

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 06/2022 OF 6<sup>TH</sup> JANUARY 2022**

**BETWEEN**  
**LONESTAR ENTERPRISES LIMITED ..... APPLICANT**

**VERSUS**

**THE ACCOUNTING OFFICER,  
PARLIAMENTARY JOINT SERVICES ..... 1<sup>ST</sup> RESPONDENT  
MFI DOCUMENT SOLUTIONS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer of the Parliamentary Joint Services with respect to tender No. PJS/011/2021-2022 for the Supply, Delivery, Installation, Commissioning, Training, and Maintenance of heavy-duty automatic scanner, server and UPS as per the technical specifications

**BOARD MEMBERS**

- |                       |              |
|-----------------------|--------------|
| 1. Ms. Faith Waigwa   | -Chairperson |
| 2. Dr Paul Jilani     | -Member      |
| 3. Mrs Irene Kashindi | -Member      |
| 4. Dr. Joseph Gitari  | -Member      |
| 5. Steve Oundo, OGW   | -Member      |

**IN ATTENDANCE**

Mr. Philip Okumu	-Acting Board Secretary
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## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

Parliamentary Joint Services (hereinafter referred to as "the Procuring Entity") invited bids for an open national tender for Supply, Delivery, Installation, Commissioning, Training, and maintenance of heavy-duty automatic scanner, server and UPS as per the technical specifications (hereinafter referred to as "the subject tender"). The tender was uploaded on the Parliamentary Joint Services website [www.parliament.go.ke](http://www.parliament.go.ke). Adverts were also placed in *The Daily Nation* and the *People Daily* newspapers on 18<sup>th</sup> November, 2021.

### **Tender Submission and Opening of Tenders**

Tenders were received and opened on Wednesday 8<sup>th</sup> December, 2021 at 11.00 am by a tender opening committee appointed vide internal memo Reference number PJS/PROC/ 2021-2022/TOC/016 dated 29<sup>th</sup> November, 2021.

Five (5) tenderers submitted their tender documents within the tender submission deadline and which were opened by the Tender Opening Committee as follows:

No.	Firms Name	Bid Amounts (Kshs)	Bid Security Amount [Kshs]	Bid Security Source	Documents Submitted	No. of Pages
1.	M/s Coseke (Kenya) Limited	17,969,662.93	800,000.00	Credit Bank	Original and Copy	263
2.	M/s Lonestar Enterprises Limited	24,570,649.84	800,000.00	Co-operative Bank	Original and Copy	330
3.	M/s Conez Technologies Limited	39, 425,520.00	800,000.00	Rafiki Microfinance Bank	Original and Copy	388

No.	Firms Name	Bid Amounts (Kshs)	Bid Security Amount [Kshs]	Bid Security Source	Documents Submitted	No. of Pages
4.	M/s MFI Document Solutions Limited	34,786,150.00	800,000.00	Stanbic Bank Kenya Ltd	Original, Copy and a Soft Copy	878
5.	M/s Fem Tech Enterprise Limited	25, 371, 358.40	NOT AVAILED	NOT AVAILED	Original Copy only	NOT PAGEN ATED

## Evaluation of Tenders

An Evaluation Committee evaluated tenders in three stages, namely:

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

### Preliminary Evaluation

The tenderers were evaluated based on the mandatory requirements specified in the tender document on a 'Yes/No basis' and the observations made by the evaluation committee were four (4) out of five (5) tenders were non-responsive and only one (1) tender belonging to the 2<sup>nd</sup> Respondent was responsive to proceed to the next stage of evaluation.

### Technical Evaluation

The Evaluation Committee subjected the remaining one (1) tender belonging to the 2<sup>nd</sup> Respondent to a technical evaluation against the criteria outlined in the tender document and observed that the 2<sup>nd</sup> Respondent's tender scored 89.2 marks out of 100 marks thus met the minimum technical score and hence qualified for financial evaluation.

## **Financial Evaluation**

At the end of this stage of evaluation, the 2<sup>nd</sup> Respondent was determined to be the lowest evaluated tenderer at its tender sum of KShs 34,786,150.

## **Recommendation**

The Evaluation Committee recommended the award of the tender to the 2<sup>nd</sup> Respondent having been determined to be the lowest evaluated tenderer.

## **Professional Opinion**

In a Professional Opinion dated 21<sup>st</sup> December 2021, the Procuring Entity's Chief Procurement Officer reviewed the process of how the subject procurement process was undertaken including the evaluation of tenders and concurred with the Evaluation Committee's recommendation on award of the subject tender to the 2<sup>nd</sup> Respondent at its tender sum of KShs 34,786,150. He recommended that the Accounting Officer approves the Professional Opinion. The Accounting Officer approved the Professional Opinion on 21<sup>st</sup> December 2021.

## **Letters of Notification**

Vide letters dated 23<sup>rd</sup> December 2021, the 1<sup>st</sup> Respondent notified all tenderers of the outcome of their respective tenders.

## **REQUEST FOR REVIEW**

M/s Lonestar Enterprises Limited, (hereinafter referred to as "the Applicant") lodged a Request for Review dated 6<sup>th</sup> January, 2022 which was filed with the Board on even date together with a Statement in

Support of the Request for Review signed by Harry Jonah Njoroge on 6<sup>th</sup> January 2022 and filed on even date through the firm of Lemayian & Begi seeking the following prayers;

- 1. THAT the decision by the Procuring Entity to the Applicant contained in a letter dated 23<sup>d</sup> December, 2021 in RESPECT OF TENDER NO. PJS/011/2021-2022 FOR THE SUPPLY, DELIVERY, INSTALLATION, COMMISSIONING, TRAINING AND MAINTENANCE OF HEAVY DUTY, AUTOMATIC BOOK SCANNER, SERVER AND UPS FOR KENYA PARLIAMENT finding that the Applicant's bid was not responsive and intending to award the contract to the 2<sup>nd</sup> Respondent be annulled and set aside;***
- 2. THAT the Procuring Entity's letter dated 23<sup>d</sup> December, 2021 notifying the Applicant that it had not been successful in TENDER NO. PJS/011/2021-2022 FOR THE SUPPLY, DELIVERY, INSTALLATION, COMMISSIONING, TRAINING AND MAINTENANCE OF HEAVY DUTY, AUTOMATIC BOOK SCANNER, SERVER AND UPS FOR KENYA PARLIAMENT be annulled and set aside;***
- 3. THAT in order to cure the mischief of the 1<sup>st</sup> Respondent simply fishing for reasons and writing a new unsuccessful letter to the Applicant herein, the 1<sup>st</sup> Procuring Entity be estopped to prevent a miscarriage of justice;***
- 4. THAT the Procuring Entity be directed to re-admit the Applicant's bid and to carry out a re-evaluation noting to***



*observe and apply the criteria in the Tender Document as required by the Act as section 80(2) and to carry out the re-evaluation in compliance with section 79(1) and 86(1) of the Act as read with Regulation 77(3) after which re-evaluation to issue the Applicant with a successful notification letter in compliance with the letter and spirit of section 87(3) of the Act;*

- 5. THAT the Tender Number PJS/011/2021-2022 FOR THE SUPPLY, DELIVERY, INSTALLATION, COMMISSIONING, TRAINING AND MAINTENANCE OF HEAVY DUTY, AUTOMATIC BOOK SCANNER, SERVER AND UPS FOR KENYA PARLIAMENT be annulled and the entire procurement process herein be terminated and the Board be pleased to order a fresh procurement process;*
- 6. THAT in alternative to prayer (3) above, the Procuring Entity be directed to progress the procurement process to its logical conclusion inclusive of the Applicant and make an award within seven (7) days; and*
- 7. THAT the Procuring Entity be ordered to pay the full costs of and incidental to these proceedings to the Applicant for its non-compliance necessitating this Request for Review.*

The Procuring Entity filed a response by way of a letter dated 13<sup>th</sup> January, 2022 addressed to the Board Secretary, which was lodged on 13<sup>th</sup> January 2022.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020, detailing an administrative and contingency management plan to mitigate the effects of the COVID-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed submissions on 23<sup>rd</sup> January 2022. The Procuring Entity did not file submissions.

### **BOARD'S DECISION**

The Board has considered each party's case, the pleadings and the written submissions filed before it, including the confidential documents submitted by the Procuring Entity pursuant to section 67(3) (e) of the Public Procurement and Asset Disposal Act, 2015 (the Act) and frames the issues for determination as follows;

- I. Whether the letter of notification dated 23<sup>rd</sup> December, 2021 issued to the Applicant complied with Section 87 of the Act as read with Regulation 83 of Public Procurement and Asset Disposal Act, 2020 (the Regulations).***
- II. Whether the Procuring Entity evaluated the Applicants' bid in accordance with the Tender Document as read with Section 80(2) of the Act.***
- III. What are the appropriate orders to grant in the circumstances?***



## **Issue I**

The Applicant contended that the letter of notification dated 23<sup>rd</sup> December 2022 did not specify the reasons why its bid was unsuccessful and that the reason given by the Procuring Entity that its bid was "*Not Responsive to Mandatory Requirements*" was not sufficient. The Applicant stated that the letter of notification amounted to a breach of section 87(3) of the Act, section 4(2) of the Fair Administrative Action Act, and Article 227(1) of the Constitution.

The Applicant added that the contents of the notification letter which provided that the Procuring Entity needed to provide only "*One Reason Why Not Evaluated*" greatly offended the provisions of section 87 of the Act.

The Applicant further contended that it communicated its dissatisfaction with the outcome of the evaluation and requested for a debrief of the same through a letter dated 24<sup>th</sup> December, 2021, and to date it has not received any official communication in response thereto.

The Procuring Entity in its response stated that the letter of notification was in the format issued by the Public Procurement Regulatory Authority (the PPRA) through the standard tender documents.

The Procuring Entity further states that the current format of the standard tender documents required it to provide only one reason why a bidder was not evaluated at the technical stage. The Procuring Entity added that it



complied with this requirement and provided the reason for the Applicant's not being evaluated as *"Not Responsive to Mandatory Requirements"*.

The Procuring Entity also submits that it was their interpretation that the purpose of debriefing is to provide the specific reasons to any bidder who may require further information on the specific areas that they were found to be non-responsive. The Procuring Entity added that there was a debriefing which was held on 30<sup>th</sup> December 2021 between the Applicant's representative one Mr Jonah Harry Njoroge, the Procuring Entity's Chief Procurement Officer and its Procurement Officer, in which the Applicant's representative was taken through the specific reason of its failure at mandatory evaluation stage, was informed of its right to request for a review under section 167 of the Act, as well as the powers of the Board should the bidder have been aggrieved by the decision of the Procuring Entity.

The Procuring Entity added that it informed the Applicant during the debriefing meeting of 30<sup>th</sup> December 2022 that its bid was not successful for failure to submit a Manufacture's Authorization for UPS as set out in the mandatory requirements of the tender.

The Board notes that the notification letter dated 23<sup>rd</sup> December 2021, partly provides as follows:-

<b><i>S/N o.</i></b>	<b><i>Name of Tender</i></b>	<b><i>Tender Price as read out</i></b>	<b><i>Tender's evaluated price (Note a)</i></b>	<b><i><u>One Reason Why Not Evaluated</u></i></b>

<b>1</b>	..... ...			
<b>2</b>	<b>M/s Lonestar Enterprises Limited, P. O. Box .....</b>	<b>24,570,649. 84</b>	<b>NE</b>	<b><u>Not- Responsive to Mandatory Requirements</u></b>
<b>3</b>	.....	.....	.....	
<b>4</b>				

The Board is further invited to note that the Procuring Entity has submitted to the Board original minutes of a meeting held on 30<sup>th</sup> December, 2021, titled “**MINUTES OF THE DEBRIEFING MEETING OF THE FOR THE SUPPLY, DELIVERY, INSTALLATION, COMMISSIONING, TRAINING AND MAINTENANCE OF HEAVY DUTY, AUTOMATIC BOOK SCANNER, SERVER AND UPS FOR PARLIAMENT OF KENYA TENDER NUMBER PJS/011/2021-2022 HELD ON THE 30<sup>TH</sup> DECEMBER, 2021 AT PROTECTION HOUSE 4<sup>TH</sup> FLOOR, CPO’S OFFICE AT 11:00 AM**”

The Board notes that the above minutes indicate that the following persons attended the meeting:-

**“PROCUREMENT ENTITY’S REPRESENTATIVE PRESENT**

**Mr. Keith Kisinguh - Chief Procurement Officer**

**Mr. Dan Kiprop - Procurement Officer**

**FIRM’S REPRESENTATIVE**

*Mr. Harry Jonah Njoroge."*

The Board notes that the Minutes partly state as follows:-

**".....**

***Lonestar Enterprises Limited were informed that a committee had been formed to carry out tender evaluation as per the Public Procurement and Asset Disposal Act, 2015 and its attendant regulations 2020. The tender Evaluation Committee in their report found that Lonestar Enterprises Limited had not been responsive to Mandatory requirements. Out of five bidders who submitted their bids, only one had been responsive on technical requirements***

**.....**

***Lonestar Enterprises Limited also wanted to know why they were non responsive in the Mandatory requirement. Lonestar Enterprises Limited were told to refer to the tender document on the evaluation criteria. They were told that evaluation is normally done as per the criteria set out in the tender document. That they did not attach manufactures Authorization for UPS as set out as mandatory requirements in the tender document.***"

The notification of outcome of bids is governed by Section 87 of the Act as read with Regulation 82.

Section 87 of the Act provides as follows:

- 87(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.*
- 87(2)** *The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.*
- 87(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.*
- 87(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."*

Regulation 82 provides as follows:-

- "82(1)** *The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.*
- 82(2)** *For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.*
- 82(3)** *The notification in this regulation shall include the name of the successful bidder, the tender price and the reason*



***why the bid was successful in accordance with section 86(1) of the Act.”***

Considering the above legal provisions, a notification letter must state the specific reasons why a bid is unsuccessful. Contrary to the Procuring Entity's assertion, a procuring entity is not restricted to giving only one reason. The provisions of the standard documents issued by PPRA are not cast in stone and procuring entities must use the standard documents while fully complying with the Act and the Regulations.

The debriefing relied upon by the Procuring Entity is not sufficient to comply with Section 87 and Regulations 82 which require procuring entities to notify bidders of outcome of bids in writing and this must be done simultaneously. The minutes of the meeting said to have been held on 30<sup>th</sup> December, 2021 do not suffice to comply with these requirements. It is also noteworthy that the minutes are not signed by the Applicant.

Given the above, the Board finds that the letter of notification dated 23<sup>rd</sup> December, 2021 issued to the Applicant did not comply with Section 87 of the Act as read with Regulation 82.

**Issue II**

The Applicant contended that the Procuring Entity breached section 79(1) of the Act by failing to consider the Applicant's bid as responsive in spite of the fact that the Applicant's bid complied with all the mandatory and other eligibility requirements under the Tender Document.

The Applicant added that the Procuring Entity breached section 80(2) of the Act by declaring the Applicant's bid unsuccessful on account of unjustified reasons indicative that the Applicant's bid was not evaluated in accordance with the criterion stipulated under the provisions of the tender document.

The Procuring Entity contended that the Applicant's bid failed for want of a Manufacturer's authorization for UPS.

The evaluation of public procurement tenders should be undertaken in accordance with the criteria set out in the Tender Documents. This is captured at Section 80(2) of the Act which provides as follows;

***"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."***[Emphasis added]

Considering the provisions of section 80(2), it is incumbent upon the Board to establish if the Procuring Entity evaluated the Applicant's bid according to the criteria set out in the Tender Document.

The relevant provisions of the tender document are set out at Clause 2.2.1 of the SECTION III - EVALUATION AND QUALIFICATION CRITERIA which provides the Mandatory Requirement No. 8 as follows:-

***"8. Manufacturer authorization letter (the manufacturer authorization form shall be in the format provided). In the event of joint venture only one of the partners shall meet this requirement."***

The Board further notes that the Tender Document provides a template of the Manufacturer's Authorisation Form which appears as follows:-

***MANUFACTURER'S AUTHORIZATION FORM***

*[The tenderer shall require the Manufacturer to fill in this Form in accordance with the instructions indicated. This letter of authorization should be on the letterhead of the Manufacturer and should be signed by a person with the proper authority to sign documents that are binding on the Manufacturer. The tenderer shall include it in its Tender, if so indicated in the TDS.]*

*Date: .....[insert date (as day, month and year) of Tender submission]*

*ITT No.: .....[insert number of ITT process] Alternative No.: .....[insert identification No if this is a Tender for an alternative]*

*To: ..... [Insert complete name of Procuring Entity]*  
***WHEREAS***

*We..... [insert complete name of Manufacturer], who are official manufacturers of.....[insert type of goods manufactured], having factories at [insert full address of Manufacturer's factories], do hereby authorize [insert complete name of tenderer] to submit a Tender the purpose of which is to provide the following Goods, manufactured by us.....*



*[insert name and or brief description of the Goods], and to subsequently negotiate and sign the Contract.*

*We hereby extend our full guarantee and warranty in accordance with Clause 28 of the General Conditions of Contract, with respect to the Goods offered by the above firm.*

*Signed: ..... [Insert signature(s) of authorized representative(s) of the Manufacturer]*

*Name: .....[Insert complete name(s) of authorized representative(s) of the Manufacturer]*

*Title: ..... [Insert title] Dated on day of , [insert date of signing]"*

The Board also notes that there were three components of the tender, namely, **automatic scanner**, **server** and **UPS**. The Applicant did not controvert the Procuring Entity's assertion that the Applicant did not submit a manufacturer's authorization for the UPS. The Board also noted from the confidential documents that the Applicant's bid does not contain a Manufacturer's Authorization for the UPS. The Board has noted from the confidential documents that Applicant submitted manufacturers' authorisations for only two components of the tender as follows:

- a. A Manufacturer's Authorization Form from a firm by the name "Qidenus Technologies GmbH" of an address in Vienna, which states that they are manufacturers of Robotic Book **Scanner**, and authorised the Applicant to submit a tender and subsequently negotiate and sign the contract with the Procuring Entity for the items manufactured by them.



- b. At page 60 of the Applicant's Bid document there is a copy of another Manufacturer's Authorization Form from the firm "*Dell Emerging Markets (EMEA) Limited*" of Nairobi, Kenya for the supply of Servers.

Given the above, it is clear that the Applicant did not comply with a mandatory requirement regarding submission of manufacturer's authorization for the UPS and to that extent its bid was unresponsive within the meaning of Section 79 of the Act.

The Applicant also asserted that the specifications for automatic book scanner and the UPS as framed in the tender document are verbatim replications lifted exactly as worded from the Treventus ScanRobotMDS 2.0(for automatic book scanner), and TRIPP – LITE SMARTINT2200VS (for UPS) designed to unfairly favour a specific bidder and that this grossly violated the principles of fairness, transparency and accountability as detailed under Article 227 of the Constitution of Kenya, 2010.

The above complaint relates to the provisions of the tender document. The Board takes the position that this is an issue the Applicant was aware when it obtained the tender document. The tender submission period closed on 8<sup>th</sup> December 2021. The Applicant ought to have raised the concern before the lapse of the tender submission deadline. For that reason and for the reason that the Applicant participated in the subject tender being well aware of this issue, the complaint fails.

The Applicant further contended that the Procuring Entity erred in awarding the subject tender to a bidder that submitted the highest financial proposal.

It is trite law that price is not the sole consideration in the process of evaluation of bids. The lowest-priced bid is not the same as the lowest evaluated bid within the meaning of section 86(1)(a) which provides that the successful tender shall be who submitted **"the tender with lowest evaluated price"**. This was succinctly addressed by the High Court in the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR* as follows;

*" A procurement must, therefore, before any other consideration is taken into account whether in the parent legislation or the rules and regulations made thereunder or even in the tender document, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words, any other consideration which does not espouse these ingredients can only be secondary to the said constitutional dictates. In my view, the consideration of the lowest tender as a form of cost-effectiveness does not infer that the Procuring Entity must go for the lowest tender no matter the results of the evaluation of the bid. Therefore apart from the lowest tender, the Procuring Entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with*

**the conditions stipulated therein it would be unlawful for the Procuring Entity to award a tender simply on the basis that the tender is the lowest. It ought to be emphasized that Section 66(4) of the Repealed Act talks of "the lowest evaluated price" as opposed to merely the "lowest price". The issue of price must therefore follow an evaluation in accordance with the tender document."**  
(Emphasis Added)

Bearing in mind the above, the Board concludes that the Applicant has not demonstrated that its bid was not evaluated in accordance with the tender document.

### **Issue III**

The upshot of the determination in the above issues for determination is that the Request for Review is partly allowed as stated above. Each party will bear their own costs.

### **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 Accounting Officer's Letters of Notification dated 23<sup>rd</sup> December 2021 for the Supply, Delivery, Installation, Commissioning, Training, and Maintenance of heavy-duty automatic scanner, server and**



**UPS addressed to all tenderers who participated in the subject procurement proceedings, be and are hereby cancelled and set aside.**

**2. The Procuring Entity's Accounting Officer is hereby ordered to reissue fresh notification letters to all tenderers within 7 days of this decision in full compliance with the requirements of Section 87 of the Act as read with Regulation 82 and to bear in mind the findings made in this decision.**

**3. Save as stated above, the Applicant's Request for Review lodged on 6<sup>th</sup> January 2022 is otherwise dismissed.**

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

**Dated at Nairobi, this 27<sup>th</sup> day of January 2022**



.....  
**CHAIRPERSON**  
**PPARB**



.....  
**SECRETARY**  
**PPARB**