

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 70 OF 2022 OF 4TH AUGUST, 2022

BETWEEN

SMART APPLICATIONS INTERNATIONAL LIMITED..... APPLICANT

AND

ACCOUNTING OFFICER

KENYA ELECTRICITY GENERATING COMPANY 1ST RESPONDENT

KENYA ELECTRCITY GENERATING COMPANY 2ND RESPONDENT

LCT AFRICA LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Electricity Generating Company [*KenGen*] (hereinafter referred to as 'the Procuring Entity and/or the Respondent') made on 22nd July 2022 in the with respect to Tender Number KGN-HR-05-2022 for the provision of Biometric Smart Card Technology with Smart SMS Alerts (hereinafter referred to as 'the subject tender')

BOARD MEMBERS PRESENT

- | | |
|-----------------------|---------------------------------|
| 1. Mrs. Njeri Onyango | -Vice Chairperson (Panel Chair) |
| 2. Eng. Mbiu Kimani | -Member |
| 3. Q.S. Hussein Were | -Member |
| 4. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

1. Mr Philip Okumu

-Acting Board Secretary

BACKGROUND OF THE AWARD

The Tendering Process

Tender No. KGN-HR-05-2022 for the provision of Biometric Smart Card Technology with SMS Alerts was advertised by the Kenya Electricity Generating Company [*KenGen*] (hereinafter referred to as, 'the Procuring Entity') in the media through open tender on 10th May 2022 and closed on 24th May 2022 at 10.00a.m. The tender was open to Citizen Contractors.

Submission of Tender and Tender Opening

The tender was opened by the officers from the Procuring Entity on 24th May 2022 at 10.30 a.m. The following three (3) firms submitted their bids on the submission deadline:

No.	Name of Firm	Amount in Kshs.	Bid Bond	Ranking as per Opening Price
1	Smart Applications International Limited	20,396,342.00	YES	3
2	LCT Africa Limited	10,022,400.00	YES	1
3	Avuity Limited	18,689,200.00	NO	2

Evaluation

A Tender Evaluation Committee was appointed to undertake evaluation in the following stages:

- i. Preliminary Evaluation;
- ii. Tender Evaluation; and
- iii. Financial Evaluation.

i. Preliminary Evaluation

At the Preliminary Evaluation, Avuity Limited was found not have uploaded their bid documents and therefore could not be evaluated. LCT Africa Limited, a Joint Venture constituted of two firms, namely, Compulynx Limited and Liaison Healthcare Limited were evaluated as a Joint Venture.

The table below indicates the evaluation:

			1	2
MANDATORY REQUIREMENTS EVALUATION			SMART APPLICATI ONS INTERNATI ONAL LTD	LCT AFRICA LIMITED
1	MR 1	Copy of Registration Certificate /Certificate of Incorporation	✓	✓
2	MR 2	Valid Business permit /License number Attach copy	✓	✓
3	MR 3	Valid tax compliance certificate/Pin Certificate	✓	✓
4	MR 4	Copy of CR 12 issued within 6 months before tender closure date (where applicable)/Not Applicable to sole Proprietors	✓	✓

5	MR 5	Confidential Business Questionnaire duly filled, signed & stamped	✓	✓
6	MR 6	Duly filled, signed and stamped tender form	✓	✓
7	MR 7	Duly filled, signed and stamped price schedule	×	✓
8	MR 8	Duly filled and stamped Addendum(s)/Clarification(s) issued must be attached (Where Applicable)	N/A	N/A
9	MR 9	The Tender MUST be sequentially serialized on each page of the bid submitted, Sec.74.1.i. of the PPADA, 2015.	✓	✓
10	MR 10	The tender has been duly signed by the person lawfully authorized to do so through the Power of Attorney FORM	✓	✓
11	MR 11	Tender documents Must be submitted through our e-procurement platform	✓	✓
12	MR 12	Annual Accounts The audited financial statements by a registered audit firm for the last 3 years shall be submitted and must demonstrate the current soundness of the Bidder's financial position and its prospective long-term profitability	✓	✓
13	MR 13	Duly filled, signed and stamped Self Declaration form that the tenderer is not debarred in the matter of PPADA 2015	✓	✓
14	MR 14	Duly filled, signed and stamped Self Declaration form that the tenderer will not engage in any corrupt or Fraudulent Practice.	✓	✓
15	MR 15	Duly filled, signed and stamped Certificate of Independent Tender Determination	✓	✓
16	MR 16	Duly filled, signed and stamped Declaration and Commitment to The Code of Ethics	✓	✓
17	MR 17	Duly completed Beneficial Ownership Disclosure Form	✓	✓
18	MR 18	The tender security shall be of the amount KES 200,000.00 in the form of an irrevocable bank guarantee from a reputable commercial bank registered by the Central Bank of Kenya.	✓	✓

		The tender security shall be valid for at least 30 days beyond tender validity i.e. valid for at least 150 days)		
19	MR 19	Signed Warranty and after sales support from manufacturer or manufacturer local representative / local agent has been submitted	✓	✓
20	MR 20	ICD-10 2016 Diagnostic License from World Health Organization (WHO) a minimum requirement	✓	✓
21	MR 21	Evidence of Registration by ICT Authority (ICTA)	✓	✓
22	MR 22	Must Attend the Virtual Pre-bid Conference meeting via zoom	✓	✓

KEY:

✓ - COMPLIANT

× - NOT COMPLIANT

In the end, Smart Applications International Limited was found not to have met all the preliminary/mandatory requirements hence did not qualify for the Technical Evaluation stage. Smart Africa International Limited had attached a duly filled and signed price schedule but did NOT stamp as per the tender requirement (MR7). LCT Africa Limited met all the preliminary/mandatory requirements and proceeded to the Technical Evaluation stage.

ii. Technical Evaluation

The technical evaluation was carried out as per the tender requirements contained in the Tender Document and herein-below reproduced:

No.	Item Description	LCT Africa Limited Response
1.	The technology MUST be able to integrate with SAP ERP and ensure that the integration works seamlessly and MUST also be able to integrate with our clinics in the business areas that also use SAP ERP	Complied
2.	The solution MUST securely store members' data/information.(signing of non-disclosure agreement MANDATORY)	Complied
3.	The bio-metric smart card system MUST be operational in 47 counties in Kenya and the East African region. The bidder MUST have the ability to install bio-metric smartcard readers at any healthcare service provider in Kenya and East Africa when advised to.	Complied
4.	Proof of at least three (3) major references from firms/companies of a similar size and spread as KenGen (10,000 plus beneficiaries) to whom the supplier has provided their employees with IN-HOUSE medical schemes with similar medical bio-metric smart card systems	Complied
5.	To provide at least (3) references from major Medical Service Providers of KenGen in Nairobi and a further two (2) references each from Naivasha, Nakuru, Kisumu, Mombasa, Kitale and Embu	Complied
6.	The bio-metric smart card system MUST be operational and able to use existing infrastructure (if any) and MUST have ability to map the current and future healthcare service providers including hospitals, clinics, pharmacies, doctors and diagnostic centers in the KenGen service provider panel	Complied
7.	The service provider owns and operates the bio-metric smart card readers and associated system hardware and software and charges only for operations.	Complied

No.	Item Description	LCT Africa Limited Response
8.	The bio-metric smart card system has been in use by at least 15 healthcare service providers for over a period of at least 5 years. (Attach references)	Complied
9.	The solution MUST have a portal that will enhance the client's management of the scheme. Portal must also include Electronic Data Interchange which gives diagnostic information on all claims.	Complied
10.	The service Provide should provide adequate and reliable system support when necessary. Attach testimonials from clients	Complied
11.	The bio-metric smartcard system MUST be able to generate and print reports from the system and export reports to the following formats: HTML, MS Excel, PDF, RTF, CSV and texts.	Complied
12.	Provide CVs of staff involved in the installation and support of the system including that of the Project Manager who must have: <ul style="list-style-type: none"> • Worked with the company for at least five (5) years, • A holder of a degree in ICT and • Experience in supporting the management of an in-house medical scheme. • Provide References from at least two (2) companies the Project Manager has supported. Copies of relevant certificates MUST be provided. 	Complied
13.	The solution MUST provide access to their Call Centre on a 24hours basis to the client	Complied
14.	Provide a draft Service Level Agreement with incident resolution times and incident escalation structures to be discussed and signed upon successful Award.	Complied
15.	Financial ratios	The audited financial statements by a registered audit firm for the last 3

No.	Item Description	LCT Africa Limited Response
	<p>years shall be submitted. The bidder shall meet the following both ratios for all the 3 years.</p> <p>a. Current Ratio 1:1</p> <p>b. Debt to Equity Ratio of less than 2.33 times</p> <p>Or</p> <p>Evidence of line of credit from a bank registered by the Central Bank to cover to the tender cost</p>	

iii. Financial evaluation

At the Financial Evaluation stage, LCT Africa Limited qualified to the financial evaluation as summarized below:

No.	Description	Unit Cost	Quantity	Total Cost
1.	Supply & Install Dedicated Data Transmission to Medical Services Providers	-	1	
2.	Supply & commission Dedicated Server to receive Smart data from hospitals	-	1	-
3.	Supply of smart cards (Printed & Loaded with Data)	-	11200	-
4.	Develop and Implement data exchange capability with KenGen Systems (Days)	-		-
5.	Smartcard replacement Fee	-	11200	-

6.	Cost of generating email statements to individual members and to the client monthly	-	11200	-
7.	Bulk SMS (Recurring cost per month)	185,600.00	12	2,227,200.00
8.	Access fees per year for the duration of the contract	696.00	11200	7,795,200.00
Total Cost per year Inclusive of taxes				10,022,400.00

Evaluation Committee's Recommendation

The Evaluation Committee recommended the Tender for Provision of Biometric Smart Card Technology with SMS Alerts be awarded to LCT Africa Limited at their quoted price of Kshs. 10,022,400.00 per year inclusive of taxes.

Professional Opinion

By a Professional Opinion dated 6th July 2022, the Head of procurement of the Respondent's Entity, concurred with the evaluation report conclusions and recommended that the Tender for Provision of Biometric Smart Card Technology with SMS Alerts be awarded to LCT Africa Limited at their total quoted price of Kshs. 10,022,400.00 (Ten Million Twenty-Two Thousand Four Hundred only) per year, inclusive of taxes.

Letters of Notification

Vide letters dated 22nd July 2022, the Procuring Entity notified the bidders of the outcomes of their respective bids. The Applicant was given a Notification of Regret whereas the Interested Party was issued a Notification of Award.

REQUEST FOR REVIEW

The Request for Review dated 1st August 2022 was lodged on 4th August, 2022 by M/s Smart Applications International Limited, the Applicant herein, whose address for purposes of the Application is care of Andrew & Steve Advocates of P. O. Box 52 – 00606, Nairobi, in the matter of Tender No. KGN-HR-05-2022- for the Provision of Biometric Smart Card Technology with Smart SMS Alerts.

The Applicant requests the Board for the following orders:

- I. A declaration that the Procurement Entity breached the provisions of Article 227(1) of the Constitution and Section 79(1) of the Public Procurement and Disposal Act;***
- II. The decision of the Procuring Entity to award the Tender to the Interested Party be annulled and set aside;***
- III. The Board be pleased to order a re-evaluation of Tender No KGN-HR-05-2022- FOR THE PROVISION OF BIOMETRIC SMART CARD TECHNOLOGY WITH SMART SMS ALERTS, and***

award the tender to the Applicant who strongly believes it has the lowest, and most competitive bid;

- IV. The Board be pleased to annul any contract that may have been entered into by the Respondents and the Interested Party before the lapse of the 14-day period within which tenderers may seek administrative review;***
 - V. The Board be pleased to stop any implementation of any such contract entered into between the Respondents and Interested Party;***
 - VI. The Respondents be compelled to pay the costs to the Applicant arising from/and incidental to this Application;***
 - VII. The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***
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In a Notification of Appeal and letter dated 4th August 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") notified the Respondents of the filing of the Request for Review and the suspension of the 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. 02/20 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 five days from 4th August 2022.

The Applicant attached to the Request for Review, the Applicant's Sworn Statement and dated 2nd August 2022 by one Harrison Muiru and a further Applicant's Supplementary Affidavit dated 19th August 2022 and filed on 22nd August 2022 together with their Written Submissions dated 19th August 2022 and filed on 22nd August 2022. The 1st and 2nd Respondents filed their Respondent's Memorandum of Response to the Request for Review dated 8th August 2022 and filed on 10th August 2022 sworn by one Vincent Mamboleo, the Acting General Manager, Supply Chain of the Procuring Entity. They later filed a list of Authorities and Annexure Dated 22nd August, 2022. The Interested Party, M/s LCT Africa Limited JV, filed The Interested Party's Notice of Appointment of Advocated dated 8th August and filed on even date wherein they appointed Caroline Oduor & Associates Advocates of P.O. Box 18872-00100 Nairobi; the Interested Party's Replying Affidavit sworn by one Jotham Alumasa Kegode sworn and dated 11th August 2022 and filed on even date and the Interested Party's Grounds of Opposition dated 11th August and filed on even date. They also filed a Further Affidavit dated 22nd August and file on 23rd August, 2022 together with their Written Submissions and Authorities, which the Board has reviewed.

APPLICANT'S CASE

The Applicant alleges that the Procuring Entity is in breach of the Act as read with Article 227(1) of the Constitution in that it unlawfully disqualified the Applicant's bid on account of allegedly failing to submit a stamped Price schedule as required under the Tender Document and unlawfully failed to consider the Applicant's Price Schedule which was duly filled, signed and stamped, and which does not materially depart from the requirements of the tender document.

The Applicant further alleges that the Procuring Entity failed to adhere to Section 79(1) of the Act which provides that a tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender document, and that the Procuring Entity failed to take into account the fact that the Applicant had fully complied with the eligibility criteria and mandatory requirements under the tender document as is provided under Section 79(1) of the Act and submitted a valid bid.

The Applicant proceeds to allege that the Procuring Entity failed to promote transparency, fairness and integrity of the procurement process by unlawfully disqualifying the Applicant's bid on the basis of a technicality that does not affect the substantive bid, despite it having met all the requirements therein, and that the Procuring Entity failed to award the tender to the Applicant as required by law in view of the responsiveness of the Applicant's bid.

The Applicant alleges that The Procuring Entity awarded the tender to the Interested Party, while aware that it did not meet the eligibility criteria as follows: -

- (i) The Interested Party lacks technical knowledge and experience in the sector;**
- (ii) The Interested Party had not submitted the lowest evaluated cost;**
- (iii) The Interested Party has no proven industry knowledge to fulfill the Contract; the Interested Party has no biometric- smart card capability, but instead uses only biometrics solution, thus not qualified.**
- (iv) The Interested Party's biometric solution does not have the smart card feature and is not operational in 47 counties in Kenya and the East African region; the Interested Party has presence in only 41 Counties and not in the East African region;**
- (v) The Interested Party's bid did not, and could not have demonstrated their ability to install biometric- smart card readers at any healthcare service providers in Kenya and East Africa;**
- (vi) The Interested Party does not, and could not have had an ICD-10 2016 Diagnostic License from World Health Organization (WHO);**

- (vii) The Interested Party does not have, and could not have had Registration by ICT Authority (ICTA);**
 - (viii) The Interested Party does not and could not have had any in-house medical scheme they were supporting for the management of staff medical scheme thus lacked the requisite experience;**
 - (ix) The Interested Party is a company incorporated in the Republic of Kenya on 23 January 2019, thus lacked the requisite qualification under the tender document, being five (5) years;**
 - (x) The Interested Party's bid did not, and could not have demonstrated responsiveness of its alleged system having been in use in at least 15 healthcare providers for over a period of at least 5 years;**
-
- (xi) The Interested Party's bid did not, and could not have had a portal that enhances the procuring entity's management of the scheme and include Electronic Data Interchange which gives diagnostic information on all claims;**
 - (xii) The Interested Party's bid did not, and could not have demonstrated that their bio-metric smart card system could be operational and able to use existing infrastructure (if any) and have ability to map the current and future healthcare service providers including**

hospitals, clinics, pharmacies, doctors and diagnostic centers in the Procuring entity's panel.

in the end , the Applicant has sought various Orders from the Board, *inter alia* , that its tender was wrongfully and unlawfully evaluated and that the award to the Interested party arose from an unlawful process and not based on the criteria set in the Tender document.

THE RESPONDENT'S CASE

In their Memorandum of Response to the Request for Review the 1st & 2nd Respondents aver that it was a mandatory requirement in the Tender Document that the bidders attach a duly filled, signed and stamped Price Schedule.

The Respondents further aver that vide a letter dated 22nd July 2022 the Procuring Entity notified the Applicant that it was not successful in its bid as the Price Schedule attached at page 31 of its bid was not stamped.

The Respondents aver that contrary to paragraph 23(ix) of the Applicant's Statement it was not a requirement that a bidder should have had 5 years' experience but rather the biometric card system must have been in use for a period of at least 5 years as stipulated at page 36 of item 8 of the Tender

Document.it has urged the Board to find that the award to the Interested party was done procedurally and that the Application herein be dismissed.

THE INTERESTED PARTY'S CASE

The Interested Party, in its Replying Affidavit filed with the Board, submits that in response to the Applicant's sworn statement, a perusal of the Applicant's bid as filed and attached to the Request for Review Application as Exhibit HM-3 reveals that the Applicant's Price Schedule is not duly stamped contrary to the mandatory subject tender requirements.

The Interested Party further avers that the allegations made against it points to the Applicant's breach of procurement law specifically section 67(1) of the Act in that it is information alleged to relate to the subject procurement including purported contents of the Interested Party's bid which information ought to be confidential and protected against disclosure by virtue of section 67(1) of the Act.

The Interested Party submits that the Applicant has no authority whatsoever to purport to evaluate the responsiveness of the Interested Party's tender noting that the said function is legally reserved for the Respondents and its Evaluation Committee.it has prayed that the Application be dismissed.

BOARD DECISION

The Board has had a chance to look through and consider the Applicant's Request for Review and its Sworn Statement, Supplementary Affidavit and Written Submissions; the Respondent's Memorandum of Response and confidential documents submitted to the Board and the Interested Party's Grounds of Opposition and its Replying Affidavit. In the end, the Board has framed the following issues for its determination of the Request for Review dated 1st August 2022 and lodged 4th August 2022:

- i. Whether the Applicant's tender bid was properly evaluated and disqualified at the Mandatory/Preliminary stage?**
 - ii. Whether the Interested Party's tender bid was properly evaluated and awarded the subject tender?**
 - iii. What are the appropriate orders to issue in the circumstances?**
-

In this instant application, the Applicant bases its claim on unlawful disqualification of its tender bid among other grounds summarized above. Vide a letter dated 22nd July 2022 the Procuring Entity communicated its intention to award the subject tender to the Interested Party and issued letters of regret to among others the Applicant dated and delivered on 22nd July 2022. The Applicant lodged the Request for Review on 4th August 2022, this is well within the statutory period of 14 days specified in Section 167 (1) of the Act. In the upshot, the Board is properly seized of the matter at hand.

Whether the Applicant's tender bid was properly evaluated and disqualified at the Mandatory/Preliminary stage?

The Board has examined the blank Tender Document as submitted to the Board by the Respondent. Mandatory Requirement 7 (MR7) of the Stage 1 MANDATORY REQUIREMENTS for the Preliminary Examination of Responsiveness under SECTION III- EVALUATION AND QUALIFICATION CRITERIA provides as follows: -

2 "Preliminary examination for Determination of Responsiveness

The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined below. The Standard Tender Evaluation Report Document for Goods, Services and Works for evaluating Tenders provides very clear guide on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further.

No	MANDATORY REQUIREMENTS	Tenderer's
<i>MR 1</i>	
.....	
MR 7	<i>Duly filled, signed and stamped price schedule</i>	
.....	

Section IV of the said Tender Document provides a format/sample of the Price Schedule that the bidders are required to fill and submit. The same appears as follows: -

"SECTION IV

1. The Specifications and Priced Activity Schedules

NO	DESCRIPTIION	UNIT COST (KShs)
<i>1</i>	<i>Supply & Install Dedicated Data Transmission to Medical Services Providers</i>	
<i>2</i>	<i>Supply & commission Dedicated Server to receive Smart data from hospitals</i>	
<i>3</i>	<i>Supply of smart cards (Printed & Loaded with Data)</i>	

4	<i>Develop and Implement data exchange capability with KenGen Systems (Days)</i>	
5	<i>Smartcard replacement Fee</i>	
6	<i>Cost of generating email statements to individual members and to the client monthly</i>	
7	<i>Bulk SMS (Recurring cost per month)</i>	
8	<i>Access fees per year for the duration of the contract</i>	

NB

1 Note:

- 1. Approximate number of employees is 2,600.**
- 2. Approximate number of the medical scheme beneficiaries is 11,200.**

Tenderer's name (Company)

Signature & Rubber-stamp_____

Date_____ "

Having reproduced the two provisions of the blank tender documents above, it is prudent to note down the observation of the Board on what the Applicant

submitted. At Page 31 of its tender bid is the Applicant's Price Schedule. The Board observes as follows:

- a. The price schedule is duly filled as per the format provided in the Tender Document.***
- b. The price schedule is duly signed.***
- c. The price schedule is NOT STAMPED with any rubber stamp.***

Faced with the above, the Evaluation Committee of the Respondents had this to say,

'... the firm [read the Applicant] attached a duly filled and signed schedule but did not stamp the schedule as per the tender requirement (MR7)'

In the Letter of Notification of Regret dated 22nd July 2022 issued to the Applicant he was notified as follows:

'1. ...your firm did not meet the following mandatory requirements as stipulated in the tender documents;

a. Did not stamp the price schedule as required in MR7. You only filled and signed.'

With the above extracts, we now turn to the law. It is in this statutory provisions that the Applicant has sought refuge in seeking to convince this Board to annul the Respondent's decision.

Article 227 of the Constitution of Kenya provides as follows:

"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—*
- a) Categories of preference in the allocation of contracts;*
 - b) The protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;*
 - c) Sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and*
 - d) Sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.” [Emphasis ours]*
-

Section 79(1), (2) and (3) of the Act which provides as follows: -

"79(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

79(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.

79(3) *A deviation described in subsection (2)(a) shall—*

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders”

Section 80(2) of the Act provides as follows: -

"80(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.*"

In Republic v Public Procurement Administrative Review Board ex parte Internet Solutions Ltd: Kenya Airports Authority Ltd & 3 Others (Interested Parties) [2021] eKLR., the Learned Judge, Jairus Ngaah said,

".... As much as section 79 (2) (a) says that a responsive tender shall not be affected by "minor deviations that do not materially depart from the requirements set out in the tender documents" there is no doubt that failure to comply with mandatory requirements cannot, by any stretch of imagination, be regarded as 'minor deviations'." [Emphasis ours]

In Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR the Court stated:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. 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."
[Emphasis ours].

Further, in Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR. Justice E.K. Ogola, stated;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities." [Emphasis ours]

Considering the above Constitutional, Statutory and case law, this Board is left with an inevitable conclusion that the tender bid by the Applicant was non-responsive and therefore could not proceed to the technical evaluation stage. We consider that the Applicant has disingenuously relied on Section 79(1) and 80(2) of the Act aimed at characterizing its failure to stamp the price schedule as a 'minor deviation'. That said, it is the Board's considered view that failure to comply with the mandatory requirement in the instant request for review does not in any way amount to a 'minor deviation' and as such the provisions of Section 79(2) of the Act would not be applicable in the Applicant's case. In our view, an Applicant who fails to meet the mandatory requirements which have otherwise been met by other bidders cannot expect any preferential treatment. In the Board's view if the requirements explicitly provided for in the blank tender document were to be 'waived' and/or 'flagged' as minor for any one bidder, it will run a travesty to the hallowed provisions of the principles of fairness as espoused in Article 227(1) of the Constitution of Kenya. It would mean that the Applicant's tender would be evaluated differently from those of the other bidders. The intended uniformity in evaluating bids received would clearly be lost and with it the very essence of making standard provisions and criteria for Tender Evaluations.

The Applicant has alleged that the Respondent contravened Section 79(1) and 80(2) of the Act. This Board draws its attention to the said Section 80(2) of the Act as read with Section 79(1). These two sections have the import of commanding a Procuring Entity that a responsive bid is one that meets **ALL** the eligibility and mandatory requirements in the Tender Document and

therefore the Evaluation Committee is bound to follow the procedure and criteria that is set out in the Tender Document beforehand. In this regard, it is our considered view that the Applicant's bid was rightfully evaluated. These provisions are in our view meant to entrench the National values and principles enshrined in Article 10 and establish a society founded on transparency and good governance. Suffice to add, that a Procuring Entity cannot amend the provisions of the Tender Document once it has been released to the public and tenderers invited to bid. Such changes can only be made by way addendum with notice to all parties and well before the Tender closing date, which is not the case in the subject tender.

The Applicant has questioned the contents of Respondent's Response when it was indicated that its Tender was responsive and thereafter indicated as disqualified. The Board is of the view that the Applicant has misapprehended the sequence of Tender processing. The clear stages are the Tender opening and thereafter Evaluation through the Mandatory/preliminary, Technical and Financial as well as Due Diligence. The part relied upon by the Applicant refers to the statement of acceptance of the Applicant's Tender at the tender opening. At that stage, the Applicant's and the Interested Party's tenders were stated to be responsive, whereas the tender by the third Bidder was unresponsive for failure to upload their tender document onto the system as required. The Applicant and Third Party tenders were then taken through to the Evaluation Committee for Evaluation starting with the Mandatory Preliminary stage at which point the Applicant's tender was found to be nonresponsive and was disqualified from the next stage of the Evaluation

process. The opening of Tenders is not an evaluation process and in deed the two Aspects are undertaken by different committees.

Whether the Interested Party's tender bid was properly evaluated and awarded the subject tender?

As reproduce elsewhere above, the Respondent opened the tender bids submitted as at the close of tendering period on 24th May 2022, evaluated vide an Evaluation Committee that released its report dated 23rd June 2022. The said evaluation report recommended the award of the subject tender to the Interested Party. That recommendation was seconded by the Head of Procurement in the professional opinion dated 6th July 2022 and subsequently a Notification of award was issued vide a letter dated 22nd July 2022. Subsequent to all these, the Applicant lodged this Request for Review on 4th August 2022 wherein it has set out a litany of reasons and grounds upon which it believes this Board should be convinced that the Interested Party was not properly evaluated and therefore unlawfully awarded the subject tender.

We have perused through the twelve (12) grounds on which this allegation is based. We find one ground that the Applicant has made an attempt to tender documentary proof for. That ground is number (ix). The Applicant in this ground alleges non conformity of the Interested Party to an alleged requirement to have been in existence for 5 years. This is supported with a copy of a Cr12 of the Interested Party. The rest of the grounds are allegations that the Interested Party lacks Technical Ability as required in the

tender Document. The Applicant in a Further Affidavit filed has made effort to show that it has investigated the processes of the Interested Party and is convinced that it could not have met the technical requirements in the Tender Document. This Board has previously stated that it will not turn itself into an investigative and/or Evaluation Committee to prove or disprove allegations especially of Technical nature made against an Evaluation Committee's assessment of a bidder's tender document. Such challenges in our view must be based on the documents contained in the bidders Tender Documents as presented at the Tender Closing date in response to the Tender issued by the Procuring Entity.

The allegations now made by the Applicant have some screen shots and statements whose authenticity we cannot verify and which have not been put to test. In our view, the allegations of the Interested Party's technical inability to deliver on the tender requirements are unsupported. The Applicant has thus not discharged its evidentiary duty to prove its allegations. In so holding, we find solace in the trite law holding and statute law under **Section 107,108 and 109 of the Evidence. Act CAP 80 of Laws of Kenya** that provides:

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The burden of proof lies upon the party who invokes any legal right or liability and substantially asserts the existence of some facts. The evidence tendered must meet the requirements of admissibility as required by the Evidence Act Cap 80 of the Laws of Kenya. It must be cogent and reliable in order to establish that which it is intended to establish. It is hence upon the parties to prove their allegations failure to which this Board is forced to only consider the facts before. In this instance it is the Confidential documents produced before if by the Respondent as required by the Act

The Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** had this to say:

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden

is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue” [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)].”

That said,

The Tender Document at Item No. 8 of the STAGE 2: TECHNICAL EVALUATION ON CAPACITY TO DELIVER THE CONTRACT of the Tender Document provides as follows: -

"STAGE 2: TECHNICAL EVALUATION ON CAPACITY TO DELIVER THE CONTRACT

Technical evaluation shall be carried out only if the tender is determined to be responsive to the preliminary examination.

Bidder must fulfill all the technical specifications of the solution. A written literature/ brochure with demonstration must be attached to proof technical conformance to the technical requirements

The Technical Evaluation will be based on compliance with the technical specifications set out in Section V of this tender document.

No	Item Description	Bidders Respons
.....	
8.	<i>The bio-metric smart card system has been in use by at least 15 healthcare service providers for over a period of at least 5 years. (Attach references)</i>	

.....	
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We note that the Tender Document does not indicate whether a bidder would be disqualified or be declared non-responsive if they do not conform or comply with the any of the requirements at the Technical Evaluation stage. Be that as it may, we have elsewhere above noted that the Interested Party is a Joint Venture. The Joint Venture Agreement was submitted on 6th May 2015 with the intention of forming the firm known as LCT Africa Limited. We note that it is that creature that is now the Interested Party in this request for review. The Joint Venture is composed of Compulynx Limited and Liaison Healthcare Limited both of whom are the shareholders within the Interested Party's firm as per the attached CR12. Nothing is before us that puts to question the Technical abilities of the joint venture partners who constitute the Tenderer and who we note have been in the medical field business for considerable periods of time.

Section 86 of the Act provides as follows: -

"86(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. [Emphasis ours]

86(2) *For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score."*

Section 67(1) of the Act states as follows: -

"67(1) *During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—*

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

- (b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;*
- (c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or*
- (d) the contents of tenders, proposals or quotations.*

.....

.....

67(3) *This section does not prevent the disclosure of information if any of the following apply—*

(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or (e) the disclosure is made to the Authority or Review Board under this Act.

67(4) *Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67(2)(d)(iii).*

67(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.”

Considering the above provisions, the Board notes that from the Evaluation Report, the Interested Party was determined to be the lowest evaluated bidder at the Financial Evaluation stage in terms of Section 86(1)(a) of the Act. It's bid was determined responsive at both the Mandatory/Preliminary stage and Technical Evaluation stage.

Additionally, we opine that the Applicant is a tenderer. As such, it cannot mutate and assume the roles otherwise performed by the procuring entity's Evaluation Committee of evaluating tenders. It is the Respondent that sets the criteria for evaluation, it has access to the various tender bids, which help it to gauge and evaluate each bid's responsiveness based on the relevant laws and the criteria for evaluation set out in the tender document.

The Applicant cannot therefore purport to determine the responsiveness of the Interested Party's tender.

As regards the complaint that there was illegal access or disclosure of confidential information and documents of the Interested Party held by the Respondent, we note that the CR12 certificates submitted by the Applicant herein is dated 27th July 2022 while that submitted by the Interested Party in their tender bid is dated 12th May 2022. In essence, the parties have different documents and the complaint by the Interested Party on breach of confidentiality in regard to its documents is unfounded. The situation would

have been different had the certificate submitted by the Applicant been similar to one supplied by the Interested Party at least with regards to the date appearing on it or suggesting that it is the prima facie date of obtaining it from the Company's Registry.

The Applicant has in its Further Affidavit dated 19th August and filed on 22nd August, 2022 and Putting reliance on the Constitution stated that it has a right to access information held by the Respondent a state Agency, regarding the Interested Party's Tender Documents. We think that this is a misapprehension of the position in regard to Tendering Processes. In our view, Section 167 as read together with Regulation 203, is clear that such Documents are Confidential and can only be availed to the Board for the limited purpose of making a determination on any Request for Review filed before it.

We will note close this decision without addressing the allegation by the Applicant that the Interested Party did not meet the criteria of *'five (5) years of existence'*. The Applicant has based this on the date of registration of the Interested Party. The CR12 attached by the Interested Party dated 27th July 2022 indicates the date of registration of the Interested Party as 23rd January 2019. At this point we refer to provisions of Item No. 8 of Stage 2 on Technical Evaluation on Capacity to Deliver the Contract in the blank Tender Document. The requirement therein is for the biometric card system to have **been in use by at least 15 healthcare service providers for over a period of at least 5 years.** We note that there is no such requirement as the tenderer to have been in existence for at least five (5) years. We shall say no more this issue.

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 dated 1st August 2022 and lodged on 4th August 2022: -

- 1. The Request for Review against the decision of the Respondents in awarding Tender No. KGN-HR-05-2022 for Provision of Biometric Smart Card Technology with SMS Alerts to the Interested Party be and is hereby found unmerited and therefore dismissed,**

- 2. The Respondent be and is hereby set at liberty to continue with the procurement process with respect to Tender No. KGN-HR-05-2022 for Provision of Biometric Smart Card Technology with SMS Alerts to its logical conclusion including preparing and entering into a contract with the Interested party in accordance with Section 135(3) of the Act,**

- 3. In view of the fact that the procurement process is still ongoing, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 25th Day of August, 2022.



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VICE-CHAIRPERSON (Panel Chair)
PPARB



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SECRETARY
PPARB

