

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 86/2021 OF 23rd JUNE 2021

BETWEEN

SPECICOM TECHNOLOGIES LIMITED..... APPLICANT

AND

DIRECTOR GENERAL, PUBLIC PROCUREMENT

REGULATORY AUTHORITY..... RESPONDENT

TECHSOURCE POINT LIMITEDINTERESTED PARTY

Request for Review of the decision of the Ag. Director General of the Public Procurement Regulatory Authority of National Bank Building, 11th Floor, Harambee Avenue, CBD, P.O Box 58535 – 00200, Nairobi in the matter of the Tender for Supply and Implementation of Virtualized Sever Infrastructure and Data Storage Solution (Tender No. PPRA/10/2020-2021) dated 9th June, 2021.

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Jackson Awele | -Member |
| 3. Mr. Nicholas Mruttu | -Member |
| 4. Mr. Ambrose Ngare | - Member |

5. Dr. Paul Jilani -Member

IN ATTENDANCE

Mr. StanelyMiheso - Senior Officer ARB

BACKGROUND TO THE DECISION

The Tendering Process

The Public Procurement Regulatory Authority (hereinafter referred to as "the Procuring Entity") advertised Tender No. PPRA/10/2020-2021 for the Supply and Implementation of Virtualized Server Infrastructure and Data Storage Solution (hereinafter referred to as "the subject tender") via a Tender Invitation Notice published in the Procuring Entity's website (www.ppra.go.ke).

Tender Submission Deadline and Opening of the Tenders

The subject tender's submission deadline was Friday the 28th day of May 2021. A Tender Opening Committee whose members had been appointed on 27th May 2021 proceeded to open the tenders shortly after the tender submission deadline in the presence of tenderers representatives and recorded the tenders as follows:

1. MFI Technology Sol;

2. Techsource Point Ltd;
3. Trans Business Machines;
4. Innovative Technologies; and
5. Specicom Technologies Ltd

Evaluation Process

An Evaluation Committee whose members were appointed on 27th May, 2021 (hereinafter referred to as the "Evaluation Committee") the five tenders to ascertain if all the required documents. had been submitted and whether they were in compliance with the requirements of the blank Tender Document (hereinafter referred to as the "Tender Document"). The evaluation was based on Preliminary Evaluation, Technical Evaluation, Financial and Delivery Evaluation.

Preliminary Evaluation

The Evaluation Committee in evaluating the five tenders applied 16 mandatory requirements a criteria set out in Clause 2.2. Evaluation of Tenders- Preliminary examination for Determination of Responsiveness of Section III-Evaluation and Qualification Criteria at page 21 and 22 of the Tender Document. The said mandatory requirements are as follows:

1. Copy of Certificate of Registration/Incorporation;
2. Copy of Valid Tax Compliance Certificate;

3. Must Submit a Tender Security of Kshs. 200,000 valid for an additional thirty (30) days after the expiry of the tender validity period;
4. Must Submit ICTA Certificate (Category 4 – ICT Network, End User Computing, Data Center, Cloud Computing);
5. Must submit written warranty of all equipment to be supplied;
6. Must submit brochures / technical literature of all the software and hardware they intend to sell;
7. Fill and submit the Form of Tender in the format provided;
8. Fill and submit the Certificate of independent tender determination in the format provided;
9. Fill and submit the Self-declaration form that the person/tenderer is not debarred in the matter of the public procurement and asset disposal act 2015;
10. Must fill and submit the Self-declaration form that the person/tenderer will not engage in any corrupt or fraudulent practice in the format provided;
11. Must fill and submit the declaration and commitment to the code of ethics in the format provided;
12. Must fill and submit the Price Schedule applicable in the format provided;
13. Must fill and submit Tenderer Information Form in the format provided;
14. Must and submit a duly filled up Confidential Business Questionnaire in format provided;

15. Fill and submit the Form of Tender Security (Demand Bank in the format provided);
16. Must submit a manufacturer's authorization of the intended Hardware authorizing them to sell and service in the format provided.

At the end of this stage of evaluation, three (3) tenders were found non-responsive which included the Applicant's tender. Only MFI Technology Sol's and the Interested Party's tenders were found responsive and eligible to proceed to the Technical Evaluation stage.

Technical Evaluation Stage

The Evaluation Committee applied the criteria set out in Clause 2.2.1 Evaluation of Technical Aspects of the Tender of Section III- Evaluation and Qualification Criteria found on pages 21 to 28 of the Tender Document. Tenders were required to score a minimum of 70% to be eligible to proceed to the next stage of evaluation.

MFI Technology Sol's and the Interested Party's tenders attained the following scores as tabulated in the Evaluation Report executed on 4th June 2021 9hereinafter referred to as the Evaluation Report:

| NO | DESCRIPTION | Qty | Marks | MFI Technology Sol | Interested Party |
|-----------|--------------------|------------|--------------|---------------------------|-------------------------|
| 1. | Server | 2 | 18 | 14 | 18 |

| | | | | | |
|-----------------------------|---|-----|-------------|--------------|--------------|
| 2. | Smart UPS | 1 | 8 | 5 | 7 |
| 3. | Portable Floor Standing Air Conditioner | 1 | 12 | 0 | 11 |
| 4. | 42U Server Cabinet | 1 | 4 | 3 | 4 |
| 5. | Shared Storage | 1 | 14 | 13 | 14 |
| 6. | SAN Switch | 1 | 5 | 5 | 5 |
| 7. | Data Backup Device | 1 | 24 | 24 | 23 |
| 8. | Virtualization Software | 2 | 5 | 5 | 5 |
| 9. | Migration | Lot | 10 | 10 | 10 |
| 10. | Firms Experience | Lot | 20 | 20 | 20 |
| TOTAL SCORE | | | 120 | 99 | 117 |
| Percentage Score (%) | | | 100% | 82.5% | 97.5% |

At the end of this stage of evaluation, both MFI Technology Sol's and the Interested Party's tenders were found responsive having attained the requisite pass mark and were eligible to proceed to the Financial Evaluation Stage.

Financial& Delivery Evaluation

At this stage of evaluation, the Evaluation Committee applied the criteria set out in Clause 2.2.3 Evaluation Criteria (Other Factors)(ITT 33.6) of Section III-Evaluation and Qualification Criteria at pages 28 to 30 of the Tender Document. Tenders were required to price key delivery requirements and MFI Technology Sol's and the Interested Party's tenders complied with the delivery requirements as recorded below:

| Bidder No. | Price Schedule Total Cost | | | Rank | Delivery Period Evaluation - TABLE C (Yes/No) |
|--------------------|--|----------------------------|------------------|------|---|
| | Equipment and Implementation - Table A | Related Services – Table B | Grand Total Cost | | |
| MFI Technology Sol | 11,938,646.60 | 2,320,000.00 | 14,258,646.60 | 2 | Yes |
| Interested Party | 12,744,119.00 | 1,400,000.00 | 14,144,119.60 | 1 | Yes |

At the end of evaluation at this stage, the Interested Party's tender was found to be the lowest evaluated responsive tender for **Supply and Implementation of a Virtualized Server Infrastructure and Data Storage Solution** at a total cost of **Kshs. 14,144,119.60**.

Professional Opinion

In a professional opinion dated 7th June 2021, the Procuring Entity's Principal Procurement Officer confirmed that he had reviewed the process for the above procurement and opined that the subject procurement meets the threshold to proceed for award by the Respondent . The Respondent approved the professional opinion and the recommendation of award to the Interested Party.

Notification

In letters dated 9th June 2021, the Respondent notified tenderers of the outcome of evaluation of their respective tenders.

THE REQUEST FOR REVIEW

The Applicant lodged a Request for Review together with the Supporting Affidavit sworn by Henry Kamau, the Applicant's Managing Director, dated 21st June 2021 and filed on 23rd June 2021 seeking the following ORDERS that:

- a. The disqualification of the Applicant's tender be annulled and set aside.
- b. The award of the Tender for Supply and Implementation of Virtualized Server Infrastructure and Data Storage Solution (Tender No. PPRA/10/2020-2021) to Techsource Point Limited be annulled and set aside.

- c. The Respondent be directed to re-admit the Applicant's tender and evaluate it in compliance with the law and the tender document.
- d. The Applicant be awarded costs of the application.

Vide a letter dated 23rd June 2021, the Acting Board Secretary notified the Respondent of the Request for Review filed by the Applicant and the suspension of procurement proceedings in accordance with Section 168 of the Act. In addition to this, the Acting Board Secretary directed the Respondent to file a response to the Request for Review and confidential documents relating to the subject tender within 5 days from the date of service of the subject review effected upon the Respondent. The Acting Board Secretary further attached Circular No. 2/2020 dated 24th March 2020 (hereinafter referred to as "the Board's Circular") detailing administrative and contingency plan to mitigate against the spread of Covid-19 pandemic.

In response to the Request for Review, the Respondent filed an undated Memorandum of Response on 29th June 2021 whilst the Interested Party filed an Affidavit in Opposition to the Request for Review sworn by HanielNjathi, the managing Director of the Interested Party, on 21st June 2021 and filed on 7th July 2021. The Applicant filed a Further Affidavit sworn by Henry Kamau on 8th July 2021 and filed on 13th July 2021.

Pursuant to the Board's Circular, the Board dispensed with physical hearings and directed all Request for Review applications be canvassed by way of written submissions. Further, clause 1 at page 2 of the Board's Circular specified that pleadings and documents will be deemed as properly filed if they bear the official stamp of the Board.

However, none of the parties to the subject review filed an written submissions.

BOARD'S DECISION.

After careful consideration of parties' pleadings and confidential documents submitted to the Board by the Respondent pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as 'the Act'), the Board has identified the following two issues for determination;

- i. Whether the Request for Review is fatally defective.**
- ii. Whether the Applicant's tender complied with mandatory requirements.**

In reference to the first issue framed for determination, the Procuring Entity in its response raised a preliminary issue regarding the propriety of the Applicant's Supporting Affidavit sworn by Henry Kamau, its Managing Director and therefore its Request for Review. The Procuring Entity contends that the said Affidavit is for a different Respondent and a

different Interested Party, hence should be expunged from the Request for Review.

The Board observes that the Request for Review has the following Parties:

-

"Specicom Technologies Limited – Applicant; the Accounting Officer, Public Procurement Regulatory Authority - Respondent; and Techsource Point Limited – Interested Party."

The Supporting Affidavit sworn by one Mr. Henry Kamau, the Managing Director of the Applicant, however has the following Parties:-

"Specicom Technologies Limited – Applicant; Commissioner General, Kenya Revenue Authority - Respondent; and Dignity Traders Limited - Interested Party."

This is a clear case of misjoinder as the parties in the Supporting Affidavit i.e. ***Commissioner General, Kenya Revenue Authority and Dignity Traders Limited*** were not parties to the instant procurement process. After carefully perusing the contents of the Supporting Affidavit however, the Board observes that the same relate to the subject tender the subject matter in the subject review.

The Court of Appeal in **WILLIAM KIPRONO TOWETT & 1597 OTHERS V. FARMLAND AVIATION LTD & 2 OTHERS (2016) eKLR** held that:

"...Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-

joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

This position is further fortified by Article 159(2)(d) of the Constitution which abhors procedural technicalities at the expense of substantive justice. The said Article stipulates that:

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles

(d) justice shall be administered without undue regard to procedural technicalities."

We further note that under Regulation 203 of the Public Procurement and Disposal Regulations 2020 (hereinafter referred to as 'Regulations 2020'), a request for review is properly suited with or without a supporting affidavit. In the circumstances, we find no merit in the Respondent's objection to the Request for Review on this ground and dismiss the same.

In reference to the second issue framed for determination, the Board has carefully perused the Evaluation Report and in particular page 5 thereof,

containing the outcome of evaluation of the Applicant's tender at the Preliminary Evaluation Stage. It states: -

"• B5 was not responsive because they did not Fill and submit the Form of Tender Security (Demand Bank in the format provided)"

According to the notification letter dated 9th June, 2021 alluded to hereinbefore, the Applicant was notified that it was unsuccessful at the Preliminary Evaluation Stage, for the same reasons. The letter stated as follows: -

"RE: NOTIFICATION OF INTENT TO ENTER INTO A CONTRACT-TENDER NO. PPRA/10/2020-2021 FOR THE SUPPLY & IMPLEMENTATION OF VIRTUALIZED SERVER INFRASTRUCTURE & DATA STORAGE SOLUTION.

This has reference to the above-mentioned tender in which you participated.

*We regret however, to inform you that you were not successful in the tender because of you did not **fill and submit the Form of Tender Security (Demand Bank Guarantee) in the format provided** as required as required in the Mandatory Requirements. (***Emphasis by the Board***)*

M/S Techsource Point Limited has been recommended to be awarded the above Tender at the total cost of the Kshs. 14,144,119.60.

We take this opportunity to thank your interest in doing business with us and hope that you will continue to participate in procurement opportunities offered by the Public Procurement Regulatory Authority."

The Board has reviewed the Tender Document and ascertained that the same required tenderers to submit two forms of tender security documents as Mandatory Requirements i.e.

"3. Must Submit a Tender Security of Kshs. 200,000 valid for an additional thirty (30) days after the expiry of the tender validity period.

and

15. Fill and submit the Form of Tender Security (Demand Bank in the format provided)"

Under Regulation 74(1)(c) of Regulations 2020, where tender security is required by the Tender Document the same must be evaluated at tender preliminary evaluation stage to confirm that the same ***is in the required form, amount and validity period, where applicable.*** -

The Board observes that the evaluation criterion for the tender security for the subject tender was provided in pages 21 to 33 of the Tender Document. At page 23 thereof under Clause 2.2 titled '***Evaluation of Tenders, Preliminary examination for Determination of Responsiveness***' it is provided at sub clause 3. As follows:

"3. Must Submit a Tender Security of Kshs. 200,000 valid for an additional thirty (30) days after the expiry of the tender validity period.

And furtherat sub clause 15. as follows-

"15) Fill and submit the Form of Tender Security (Demand Bank in the format provided)."

At the footnote of Section III - Evaluation and Qualification Criteria for mandatory requirements stipulatedthat: -

"At this stage, the tenderer's submission will either be responsive or non- responsive. The non-responsive submissions will be eliminated from the entire evaluation process and will not be considered further."

The Board has reviewed the Form of Tender Security (Demand Bank guarantee) required by the tender found at page 49 of the Blank Tender Document in reference to what was provided by the Applicant found on page 000037 of Applicant original bid tender document which is a Bid bond from of Kes 200,000 qualification considered for parameter 3 which in the affirmative the evaluation committee considered as appropriate for Form of Tender Security (Tender Bond) at pages 50 of the Blank tender document .

The Board notes that the standard form of Tender Security (Demand Bank guarantee)provided for in page 49 is distinct from Form of Tender Security (Tender Bond) at pages 50. An extract of the form in part is as below:-

FORM OF TENDER SECURITY - DEMAND BANK GUARANTEE

Beneficiary: _____

ITT No: _____

Date: _____

TENDER GUARANTEE No.: _____

Guarantor: _____

- 1. We have been informed that (herein after called "the Applicant") has submitted or will submit to the Beneficiary its Tender (hereinafter called "the Tender") for the execution of under Request for Tenders No. _____ ("the ITT").*

The Board finds the Applicant provided a bid bond for KES. 200,000 at page 000037 from Consolidated Bank of Kenya which is in the format of the form provided at page 50 of the Blank Tender Document and which is separate from the Form of Tender Security-Demand Bank Guarantee format provided at page 49 of the Tender Document.

The Board however notes that the Applicant did not provide a document in the Form of Tender Security (Demand Bank in the format provided as required by item No.15 of Mandatory documents required under the criteria set out in Clause 2.2 Evaluation of Tenders- Preliminary examination for determination of responsiveness of Section III- Evaluation and Qualification Criteria provided at page 22 and 23 of the Tender Document .The format of the said tender security is in the Form of Tender Security (Demand Bank) as extracted herein before and the Board therefore notes that the Applicant did not comply with the requirement and as such was properly disqualified for not meeting mandatory requirement item No.15.

All tenderers whose tenders were found responsive at the Preliminary examination stage and proceeded for technical evaluation provided both forms of tender security. The Applicant has not controverted the contention that it did not provide both forms of tender security with the inevitable conclusion therefore that it did not fully comply with the requirements of Item No.15 of the Mandatory Requirements.

It is trite that tenderers are required to comply with all mandatory requirements in a tender document and a procuring entity is under obligation to evaluate all bids in strict conformity with the requirements of the Tender Document. Instructively, Section 80(2) of the Act provides;

"(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.”

Under Section 79(1) and (2) of the Act, it is provided that:

“(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.”

It is worth noting that excusing the Applicant’s tender from the said Mandatory Requirements while subjecting other tenders to them would be a violation of the principles of fairness, transparency and equity enunciated at Article 227(1) and section 3(1) of the Constitution and the Act respectively. In the same light, it is imperative to note that Courts of higher jurisdiction have held that such mandatory requirements cannot be waived. The High Court in **Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science and Technology; M/S AAKI**

Consultants Architects and Urban Designers (Interested Party)

[2019] eKLRat paragraph 81, held that:

"A Procuring Entity is bound by its bid documents. Mandatory conditions cannot be waived."

Guided by this principle, the Board accordingly finds that the Applicant having failed to comply with **all** the Mandatory Requirements in the Tender Document was justly disqualified at the Preliminary Evaluation Stage and could not proceed any further.

The Board has observed that the Applicant did not seek any clarification from the Procuring Entity on both requirements i.e. Item No.3 and item No.15 of the Mandatory Requirements and perhaps may have been better advised had it done so.

In the circumstances and all matters remaining constant, the Board finds that the Applicant's contention that the failure to comply with the requirements in the Tender Document was excusable by dint of Section 79(2)(b) of the Act, lacks merit and is hereby dismissed.

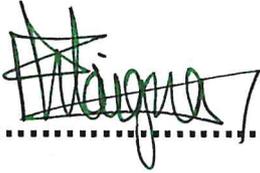
FINAL ORDERS

Pursuant to the powers granted to the Board under section 173 of the Act, the Board makes the following final orders;

- i) The Request for Review dated 23RD June 2021 be and is hereby dismissed.**

ii) Each Party shall bear its own costs.

Dated at Nairobi on this 14th day of July 2021



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB