

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 30/2022 OF 14TH APRIL 2022

PAWA IT SOLUTIONS LIMITED.....APPLICANT

VERSUS

ICT AUTHORITY..... 1ST RESPONDENT
ACCOUNTING OFFICER,

ICT AUTHORITY.....2ND RESPONDENT

AND

SAFARICOM LIMITED..... INTERESTED PARTY

Review against the decision of the Accounting Officer of ICT Authority;
the Procuring Entity in respect to Quotation No. ICTA/RFQ/GOOGLE
LICENSES/2021-2022 for Provision of Google Licenses and Support for
314 Email Accounts for One (1) Year.

BOARD MEMBERS

- | | |
|-------------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Ms. PhllisChepkemboi | -Member |
| 3. Dr. Paul Jilani | -Member |
| 4. Ms. Isabel Juma | -Member |
| 5. Mrs. Irene Kashindi | -Member |

IN ATTENDANCE

Mr. Philemon Kiprop

- Holding brief for Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

ICT Authority, the Procuring Entity and the 1st Respondent therein, invited sealed quotations from seventeen (17) candidates for Quotation No. ICTA/RFQ/GOOGLE LICENSES/2021-2022 for Provision of Google Licenses and Support for 314 Email Accounts for One (1) Year (hereinafter referred to as the 'subject tender') by way of a Request for Quotation method of tendering through emails sent to the aforesaid seventeen (17) candidates by the 1st Respondent on 23rd February 2022.

Tender Submission Deadline and Opening

According to the minutes of the 1st Respondent's Tender Opening Committee of 24th February 2022 (which minutes form part of confidential documents submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondents pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act')), the 1st Respondent received a total of eight (8) request for quotation documents (hereinafter referred to as 'tenders') via email by the tender submission deadline of 24th February 2022 at 15.00hrs. The eight (8) tenders were opened, printed and coded shortly thereafter by the 1st Respondent's Tender Opening Committee. The following tenderers were recorded as having submitted their respective tenders: -

Tender Number	Tenderer's Name
1.	Cloud IT Africa
2.	Safaricom Limited
3.	Imara Networks Ltd
4.	Virtuoxi International
5.	Corelabz Technologies
6	Granteractive Systems
7	Rova Digital Limited
8	Pawa IT Solutions

Evaluation of Tenders

The Tender Evaluation Committee appointed by the 2nd Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated the eight (8) tenders in three stages as captured in an Evaluation Report dated 24th February 2022 (hereinafter referred to as the 'Evaluation Report'). The three stages for evaluation were:

- i) Preliminary Evaluation;
- ii) Technical Evaluation; and
- iii) Financial Evaluation

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the procedure and criteria set out at Sub-clause i) Preliminary Examination to determine Tenderer eligibility of Clause 13. Evaluation of Quotations of Part 1: Instructions to Tenderers at page 5 of the blank Request for Quotation document issued to the seventeen (17) candidates by the 1st Respondent (hereinafter referred to as the 'Tender Document') read with Stage One: Preliminary/Mandatory Requirements of (i) Schedule of Requirements Table (Evaluation Criteria) at page 8 of the Tender Document. Tenders required to meet

all the mandatory requirements at this stage to qualify to proceed to the next stage of evaluation.

At the end of evaluation at this stage, the Evaluation Committee determined four (4) tenders non-responsive while another four(4) tenders were determined responsive. The Applicant's and the Interested Party's tenders were among the four(4) tenders determined responsive at this stage thus progressed to the next stage of evaluation.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the procedure and criteria set out at Sub-clause ii) Technical Examination of Clause 13. Evaluation of Quotations of Part 1: Instructions to Tenderers at page 5 of the Tender Document read with Stage Two: Technical Mandatory Requirements of (i) Schedule of Requirements Table (Evaluation Criteria) at page 8 of the Tender Document. Tenders required to be examined to determine goods eligibility, compliance with technical specifications and commercial responsiveness. Tenders failing to pass in all parameters at this stage were to be rejected and not considered in the next stage of evaluation.

At the end of evaluation at this stage, the Evaluation Committee determined all four (4) tenders that made it to this stage (which included the Applicant's and the Interested Party's tenders) responsive, thus all the four (4) tenders progressed to the next stage of evaluation.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the procedure set out at Sub-clause iii) Financial comparison of Clause 13. Evaluation of Quotations of Part 1: Instructions to Tenderers at page 5 of the Tender Document. Tenders' quotations were to be compared to determine the lowest evaluated quotation.

At the end of evaluation at this stage, the Evaluation Committee determined the Interested Party's tender to have the lowest evaluated quotation of Kshs.1,912,260.00 whilst the Applicant's tender's quotation of Kshs.10,315,276.80 was determined to be the third lowest evaluated quotation.

Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party at the Interested Party's evaluated quotation of Kenya Shillings One Million Nine Hundred and Twelve Thousand Two Hundred and Sixty(Kshs.1,912,260.00) only inclusive of VAT for being the lowest evaluated tenderer.

Professional Opinion

In a Professional Opinion dated 25th February 2022, the Deputy Director, Supply Chain Management of the 1st Respondent, Sostanis Okoth, in an Internal Memo to the Ag. Chief Executive Officer of the 1st Respondent, Dr. Paul Kipronoh Ronoh, signed on 25th February 2022, upon reviewing the tender evaluation report opined that the evaluation of the subject

tender was done within the confines of the Act and attendant Regulations, in compliance with the evaluation criteria set out in the Tender Document and that the subject tender was in the 1st Respondent's financial year's procurement plan and approved budget. To this end, Sostanis Okoth recommended to the Ag. Chief Executive Officer, the 2nd Respondent therein, to award the subject tender to the Interested Party' at the Interested Party's evaluated quotation of Kenya Shillings One Million Nine Hundred and Twelve Thousand Two Hundred and Sixty (Kshs.1,912,260.00) only inclusive of VAT for being the lowest evaluated tenderer while confirming the budget of the 1st Respondent for the subject tender was Kenya Shillings Two Million One Hundred Thousand (Kshs.2,100,000.00).

The Ag. Chief Executive Officer, the 2nd Respondent herein, approved the recommendation of award of the subject tender to the Interested Party on 25th February 2022.

Notification to tenderers

Vide a letter dated 28th February 2022, the 2nd Respondent issued the Interested Party with a Notification of Award of the subject tender. However, all other unsuccessful tenderers were notified of the outcome of evaluation of the subject tender by the 1st Respondent's via email on 7th April 2022.

REQUEST FOR REVIEW

Pawa IT Solutions Limited, the Applicant herein, lodged a Request for Review dated 14th April 2022 and filed on 14th April 2022 together with a

Statement in Support of the Request for Review sworn on 14th April 2022 by Oscar Limoke, one of the founding partners of the Applicant through the firm of Chiggai & Company Advocates seeking for the following orders: -

- 1. THAT the preliminary examination of the Applicant's tender be annulled and set aside;***
- 2. THAT the award of the tender for PROVISION OF GOOGLE LICENSES AND SUPPORT FOR 314 EMAIL ACCOUNTS FOR ONE (1) YEAR (TENDER NO. ICTA/RFQ/GOOGLE LICENSES/2021-2022) be annulled***
- 3. THAT the Board be pleased to review all the records submitted in the procurement process including the form and substance of the Applicant's tender document, and substitute and/or amend the decision of the Procuring Entity and award the Tender No. ICTA/RFQ/GOOGLE LICENCES/2021-2022:PROVISION OF GOOGLE LICENSES AND SUPPORT FOR 314 EMAIL ACCOUNTS FOR ONE (1) YEAR TO THE APPLICANT.***
- 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 Public Procurement and Asset Disposal Act as Section 80(2) and to carry out the re-evaluation in compliance with Section 79(1) and 86(1) of the Public Procurement and Asset Disposal 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 Public Procurement and Asset Disposal Act.

5. THAT the tender number ICTA/RFQ/GOOGLE LICENSES/2021-2022: PROVISION OF GOOGLE LICENSES AND SUPPORT FOR 314 EMAIL ACCOUNTS FOR ONE (1) YEAR TO THE APPLICANT be annulled and the entire procurement process herein be terminated and the Board be pleased to order a fresh procurement process.

6. THAT the contract (if any) issued by the respondent to Safaricom Limited be set aside pending the hearing and determination of this Request.

7. THAT the applicant be awarded costs of the application.

8. THAT the Honourable Board grant any other reliefs it may deem just and expedient.

In a Notification of Appeal and a letter dated 14th April 2022, the Acting Board Secretary notified the Respondents of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondents were requested to submit a response to the Request for Review together with

confidential documents concerning the subject tender within 5 days from 14th April 2022.

On 20th April 2022, the Respondents filed a Replying Affidavit sworn by 2nd Respondent on even date through the 2nd Respondent's inhouse counsel, Ms. Pauline Wamuyu Kimotho Advocate. Further, the Respondents submitted to the Board confidential information and documents with respect to the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 25th April 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective Postal and email addresses as provided by the Respondents, of the existence of the Request for Review while forwarding to tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments on the subject tender within 3 days from 25th April 2022.

On 27th April 2022, the firm of Majanja Luseno & Co. Advocates filed a Notice of Appointment to act on behalf of Safaricom PLC, the Interested Party. Thereafter, on 4th May 2022, the Interested Party filed a Replying Affidavit sworn on even date by Nadiya Aziz, the Legal Counsel, Enterprise Business of the Interested Party. However, no other tenderer in the subject tender other than the Applicant and the Interested Party

filed any pleadings or documents with respect to the subject tender in the instant review.

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 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 20th April 2022, the 1st and 2nd Respondents filed written submissions. Dated on even date whilst on 28th April 2022 the Applicant filed written submissions dated 26th April 2022.

APPLICANT'S CASE

According to the Applicant, it received the Tender Document via email on 23rd February 2022 from the 1st Respondent to participate in the subject tender and which Tender Document provided for a submission deadline of the following day, that is, 24th February 2022. On 24th February 2022, the Applicant enquired from the 1st Respondent on what Google Email license plan the 1st Respondent was to enable the Applicant to issue the 1st Respondent with a comprehensive response to the Tender Document. On the same day, the 1st and 2nd Respondents responded to the Applicant's inquiry indicating that the 1st Respondent was on the Enterprise plan. Based on the Respondents' response, it is the Applicant's averment that, on 24th February 2022, it duly submitted its tender in accordance with the instructions laid out in the Tender

Document basing its quotation on the Enterprise plan which the 1st Respondent was on.

Owing to the failure of the 1st Respondent to issue the Applicant with a notification as to the outcome of the tendering process, the Applicant avers that vide an email dated 4th April 2022, it requested the 1st Respondent's Procurement team to issue it with the said notification. On 7th April 2022, the 1st Respondent's Procurement team responded via email notifying the Applicant of the outcome of the tendering while indicating that the Successful tenderer was Safaricom Limited. According to the Applicant, the 1st Respondent was negligent in failing to inform the Applicant of the criteria used to award the tender and in failing to disclose the grounds that were used to disqualify the Applicant from being declared the successful tenderer contrary to the provisions of Section 87(3) of the Act.

According to the Applicant, it submitted its tender in full compliance of the requirements specified in the Tender Document and the advertisement, hence the 1st and 2nd Respondents were in breach of Section 80(2) of the Act by declaring the Applicant's tender unsuccessful on account of unjustified reasons indicative that the Applicant's tender was **NOT** evaluated in accordance with the criterion stipulated in the Tender Document.

The Applicant alleged that the Interested Party did not have a valid Google Cloud authorization to provide Google Workspace licenses for the

1st and 2nd Respondents and should thus have been disqualified from the tendering process as the said Google authorization is essential in providing the services enumerated in the Tender Document. Further, that the Tender Document made it a mandatory requirement for tenderers to be able to provide licenses and support for 314 Email accounts and the Companies that are certified as Google Partners benefit from access to a Google workspace plan that supports unlimited number of licenses to organizations. According to the Applicant, upon searching for the Interested Party on the Google directory which is a company that lists the certified Google Partners, there was no indication of the Interested Party being listed as such which begged the question on how the Interested Party got awarded the subject tender without meeting the requirements provided in the Tender Document and that the Applicant being a listed Google Partner would be essential in fulfilling the objectives enumerated in the subject tender.

Further, that the procurement was not cost effective as the subject tender was awarded to the Interested Party whose quotation was grossly understated hence could not be said to be the lowest evaluated price pursuant to Article 227(1) of the Constitution and Section 86(1)(a) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as Regulations 2020). In an attempt to justify that the Interested Party's quotation was grossly understated, the Applicant alleged that since the Procurement was for provision of 314 plans which when calculated against the competitive market value under the Business Starter plan, not even the Enterprise plan as requested, would be at \$72/user/year totals to about Ksh.2,260,800 without tax yet

the Interested Party quoted Ksh1,912,260. It is the Applicant's allegation that the award of the subject tender to the Interested Party did not meet the Constitutional threshold of fairness, equity, transparency and competitiveness as set out under Article 10 and 227 of the Constitution neither was it in compliance with the principles set out in Section 3 of the Act.

According to the Applicant, the 1st and 2nd Respondents by failing to comply with the provisions of Section 80(2) and 86(1) of the Act breached the guiding public procurement principles under Section 3 of the Act namely a) failing to promote transparency and accountability as contained in Section 3(a) of the Act which replicates the national values and principles contained in Article 10(2) of the Constitution and b) failing to promote competitiveness and ensuring that all tenderers are treated in a system that is fair and equal.

The Applicant avers that given the foregoing awarding the subject tender to the Interested Party was clear evidence of corruption, collusion and fraudulent practice in the procurement proceedings of the subject tender which is against the requirements of Section 66(1) of the Act, and is representative of the overall tenor of a flawed evaluation process in the subject tender.

The Applicant avers that it satisfies the requirements as specified under Section 167(1) of the Act to file the instant Request for Review because

a) it was a tenderer having submitted its tender at the closing of the subject tender pursuant to the 1st Respondent's invitation; and b) it risks suffering loss having submitted a competitive price and complied with all the specified mandatory requirement thus with the legitimate expectation of becoming one of the successful tenderers had the impugned evaluation been undertaken in accordance with the criteria and procedures under the Tender Document as read together with the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution'), the Act and attendant Regulations.

Given the foregoing, the Applicant prays for the Board's intervention in ensuring that the law is observed by the 1st and 2nd Respondents by exercising discretion vested in the Board by the law to ensure the whole evaluation process is annulled and ordered to be carried out in line with the Tender Document, the Act, Regulations 2020 and the provisions of Articles 10 and 227(1) of the Constitution as prayed in the Request for Review.

RESPONDENTS' RESPONSE

In response to the Applicant's allegations, the 1st Respondent contends that in the undertaking of its functions, it found it necessary to procure for the subject tender and which it did by inviting candidates via email on 23rd February 2022 to tender for the same.

The Respondents confirm that the 1st Respondent received eight (8) tenders by the tender submission deadline of 24th February 2022 and

the same were opened at the 1st Respondent's Head Office, 12th Floor Teleposta Tower Kenyatta Avenue, Nairobi at 3.00pm on the same day.

According to the Respondents, the 1st Respondent's Tender Evaluation Committee evaluated the eight (8) tenders and upon conclusion, recommended the subject tender be awarded to the lowest quoted tenderer, the Interested Party, at a cost of One Million, Nine Hundred and Twelve Thousand Two Hundred and Sixty Shillings only (Kshs 1,912,260.00) while determining the Applicant as the third lowest evaluated tenderer having submitted a tender of Kenya Shillings Ten Million, Three Hundred and Fifteen Thousand, Two Hundred and Seventy Six and Eighty Cents (Kshs 10,315,276.80).

The Respondents further contend that a Notification of Award was issued to the Interested Party, who was the lowest quoted, in line with Section 106(3) of the Act vide a letter dated 28th February 2022 and the Interested Party accepted the award vide a letter dated 1st March 2022 following which, the 1st Respondent issued a Local Service Order to the Interested Party in line with Section 106(5)(a) of the Act and the same was accepted on 9 March 2022. However, the Respondents admit that they inadvertently omitted to send letters of regret to the Applicant and other unsuccessful tenderers concurrently with the Notification of Award but they nevertheless did send the same via email on 07 April 2022.

It is the Respondents contention that the Applicant did not raise any challenge on the lack of the Google Certification requirement in the

Tender Document before the tender closing and therefore, the Applicant is time barred from raising the issue and that the claim that the Interested Party did not have a valid Google Cloud Authorization and should thus be disqualified, is frivolous, vexatious and should be dismissed as there was no such requirement in the Tender Document because it is not practical for *every tenderer to come up with an evaluation criteria any more that candidates in an examination would each come up with their own marking scheme.*

The Respondents contend that the Tender Document did not require tenderers must be certified as Google Partners neither is such requirement statutory. According to the Respondents, the introduction of such a criteria during evaluation of tenders would be in contravention of Section 80(2) of the Act and the claim that the Applicants tender was not evaluated in accordance with the criterion stipulated in the Tender Document is false, frivolous and vexatious meant to cast aspersions on the character of the employees of the 1st Respondent.

The Respondents contend that the Applicant's claim that the procurement was not cost effective is made in bad faith as the Interested Party submitted the lowest evaluated price in line with Article 227(1) of the Constitution, Section 86(1)(a) and Section 106(3) of the Act and the award by the 1st Respondent met the Constitutional threshold of fairness, equity, transparency and competitiveness as set out in Article 10 and 227 of the Constitution and Section 3 of the Act as it was issued to the tenderer whose tender was technically and financially compliant with the Tender Document. Further, that the tender

by the Applicant was well beyond the budget of the 1st Respondent and that the Interested Party has provided the services procured under **Tender Number ICTA/RFQ/GOOGLE LICENSES/2021-22** successfully for the last four (4) years.

It is the Respondents' contention that the correct forum for the Applicant to canvass the issue of pricing by the Interested Party is the Competition Authority of Kenya and the Board should disregard the issues raised by the Applicant as they are clearly not valid.

The 1st Respondent invited the Board to evaluate the documents submitted by it and not to grant the orders sought by the Applicant but instead and for the ends of justice to be met, called for the dismissal of the instant Request for Review, prayed for the decision of the 1st Respondent to award the subject tender to the Interested Party to be allowed and for the Applicant to be condemned to pay costs of the instant Request for Review.

INTERESTED PARTY'S RESPONSE

In opposition to the Request for Review, the Interested Party contends that it was invited to tender for the subject tender via email of 23rd February 2022 and it subsequently submitted its tender at a cost of Kshs.1,912,260.00 duly complying with all the Tender Document requirements.

To the best of its knowledge, the Interested Party contends that there was no challenge made neither was a clarification sought that resulted to any variation and/or amendment on a matter that is now the subject of the instant Request for Review.

According to the Interested Party, it was informed that it was the successful tenderer by a letter dated 28th February 2022 and by a letter dated 1st March 2022, it accepted the award and was issued with a Local Service Order by the 1st Respondent.

The Interested Party confirms that though it was not a requirement, it is indeed a Google Cloud Partner with a valid Partner Certificate valid until 31st December 2022.

According the Interested Party, the instant Request for Review is frivolous and does not disclose any merit and should be dismissed with costs as: (i) the Applicant seeks to confer onto itself powers donated to the 1st Respondent; (ii) the Applicant is seeking to have the Procuring Authority to impose a condition not forming part of the Tender Document; (iii) no loss and/or damage as a result of any breach by the Procuring Entity has been proved; and (iv) the same does not speak to the legislative intention of the Act which is anchored on Article 227 of the Constitution.

The Interested Party contends that the Board would have to consider credible non-speculative and cogent evidence if it were to grant the instant Request for Review on the grounds of corruption, collusion and fraudulent practice. It is the Interested Party's contention that its business is and continues to be undertaken on an integrity platform and it is regrettable that the Applicant would throw at the Board wild allegations in an attempt to have a decision made in its favour.

Finally, the Interested Party contends that the Applicant having filed the instant Request for Review within 14 days from the date of notification as envisaged under Section 167(1) of the Act, the Interested Party is unable to appreciate the prejudice the Applicant is alleging.

BOARD'S DECISION

The Board has considered each of the parties' case, pleadings, documents, written submissions and confidential documents submitted by the Respondents to the Board pursuant to Section 67 (3) (e) of the Act and finds that the following issues call for determination: -

- 1. Whether the Evaluation Committee evaluated the Applicant's tender with respect to providing licenses and support for 314 Email accounts in accordance with Sub-clause ii) Technical Examination of Clause 13. Evaluation of Quotations of Part 1: Instructions to Tenderers at page 5 of the Tender Document read with Item No.1 of Stage Two: Technical Mandatory Requirements of (i) Schedule of Requirements Table (Evaluation Criteria) at page 8 of the Tender Document;**
- 2. Whether the Respondents awarded the subject tender in accordance with Clause 14. Lowest Evaluated Quotation of Part 1: Instructions to Tenderers at page 5 of the Tender Document read with Section 106(3) and Section 86(1)(a) of the Act;**

- 3. Whether the 1st Respondent's failure to issue a Notification of Intention to Enter into a Contract in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 prejudiced the Applicant; and**
- 4. What orders should the Board grant in the circumstances.**

We have carefully studied the Tender Document submitted to us as part of confidential documents by the Respondents pursuant to Section 67(3)(e) of the Act and note that the subject tender was floated by the Respondents using a Request for Quotation method of tendering and the same was for provision of google licenses and support for 314 email accounts for a period of one year. In essence, the subject tender being a Request for Quotation needed to be floated among the 1st Respondent's registered suppliers from a list of registered suppliers maintained by the Head of Procurement function of the 1st Respondent and the resultant award would then be made to the registered supplier who offered a quotation with the lowest price that met the requirements set out in the Tender Document (Request for Quotation Document). With this in mind, we now proceed to address the issues framed for determination.

Whether the Evaluation Committee evaluated the Applicant's tender with respect to providing licenses and support for 314 Email accounts in accordance with Sub-clause ii) Technical Examination of Clause 13. Evaluation of Quotations of Part 1: Instructions to Tenderers at page 5 of the Tender Document read with Item No.1 of Stage Two: Technical Mandatory

Requirements of (i) Schedule of Requirements Table (Evaluation Criteria) at page 8 of the Tender Document.

The Applicant's allegation is that the Interested Party did not satisfy a mandatory requirement in the Tender Document for tenderers to be able to provide licenses and support for 314 email accounts because the Interested Party did not have a Google Cloud authorization to provide Google Workspace licenses hence the Respondents ought to have disqualified the Interested Party from the tendering process because a Google authorization is essential in providing the services enumerated in the Tender Document. In support of this allegation, the Applicant indicated that companies that are certified as Google Partners benefit from access to a Google workspace plan that supports unlimited number of licences to organisations and for one to establish whether a company is certified as a Google Partner, one searches the Google directory. According to the Applicant, upon searching on the Google directory, it found out that the Interested Party was not listed as a member of Google Cloud Partner List but the Applicant was duly listed as a member and therefore the Applicant would be essential in fulfilling the objectives enumerated in the subject tender.

In response, the Respondents contend that there was no requirement in the Tender Document for tenderers to have a valid Google Cloud Authorization or for tenderers to be certified as Google Partners neither is certification as Google Partner a statutory requirement. Further, the Respondents contend that the Applicant did not challenge lack of Google Certification requirement in the Tender Document before the tender submission deadline and the Applicant is therefore time barred from

raising the same. According to the Applicant, it is not practical for every tenderer to come up with an evaluation criteria which would be akin to candidates in an examination each coming up with their own marking scheme.

The Interested Party on its part contends that though it was not a requirement in the Tender Document, it is a Google Cloud Partner with a valid Partner Certificate set to expire on 31st December 2022. To the best of the Applicant's knowledge no challenge was made or clarification sought that resulted to any variation and/or amendment to the Tender Document on the issue at hand and what the Applicant is attempting to do through the instant Request for Review, is to seek to confer on itself powers donated to the 1st Respondent and to have the 1st Respondent impose a condition not forming part of the Tender Document.

This first issue framed for determination turns on a determination of what was the requirement of the Tender Document with respect to a tenderer providing licenses and support for 314 email accounts, whether the Interested Party met such requirement and whether the Evaluation Committee evaluated the Applicant's tender in accordance with the requirement for provision of licenses and support for 314 email accounts as set out in the Tender Document.

The Act was enacted to, *inter alia*, give effect to Article 227 of the Constitution, which provides as follows in part:

221. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

***(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following-
.....[Emphasis by the Board]***

Article 227(1) of the Constitution requires the 1st Respondent while contracting for the subject tender, to do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective which in essence, are overriding principles in procurement of public goods and services by state organs and public entities.

On the otherhand, Section 79 (1) of the Act provides as follows:

79. Responsiveness of tenders

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

[Emphasis by the Board]

Section 79(1) of the Act lays the bare minimum of a responsive tender as one that first meets all eligibility and other mandatory requirements in a tender document.

Section 80(1) and (2) of the Act is instructive on who conducts evaluation and comparison of responsive tenders and how such evaluation and comparison of tenders is carried out as it provides as follows:

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.

(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.

The above provisions of Section 80(1) and (2) of the Act requires; (a) evaluation and comparison of tenders to be conducted by an evaluation committee, and (b) such evaluation and comparison of tenders to strictly be conducted in accordance with procedures and criteria stipulated in a tender document. Simply put and with respect to the subject tender, the Evaluation Committee was required to strictly be guided by the

procedures and criteria set out in the Tender Document when evaluating tenders.

Having carefully studied the Tender Document we note the procedure and criteria for evaluation of the subject tender was set out in Clause 13. Evaluation of Quotaions of Part 1: Instructions to Tenderers at page 5 of the Tender Document read with (i) Schedule of Requirements Table (Evaluation Criteria) at page 8 to 9 of the Tender Document. However, none of such procedure and criteria for evaluation in the Tender Document required a tenderer to confirm or prove by way of documentation or otherwise to have obtained Google Cloud authorization to provide Google Workspace licenses, to have been certified as a Google Partner orto have been listed as a Google Partner on Google directory.

We note that Sub-clause ii) Technical Examination of Clause 13. Evaluation of Quotations of Part 1: Instructions to Tenderers at page 5 of the Tender Document read with of Stage Two: Technical Mandatory Requirements of (i) Schedule of Requirements Table (Evaluation Criteria) at page 8 of the Tender Document provided the criteria for evaluation of tenders at the TechnicalEvaluation stage as mandatory requirements and tenders would only proceed to the FinacialEvaluation stage if they qualified and were in compliance with the criteria set out for evaluation at theTechnical Evaluation stage. In essence, tenders were required to meet and satisfy all the mandatory requirements at the Technical Evaluation stage to qualify to proceed to the Financial Evaluation stage. Put differently, a tender that failed to meet and satisfy

even one of the mandatory requirements at the Technical Evaluation stage would be disqualified at the Technical Evaluation stage and thus would not proceed for evaluation at the Financial Evaluation stage.

Sub-clause ii) Technical Examination of Clause 13. Evaluation of Quotations of Part 1: Instructions to Tenderers at page 5 of the Tender Document reads as follows:

Technical examination to determine goods eligibility, compliance with technical specifications, and commercial responsiveness. Quotations failing this stage will be rejected and not considered in the next stage.

Item No.1 of Stage Two: Technical Mandatory Requirements of (i) Schedule of Requirements Table (Evaluation Criteria) at page 8 of the Tender Document reads as follows in part:

No	Requirement	Mandatory	Bidders Response (Indicate if Compliant or Not Compliant)
1.	Provide licenses and support for 314 Email accounts	M	
2. to 11.	
	Remarks		

	<i>(Responsive/Not Responsive)</i>		
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The aforementioned provisions of the Tender Document, when read wholesomely, required the Evaluation Committee while evaluating tenders, to confirm that a tenderer indicated whether it was compliant or not compliant with respect to provision of licenses and support for 314 Email accounts and nothing more. Put differently, tenderers were not required to provide any evidence, documentary or otherwise, other than to indicate whether they were compliant or not compliant with respect to providing licenses and support for 314 Email accounts which was a mandatory requirement as a criteria for evaluation at the Technical Evaluation stage.

We have carefully studied the Interested Party's tender document which forms part of the confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and note that the Interested Party wrote by hand the word 'compliant' against the mandatory requirement at the Technical Evaluation stage in the Tender Document to provide licenses and support for 314 Email accounts.

It is very clear that the Interested Party having jotted down the word 'compliant' as aforesaid, it complied with the mandatory requirement at the Technical Evaluation stage to provide licenses and support for 314 Email accounts.

We have also carefully studied the Evaluation Report dated 24th February 2022 and which Evaluation Report forms part of the confidential documents submitted to the Board by the Respondents and note at page 6 thereof, the Evaluation Committee noted that the Interested Party passed (satisfied) the mandatory requirement at the Technical Evaluation stage that required tenderers to provide licenses and support for 314 Email accounts.

In **Miscellaneous Application 407 of 2018 Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR**(hereinafter referred to as the Meru University case), Justice John M. Mativo held as follows with respect to evaluation of tenders:

"74. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

75.

76.

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79. For there to be fairness in the public procurement process as required under Article 227, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

80. The Evaluation Committee has a duty to act fairly.....

81. A Procuring Entity is bound by its Bid Documents.

82. The Evaluation Committee had no choice but to evaluate the bids in accordance with the eligibility and mandatory requirements of the Tender Documents by examining the documents before it.

83.

84.

85. The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive."

The Meru University case buttressed the need for evaluation to be carried out strictly in accordance with the criteria forevaluation provided in a tender document which in turn promotesfairness, equitability, transparency, cost-effectiveness and competitiveness among tenderers who are required to compete on an equal footing.

Given the foregoing, we have no doubt in our minds that the Evaluation Committee evaluated the Applicant's tender with respect to providing licenses and support for 314 Email accounts in accordance with Sub-clause ii) Technical Examination of Clause 13. Evaluation of Quotations of Part 1: Instructions to Tenderers at page 5 of the Tender Document read with Item No.1 of Stage Two: Technical Mandatory Requirements of (i) Schedule of Requirements Table (Evaluation Criteria) at page 8 of the Tender Document;

Whether the Respondents awarded the subject tender in accordance with Clause 14. Lowest Evaluated Quotation of Part 1: Instructions to Tenderers at page 5 of the Tender Document read with Section 106(3) and Section 86(1)(a) of the Act.

The Applicant's case is that the award of the subject tender to the Interested Party was not cost effective because the Interested Party's quotation of Kshs.1,912,260.00 was grossly understated thus could not be the lowest evaluated price pursuant to Article 227(1) of the Constitution and Section 86(1)(a) of the Act. In an attempt to justify this allegation, the Applicant tried to explain that the subject tender was for 314 plans which when calculated against the competitive market value under the Business Starter plan, not even the Enterprise plan as requested, would be at \$72/user/year totaling to about Kshs.2,260,800.00. We however note, the Applicant did not indicate where it got the figure of \$72/user/year neither did it provide documentary evidence or otherwise of the competitive market value. With this, we find the Applicant failed to substantiate its allegation that the Interested Party's evaluated price was grossly understated.

Nevertheless, the provisions of Clause 14. Lowest Evaluated Quotation of Part 1: Instructions to Tenderers at page 5 of the Tender Document read as follows:

14. Lowest Evaluated Quotation: The lowest evaluated quotation shall be recommended for the award of the contract.

Further, Section 106(3) and Section 86(1)(a) of the Act provide as follows:-

Section 86. Successful tender

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

Section 106(3). Procedure for request for quotations

(3) The successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotations.

A reading of Section 86 and 106(3) of the Act is clear that in Request for Quotations, such like the subject tender, a successful tenderer is one that submits a quotation with the lowest price after meeting the requirements set out in the request for quotation document. What this means is that such a tenderer's tender must pass through all the stages of evaluation being preliminary, technical and financial and have the

lowest price at the financial evaluation stage and which lowest price is known as the lowest evaluated price at the end of the financial evaluation stage having had such a tender evaluated at preliminary, technical and financial stages.

We note from the Interested Party's tender, the Interested Party quoted a total price of Kshs.1,912,260.00 for the subject tender in its Form of Quotation and Price Schedule Table. We also note at page 7 of the Evaluation Report, four (4) out of the eight(8) tenderers in the subject tender made it to the financial evaluation stage and the Interested Party's evaluated price of Kshs.1,912,260.00 was determined to be the lowest evaluated price while the Applicant's evaluated price of Kshs.10,315,276.80 was the third lowest evaluated price.

In the circumstances, we find that the Respondents awarded the subject tender in accordance with Clause 14. Lowest Evaluated Quotation of Part 1: Instructions to Tenderers at page 5 of the Tender Document read with Section 106(3) and Section 86(1)(a) of the Act.

Whether the 1st Respondent's failure to issue a Notification of Intention to Enter into a Contract in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 prejudiced the Applicant.

The Applicant's case is that the Respondents did not issue a notification as required under Section 87(3) of the Act and was only notified by the Respondents that the Interested Party was the successful tenderer

through email on 7th April 2022 after the Applicant enquired on the outcome of evaluation of the subject tender via email on 4th April 2022.

On its part, the Respondents have admitted that they inadvertently forgot to send letters of regret to the Applicant and other unsuccessful tenderers concurrently when sending to the Interested Party with the Notification of Award dated 28th February 2022. The Respondents further admit that they notified the Applicant and other unsuccessful tenderers of the outcome of evaluation of the subject tender on 7th April 2022.

Section 87 of the Act read with Regulation 82 of Regulations 2020 guides on who issues, what is contained in and how a Notice of Intention to Enter into a Contract is issued.

Section 87 of the Act provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

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

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring

entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

Regulation 82 of Regulations 2020 on the otherhand provides as follows:

82. Notification of intention to enter into a contract

(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.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(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.

The above provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020 are instructive that; (a) only an accounting officer of a procuring entity (such like the 2nd Respondent) notifies a successful tenderer of the successfulness of its tender (award of tender to the successful tenderer)in writing, and b) at the same time when the successful tenderer is notified of award of a tender, the accounting

officer of a procuring entity notifies, all unsuccessful tenderers of their unsuccessful tenders with reasons for their unsuccessfulness, in writing, while disclosing to the unsuccessful tenderers, (i) who the successful tenderer is, (ii) reasons why such a successful tenderer's tender was successful in accordance with Section 86(1) of the Act and (iii) at what tender price the successful tenderer was awarded a tender. This in our considered view goes a long way in upholding a procurement system that is transparent as enshrined in Article 227(1) of the Constitution, the national values and principles of governance on transparency and accountability under Article 10 of the Constitution, the principles of public finance of openness and accountability under Article 201 of the Constitution, the values and principles of public service on accountability of administrative acts and transparency under Article 232 of the Constitution.

The aforementioned email of 7th April 2022 informing the Applicant that the Interested Party was the successful tenderer was addressed and sent to Oscar Limoke, one of the Applicant's founding partners, by Stephen Maina of Supply Chain Management Department of the 1st Respondent and reads as follows in part:

"Hello Oscar, The Quotation was won by Safaricom Ltd at a total cost of Kes.1,912,260.

Thankyou for participating in the Procurement Process and hope to do business with you in the future

Kind Regards

....."

The aforementioned email as reproduced in part (i) was sent to the Applicant more than a month from when the Interested Party was notified of its successfulness, (ii) was not issued by the 2nd Respondent but by a staff member of the 1st Respondent, (iii) did not disclose why the Applicant's tender was not successful; and (iv) though it disclosed that the Interested Party was the successful tenderer and the price at which the subject tender was awarded to the Interested Party, it did not disclose why the Interested Party's tender was successful in accordance with Section 86(1) of the Act.

Section 86(1) of the Act provides as follows:

86. Successful tender

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.

We have hereinbefore observed that the award of the subject tender was made to to the Interested Party for being the tenderer who offered the lowest evaluated price having been found responsive at the Preliminary, Technical and Financial evaluation stages and which is in accordance with Section 86(1)(a) of the Act. This is what the 2nd Respondent should have disclosed as the reason why the Interested Party's tender was successful in accordance with Section 86(1) of the Act.

However, we do note that even though the Notification of Intention to Enter into a Contract in the subject tender dated 28th February 2022 was not issued in accordance with Section 87(3) of the Act read with Regulation 82 of Regulations 2020, the Applicant became aware of the reasons why its tender was not successful and why the Interested Party's tender was successful during the pendency of this review and was able to challenge the award of the subject tender to the Interested Party while seeking to be awarded the subject tender albeit unsuccessfully. In our considered opinion, the Applicant has suffered no prejudice whatsoever having been able to approach the Board in good time, ventilate its grievances and challenge the award of the subject tender albeit unsuccessfully.

In the circumstances, we find the Applicant has not been prejudiced in any way by the 1st Respondent's failure to issue a Notification of Intention to Enter into a Contract in the subject tender in accordance with Section 87 of the Act read with Regulations 82 of the Act.

What orders should the Board grant in the circumstances.

We have held that the Evaluation Committee evaluated the Applicant's tender with respect to providing licenses and support for 314 Email accounts in accordance with the procedure and criteria set out in the Tender Document, that the Respondents awarded the subject tender to the Interested Party being the lowest evaluated tenderer in accordance with the provisions of the Tender Document read with Section 106(3) and 86(1)(a) of the Act and that the Applicant has not been prejudiced in any way by the 1st Respondent's failure to issue a Notification of Intention to Enter into a Contract in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 prejudiced the Applicant. In the circumstances, we find that the instant Request lacks merit and is ripe for dismissal. The upshot of our findings herein is that the instant review fails.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 14th April 2022:

- 1. The Applicant's Request for Review dated 14th April 2022 be and is hereby dismissed.**

2. Given the findings of the Board herein, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 5th day of May 2022.



CHAIRPERSON
PPARB



SECRETARY
PPARB

