant vide a letter dated 4th May 2020 requested the Procuring Entity to reconsider this requirement since it was impossible to obtain the said references due to non-availability of its clients with similar installations whose businesses had closed due to the COVID-19 pandemic.

However, the Applicant submitted that it only received a response from the Procuring Entity allowing the Applicant to procure digitally signed and scanned reference letters after it had submitted its bid document to the Procuring Entity on 7th May 2020. According to the Applicant, the Procuring Entity's response amended the tender to the extent relating to provision of references but due to the deadline for submission of tenders, the Applicant was not in a position to be guided by the said amendments as the same was served upon it after it had submitted its bid documents.

The Applicant contended that the Procuring Entity refused to extend the deadline for submission of tenders to allow the Applicant obtain digitally signed or scanned copies of references from its client and thus in its view the Procuring Entity contravened section 75 (5) of the Act which allows the accounting officer of a procuring entity to extend the deadline

for submission of tenders to allow amendment of the tender document to be taken into account in the preparation or amendment of bids.

On its part, the Procuring Entity submitted that the Applicant misinterpreted the Procuring Entity's Letter dated 6th May 2020 to have been modification/amendment of the tender. The Procuring Entity submitted that the Tender Document was only amended vide Addendum No.1, 2 and 3 and that the said letter from the Procuring Entity did not vary the terms of the Tender Document but only indicated that the Procuring Entity could receive such references that had been signed digitally or scanned reference letters, which form of submission is part of the normal conduct of business operations and was not unique to the tender process.

The Procuring Entity further contended that its letter to the Applicant dated 6th May 2020 did not amount to modification/amendment of the Tender Document as the same did not satisfy the requirements of Clause 2.6.1 of the Tender Document on modifications of tender. It was therefore the Procuring Entity's submission that its letter dated 6th May 2020, did not occasion the Applicant any prejudice or disadvantage in the subject procurement proceedings.

The Board examined the Procuring Entity's confidential documents submitted to the Board in accordance with section 67 (3) (e) of the Act and observes therein that the Procuring Entity issued the following Addendums to its Tender Document: -

- a) **Addendum Notice No. 1 of 04/2020** – Issued on 16th April 2020, addressing clarifications requested with respect to the Under Gathering Machine and Under Perfect Binder;
- b) **Addendum Notice No. 2**– Through an advertisement extending the closing date of the tender from 21st April 2020 to 7th May 2020 at 10:00 am.;
- c) **Addendum Notice No. 2** – Issued on 28th April 2020. This reviewed the Mandatory and Technical Specifications Requirements on page 25-28 of the Tender Document.

The Board observes on page 52 of the Applicant's bundle of documents that the Applicant wrote a letter to the Procuring Entity dated 4th May 2020 stating that it still found gaps and anomalies in the tender specifications in the Tender Document and further stated as follows: -

"...We observe in the Addendum No. 3 newly added Point No. MR 5 "Must provide at least three (3) local clients reference letters (original copies)" pertaining to mandatory requirements is an impossible proposition in the current ongoing COVID-19 pandemic. Reason being accessibility as well as non-availability of signatories of our clients with similar installations. Whereas as the previous specification specified "Experience of supplying and commissioning of similar machine technology locally. At least three (3) reference sites" which is readily available. We urge you to reconsider this..."

From the above letter, we observe that Addendum No. 3 introduced Mandatory Requirement No. 5 which read as follows:

"Must provide at least three (3) local clients reference letters (Original Copies)"

According to the Applicant, it could not provide the reference letters due to "accessibility as well as non-availability of signatories of our clients with similar installations" but informed the Procuring Entity that it could only provide three reference sites as proof of experience of supplying and commissioning of similar machine technology locally, which was the previous specification in the Tender Document.

The Board then examined the response from the Procuring Entity addressed to the Applicant dated 6th May 2020 which reads as follows: -

**"COMPLAINT AGAINST TENDER NO KLB/T/30/19-20
SUPPLY, DELIVERY, INSTALLATION, TESTING, TRAINING
AND COMMISSIONING OF A BOOK BINDING LINE**

***Reference is made to your letter Ref
MFI.NRB/KLB/044/20 dated 4th May 2020 and the
enclosures thereon and our letter ref.
KLB/4/05:1.XIII/119 on the above subject matter.***

***The published addendum No. 3 of April 28th 2020 was
issued to provide clarity on the bid and to ensure fair and
equitable participation by interested bidders. In line with***

the guidance given by the Public Procurement and Regulatory Authority on procurement activities, the Bureau has no objection to receiving digitally signed and scanned reference letters.

We look forward to your participation in the tender process.”

The Board observes that the Procuring Entity informed the Applicant that it had no objection to receiving digitally signed and scanned reference letters in response to the requirements under the Tender Document.

It is on the basis of this letter that the Applicant submitted that the Procuring Entity allegedly amended the Tender Document and failed to extend the tender submission deadline to allow the Applicant obtain digitally signed or scanned copies of references from its clients, noting that it received the said letter after the tender submission deadline and after the Applicant had submitted its bid.

From the foregoing, the Board observes that at the time the Applicant received the response from the Procuring Entity on 7th May 2020, the Applicant was aware of the alleged breach of duty by the Procuring Entity. This means that as at 7th May 2020, the Applicant was in a position to lodge a request for review with respect to the occurrence of this alleged breach of duty by the Procuring Entity and ought to have challenged the same within fourteen (14) days from 7th May 2020.

In this regard therefore, the fourteen-day period imposed under section 167 (1) of the Act started running a day after the 7th of May 2020 and thus the Applicant's right to approach this Board with respect to the Procuring Entity's letter dated 6th May 2020, lapsed on 21st May 2020.

Notably, the Applicant lodged the Request for Review on 25th June 2020, more than one month later.

Accordingly, the Board finds that this ground for review was raised by the Applicant outside the statutory period of 14 days contrary to section 167 (1) of the Act and this Board lacks the jurisdiction to entertain the same. The effect of this finding is that the Board lacks the jurisdiction to entertain the fifth issue for determination.

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

A brief background to the Request for Review is that the Procuring Entity advertised the subject tender on 7th April 2020 and invited interested and eligible bidders to submit bids in response to the same.

The Procuring Entity received a total of four (4) bids by the closing date of 7th May 2020, which were read out by the Procuring Entity's Tender Opening Committee in the presence of bidders and their representatives.

The Procuring Entity's Evaluation Committee evaluated the bids as received and at the conclusion of the evaluation process, recommended award of the subject tender to M/s Vivid Printing Equipment Solutions Limited, the 2nd Respondent herein, as the lowest evaluated responsive bidder.

The Accounting Officer approved the Evaluation Committee's recommendation, having been reviewed by the Head of Procurement function. All bidders, including the Applicant herein, were informed of the outcome of their bids.

Vide a letter dated 9th June 2020, the Procuring Entity informed the Applicant of the outcome of its bid which letter stated as follows:-

"Reference is made to Tender No. KLB/T/30/19-20 for Supply, Delivery, Installation, Testing, Training and Commissioning of a Binding Line Machine. This is to inform you that your tender was not successful as your bid failed at the technical stage.

We wish you success in the future tender with us."

Aggrieved, the Applicant moved the Board through the Request for Review.

It was the Applicant's submission that its letter of notification of unsuccessful bid was defective as it failed to disclose the reason for the

disqualification as well as the successful tenderer as required by the provisions of section 87 (3) of the Act.

In response, the Procuring Entity submitted that the Applicant was properly informed of its unsuccessful bid and was further informed that its bid failed in the Technical Evaluation Stage. It was therefore the Procuring Entity's submission that the letter of notification of unsuccessful bid issued to the Applicant did not in any way invalidate the propriety of the conduct and evaluation of the entire procurement process.

Having considered all parties' submissions, the Board shall begin by addressing the question: What is the manner in which notification of award or intention to enter into a contract ought to be made?

In order to address this question, the Board studied section 87 of the Act cited hereinbefore which is instructive on the manner in which notification ought to be carried out.

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, the Board notes that a procuring entity's notification of unsuccessful bid to a bidder should disclose the reasons why a bid was unsuccessful and further disclose the successful bidder in the procurement process therein.

Notification to an unsuccessful bidder under section 87 (3) of the Act is a fundamental process within any procurement process for the following reasons:

Firstly, it provides a period of 14 days within which a procuring entity and a successful bidder are precluded from entering into a written contract for an unsuccessful bidder to seek redress before the Board, if need be.

Secondly, it protects the right of the unsuccessful bidder to administrative review by disclosing the specific reasons why its tender was unsuccessful, in order for a respective bidder to challenge the same before the Board.

The Board is cognisant that providing a bidder with reasons why its bid was found unsuccessful is an issue that goes to the root of the rules of natural justice, one of them being, "the right to a fair hearing" including the right to have adequate time and facilities to prepare a defence as stated under Article 50 (c) of the Constitution.

A bidder cannot adequately exercise this right when specific reasons are not afforded to it by a procuring entity. In contrast, providing a bidder with specific reasons why its bid was unsuccessful enables such bidder to have clear grounds that form its request for review lodged before this Board, if it wishes to do so.

These reasons ought to be specific and not general, such that if a bidder is found non-responsive at the Technical Evaluation stage, the letter of notification ought to specifically state:-

- a. Whether there was a failure by the bidder to achieve the minimum technical score, if technical evaluation was based on scores;
- b. Whether there was a failure to submit documents evidencing compliance to technical specifications and the specific documents in question.

Moreover, the procuring entity is also required under section 87 (3) of the Act, to disclose the identity of the successful bidder in a tender, in order to afford 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 which provides that: -

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

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

In the instant case, the procedure to be followed in notification was stipulated under Clause 2.27 Notification of Award of Section II Instructions to Tenderers on page 15-16 of the Tender Document which reads as follows: -

"2.27.1 Prior to expiration of the period of tender validity, the Bureau will notify the successful tenderer in writing that its tender has been accepted."

2.27.2 The notification of award will signify the formation of the contract but will have to wait until the contract is finally signed by both parties. Simultaneously, other tenderers shall be notified that their tenders have not been successful."

2.27.3 Upon the successful tenderer's furnishing of the performance security pursuant to paragraph 2.29, the

Bureau will simultaneously inform the other tenderers that its tenders have not been successful."

Accordingly, notification of award to a successful bidder should be done prior to expiration of the bid validity period and both successful and unsuccessful bidders should be notified of the outcome of their bids at the same time.

The Board examined the Applicant's notification from the Procuring Entity dated 9th June 2020 and notes from the contents therein that the Procuring Entity did not provide reasons why the Applicant's bid was unsuccessful and further did not disclose the identity of the successful bidder in the subject tender.

It is therefore the finding of this Board 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 reasons why the Applicant's bid was found unsuccessful.

From the foregoing, it is not lost to the Board that had the Procuring Entity issued a letter of notification of unsuccessful bid with specific reasons to the Applicant as required under section 87 (3) of the Act, the Applicant would perhaps have had sufficient grounds upon which to base its Request for Review.

The Board has examined the pleadings submitted by all parties and the Procuring Entity's confidential documents with respect to the subject tender and notes, the Applicant was disqualified at the Technical Evaluation Stage.

In this regard therefore, the Board deems it necessary to direct the Procuring Entity to issue the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 of the Act, taking into consideration the finding of this Board concerning how notification to bidders ought to be carried out.

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

FINAL ORDERS

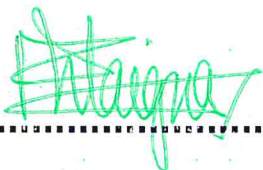
In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review: -

- 1. The Contract dated 26th June 2020 with respect to Tender No. KLB/T/30/19-20 for Supply, Delivery, Installation, Testing Training and Commissioning of a Book Binding Line Machine signed between the Procuring Entity and M/s Vivid Printing Equipment Solutions be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 9th June 2020 with respect to Tender No. KLB/T/30/19-20 for Supply, Delivery, Installation, Testing Training and Commissioning of a Book Binding Line Machine addressed to the Applicant and all other unsuccessful bidders be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to issue a Notification of Intention to Enter into a Contract to the Successful Bidder and Letters of Notification of Unsuccessful bid to the Applicant and all other unsuccessful bidders in Tender No. KLB/T/30/19-20 for Supply, Delivery, Installation, Testing, Training and**

Commissioning of a Book Binding Line Machine in accordance with section 87 of the Act, within seven (7) days from the date hereof.

- 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 16th Day of July, 2020


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CHAIRPERSON

PPARB


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SECRETARY

PPARB