

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 97/2020 OF 8TH JULY 2020

BETWEEN

ALPHINE INVESTMENTS LIMITED.....APPLICANT

AND

THE PRINCIPAL SECRETARY

MINISTRY OF ENVIRONMENT

AND FORESTRY.....1ST RESPONDENT

MINISTRY OF ENVIRONMENT

AND FORESTRY.....2ND RESPONDENT

Review against the decision of the Ministry of Environment and Forestry with respect to Tender No. MOE&F/KMD/OT/009/2019-2020 for Supply, Delivery, Installation and Commissioning of Airport Weather Observing System (AWOS) at Mombasa, Nanyuki and Nairobi

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Robi Chacha | -Member |
| 3. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

The Ministry of Environment and Forestry (hereinafter referred to as "the Procuring Entity") advertised Tender No MOE&F/KMD/OT/009/2019-2020 for Supply, Delivery, Installation and Commissioning of Airport Weather Observing System (AWOS) at Mombasa, Nanyuki and Nairobi (hereinafter referred to as "the subject tender") in the Procuring Entity's website www.meteo.go.ke, the Government Advertising Agency www.mygov.go.ke and in the Daily Newspapers (Standard Newspaper, The Star Newspaper and People Daily) on 31st March 2020.

An Addendum to the subject tender was also posted on the aforementioned websites on Tuesday 14th April 2020.

Bid Submission Deadline and Opening of bids

A total of five (5) 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 Datacore Limited
2.	M/s Adrian Kenya Limited
3.	M/s Fuzike Ventures
4.	M/s Alpine Investment Limited

Bidder No.	Bidder Name
5.	M/s Caliken Networks E.A. Limited

Evaluation of Bids

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

- Compliance with the Mandatory Requirements;
- Detailed Evaluation of Bids;
- Financial Evaluation.

1. Compliance with the Mandatory Requirements

At this stage of evaluation, all submitted bids were checked for compliance with the following mandatory requirements: -

NO.	REQUIREMENTS
MR 1	Submit 1 (one) Original and 1 (one) copy of the tender document.
MR 2	Provide documentary evidence of the company's Certificate of Incorporation (legal structure)
MR 3	Provide certified copy of the company's valid Tax Compliance Certificate issued by Kenya Revenue Authority (KRA)
MR 4	Submit a duly filled, signed and stamped Confidential Business Questionnaire provided in this tender document.
MR 5	Bidders must quote for the three sites
MR 6	Submit a bid bond of Kshs 2,000,000/=, valid for 150 days from date of opening of tender. The bid bond must be from a reputable bank or insurance approved by the PPRA and in the prescribed format
MR 7	Submit a duly filled, signed and stamped form of tender

MR 8	Confirm visit of the site to verify site details before completing and submitting the tender. Tenderer should sign site attendance register and site visit form
MR 9	Must submit audited accounts for the last three (3) years
MR 10	Bidding document must be well bound and paginated/serialized including all attachments. All bidders are required to submit their documents paginated in a continuous ascending order from the first page to the last in this format (i.e 1,2,3....n) where n is the last page
MR 11	Bidder must provide evidence that it has the necessary personnel to implement the required solution. The CVs and current valid copies of certified certificates of the technical personnel must be attached. Project Manager, Project Engineer and Network Engineers
MR 12	Duly filled declaration letter that the tenderer has never and shall not engage in any corrupt or fraudulent practices in the procurement proceedings
MR 13	Duly filled declaration letter that the firm/person and his or her subcontractor if any is not debarred from participating in procurement proceedings
MR 14	Duly filled Declaration Letter that the firm/person is not guilty of any serious violation
MR 15	Provide Manufacturer Authorization

Any bidder who fails to meet any of these items will be deemed non-responsive and will not be considered for further evaluation.

The Evaluation Committee noted that there was an addendum to tenders published on 14th April 2020 which removed MR 8 as a mandatory requirement for tender evaluation due to prevailing Covid 19 outbreak. Members therefore agreed that bidders shall not be subjected to the said mandatory requirement.

Upon conclusion of this stage of evaluation, the following two bids were evaluated as **NON-RESPONSIVE** for reasons indicated below:

Bidder No.	Bidder Name	Reasons for non responsiveness
2	M/s Adrian Kenya Limited	The bidder did not comply with:- i. MR 3- Provide certified copy of the company's valid Tax Compliance Certificate issued by Kenya Revenue Authority (KRA) ii. MR 12- Duly filled Declaration letter that tenderer have never and shall not engage in any corrupt or fraudulent practices in the procurement proceedings,
4	Alphine Investment Ltd	i. MR 10- Bidding documents must be well bound and paginated/serialized including all attachments. All bidders are required to submit their documents paginated in a continuous ascending order from the first page to the last in this format; (i.e. 1,2,3..... n) where n is the last page. ii. MR 11- Bidder must provide evidence that it has the necessary personnel to implement the required solution. The CVs and current valid copies of certified certificates of the technical personnel must be attached. Project Manager, Project Engineer and Network Engineers.

The following three bids fully met the mandatory requirements set out in the tender document hence were evaluated as **RESPONSIVE** and recommended for further evaluation:

Bidder No.	Bidder Name
1	Datacore Limited
3	Fuzike Ventures
5	Caliken Networks E.A Ltd

2. Technical Evaluation

This stage of evaluation was done in two (2) stages pursuant to Clause 2.22 of the Appendix to Instructions to Tenderers (ITT) of the Tender Document as follows:

- i. Preliminary Technical Evaluation involved examination of fulfillment of the mandatory technical requirements/specifications for the proposed solution,
- ii. Detailed Technical Evaluation sought to determine the bid proposals' ability to meet the set specifications,

A. Preliminary Technical Evaluation

Here evaluation was carried out based on bids meeting the minimum technical specifications required for the items. The final remark for each bid was either a "PASS" or "FAIL" based on how it met the minimum technical specifications required.

Upon conclusion of Preliminary Technical Evaluation one bid **did not fully meet** the minimum Technical Specifications as required in the Preliminary Technical Evaluation Stage. Consequently, the bid **failed** this stage of evaluation and therefore was **not recommended** to proceed to the Detailed Technical Evaluation Stage as follows: -

Bidder No.	Bidder Name	Reason for Non- Compliance
1	M/S Datacore Limited P.O Box 21483-00505 Nairobi	<ul style="list-style-type: none">• The bidder indicated that they would not provide Transmissometer• Did bidder indicated that they would not provide

Bidder No.	Bidder Name	Reason for Non- Compliance
		background luminance meter for RVR calculation • No commitment to provide GPS synchronizer to provide time synchronization for AWOS

Two bids **fully met** the minimum Technical Specifications as required in the Preliminary Technical Evaluation Stage. Consequently, their bids **passed** this stage of technical evaluation and therefore **recommended** to proceed to the Detailed Technical Evaluation Stage as follows: -

Bidder No.	Bidder Name
3	M/S Fuzike Ventures P.O Box 67591-00100 Nairobi
5	M/S Caliken Networks E.A Ltd P.O. Box 36748-00200 Nairobi

B. Detailed Technical Evaluation

Detailed Technical Evaluation was carried out based on the bids that met the minimum technical specifications in the Preliminary Technical Evaluation Stage.

Only bids with an overall score of 75% and above in the Detailed Technical Evaluation Stage would be recommended for financial evaluation pursuant to Clause 2.22 of the Appendix to Instructions to Tenderers (ITT) of the Tender Document. The results were as follows: -

Item	Category	Description of requirement	Percentage of weighting	BIDDER 3	BIDDER 5
				Average Score	
1	Documentation	Level of presentation, completeness and well referenced document – 4%	10%	10%	10%
		Provided detailed itemized price schedule - 3%			
		Provide audited financial statements for the last three years – 3%			
2	References and Past experience	Evidence of three similar projects successfully completed in the last five (5) years. Must provide proof of having undertaken similar works (attach copies of contracts/LSO and contact details) -18% (6% each project completed)	27%	9%	23%
		Completion Certificates for the above contracts – 9% (3% each certificate of completion)			
3	Management Team Technical Skills	Number of qualified Engineers/technicians specialized in AWOS technologies and project management (Provide evidence using CV and certificates) a) Registration with IEK 5% b) ICT Certificate 3% c) Specialization in AWOS technologies 5%	13%	8%	13%
4	Solution Design, Project plan and Methodology of implementation	a) Proposed equipment meets or exceed the minimum requirements – 30% b) Project plan and Methodology of implementation – 20%	50%	48%	37%
TOTAL MARKS			100%	75%	83%
OVERALL SCORE "PASS"/ "FAIL"				Pass	Pass

Two (2) bids were recommended to proceed to the Financial Evaluation Stage having met the minimum score of 75% pass mark required to

pass the detailed technical evaluation stage. The two bidders were as follows:

Bidder No.	Bidder Name
3	M/S Fuzike Ventures P.O Box 67591-00100 Nairobi
5	M/S Caliken Networks E.A Ltd P.O. Box 36748-00200 Nairobi

4. Financial Evaluation

Financial evaluation was based on the prices quoted. The overall lowest bidder for all the three (3) sites among the technically responsive bidders was considered as the lowest evaluated bidder hence recommended for the award for the three sites.

			Bidder No. 3	Bidder No.5
Lot No.	ITEM DESCRIPTION	Qty	Total Cost (Ksh.)	Total Cost (Ksh.)
1	Supply, delivery, installation and commissioning of Airport Weather Observing System (AWOS) at Mombasa International Airport	1No.	83,355,660.00	62,525,298.00
2	Supply, delivery, installation and commissioning of Airport Weather Observing System (AWOS) at Moi Airbase	1No.	68,642,290.00	48,926,837.00
3	Supply, delivery, installation and commissioning of Airport Weather Observing System (AWOS) at Laikipia Airbase	1No.	68,642,290.00	48,926,837.00
4	Factory Acceptance Test and Training		9,373,288.00	4,969,150.00
5	Country of Origin/Destination		Finland	France
Overall total cost for MAB, LAB and MIA			230,013,528.00	165,348,122.00

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended **Bidder No.5 M/s Caliken Networks (E.A) Limited of P.O Box 36748 -00200 Nairobi** for award of the subject tender at a total cost of **Kshs. 165,348,122.00 (Kenya Shillings One Hundred Sixty-five Million Three Hundred Forty Eight Thousand One Hundred Twenty-two only)** being the lowest evaluated bidder as tabulated below.

			Bidder No.5
Lot No.	ITEM DESCRIPTION	Qty	Total Cost (Ksh.)
1.	Supply, delivery, installation and commissioning of Airport Weather Observing System (AWOS) at Mombasa International Airport	1No.	62,525,298.00
2.	Supply, delivery, installation and commissioning of Airport Weather Observing System (AWOS) at Moi Airbase	1No.	48,926,837.00
3.	Supply, delivery, installation and commissioning of Airport Weather Observing System (AWOS) at Laikipia Airbase	1No.	48,926,837.00
4.	Factory Acceptance Test and Training		4,969,150.00
5.	Country of Origin/Destination		France
Overall total cost for MAB, LAB and MIA			165,348,122.00

Professional Opinion

The Head of Supply Chain Management Services reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee which was duly approved by the Accounting Officer on 24th June 2020.

REQUEST FOR REVIEW NO. 97 OF 2020

M/s Alphine Investments Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 8th July 2020 (hereinafter referred to as "the Request for Review") together with a Statement in Support of the Request for Review sworn and filed on even date (hereinafter referred to as "the Applicant's Statement"), through the firm of Cheboi Kiprono Advocates. The Applicant further filed a Replying Affidavit dated and filed on 17th July 2020 (hereinafter referred to as "the Applicant's Affidavit").

In response, the Procuring Entity, acting in person, lodged a Response to the Request for Review dated 13th July 2020 and filed on 14th July 2020 (hereinafter referred to as "the Procuring Entity's Response").

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

- i. An order nullifying the entire procurement proceedings in Tender No. MOE&F/KMD/OT/009/2019-2020 for Supply, Delivery, Installation and Commissioning of Airport Weather Observing System (AWOS) at Mombasa, Nanyuki and Nairobi;***
- ii. An order directing the Respondents to award the Applicant Tender No. MOE&F/KMD/OT/009/2019-2020 for Supply, Delivery, Installation and Commissioning of Airport Weather Observing System (AWOS) at***

Mombasa, Nanyuki and Nairobi for being substantially responsive and the lowest evaluated tenderer;

- iii. In the alternative, an order directing the Procuring Entity to re-evaluate all the submitted bids within the law;***
- iv. In the alternative, an order directing the Procuring Entity to prepare a fresh Tender Document and re-tender for Supply, Delivery, Installation and Commissioning of Airport Weather Observing System (AWOS) at Mombasa, Nanyuki and Nairobi;***
- v. An order awarding 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 Request for Review was filed on 8th July 2020. The Procuring Entity was served with a physical copy of the Request for Review on 10th July 2020. Thereafter, the successful bidder, M/s Caliken Networks East Africa Limited was served with an electronic copy of the Request for Review on 22nd July 2020.

However, the Board observes that the successful bidder did not file any pleadings in response to the Request for Review despite being invited to do so.

The Applicant filed Written Submissions dated 17th July 2020 on even date whereas 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 Applicant's written submissions.

The issues that arise for determination are as follows:-

- I. Whether the Procuring Entity issued the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act;***
- II. Whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation Stage in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution with respect to the following mandatory requirements as outlined in the Tender Document: -***
 - a) MR 10: Bidding document must be well bound and paginated/serialized including all attachments. All bidders are required to submit their documents paginated in a continuous ascending order from the first page to the last in this format (i.e 1,2,3....n) where n is the last page*
 - b) MR 11: Bidder must provide evidence that it has the necessary personnel to implement the required solution. The*

CVs and current valid copies of certified certificates of the technical personnel must be attached; Project Manager, Project Engineer and Network Engineers.

III. Whether the Procuring Entity evaluated the bids received in the subject tender within the maximum period provided for under section 80 (6) of the Act.

The Board will now proceed to address the first issue for determination:

The Applicant contended that the Procuring Entity failed to disclose the identity of the successful tenderer in the Applicant's letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act, which allegation was denied by the Procuring Entity.

The Board examined the Applicant's letter of notification of unsuccessful bid dated 24th June 2020 which stated as follows: -

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

The tendering process in respect of the above tender has been concluded. We regret to notify you that your bid was unsuccessful because of the following reasons:

Your company did not comply with: -

a. MR 10 – Bidding documents must be well bound and paginated/serialized including all attachments. All bidders are required to submit their documents paginated in a continuous ascending order from the first page to the last in this format (i.e. 1,2,3...n) where n is the last page.

b. MR 11 – Bidder must provide evidence that it has the necessary personnel to implement the required solution. The CVs and current valid copies of certified certificates of the technical personnel must be attached - Project Manager, Project Engineer and Network Engineers.

We thank you for your participation and hope that you will still show interest in our future tenders."

From the foregoing, the Board observes, the Applicant's letter of notification contains the specific reasons why the Applicant's bid was found non-responsive but does not disclose the identity of the successful tenderer.

In this regard therefore, the Board studied section 87 of the Act which states as follows:-

"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the

procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

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

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

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

According to section 87 of the Act, a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This section further requires that in the same breath, a Procuring Entity must notify other bidders who participated in the subject tender that their respective bids were not successful when notifying the successful bidder that its tender was successful.

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

It is important to note that the requirement to disclose the successful bidder of a subject tender as stipulated under section 87 (3) of the Act, affords unsuccessful bidders the opportunity to establish if the successful bidder satisfied the eligibility criteria as set out in the Tender Document, that is, whether the successful bidder was qualified for award of the tender and challenge the same if need be.

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.

As noted hereinbefore, the Procuring Entity did not disclose the identity of the successful bidder in the subject tender in the Applicant's letter of notification dated 24th June 2020.

Despite this omission by the Procuring Entity, we note the Applicant subsequently learnt of the identity of the successful bidder following the Procuring Entity's response to the Applicant's Request for Review and suffered no loss or damage since the Applicant was able to approach the Board within the statutory period imposed under section 167 (1) of the Act and challenge the award of the subject tender.

On the second sub-issue for determination, the Board observes that the Procuring Entity issued letters of notification dated 24th June 2020, to all bidders, including the Applicant herein.

The Applicant on its part contended that section 87 (3) of the Act mandates the accounting officer of a procuring entity to notify bidders of the outcome of their respective bids. However, it was the Applicant's contention that its letter of notification of unsuccessful bid dated 24th June 2020 was not issued by the Accounting Officer of the Procuring Entity.

In response to this allegation, the Accounting Officer of the Procuring Entity averred in paragraph 37 of the Procuring Entity's Response that

he authorized the Head of Procurement to communicate the outcome of the tendering process to all bidders on his behalf.

In view of parties' submissions, the Board examined section 87 of the Act as cited hereinabove which stipulates 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);

(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);

The above provision clearly stipulates that the accounting officer of a procuring entity issues notification letters to successful and unsuccessful bidders.

As to whether an accounting officer can delegate his authority to issue notification letters to successful and unsuccessful bidders, this Board in **PPARB Application No. 9 of 2020 Internet Solutions (K) Limited v. Kenya Airports Authority** determined 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. However, as a public officer, an accounting officer is bound by principles of leadership and integrity as espoused under the Constitution 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.

The Board examined the letter of notification issued to the Applicant dated 24th June 2020 and observes the tail end of the Applicant's letter appears as follows: -

".....we thank you for your participation and hope that you will still show interest in our future tenders.

R Yator

For: Principal Secretary”

From the above excerpt, the Board observes that the said letter of notification was issued to the Applicant on behalf of the Principal Secretary, by one R. Yator.

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 no memo or document therein delegating authority to R. Yator to issue notification letters to bidders with respect to the subject tender, noting that any delegated authority must be in writing and specific to the tender in question.

It is therefore the finding of this Board that the said R. Yator who issued and signed notification letters to both the successful and unsuccessful bidders on behalf of the Accounting Officer acted without authority in doing so, since there was no evidence of any documentation from the Accounting Officer specific to the subject tender which delegated such authority to him.

In totality of this issue, the Board finds the Procuring Entity did not issue the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act and is therefore null and void.

On the second issue for determination, the Applicant contended that the reasons advanced by the Procuring Entity as to why its bid was found unsuccessful at Preliminary Evaluation Stage were unfounded. In the Applicant's view, its bid was compliant with all the tender requirements. According to the Applicant, its bid was well bound and serialized on all its pages. Moreover, it provided resumes for key personnel to implement the required solution in compliance with the mandatory requirement in the Tender Document. It was therefore the Applicant's submission that its bid was unfairly disqualified from further evaluation.

In response, the Procuring Entity contended that the Applicant did not meet Mandatory Requirement No. 10 and 11 of the Tender Document and thus could not qualify for further evaluation.

Having considered parties' submissions, the Board observes that the Applicant's bid was found unsuccessful at Preliminary Evaluation Stage for failure to meet the following mandatory requirements: -

a) MR 10: Bidding document must be well bound and paginated/serialized including all attachments. All bidders are required to submit their documents paginated in a continuous ascending order from the first page to the last in this format (i.e 1,2,3....n) where n is the last page

b) MR 11: Bidder must provide evidence that it has the necessary personnel to implement the required

solution. The CVs and current valid copies of certified certificates of the technical personnel must be attached. Project Manager, Project Engineer and Network Engineers.

In determining whether the Procuring Entity fairly evaluated the Applicant's bid with respect to the above mandatory requirements, at the Preliminary Evaluation Stage, the Board addressed its mind to each of the aforementioned criteria as follows: -

A) MR 10: Bidding document must be well bound and paginated/serialized including all attachments. All bidders are required to submit their documents paginated in a continuous ascending order from the first page to the last in this format (i.e 1,2,3....n) where n is the last page

According to this criterion, bidders were required to submit well bound paginated/serialized bid documents, in that, bid documents were required to be paginated in a continuous ascending order from the first page to the last page.

The question therefore arises: what is the meaning of a well bound paginated/serialized bid document?

For one, the Cambridge English Dictionary defines the word 'bind' to mean:

"to tie something tightly or to fasten something; to make separate pieces of paper into a book:

From this definition, a well bound bid document can be interpreted to mean a bid document whose contents/documents are fastened together in the form of a book.

Secondly, the same dictionary defines the term 'pagination' as follows: -

"the way in which the pages of a book, document, etc. are given numbers"

Pagination is therefore assigning numbers to pages in a book or document.

Finally, the **Concise Oxford English Dictionary** defines a serial as

"consisting of, forming part of, or taking place in a series"

It further defines "to serialise" as ***"to arrange in a series"*** and a "series" as ***"a number of similar or related things coming one after another"***.

In this regard therefore, the ordinary meaning of 'serialisation' is to publish or present something in the form of a serial. Serialization of pages may therefore be interpreted to mean that each page must be arranged and presented in a manner that it is evident that a page is coming after another page.

The Board notes that serialization of a bid document is a requirement under section 74 (1) (i) of Act which reads as follows:-

“(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

(a);

(b);

(c);

(d);

(e);

(f);

(g);

(h).....;

(i) requirement of serialisation of pages by the bidder for each bid submitted; [Emphasis by Board]

The Board examined the Applicant’s Technical Proposal document and observes that the Applicant submitted two volumes: The first volume it titled as ‘Original’ and the second volume it titled as ‘Technical Proposal/Data sheets’.

The Board observes, the first volume of its Technical Proposal Document titled ‘Original’ was well bound but had nil pagination. However, three documents in this volume had their original pagination, that is, a

document titled 'All Weather, Inc Company Profile' (pages 1 to 3), 'All Weather Inc. Airport Reference List – non FAA AWOS' (pages 1 to 7) and a document titled 'All Weather Inc U.S. AWOS Installations' (pages 1 to 17).

With respect to the second volume of the Applicant's Technical Proposal Document titled 'Technical Proposal/Data Sheets', the Board observes the said document was also well bound but had nil pagination. However, the following documents therein had their original pagination: -

- a) U.S. Department of Transportation Federal Aviation Administration, National Policy (Effective Date 1/20/11), Order 6560.10C, Runway Visual range (pages 1 to 9)
- b) White Paper, The Case for Forward Scatter Sensors for IRVR by Ian Clark and Jonathan Abbott (May 2012) (pages 1 to 12)
- c) Product Manual CS140 Background Luminance Sensor (pages 1 to 27)

From the foregoing, the Board observes that the two volumes of the Applicant's Technical Proposal Document were well bound but were not paginated and/or serialized as required under Mandatory Requirement No. 10 of the Tender Document.

The Board examined the Procuring Entity's Evaluation Report dated and signed on 30th May 2020 and observes on page 9 therein that the

Applicant's bid was found non-responsive for failure to comply with the said mandatory requirement.

The Board notes, the mischief that the requirement for pagination/serialization seeks to cure is to eliminate instances of bid tampering and to protect the sanctity of a bidder's bid document.

As was stated by the Honourable Justice Nyamweya in **Judicial Review Miscellaneous Application No. 312 of 2018, Republic v Public Procurement Administrative Review Board; Nairobi City Water Sewerage Company Limited & another Ex parte Fourway Construction Company Limited (2019) eKLR**: -

"Two key principles and objectives come to play in the requirement for serialisation of every page of a bid document. The first is that following laid down rules of procedure is an important aspect of fairness, non-discrimination and equal treatment. Therefore, to allow non-conformity with the rules set down on serialisation of pages of bid documents will entail unequal and unfair treatment of other tenderers. This is especially so if other tenderers have acted on the said rules and have been caused prejudice in doing so - for example, if they have incurred costs and expenses in complying. Not following the rules also damages confidence in the system of public procurement for the longer term, to the detriment of value for money.

Secondly, compliance with the requirement of serialisation of every page of a bid document is crucial for good governance, transparency, and accountability. Non-conformity with this requirement will be open to abuse by procuring entities and bidders, who can deliberately plant documents, and use the opportunity for correction to advance their own interests. In addition, the possibility of accepting non-conforming tenders as regards serialization of every page will require that discretion is given to procuring entities or reviewing bodies to judge whether or not to waive or allow correction of the particular non-conformity, and such discretion can be abused to favour certain bidders.

Accordingly, the requirement of serialisation of every page of a bid document is an important aspect of fairness, non-discrimination and equal treatment noting that this requirement is a mandatory requirement that all bidders are required to adhere to. Moreover, this requirement is crucial for good governance, transparency, and accountability as non-conformity with this requirement can lead to instances whereby procuring entities or bidders deliberately tamper with bid documents in order to advance their own interests.

It is therefore the finding of this Board that the Applicant did not satisfy Mandatory Requirement No. 10 of the Tender Document.

b) MR 11: Bidder must provide evidence that it has the necessary personnel to implement the required solution. The CVs and current valid copies of certified certificates of the technical personnel must be attached. Project Manager, Project Engineer and Network Engineers.

According to this criterion, bidders were required to provide evidence of having the necessary personnel to implement the required solution in form of curriculum vitas **and** current valid copies of certified certificates of technical personnel, that is, of a Project Manager, Project Engineer and Network Engineers.

The Board examined the Applicant's Technical Proposal Document and observes that the Applicant provided the following in response to this criterion: -

a) Curriculum Vitae

Name: Richard Gitari Muchira

(No indication of position/title)

b) Curriculum Vitae

Name: Edwin Njogu Mungai

Title/Position – Experienced Engineering Project Manager

c) Curriculum Vitae

Name: Remus Zaharescu

Title/Position: VP International Sales

d) Curriculum Vitae

Name: Rex Brown

Title/Position: Quality Assurance Manager

e) Curriculum Vitae

Name: Aaron Hustead

Title/Position: Project Engineer

f) Curriculum Vitae

Name: Gregory A Earlenbaugh

Title/Position: Field Engineer

g) Curriculum Vitae

Name: Michael Earl

Title/Position: Senior Software Engineer

h) Curriculum Vitae

Name: Director of Manufacturing

Title/Position: Jeff Patterson

i) Curriculum Vitae

Name: Scott Ardley

Title/Position: Field Service Technician

From the foregoing, the Board observes, the Applicant provided nine (9) curriculum vitas and from these nine curriculum vitas we observe one for a Project Manager, one for a Project Engineer and one for a Network Engineer (Senior Software Engineer). However, the Applicant did not provide any current valid copies of certified certificates as required under Mandatory Requirement No. 11.

It is therefore the finding of this Board that the Applicant did not satisfy Mandatory Requirement No. 11 of the Tender Document.

In totality of this issue, the Board finds that the Procuring Entity evaluated the Applicant's bid in accordance with Mandatory Requirement No 10 and Mandatory Requirement No. 11 of the Tender Document and section 80 (2) of the Act as read together with Article 227 (1) of the Constitution.

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

The Applicant contended that the Procuring Entity's Evaluation Committee did not conduct the evaluation of bids within thirty (30) days from the opening of the tender contrary to section 80 (6) of the Act. The Procuring Entity denied this allegation and submitted that the evaluation

of bids was undertaken by its Evaluation Committee within the statutory period of thirty (30) days as required under section 80 (6) of the Act from the tender opening on 7th May 2020 to the signing of the evaluation report by all members of the Evaluation Committee on 30th May 2020.

Having considered parties' submissions, the Board deems it necessary to establish the meaning of evaluation and what it entails.

The Black's Law Dictionary, 6th Edition defines "Bid Evaluation" as follows:-

"After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award."

Section 85 of the Act further states that:-

"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers"

From the above provisions and having noted the ordinary meaning of bid evaluation, it is the Board's considered view that evaluation is conducted with a view of recommending a bidder for award of a tender.

Section 80 (4) of the Act is further instructive on the document that marks the end of evaluation. It states as follows:-

"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation"

An Evaluation Committee having conducted evaluation of tenders is able to recommend a bidder for award of a tender. The recommendation envisioned by the Head of Procurement function is only in respect of his/her professional opinion given pursuant to section 84 of the Act advising the Accounting Officer on the appropriate action to take.

In essence, evaluation of bids ends once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation and comparison of tenders and recommendation of award. It therefore follows that the evaluation of bids does not include all other processes after the conclusion of an evaluation process as contained in the Evaluation Report that is prepared and signed by the Evaluation Committee.

The Board now turns to determine whether the Procuring Entity complied with the timelines provided for evaluation of bids as provided in the Act.

Section 80 (6) of the Act states as follows:-

"The evaluation shall be carried out within a maximum period of thirty days."

The above provision does not state when the period of evaluation should start running but specifies that evaluation must be carried out within a maximum period of 30 days. The Board notes, this provision is couched in mandatory terms and a procuring entity is not at liberty to extend the period within which it conducts an evaluation process.

Furthermore, it is expected that the accounting officer of a procuring entity ought to appoint an evaluation committee prior to tender opening to ensure that the process of evaluation commences without delay.

This is in line with section 176 which states that it is an offence to ***"delay without justifiable cause the opening or evaluation of tenders"***.

In the instant case, the Board observes, the Invitation to Tender on page 1 and 2 of the Tender Document indicated that the subject tender

was scheduled to open on 23rd April 2020. However, the Procuring Entity issued an Addendum published on 14th April 2020 which pushed the tender opening/tender submission deadline to 7th May 2020.

From the Procuring Entity's Tender Evaluation Report and from paragraph 38 of the Procuring Entity's Response, it is clear that technical and financial evaluation was finalized on 30th May 2020 but it is not clear on which date it commenced.

It is worth noting that the period of evaluation of bids does not include a post qualification evaluation pursuant to section 83 of the Act, a professional opinion rendered by the Head of Procurement Function pursuant to section 84 of the Act and award of tenders by the Accounting Officer pursuant to section 87 of the Act.

From the foregoing, we note, if the tender was opened on 7th May 2020 and evaluation of the technical and financial bids was finalized on 30th May 2020, it is logical to state that the evaluation was carried out within the period envisaged under section 80 (6) of the Act, even though it is not clear when such a process commenced but it is clear when the process was finalized. It would be absurd to imagine that the evaluation process would commence prior to tender opening on 7th May 2020.

In this regard therefore, the Board finds the Evaluation Committee conducted evaluation of proposals within the thirty day period for evaluation of bids in accordance with section 80 (6) of the Act.

In conclusion, 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 issue the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act. In this regard therefore, the Board deems it necessary to cancel the said letter of notification and to direct the Procuring Entity to issue a letter of notification of intention to enter into a contract with the lowest evaluated responsive tenderer and simultaneously issue all unsuccessful tenderers with a letter of notification of unsuccessful bid, taking into consideration the findings of this Board and the provisions of the Tender Document, the Act, its attendant regulations and the Constitution.

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 Procuring Entity's Notification of Intention to Enter into a Contract dated 24th June 2020 with respect to Tender No. MOE&F/KMD/OT/009/2019-2020 for Supply, Delivery, Installation and Commissioning of Airport Weather Observing System (AWOS) at Mombasa, Nanyuki and Nairobi addressed to M/s Caliken Networks (E.A.) Limited be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letters of Notification of Unsuccessful bid dated 24th June 2020 with respect to Tender No. MOE&F/KMD/OT/009/2019-2020 for Supply, Delivery, Installation and Commissioning of Airport Weather Observing System (AWOS) at Mombasa, Nanyuki and Nairobi addressed to the Applicant and all other unsuccessful bidders be and are hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to notify all bidders of the outcome of the evaluation in accordance with section 87 of the Act within seven (7) days from the date**

hereof, taking into consideration the Board's findings in this Request for Review.


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 29th Day of July, 2020


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CHAIRPERSON

PPARB


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SECRETARY

PPARB

