

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 75/2022 OF 19TH AUGUST 2022

BETWEEN

TEKNOHUB LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER,

**STATE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING, URBAN
DEVELOPMENT AND PUBLIC**

WORKS.....RESPONDENT

Review of the decision of Ministry of Transport, Infrastructure, Housing and Urban Development & Public Works, State Department for Housing and Urban Development, dated 28th July 2022 in the matter of Tender No. MTIHU DPW/SDHUD/CSHSF/046/2021-2022 for Proposed Supply, Design, Development, Customization, Installation, Training, Configuration, Testing, Commissioning and Technical Support of Enterprise Resource Planning (ERP) Information System.

BOARD MEMBERS

1. Mrs. Njeri Onyango - Vice Chairperson (panel Chair)

Two addenda were issued as follows:

- a) **Addendum 1** was issued to interested and eligible bidders to clarify that the Tender security required was Kshs 500,000 from a bank or an insurance company approved by PPRA.
- b) **Addendum 2** was issued to notify interested and eligible bidders that the submission/closing date had been extended from Tuesday 17th May, 2022 at 11.00am to Tuesday 24th May, 2022 at 11.00 a.m.

Tender Submission Deadline and Opening of Bids

By the Tender submission deadline of 24th May 2022, the Procuring Entity had received a total of ten (10) bids. The subject tender was opened by a Tender Opening Committee and the following tenderers were recorded as having submitted their bids per the Tender opening summary:

S/No	Firm Name	Contacts/ Postal Address /Email Address	Bid Amount (Kshs)	Bid Security Amount (Kshs)	Bid Security Provider	No. of Copies
1.	Kobby Technologies Limited	P.O. Box 5824 Nairobi	19,845,869.28	500,000	NCBA Bank	1 Original 1 Copy 1 Soft Copy
2.	Pensoft Systems LTD	P.O. Box 52624 Nairobi	67,496,241.00	500,000	The Monarch Insurance	1 Original 1 Copy 1 Soft Copy
3.	Teckno Hub Limited	P.O. Box 35120 Nairobi	38,509,680.00	500,000	AMACO	1 Original 1 Copy 1 Soft Copy

1. Preliminary Evaluation
2. Technical Evaluation
3. Financial Evaluation

Preliminary Evaluation

The tenders were examined for compliance with mandatory requirements as set out in the tender document.

The following two (2 No.) bidders were found to be non-responsive at the Preliminary Evaluation stage and therefore did not qualify for further evaluation.

Summary of non-responsive bidders

Bidder No.	Bidder's Name	Reasons
2	M/s Pensoft Systems Ltd	<ul style="list-style-type: none"> • The Form of tender provided was filled, signed but not stamped • Confidential Business Questionnaire provided was filled, signed but not stamped
9	M/s Liberty Afrika Technologies Ltd	<ul style="list-style-type: none"> • The Form of tender provided was filled, signed but not stamped • Confidential Business Questionnaire provided was filled, signed but not stamped • The bidder did not submit manufacturers' Authorization or accreditation from

Technical Evaluation

The technical evaluation was conducted in two evaluation stages:

- a) Technical mandatory requirement evaluation
- b) Scoring technical evaluation

a) Technical mandatory requirement evaluation

In this stage:

- a) Bidders were to respond with YES/ NO and attach all relevant certified documentation for each item.
- b) Bidders were required to meet all the mandatory technical requirements to proceed to next level of evaluation.
- c) Bidders who failed to attach the required documentation/ brochure of their proposed solution with an explanation indicating the correct page on the page number column were disqualified.

The following Four (4) bidders were found to be non- responsive at the technical mandatory stage and therefore did not qualify for the next stage of in the technical evaluation:-

Bidder No.	Bidder's Name
4	M/s COSEKE (K) Ltd COSEKE (K) Ltd in Joint Venture with DSL Systems and Solutions Limited
7	M/s Dynasoft Business Solutions Ltd
8	M/s Appkings Solutions Limited
10	M/s Green Com Enterprise Solutions Limited

b) Scoring technical evaluation

Firms that met all the Technical mandatory evaluation requirement were subjected to a scoring at the scoring technical evaluation stage at a scale of 0 to 100 with the pass mark as 70 marks. The firms were evaluated on a scoring matrix as shown below.

The four (4) bidders below met the minimum qualifying score of 70 points at the scoring technical stage and therefore qualified for financial evaluation.

Responsive Bidders

Bidder No.	Bidder's Name	Score
4	M/s COSEKE (K) Ltd in Joint Venture with DSL Systems and Solutions Limited	77
7	M/s Dynasoft Business Solutions Ltd	70
8	M/s Appkings Solutions Ltd	94

2. Bidder No.10 did not complete the Price Schedules Forms as required by Clause 19 of the ITT and under the financial evaluation criteria and therefore its Financial Proposal was considered incomplete. The bidder only gave the grand total and did not give itemized prices for the ERP components. **It's proposal was therefore not complete and it was adjudged non-responsive.**

b) Checking arithmetical errors in computation and summations.

The Financial Proposals for Bidder No. 4, 7 and 8 having been determined responsive were subjected to arithmetic and error checks as shown below.

Arithmetic and other Error Check

Bid No	Name of Tenderer	Tender Sum (KShs)	Corrected Tender Sum (KShs)	Error (KShs)	% Error
4	M/s COSEKE (K) Ltd in Joint Venture with DSL Systems and Solutions Limited	74,706,784.00	-	None	None
7	M/s Dynasoft Business Solutions Ltd	82,809,616.00	-	None	None
8	M/s Appkings Solutions Ltd	89,958,000.00	-	None	None

c) Ranking of Bids

Due Diligence

Pursuant to Section 83 of the Public Procurement and Asset Disposal Act, 2015 and attendant Regulations, the evaluation committee carried out due diligence on the tender submitted by **M/s COSEKE (K) Ltd of P.O. Box 1208, Nairobi** in Joint Venture with **M/s DSL SYSTEMS AND SOLUTIONS LIMITED of P.O. Box 3209, Nairobi** from 27th June to 8th August, 2022. Due diligence was conducted through written correspondences to financial institutions and clients of the firms to confirm authenticity of the tender security /credit line and firms' specific experience respectively. The evaluation committee then analyzed the responses and compiled a due diligence report. The committee was therefore satisfied that **M/S COSEKE (K) Ltd of P.O. Box 1208, Nairobi** in Joint Venture with **DSL SYSTEMS AND SOLUTIONS LIMITED of P.O. Box 3209, Nairobi** had given truthful information and they are capable of Supplying, Designing, Developing, Customizing, Installing, Training, Configuring, Testing, Commissioning and Technical Support of Enterprise Resource Planning (ERP) Information System.

Professional Opinion

By a professional opinion dated 27th July 2022 addressed to the Respondent, the Procuring Entity's Head Supply Chain Management Unit, Mr. John Maina, noted that the subject tender was budgeted for and funds had been confirmed available, and that the evaluation process together with the due diligence was carried out as per the set criteria in the Tender Document. He concurred with the Evaluation Committee's recommendation of the award of the subject tender.

In a Notification of Appeal and a letter dated 19th August 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") notified the Respondents of the existence of the Request for Review and suspension of procurement proceedings for the subject tender while forwarding 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 Respondent was requested to submit any information and arguments about the subject tender within five days pursuant to the PPARB Circular No. 2/2020 dated 24th March 2020.

In opposition of the Request for Review, the Respondent filed its Response to the Applicant's Request for Review dated 22nd August 2022 and filed on 23rd August 2022.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with

The Applicant's case

The Applicant has relied on four (4) grounds in support of its application. The Applicant avers that it provided the business functional requirements at page 105 of its bid document as required yet that was the reason given for declaring it unsuccessful.

The Applicant further states that it provided system notifications and alerts at pages 292, 293 and 305 in its bid document and not at page 24 as asserted by the Respondents which guided it in arriving at its decision of declaring the Applicant's bid unsuccessful.

The Applicant avers that if at all the systems notifications and alerts was indicated in a wrong reference page in the bid document the error was minor, inadvertent and regrettable and did not affect the validity of the bid document.

That the Respondent unfairly declared its bid document to be non-responsive in the technical mandatory evaluation stage despite the same being responsive and that such evaluation offends the provisions of Section 79 of the Act.

The Respondent's Case

In response to the allegations raised in the Request for Review, the Respondent on the issue of System Notification and Alerts states that the evaluation committee disqualified the bidder having noted that system notification and alerts appeared under page 24 which entailed organizational

In its rejoinder, the Applicant noted that the Respondent reiterated that it referenced the wrong page in its tender document hence leading to its tender being found non-responsive and states that if it did quote the wrong reference page in its bid document the same cannot be said to have qualified as a material deviation, reservation and or omission as is contemplated under clause 31 of subject the tender.

The Applicant further states that material deviation, reservation or omission as provided in the said tender document is one that:

a. if accepted, would:

i.) Affect in any substantial way the scope, quality, or performance of the Information System specified in the Contract; or

ii.) Limit in any substantial way, in consistent with the tendering document, the Procuring Entity's rights or the Supplier's obligations under the proposed Contract; or

b.) if rectified, would unfairly affect the competitive position of other Suppliers presenting substantially responsive Tenders.

The Applicant avers that the alleged quote of the wrong referenced page does not in any way affect the scope, quality or performance of the information system in the Tender Document, neither does it limit in any way the Procuring Entity's rights or the Supplier's obligation in the proposed contract and furthermore were it to be rectified it does not give the Applicant a competitive edge over other suppliers presenting their substantially responsive bid documents.

the functional, architectural and performance requirements as is stated in its response. It is therefore apparent to the Applicant that the Respondent is in concurrence that the Applicant correctly provided the functional, architectural and performance requirements as per the Tender Document.

The Applicant avers that it appears that the Respondent is on a fishing expedition of justifying its false finding that the its bid was non-responsive when it is clear that the Respondent is struggling to maintain the same position as it keeps changing its reasons for finding the tender non-responsive.

It is the Applicant's position that it met all the technical mandatory requirements and was the lowest evaluated bidder having quoted Kshs. 38,509,680.00 as against the Interested Party who was awarded the tender at Kshs. 74,706,784.00 and that the Respondent can only be said to have achieved value for its money only if it awards the subject tender to the bidder offering a cost effective bid of which it did.

The Interested Party's case

The interested party submits that it filled, signed and stamped the Price schedule forms as prescribed. That according to ITT Clause 19 and Financial Evaluation Criteria, it submitted the Grand Total and itemized prices for the ERP components required per the Procuring Entity requirements.

In the circumstances, the interested party prays for the Procuring entity's decision awarding the subject tender to it be upheld as they are more than

".....

Your tender was non-responsive in the Technical mandatory requirement evaluation stage for the following reasons:

- ***The Business functional requirements to be met by the system was not provided as per the guidelines of the tender document.***
- ***System alerts and notifications indicated a wrong reference page. Page 24 entailed organizational charter and not system alerts and notification.***

....."

The Applicant contended that the Procuring Entity erred in finding the Applicant bid as unresponsive at the Technical mandatory requirement evaluation stage. The Applicant asserted that its bid complied with the provisions of the Tender Document. The Applicant contended that the Procuring Entity breached the provisions of Section 79 the Act.

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

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the

39.2 The Procuring Entity's evaluation of tenders will consider technical factors, in addition to cost factors. The Technical Evaluation will be conducted following the Criteria specified in Section III, Evaluation and Qualification Criteria, which permits a comprehensive assessment of the technical merits of each Tender. All tenders that fail to pass this evaluation will be considered non-responsive and will not be evaluated further. [Emphasis ours]

Section III (Evaluation and Qualification Criteria) of the Tender Document sets out the Technical Evaluation Criteria which is separated into two evaluation stages being:

- a. Technical **mandatory requirement** evaluation.
- b. Scoring technical evaluation.

The Board having studied the blank Tender Document submitted as part of the Confidential documents by the Respondent notes that the mandatory technical evaluation provisions are set out as follows:

.....			
System alerts and notification	The system should send functionality and availability alerts to the administrator and should have self-healing features in case of an error, and enable Error logging			

Notes:

- a) ***Bidders to respond with YES/ NO and attach all relevant certified documentation for each item***
- b) ***Bidders will be required to meet all the above mandatory technical requirements to proceed to next level of evaluation.***
- c) ***Bidders who fail to attach the required documentation/ brochure of their proposed solution with an explanation indicating the correct page on the page number column in the table below will lead to disqualification.***

c) *Item-by-Item Commentary on the Technical Requirements demonstrating the substantial responsiveness of the overall design of the System and the individual Information Technologies, Goods, and Services offered to those Technical Requirements.*

In demonstrating the responsiveness of its tender, the Supplier must use the Technical Responsiveness Checklist (Format). Failure to do so increases significantly the risk that the Supplier's Technical Tender will be declared technically non-responsive. Among other things, the checklist should contain explicit cross-references to the relevant pages in supporting materials included the Supplier's Technical Tender. [Emphasis ours]

Note: The Technical Requirements are voiced as requirements of the Supplier and/or the System. The Supplier's response must provide clear evidence for the evaluation team to assess the credibility of the response. A response of "yes" or "will do" is unlikely to convey the credibility of the response. The Supplier should indicate that—and to the greatest extent practical—how the Supplier would comply with the requirements if awarded the contract. Whenever the technical requirements relate to feature(s) of existing products (e.g., hardware or software), the features should be described and the

i)

ii) Business Function Requirements to be met by the Information System

2.1 The Information System MUST support the following business functions

1)[describe, at the appropriate level of detail for the Information System being supplied and installed: each specific business processes and procedures that will be automated by the Information System.]

2)Note: These business process descriptions may be textual as well as presented in a formal system analysis formats (e.g., process model and data model, use-case model, entity-relation diagrams, swim-lane diagrams, etc.)

As appropriate, prepare a subsection for the Background and Informational Materials with samples of existing standardized reports, data entry forms, data formats, data coding schemes, etc. which the Information System will need to implement; reference these materials.

(Note: The bidder MUST fill Annex 1 to Annex 25 to indicate their response to user requirements.)

Function	Requirement	Bidders No.		
		B1	B3
Functional Architectural and Performance requirements	The solution shall support a multi-tier architecture with each tier fully independent. To allow for Security, Easy to manage, Scalability, Flexibility Must have capabilities of integrating with email systems	Y	Y	
Business functional requirement to be met by the system as outlined in user requirement	The system MUST meet the user requirement as outlined in the user requirement schedule <i>Refer to Annex 1 to Annex 25</i>	Y	N	
System alerts and notification	The system should send functionality and availability alerts to the administrator and should have self-healing features in case of an error, and enable Error logging	Y	N	
Responsive/Non Responsive(R/NR)		NR	NR	

KEY

Y- Compliant with requirements

N - Non-compliant with requirements

R - Responsive

NR-Non-Responsive

***and not page 24 as asserted in your letter
(annex 02)***

***We hereby advise you to rescind your decision and
consider our bid failure to which, we shall seek
guidance from the PPRB as per the law.***

....."

Upon issuance of this clarification, the Respondent contends that it perused the referenced page 091 of the submitted tender document and noted that it contained functional, architectural and performance requirements which did not make reference to system notification and alerts as per what the Tender document required.

The Applicant in its Supplementary Affidavit dated 30th August 2022 and filed on even date stated that the information required by Respondent on systems notifications and alerts is contained in its submitted tender document at pages 292, 293 and 305.

The Board observes from the Applicant's Tender Document that the referenced pages fall under Section II Scoring of the Technical Requirements where Proposed Solution run from page 290 to page 341. There is no subheading indicating that pages 292, 293 and 305 make reference to Systems Notifications and Alerts.

The Applicant in its submissions dated 30th August 2022 states that if at all the systems alerts and notifications was indicated in a wrong

Clause 31.3 further provides that:

31.3 A substantially responsive Tender is one that meets the requirements of the tendering document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that;

a) If accepted, would:

i. Affect in any substantial way the scope, quality, or performance of the Information

System specified in the Contract; or

ii. Limit in any substantial way, in consistent with the tendering document, the Procuring Entity's rights or the Supplier's obligations under the proposed Contract; or

b) if rectified, would unfairly affect the competitive position of other Suppliers presenting substantially responsive Tenders.

Clause 31.4 however dictates that all requirements of Section V ought to be met without any material deviation, reservation, or omission and states that:

"The Procuring Entity shall examine the technical aspects of the Tender in particular, to confirm that all requirements of Section V, Procuring Entity's Requirements have been met without any material deviation, reservation, or omission."

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

(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.

Sections 79(1) of the Act has 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.

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 held:

".... 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]

even if they contain minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents, or if they contain errors or oversights that can be corrected without touching on the substance of the tender. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, 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.”

The upshot of the foregoing is that the Board is of the view that the Procuring Entity evaluated the Applicant's bid at the Technical mandatory requirement evaluation stage in accordance with the evaluation criteria set out in the Tender Document and in accordance with Section 79 and 80 (2) of the Act and the principles provided in Article 227(1) of the Constitution.

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

Dated at Nairobi, this 8th day of September 2022



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VICE CHAIRPERSON (Panel Chair)
PPARB



.....
SECRETARY
PPARB