

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 118/2021 OF 27th SEPTEMBER 2021

BETWEEN

AZAMASOFT CONSULTING LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

COMMISSION FOR UNIVERSITY EDUCATION..... RESPONDENT

GRANDE-AFRIQUE

CONSULTING LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Commission for University Education in relation to Tender No. CUE/RFPR/01/2021-2022: Supply, Installation, Customization, Testing, Training, Commissioning and Maintenance of an Off-the Shelf Integrated Internal Audit Management Software (Re-Advertisement)

BOARD MEMBERS

- | | |
|--------------------------|---------------------------------|
| 1. Mrs. Njeri Onyango | -Vice Chairperson (Panel Chair) |
| 2. Dr. Paul Jilani | -Member |
| 3. Eng. Mbiu Kimani, OGW | -Member |
| 4. Mr. Alfred Keriolale | -Member |

IN ATTENDANCE

Mr. Stanley Miheso	-Holding brief for the Acting Board Secretary
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BACKGROUND TO THE DECISION

The Tendering Process

Commission for University of Education (CUE) (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. CUE/RFP/01/2021-2022 for Supply, Installation, Customization, Testing, Training, Commissioning and Maintenance of an Off-the Shelf Integrated Internal Audit Management Software (Re-Advertisement) (hereinafter referred to as “the subject tender”) through an advertisement published in MyGov newspaper issued on 27th July 2021, the Procuring Entity’s website (www.cue.or.ke) and the government tenders portal (www.tenders.go.ke).

Addendum

Through Addendum No. 1 of 4th August 2021, the Procuring Entity issued a clarification on the tender security amount.

Appointment of Tender Evaluation Committee

A Tender Evaluation Committee was appointed by the Commission Secretary on 9th August 2021 to evaluate tenders in accordance with the tender document.

Tender Submission Deadline and Opening of Tenders

The Procuring Entity received a three (3) tenders by the tender submission deadline of 11th August 2021. The tenders were opened by a Tender Opening Committee appointed by the Accounting Officer shortly thereafter in the

presence of tenderers' representatives. The following tenderers were recorded as having submitted their respective tenders;

- 1. Revival Software Limited and Revival Holding Limited, JV**
- 2. Azmasoft Consulting Limited**
- 3. Grande Afrique Consulting Limited**

Evaluation of Tenders

An Evaluation Committee evaluated tenders three stages, namely:

- i. Preliminary Examination;**
- ii. Technical Evaluation;** and
- iii. Financial Evaluation.**

Preliminary Evaluation

At this stage, the Evaluation Committee evaluated tenders against the criteria outlined in Clause 3. Preliminary Examination for Determination of Responsiveness of Section III-Evaluation and Qualification Criteria at page 25 and 26 of the tender document. At the end of evaluation at this stage, two (2) tenders including the Applicant's tender were found non-responsive while one (1) tender, that is, the Interested Party's tender was found responsive thus proceeded to the Technical Evaluation stage.

Technical Evaluation

The Evaluation Committee subjected the remaining tender to a technical evaluation against the criteria outlined in Clause 4. Technical Evaluation of Section III-Evaluation and Qualification Criteria at page 26 to 36 of the

Tender Document. At this stage of evaluation, the one (1) remaining tender was found responsive, thus eligible to proceed to Financial Evaluation.

Financial Evaluation

At this stage, the Evaluation Committee evaluated tenders in accordance with the criteria outlined in Clauses 5, 6, 7 and 8 Financial Evaluation of Section III-Evaluation and Qualification Criteria at page 37 and 38 of the Tender Document. At the end of this stage of evaluation, was determined the lowest evaluated responsive tender at its tender sum of Kshs 13,024,078.00 (Kenya Shillings Thirteen Million Twenty-Four Thousand and Seventy-Eight).

Due Diligence

Due diligence was conducted on Grande Afrique Consulting Limited and a report was drafted showing that it was found to have the ability to provide the Procuring Entity with the intended solution for Automated Internal Audit Management.

Recommendation

The Evaluation Committee recommended award of the subject tender to Grande Afrique Consulting Limited following a positive due diligence outcome at its tender sum of Kshs 13,024,078.00 (Kenya Shillings Thirteen Million Twenty-Four Thousand and Seventy-Eight).

Professional Opinion

In a Professional Opinion dated 9th September 2021, the Procuring Entity's HOD, Supply Chain Management Department, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation on award of the subject tender to the Interested Party at its tender sum of Kshs 13,024,078.00 (Kenya Shillings Thirteen Million Twenty-Four Thousand and Seventy-Eight). She recommended that the Accounting Officer approves the Professional Opinion. The Accounting Officer approved the award of the subject tender as per the Evaluation Report.

Letters of Notification

Vide letters dated 13th September 2021, the Procuring Entity notified all tenderers of the outcome of their respective tenders.

THE REQUEST FOR REVIEW

Azmasoft Consulting Limited (hereinafter referred to as "the Applicant") lodged a Request for Review together with a Supporting Affidavit dated 20th September 2021 and filed on 27th September 2021 on its own behalf seeking the following order:

- 1. An order for a debrief be carried out on the evaluation of RFQ No. CUE/RFPR/01/2021-2022.**

Vide letters dated 27th September 2021 the Acting Board Secretary notified the Procuring Entity of the existence of the Request for Review and invited them to file their response on the same, further the Board Secretary attached the Board's Circular No.2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

In response, the Respondent filed a Preliminary Objection to the Request for Review dated 30th September 2021 and filed on 1st October 2021 on its own behalf.

Vide letters dated 7th October 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while inviting them to supply the Board with any information and arguments touching on the subject tender. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No.2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

The Interested Party filed a Memorandum of Appearance together with a Notice of Preliminary Objection dated 8th October 2021 on 12th October 2021, together with an Authority to Act and a Replying Affidavit sworn by Godfrey Mwika on 8th October 2021 and filed on 12th October 2021 through the firm of James Oketch & Co Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. The Interested Party filed Written Submissions together with a list of Authorities dated 8th October 2021 and filed on 12th October 2021.

BOARD'S DECISION

The Board has considered each of the parties' pleadings, Written Submissions and confidential documents submitted by the Respondents pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds that the following issues call for determination: -

(i) Whether the Application herein was filed within the time prescribed under Section 167 (1) of the Act.

Depending on the outcome of the above issues

(ii) Whether the Procuring Entity evaluated the Applicant's bid in accordance with Section 80 (2) of the Act as read together with Article 227 of the Constitution of Kenya, 2010 and in terms of the criteria for evaluation in the Tender document?

The Board will proceed to address the above issues.

On the first issue for determination, it is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction. Nyarangi JA stated as follows in the *locus classicus* case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR:**

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [Emphasis added]

Similarly, in the case of ***Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] ekLR*** the Court of Appeal emphasized the importance of the issue of jurisdiction and stated that:

"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."

It therefore behoves the Board to determine whether it has jurisdiction to entertain the Request for Review.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others [2012] ekLr** pronounced itself regarding where the source of jurisdiction of a court or any other decision as follows: -

"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..."

The Procuring Entity has in its response dated 30th September, 2021 and filed on 1st October, 2021 presented a response titled

"Preliminary objection to the request for to the Request for Review by AZAMSOFT CONSULTING LIMITED

In the said response at Clause 1.5 headed Notification of Intention to award the procuring entity states as follows

"Commission for University Education on 13th September, 2021 notified all bidders who participated in the tendering process of the intention to award to the lowest evaluated bidder. The unsuccessful bidders were informed of the reasons for failure."

Further at Clause 1.7 titled "Request for Review, the procuring entity states ***"On 28th September, 2021, the commission received the letter from the Public Procurement Review Board on the filed Request for Review by the Applicant Azamsoft Consulting Ltd stopping the Procurement process until the review is finalized. However, we note that the standstill period expired on midnight of 27th September, 2021.***

In regard to the above Request for Review Commission for University has shared evidence that the Applicant's Request for debriefing was addressed as provided for in Public Procurement law within 14 days' standstill period which expired on midnight of 27th September, 2021"

On its part, the Applicant has filed a short supporting Affidavit [Form r. 200 (1)] the 1st paragraph thereof states

" Request for Review in respect of Tender No RFQ NO: CUE/RFPR/01/2021-2022 FOR SUPPLY INSTALLATION, CUSTOMIZATION, TESTING, TRAINING, COMMISSIONING AND MAINTENANCE OF AN OFF THE SHELF INTEGRATED SOFTWARE issued on 13th September, 2021(Emphasis added)

It is clear from both the parties that the letters of Notification were dated and apparently issued on 13th September, 2021.

The Board takes note that the Application by the Applicant is dated 20th September, 2021. On the official part its shown as follows

"FOR OFFICIAL USE ONLY

LODGED with the Secretary Public Procurement Administrative Review Board on..... day of

SIGNED

BOARD SECRETARY

The hand written part shows the date of lodging the Application **was 27th day of September, 2021**. It is signed by the Acting Board Secretary. The Board also notes that the document bears a stamp of the Board Secretariat

as **“Received on 27th September, 2021.”** Therefore, the date of lodging of the Application is on 27th September, 2021.

Section 167 (1) of the Act provides as follows

Request for a review

(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) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

(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

while Section 168 on Notification of Review and suspension of proceedings provides

168. Notification of review and suspension of proceedings

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.

From the foregoing the Board is of the view that the operative date for filing which is conceded by the Procuring Entity is 27th. Therefore, the standstill date as correctly conceded is the 27th. The Procuring Entity's difficulty and objection as set out in its Response is clearly on the fact that it was Notified by the Board on the 28th September, 2021 which is "**after the standstill period had expired.**"

The Board has considered the above position and takes the position that the Application for Review was properly lodged with the Board on the 27th September, 2021 which is within 14 days period allowed under Section 167 (ii).

Section 203 of The Public Procurement and Asset Disposal Regulations 2020 (hereinafter the Regulations") provides as follows

Section 203 (3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

Section 203 (4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.

In regard to Notification it is noted that Section 168 does place the duty to notify the accounting officer of a Procuring Entity upon the Secretary of the Board and not on the Applicant. Whereas Section 168 does not set the timelines to do so. Section 205 states

The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

Accordingly, the duty of the Applicant is to file the Application for Review within the prescribed time. In this instant the period was on or by 27th September, 2021 which was done. The duty to notify the Accounting Officer of the Respondent is on the Secretary of the Board and he is only required to do so "immediately" after the filing. It has not been argued or shown that that was not done. Further any delay to so act would not be visited upon the Applicant who had complied with Section 167 (1) of the Act as read together with Section 205 (1) of the Regulations.

The Interested party on its part has alleged that the Application is filed out of the 14 days period allowed and is therefore defective. Reliance is placed on the Objection raised by the Respondent, as can be seen from paragraph 3 of the Affidavit of Godfrey Mwaika. No further detail is given in that regard. The Board therefore considers that the determination above on the filing of the Application on 27th sufficiently covers this preliminary objection by the Interested Party as well.

The upshot of this is that the Board finds that the Applicant's Application for Review was properly filed within the prescribed time. The Preliminary

objections by the Respondent and the Third party on that limb are therefore dismissed.

The Board will now address the second issue for determination;

Whether the Procuring Entity evaluated the Applicant's bid in accordance with Section 80 (2) of the Act as read together with Article 227 of the Constitution of Kenya, 2010 and in terms of the Criteria for evaluation in the Tender document

The Applicant in the Review Application has set out his request as follows

REQUEST FOR REVIEW

We Azamsoft Consulting Limited, the above named Applicant, of address: Physical address K&K Maisonettes, Gichugu Rd, Kileleshwa Nairobi P.O Box No 717 -00517 Nairobi Kenya. Tel No +254 (20) 2525802 Email admin@azamsoft.com, hereby request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds namely:

- 1. We have requested a review on the evaluation criteria from Commission for University Education as we note that the number of copies of the document to be submitted was not a mandatory requirement and a point of disqualification. Please see attached letter to the Commission for University Education.***

2. This disqualification has led to an estimated loss of revenue of Kenya Shillings Thirteen Million Four Hundred and Six Thousand Eight Hundred and Ninety-Four and Fourteen Cents (13,406,894.14)

It is shown that the Letter of Regret was issued on 13th September, 2021. The Letter to the Applicant is as follows

CUE/10/7/VOL.13

Azmasoft Consulting Ltd

Box 717-00517

Nairobi

Te.0733-484449

david.wanga@azmasoft.com

Attn: David Wagacha

RE:-NOTIFICATION OF INTENTION TO AWARD

This notification is sent from Commission for University Education for Supply, Installation, Customization, Testing, Training, Commissioning and Maintenance of an off-the shelf Integrated Internal Audit Management Software RFP No: CUE/RFPR/01/2021-2022.

This Notification of Intention to Award (Notification) notifies you of our decision to award the above. Contract. The transmission of this Notification begins the Standstill Period of 14 days. During the Standstill Period you may;

- a) Request a debriefing in relation to the evaluation of your Tender, and/or
- b) Submit a Procurement-related Complaint in relation to the decision to award the contract

However your bid was not successful since you submitted only two documents, original and one copy instead of original and two copies as required

The successful Tenderer for Supply, Installation, Customization, Testing, Training, **Commissioning and Maintenance of an off-the shelf Integrated Internal Audit Management Software** was M/S Grande Afrique Consulting Limited at a total cost of KES. 13,024,078 comprising of 5 years recurrent cost.

How to request a debriefing

DEADLINE: The deadline to request a debriefing expires at midnight on 27th September 202 time.

You may request a debriefing in relation to the results of the evaluation of your Tender. If you decide to request a debriefing your written request must be made within three (3) Business Days of receipt of this Notification of Intention to Award.

Provide the contract name, reference number, name of the tenderer, contact details; and address the request for debriefing as follows

Attention: Prof. Mwenda Ntarangwi PhD,

Title/Position: Commission Secretary/Chief Executive

Agency: Commission for University Education

Email address: info@cue.or.k

.....”

The Applicant upon receipt of the letter requested for a debrief on the same day. The Procuring Entity Responded to the debrief requested by its letter of 15th September, 2021. The Response found in the Procuring Entities response is as follows

Azamsoft Consulting Ltd

Box 717-00517

Tel 0733-484449

david.wanga@azamsoft.com

Attn; David Wanga

**RE: DEBRIEFING FOR REP NO. CUE/REPR/01/2021-2022:
SUPPLY, INSTALLATION, CUSTOMIZATION, TESTING
TRAINING, COMMISSIONING AND MAINTENANCE OF AN OFF THE
SHELF INTEGRATED INTERNAL AUDIT : MANAGEMENT SOFTWARE**

The Above subject refers

The Commission for University Education hereby clarifies the following instructions to Tenderers that are in the Standard bid document that was distributed to the bidders

1. 23.1 *The Tenderer shall prepare one original of the documents comprising the Tender as described in ITT 11 and clearly mark it "ORIGINAL." Alternative Tenders, if permitted in accordance with ITT 13, shall be clearly marked "ALTERNATIVE". In addition, the Tenderer shall submit copies of the Tender, in the number specified in the TDS and clearly mark them "COPY." In the event of any discrepancy*

between the original and the copies, the original shall prevail. (Page 11)

- 2. The TDS specified 2 copies of the Bid document on page 22 of the Bid document*

<i>ITT 23.1</i>	<i>In addition to the original of the tender, the number of copies is two</i>
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3. Submissions, sealing and Marking of Tenders

24.1 *The Tenderer shall deliver the Tender in a single, sealed envelope (one (1) envelop process). Within the single envelope the Tenderer shall place the following separate, sealed envelopes:*

a) in an envelope marked "ORIGINAL", all documents comprising the Tender, as described in ITT II; and

b) in an envelope marked "COPIES", all required copies of the Tender;

4. Section III on evaluation of bid documents on evaluation of Tenders. (Page 24)

This Section contains all the criteria that the Procuring Entity shall use to evaluate Tenders and qualify Tenderers. No other factors, methods or criteria shall be used. The Tenderer shall provide all the information requested in the forms included in Section IV, Tendering Forms. The Procuring Entity should use the Standard Tender Evaluation Report for Goods and Works for evaluating Tenders.

5. Preliminary examination for Determination of Responsiveness

The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and that the tender is complete in all aspects in meeting the

requirements provided for in the preliminary evaluation criteria outlined below. The Standard Tender Evaluation Report Document for Goods and Works for evaluating Tenders provides very clear guide on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will be considered non responsive and will not be considered further. Below is the summary of the preliminary evaluation requirements on the Standard

Tender Evaluation Report Document as published by PPRA:

The evaluation committee shall first conduct a preliminary evaluation to determine whether: -

- a) A tenderer complies with all the eligibility requirements*
- b) The tender has been submitted in the required format and serialized*
- c) any tender security submitted is in the required form, amount and validity period, where applicable;*
- d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;*
- e) the required number of copies of the tender have been submitted;*
- f) the tender is valid for the period required;*
- g) any required samples have been submitted and;*
- h) all required documents and information have been submitted*

The above summarizes the specific Instruction to Tenderers, and evaluation criteria applied in the reference to the number of copies submitted by a bidder in evaluating the Tender.

Yours faithfully

MWENDA NTARANGWI, PhD,

COMMISSION SECRETARY/ CEO

The Applicant was not satisfied with the Contents of this letter from the Procuring Entity. He therefore on 21st September, 2021, wrote yet another letter requesting for debriefing. The same was in the following terms

Commission Secretary/Chief Executive

Commission for University Education

Red Hiti Road, off Limuru Road;

P. O. Box 54999 – 00200

21 September 2021

Upon receipt of the above letter, the Applicant again wrote to the Respondent as follows:

Attention: Prof. Mwenda Ntarangwi PhD

RE: SUPPLY, INSTALLATION, CUSTOMIZATION, TESTING, TRAINING, COMMISSIONING AND MAINTENANCE OF AN OFF-THE SHELF INTEGRATED INTERNAL AUDIT MANAGEMENT SOFTWARE: RFP NO. CUE/RFPR/01/2021-2022 - REQUEST FOR A DEBRIEF

We refer to your letter of debriefing dated 15th of September 2021 in which you responded to our request for a debrief.

We appreciate the response provided; however, we did not find some of the responses satisfactory. Below We have highlighted additional queries on the evaluation process:

- 1. In Section III - Evaluation and Qualification criteria Part 3. Preliminary examination for Determination of Responsiveness highlighted the*

*mandatory requirements for the **valuation**. In this section, there is no mention of the number of copies to be delivered being a mandatory requirement as per below screenshot of the document;*

2. Also, in Section 111 - Evaluation and Qualification Criteria (pages 25 to 39 of the tender document) there is no mention of the number of copies being part of the evaluation criteria.

We look forward to your earliest response

Yours faithfully,

David Wagacha

Managing Director

Azmasoft Consulting Limited

The Procuring Entity through its CEO the 1st Respondent made a response on 24th September, 2021 in the following terms

Azmasoft Consulting Ltd

24th September, 2021

Box 717-00517 Nairobi Te.0733-484449

david.wanga@azmasoft.com

Attn. David Wagacha

***RE: DEBRIEFING FOR REP NO. CUE/RIPR/01/2021-2022:
SUPPLY, INSTALLATION, CUSTOMIZATION, TESTING, TRAINING,
COMMISSIONING AND MAINTENANCE OF AN OFF-THE SHELF
INTEGRATED INTERNAL AUDIT MANAGEMENT SOFTWARE***

Reference is made to your letter on the above subject dated 21st September 2021;

Commission for University Education hereby reaffirms its position on the subject as indicated in the earlier communication dated 15th September 2021.

Yours Faithfully

MWENDWA NTARANGWI, PhD

COMMISSION SECRETARY/ CEO

The Applicant being dissatisfied and aggrieved with the evaluation and the Responses filed this Application on 27th September, 2021.

The Evaluation of the Tender according to the Tender document was to be in Three (3) stages as set out in Section III on Evaluation of bid documents on Evaluation of Tender at page 24 as cited above those were

- i) Preliminary examination for Determination of Responsiveness (on eligibility criteria and other mandatory requirements)
- ii) Technical Evaluation
- iii) Financial Evaluation

The Applicant's position is that its Tender Documents met the requirements and the Evaluation thereof and disqualification at the Preliminary Stage based on the reasons given regarding failure to comply in submission of TWO (2) sets of Copies was improper as there was no Mandatory requirement for a tenderer to supply two (2) set of copies.

The Procuring Entity on its part states that the Evaluation was conducted in accordance with the Tender Document as cited in its response and that the Applicant's tender was properly Evaluated and disqualified. In essence, that the requirement for a tenderer to provide two (2) sets of copies was a mandatory requirement under item 23.1 of the tender document.

The Tender opening minutes supplied with the Procuring Entity confidential documents show that there were 3 bidders that submitted their tender documents as at the close/opening of the Tender on 11th August, 2021 at Table 2 of the Minutes is as follows

S/No	Bidder name	Documents Submitted (Original and two copies)	Bidder's Tender Sum As per form of Tender(KES)	Tender Security (KES)	Tender Security Guarantor
1.	Revival software Limited Box 3942– 00100 Tel. 0725273738 Email.info@galvanizeafrica.com /jacobw@galvanizeafrica.com	3	5,658,400	150,000	NCBA
2.	Azamsoft Consulting Ltd Box 717 -00517 Nairobi Te. 0733-484449 david.wanga@azamsoft.com	2	13,406,8940.14	150,000	Rafiki Microfinance bank
3.	Grande Afrique Consulting Ltd Box 37842 00100 Nairobi Tel. 0202627569	3	13,024,078	150,000	The monarch Insurance

The Board also notes that there was one request for clarification which resulted in the issuance by the Procuring Entity of ADDENDUM NO. 1 DATED

AUGUST 4, 2021 – CLARIFICATION ON THE TENDER SECURITY AMOUNT
as follows

***ADDENDUM NO.1 DATED AUGUST 4, 2021: CLARIFICATION OF
THE TENDER SECURITY AMOUNT***

***RFP NO. CUE/RFPR/01/2021-2022: SUPPLY, INSTALLATION,
CUSTOMIZATION, TESTING, TRAINING, COMMISSIONING AND
MAINTENANCE OF AN OFF-THE SHELF INTEGRATED INTERNAL
AUDIT MANAGEMENT SOFTWARE (Re advertisement)***

Dear Sir/Madam,

Following a request for clarification dated 4th August 2021 on the Tender security amount, which appears as KES.400, 000 on page 2 of the bid document and as KES.150,000 on page 28 of the bid document, Commission for University Education hereby clarifies that the requested Tender Security shall be KES.150, 000 as indicated on page 28. We regret any inconvenience.

The bid document has been amended accordingly.

Thank You

Commission Secretary/CEO

Prof. Mwenda Ntarangwi, PhD

The complete tender document was provided with the Procuring Entity's confident document part I – Tendering Procedures was in Three sections

- i) SECTION I – Instructions to Tenders (ITT)

- ii) SECTION II – Tender Data Sheet (TDS)
- iii) SECTION III – Evaluation & Qualification Criteria

Under item D – Submission and Opening of Tenders, Clause 24 – submission, sealing and making of Tenders at page 11 of the Tender document, the following was provided under Clause 24.1

24.1 The Tenderer shall deliver the Tender in a single, sealed envelope (one (1) envelope process). Within the single envelope the Tenderer shall place the following separate, sealed envelopes:

- a) In an envelope marked "ORIGINAL", all documents comprising the Tender, as described in ITT 11; and***
- b) In an envelope marked "COPIES", all required copies of the Tender; and,***
- c).....***
 - i).....***
 - ii).....***

On the other hand, Clause 37 titled evaluation of Tenders, Sub Clause 37.1 at page 15 of the Tender document stated

The Procuring Entity shall use the criteria and methodologies listed in this ITT and Section III, Evaluation and Qualification criteria. No other evaluation criteria or methodologies shall be permitted. By applying the criteria and methodologies the Procuring Entity shall determine the Best Evaluated Tender at page 15 of the Tender document stated

"37.1. The Procuring Entity shall use the criteria and methodologies listed in this ITT and Section III, Evaluation and Qualification criteria. No other evaluation criteria or methodologies shall be permitted. By applying the criteria and methodologies the Procuring Entity shall determine the Best Evaluated Tender."

UNDER SECTION II – TENDER DATA SHEET (TDS) found at page 21 of the Tender document the following is provided

"The Following Specific data for the Information System to be produced shall complement, supplement, or amend the provisions in the Instructions to Tenders (ITT). Whenever there is a conflict, the provisions herein shall prevail over those in ITT."

*The sections that are specifically stated to be affected under this provision are set out on a table specifying and referring to the **ITT clause affected and the particulars of Appendix to instructions to Tenders running from page 21 to 24. Page 22 is set out as follow'***

Reference to ITC Clause	PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDERS
	<ul style="list-style-type: none"> i) Training Sub-Plan; ii) Testing and Quality Assurance Sub-Plan; iii) (v) Warranty Defect Repair and Technical Support Service Sub-Plan
ITT 18.3	In the interest of effective integration, cost-effective technical support, and reduced re-training and staffing costs, Tenderers are required to offer specific brand names and models for the following limited number of specific items: N/A

ITT 19.2	The Tenderer must tender Recurrent Cost Items
ITT 19.2 (a)	The Tenderer must not tender for contracts of Recurrent Cost Items not included in the main Contract.
ITT 19.5	The Incoterms edition is: N/A
ITT 19.5 (a)	Named place of destination is: N/A
ITT 19.6	Named place of final destination (or Project site) is: Commission for University Education offices in Nairobi
ITT 19.8	ITT 17.8 is modified as follows: There is no modification
ITT 19.9	The prices quoted by the Tenderer shall not be subject to adjustment during the performance of the Contract.
	The Tender price shall be adjusted by the following factor(s): N/A
ITT 20.1	The Tenderer is required to quote in the currency of Kenya the portion of the Tender price that corresponds to expenditures incurred in that currency.
ITT 21.1	The Tender validity period shall be 120 days
ITT 22.1	A Tender Security shall be required. If a Tender Security shall be required, the amount and currency of the Tender Security shall be Kenya shillings One Hundred and Fifty Thousand (KES.150, 000)
ITT 22.3 (v)	Other types of acceptable securities are Performance Security of Kenya Shillings Three hundred thousand (KES.300,000)
ITT 23.1	In addition to the original of the Tender, the number of copies is: Two

D. Submission and Opening of Tenders

ITT 25.1	For Tender submission purposes only, the Procuring Entity's address is: Commission Secretary/CEO Commission for University Education Red Hill Road, off Limuru Road P. O. Box 54999 – 00200 NAIROBI
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	The deadline for Tender submission is: 11th August 2021 at 12:00 noon
ITT 25.1	Tenderers shall not have the option of submitting their Tenders electronically.
ITT 28.1	The Tender opening shall take place at: Commission Secretary/CEO Commission for University Education Red Hill Road, off Limuru Road P. O. Box 54999 – 00200 NAIROBI
ITT 28.1	Date: 11th August 2021 at 12:00 noon The electronic Tender opening procedures shall be: N/A

Section III – Evaluation and Qualification Criteria contained at page 25 to 27, the Evaluation methods

2 Evaluation and contract award Criteria

The Procuring Entity shall use the criteria and methodologies listed in this Section to evaluate tenders and arrive at the Lowest Evaluated Tender. The tender that (i) meets the qualification criteria, (ii) has been determined to be substantially responsive to the Tender Documents, and (iii) is determined to have the Lowest Evaluated Tender price shall be selected for award of contract.

3 Preliminary examination for Determination of Responsiveness

The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and that the tender is

complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined below. The Standard Tender Evaluation Report Document for Goods and Works for evaluating Tenders provides very clear guide on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will be considered non- responsive and will not be considered further

No	Requirements	YES	NO
1.	A copy of firms certificate of Registration/Incorporation		
2.	Valid Certificate of Tax Compliance		
3.	Current Trading License		
4.	Copy of I-tax PIN certificate with active value added tax obligations		
5.	Current CR-12 Certificates		
6.	The bidder should have an experience in installation, implementation, support and maintenance of an integrated automated internal audit solutions for a minimum period of Three (3) years. (Attach evidence).		
7.	Audited Financial Statements for the last two (2) years.		
8.	Must provide a valid certification/ accreditation from Communication Authority of Kenya Certification or ICT Authority (Kenya)		

9.	Fully filled up tendering forms in the bid documents without alteration of text		

The Applicant's Contention regarding the foregoing as the Board understands it, is that under the preliminary examination section III part 3 the 9 items listed as above for mandatory must meet requirement on a yes and no basis did not include 2 sets of copies of the tender document. The Procuring Entity on the other hand holds to the position expounded in its letter of 15th September in response to the Applicant which has been set out above in full.

The Board is therefore required to determine whether or not the requirement to provide two (2) sets of copies was a mandatory criterion for Evaluation at the Preliminary Mandatory Stage.

Section 79 of the Act on responsiveness of Tenders provides

79. Responsiveness of tenders

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

Section 80 of the Act on Evaluation of Tenders also provides

80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation;

The above position is also reflected under the provisions of Regulation 74 of the Regulations which provides as follows

74. (1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether —

(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;

- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
 - (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
 - (d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;***
 - (e) the required number of copies of the tender have been submitted;***
 - (f) the tender is valid for the period required;***
 - (g) any required samples have been submitted; and***
 - (h) all required documents and information have been submitted.***
- (2) Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive.***

Under Regulation 75 (1), A procuring entity can reject a tender which is not in conformity with the requirements of Section 79 of the Act as read together with Regulation 74. The Procuring Entity is obliged to evaluate the Tenders in conformity with the criteria set in the Tender document.

The criteria for Evaluation of the Tenders in the instant matter is set out at Clause 24.1 at pg 11 of tender document. The tenderer was to provide

24.1 The Tenderer shall deliver the Tender in a single, sealed envelope (one (1) envelope process). Within the single envelope the Tenderer shall place the following separate, sealed envelopes:

- a) In an envelope marked "ORIGINAL", all documents comprising the Tender, as described in ITT 11; and***
- b) In an envelope marked "COPIES", all required copies of the Tender; and,***
- c) If alternative Tenders are permitted in accordance with ITT 13, and if relevant:***
 - i) In an envelope marked "ORIGINAL-ALTERNATIVETENDER", the alternative Tender; and***
 - ii) in the envelope marked "COPIES – ALTERNATIVE TENDER" all required copies of the alternative Tender.***

The Board also notes that Clause 37 at page 15 of the Tender document required the tenderer to provide 2 copies together with the original. Further under section II (Tender Data Sheet) and instructions to tenderers at page 21 of the Tender Documents, the requirements under that section if in conflict with the provisions in the other part were to prevail.

In miscellaneous Civil Application Number 85 of 2018, ***Republic vs Public Procurement Administrative Review Board Exparte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested parties) [2019] eKLR***

38. In Public Procurement Regulation it is a general rule that Procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in

other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions.

48.Evaluation criteria are the standards and measures used to determine how satisfactorily a proposal has addressed the requirement identified in the request for proposals. Suppliers either meet or not meet mandatory criteria. Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected.

In the event that the Applicant required clarification, he was at liberty to write to the Procuring Entity to seek clarification, as was provided for in the Tender Document as well as in the Act

Consequently, the Applicant's tender was found to have been unresponsive for the failure to comply with a mandatory Evaluation Criteria at the Preliminary Evaluation Stage. The Board finds that the requirements of ITT 23.1 at Section 3 as read together with TDS Section 2 at page 23 to page 24 made it a mandatory requirement that the copies at ITT 23.1 should be TWO (2) as a mandatory requirement. Indeed, the Tender Document required the provisions under Section II TDS if in conflict with any other part the requirements under the TDS would prevail and in this instance ITT 23.1 was specifically so amended.

Consequently, the Board finds that the Applicant's bid was properly evaluated in terms of the Tender Document as read together with Section 82 and Article 227 of the Constitution of Kenya.

Having so found, the Board will therefore not address claims for loss claimed under prayer 2 of the Application

The Board therefore proceeds to make the following orders

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders;

- 1. The Request for Review dated 20th September, 2021 and filed on 27th September, 2021 in respect of Tender Number CUE/PFPR/01/2021-2022 Be and is hereby dismissed.**
- 2. Each party shall bear its own costs**

Dated at Nairobi this 18TH day of OCTOBER 2021

**VICE CHAIRPERSON (PANEL CHAIR)
(PPARB)**

**SECRETARY
(PPARB)**