

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 34/2010 OF 15<sup>TH</sup> JUNE, 2010**

**BETWEEN**

**ALLIANCE TECHNOLOGIES SOLUTIONS LTD.....APPLICANT**

**AND**

**PUBLIC PROCUREMENT OVERSIGHT AUTHORITY.....PROCURING  
ENTITY**

Review against the decision of the Tender Committee of the Public Procurement Oversight Authority, dated 3rd June, 2010 in the matter of Tender No. IFB No. PPOA/ICB/05/2009-2010 for Supply of E-Procurement Software

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Amb. C. M. Amira	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Joshua W. Wambua	-	Member

## **IN ATTENDANCE**

Ms. Kerina A. Rota - Secretariat  
Ms. Juliet Wambulwa - Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Alliance Technologies Ltd**

Mr. Murete Kithigi - Lawyer  
Mr. Waithaka Ngigi - Managing Director  
Mr. Andrew Kamau - General Manager  
Mr. Kamau Tirus - PM

### **Procuring Entity, Public Procurement Oversight Authority**

Mrs. Jane Njoroge - Ag. Director, Technical Services  
Mr. H. K. Kirungu - Manager, Policy & Research  
Mr. Jerome Ochieng' - ICT Manager  
Mr. Peter K. Ndung'u - Ag. Deputy Manager Compliance  
Mr. Martin Okwatta - Head, Procurement  
Mr. Lawrence Kanyinyi - ICT Officer  
Mrs. Jane W. Macharia - Human Resource Officer  
Ms. Caroline Warothe - Compliance Officer  
Mr. James Kilaka - Procurement  
Ms. Melody Karani - Procurement

### **Interested Candidates**

Mr. Mohammed Nyaoga - Advocate, C1 India  
Mr. Muthomi Thiankolu - Advocate, C1 India  
Mr. Bochere Omariba - Lawyer, C1 India

Mr. Akshaya K. Rath - AVP- Sales, C1 India  
Mr. Sabu Joseph - BOM, C1 India  
Ms. Laura Kisirio - Software Consultant, Openview  
Business System

## **BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidates and upon considering the information in all documents before it, the Board decides as follows: -

## **BACKGROUND**

An Expression of Interest (hereinafter "EOI") was advertised in the Daily Nation and The Standard Newspapers of Wednesday 13<sup>th</sup> May, 2009, and The East African Newspaper of May, 18<sup>th</sup> 2009. The Notice was also posted in the United States Government Advertisement portal fedbizopps, UN DG Business, tenders.go.ke and the Procuring Entity's website.

The deadline for submission for the EOI was Friday May 29<sup>th</sup> 2009 and thirty six (36) firms submitted their bids. The EOI was evaluated and the following fifteen (15) firms shortlisted and issued with the Request for Proposal document on 29<sup>th</sup> December 2009:-

M/s Alfa Web software Company

M/s Combinenet

M/s SRA International

M/s Development Gateway

M/s Deloitte Consultant Limited

M/s Winpro Technologies  
M/s TATA Consultancy Services  
M/s VESL Limited  
M/s Open View Business Systems Limited  
M/s Pegrume Ltd  
M/s Computech Ltd  
M/s Standard IT Solutions Ltd  
M/s CI India PVT Ltd  
M/s Procservice  
M/s Alliance Technologies

A pre-bid conference was held on 15<sup>th</sup> January, 2010.

**Closing/Opening:**

The tender was closed/opened on Friday, 29<sup>th</sup> January, 2010. Eight (8) firms of the 15 responded and the following were their tender prices:

**Table I**

No.	Tenderer	Read Out Amount (USD)
1	Delloite Consulting Company	1,939,329.60
2	Openview Business Systems	612,627.00
3	C1 India	1,254,000.00
4	Alfa Web Software	500,000.00
5	Wipro Technologies	1,548,100.00
6	Computech Kenya Limited	1,907,762.33
7	Alliance Technologies Solutions Limited	1,994,267.00
8	VESL Technologies Limited	2,107,398.00

**Evaluation**

The evaluation was carried out in the following stages:

- i) Preliminary Evaluation

ii) Technical Evaluation

iii) Financial Evaluation

iv) Combined Technical and Financial Evaluation

### Preliminary Evaluation

The bidders were evaluated on completeness and compliance to the tender submission requirements and the results were as tabulated below:

**Table II**

No.	Name of Document	Delloite Consulting Company	Openview Business systems	C1 India	Alfa Web Software	Wipro Technologies	Computech Technologies Limited	Alliance Technologies Solutions Limited	VESL Technologies Limited
1	Bid submission form (completed and signed)	Yes	No	Yes	Yes	Yes	Yes	Yes	No
2	Price schedule duly completed	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
3	Valid Bid Security (\$15,000)	No	Yes	Yes	No	Yes	Yes	Yes	Yes
4	Financial Capability (BDS - ITB 6.1a)	Yes	Yes	Yes	No	Yes	Yes	Yes	No
5	Written confirmation authorizing the signatory of the bid (ITB sec. 13.1d)	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
6	Eligible countries for the provision of goods, works and services(ITB sec III)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
7	Manufacturer Authorization (BDS - ITB 6.1b)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	<b>Responsiveness</b>	<b>No</b>	<b>No</b>	<b>Yes</b>	<b>No</b>	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>	<b>No</b>

The following bidders M/s Delloite Consulting Company; Open View Business Systems; Alfa Web Software and VESL Technologies Ltd were declared non-responsive at this stage.

## Technical Evaluation

The technical evaluation was undertaken in two stages as follows:

### i) Desktop technical evaluation

The evaluation criterion was developed from the functional and Technical requirements as stated in the statement of works. The results were as tabulated below:

**Table III**

No.	Specification	Marks (200)	C1 India	Wipro Technologies	Computech Technologies	Alliance Technologies Solution Ltd
1	Technical Capability	15	14.00	14.33	10.67	12.00
	Technical Staff	15	14.33	13.67	11.00	12.00
2	Implementation	25	22.33	20.00	5.00	21.00
3	Reference	5	5.00	4.67	4.67	3.00
4	Procurement planning;	15	12.67	14.00	12.33	13.00
5	Supplier registration and management;	15	14.67	15.00	12.33	14.00
6	Requisition and Purchase order management;	15	9.33	14.00	10.67	14.00
7	Catalogue management;	10	8.67	7.67	8.33	8.67
	e-Tendering;	30	29.67	29.67	20.00	29.00
Phase II						
1	Contract management;	10	9.67	10.00	7.00	9.67
Phase III						
1.	e-Payments; and	5	5.00	5.00	4.00	0.00
2.	e-Auction;	10	10.00	10.00	7.67	9.33

9	Technical Specification	30	28.33	29.33	20.00	29.33
Total		200	183.67	187.33	133.67	175.00
Out of 45		45	41.33	42.15	30.08	39.38
%		100	91.84	93.67	66.84	87.51

M/s Computech Technologies scored less than 70% and was declared non-responsive. Only bidders who scored 70% and above of the desktop technical evaluation were to be subjected to the technical and functional demonstration evaluation.

### **ii) Technical and Functional Demonstration of the Solution**

The short listed bidders from the desktop technical evaluation presented their e-procurement solution to the evaluators. The demonstrations were evaluated based on the following criteria:

- a. Demonstration of the functional and technical capabilities of the system and how it meets the requirements of the Government of Kenya;
- b. Clear understanding of the public procurement process and a demonstration of how the proposed solution delivers this;
- c. The level of vendor understanding of e-procurement and a demonstration of how all stakeholders needs are catered for by the proposed system;
- d. User friendliness of the system;
- e. Knowledge of the bidders in explaining how the system works; and

f. Reporting capability of the system.

The results were as tabulated below.

**Table IV**

No.	Specification	Marks (200)	C1 India	Wipro Technologies	Alliance Technologies Solution
1.	Procurement planning;	10	6.00	7.17	7.33
2.	Supplier registration and management;	10	6.83	9.17	8.00
3.	Requisition and Purchase order management;	10	5.50	8.50	7.67
4.	Catalogue management;	10	5.17	8.33	8.33
5.	e-Tendering;	20	12.50	18.17	13.83
Phase II					
1	Contract management;	10	4.67	8.83	6.67
Phase III					
1.	e-Payments; and	5	3.50	4.00	3.50
2.	e-Auction;	5	3.50	4.50	3.50
9	Technical Specification	20	10.83	17.50	16.17
Total		100	58.50	86.17	75.00
Out of 35		35	20.48	30.16	26.25



### iii) Financial Evaluation

As per the statement of works, the financial evaluation was done as follows:-

**Table V**

Cost Item		C1 India	Wipro Technologies	Alliance Technologies
Initial License cost	Purchase Order Management	950,000.00	380,000.00	0
	e-tendering		352,000.00	0
	Catalogue management		0	0
	License for the suppliers(if any)		110,000.00	0
Annual Technical Support	Purchase Order Management	209,000.00	86,500.00	38,798.00
	e-tendering		63,600.00	31,523.36
	Catalogue management		0	23,036.32
	Licenses(if any)		24,200.00	0
Implementation Cost	Purchase Management	194,000.00	40,000.00	484,975.00
	Supplier Management		20,000.00	394,042.00
	e-tendering		48,000.00	348,576.00
	catalogue management		20,000.00	287,954.00
	Overall Project Management		0	30,000.00
TOTAL		1,487,200.00	1,040,100.00	2,087,624.68
FINANCIAL SCORE		13.99	20.00	9.96

### iv) Combined Technical and Financial Scores

**Table VI**

Evaluation Area	Evaluation Sub-area	Assigned % Weight	C1 India	Wipro Technologies	Alliance Technologies Solutions Limited
Technical Evaluation (80%)	Desktop Technical Evaluation	45	41.33	42.15	39.38
	Technical and functional Demonstration of the Solution	35	20.48	30.16	26.25
Technical Evaluation Totals		80	61.81	72.31	65.63
Financial Evaluation (20%)		20	13.99	20	9.96
Total		100	75.8	92.31	75.59

## **RECOMMENDATIONS**

The Evaluation Committee then recommended M/s Wipro Technologies who had the highest evaluated score for award after negotiations. The Bidder's evaluated Bid Price was USD 1,040,100.00

## **THE TENDER COMMITTEE DECISION**

The PPOA Tender Committee in its meeting held on 26<sup>th</sup> April, 2010 deliberated on the recommendations of the Evaluation Committee and recommended a post-qualification be done on the recommended bidder M/s Wipro Technologies pursuant to Clause 31 of the Instruction to Bidders and Regulation 52 of the Public Procurement Disposal Regulations, 2006. In addition, the Tender Committee recommended that the Evaluation Committee reconsider the comparison of prices using the quoted prices for the implementation of phase 1 as per the Statement of Works.

## **POST QUALIFICATION**

During the post qualification process, the Evaluation Committee received information from the World Bank that the recommended bidder M/s Wipro Technologies had been debarred from participating in World Bank Procurements for four years, a period that would conclude in mid-2011. This was communicated to USAID, the financiers of the project, who indicated that they were of the opinion that it would be inappropriate for the Procuring Entity to enter into a contract with United States Government funds with a firm that had been debarred by the World Bank. As a result, the Evaluation Committee pursuant to Section 7 of the Public

Procurement and Disposal Act, 2005 re-evaluated the financial proposals excluding the bid from Wipro Technologies.

The financial evaluation was re-done using the initial license cost and implementation cost of phase 1. The financial proposal had a weight of 20% and therefore the lowest financial proposal was allocated 20 points and the other calculated on a prorata basis as below:-

**Table VII**

Cost Item		C1 India	Alliance Technologies
Initial License cost	Purchase Order Management		0
	e-tendering		0
	Catalogue management	950,000.00	0
	License for the suppliers(if any)	110,000.00	0
Implementation Cost	Purchase Management		484,975.00
	Supplier Management		394,042.00
	e-tendering		348,576.00
	catalogue management	194,000.00	287,954.00
	Overall Project Management	0	478,720.00
TOTAL		1,254,000.00	1,994,267.00
FINANCIAL SCORE		20.00	12.58

**Combined Technical and Financial Scores**

**Table VIII**

Evaluation Area	Evaluation Sub-area	Assigned % Weight	C1 India	Alliance Technologies Solutions Limited
Technical Evaluation (80%)	Desktop Technical Evaluation	45	41.33	39.38
	Technical and functional Demonstration of the Solution	35	20.48	26.25
Technical Evaluation Totals		80	61.81	65.63
Financial Evaluation (20%)	-	20	20	12.58
Total		100	81.81	78.21

## Annual Technical Support

The Costs of annual maintenance as indicated by the bidders for phase one was as below:-

**Table IX**

Cost Item		C1 India	Alliance Technologies
Annual Technical Support	Purchase Order Management		38,798.00
	e-tendering		31,523.36
	Catalogue management	209,000.00	23,036.32
	Licenses(if any)	24,200.00	0
<b>TOTAL</b>		<b>233,200.00</b>	<b>93,357.68</b>

The Evaluation Committee noted that M/s Alliance Technologies financial proposal did not give a cost for annual technical support of catalogue management. The bidder had however stated that the total annual maintenance was charged at 8% of the total cost of implementation, less project management services. The Evaluation Committee therefore calculated 8% of the cost of implementing catalogue management (i.e. USD. 287,954.00) and arrived at USD 23,036.32. This was communicated to the bidder who accepted the error and the cost added to his annual technical support.

The cost of annual technical support did not form part of the implementation costs of phase one but was to form part of the contract as USAID had given an undertaking that they will pay the annual technical support for the first year.

## **RECOMMENDATIONS**

M/s C1 India had the highest evaluated bid score and was therefore recommended for award at their quoted price of **USD 1,254,000.00**. The

contract was however to include an Annual Technical support of **USD 233,200** to cater for the first year annual technical support.

### **TENDER COMMITTEE DECISION**

The Procuring Entity's Tender Committee in its meeting held on 2<sup>nd</sup> June, 2010 awarded the tender to the recommended bidder M/s C1 India at their quoted price of USD 1,254,000. Notification of tender award was done simultaneously to both successful and unsuccessful tenderers on 3<sup>rd</sup> June 2010.

### **THE REVIEW**

This Request for Review was lodged by M/S. Alliance Technologies Solutions Ltd on 15<sup>th</sup> June, 2010 against the decision of the Tender committee of PPOA in the matter of Tender Number IFB No. PPOA/ICB/05/2009-2010 for Supply of e- Procurement Software.

The Applicant was represented by Mr. Marete Githinji Advocate, while the Procuring Entity was represented by Mr. H. K. Kirungu, Manager. The Successful Bidder, C1 India, was represented by Mr. Mohammed Nyaoga, Advocate. The Applicant has raised eleven grounds of Appeal and urged the Board to make the following orders:

1. ***"That the Procurement Proceedings be annulled in their entirety.***
2. ***That in the alternative to (1) above the Board be pleased to give directions to the procuring entity with respect to anything to be done***

*or redone to ensure that the procurement proceedings are fair and unbiased.*

3. *That the Applicant be awarded the costs of and incidental to these proceedings.*
4. *Such other or further orders and/or directions the Honourable Board"*

## **PREAMBLE**

This case presents a unique situation on how the Public Procurement and Disposal Act, 2005 is structured. The Public Procurement Act 2005 came into operation on 1<sup>st</sup> January, 2007 through operationalization by the Minister for Finance by Kenya Gazette No.77 of 9<sup>th</sup> December, 2006.

Prior to the enactment of this Act, Public Procurement in Kenya was regulated by the Exchequer and Audit (Public Procurement) Regulations, 2001 made by the Minister for Finance under the Exchequer and Audit Act Chapter 455 of the Laws of Kenya.

Upon enactment of the Public Procurement and Disposal Act, 2005, the Review Board was continued under Section 25 of the Act which provides as follows:-

- "25. (1) The Public Procurement Complaints, Review and Appeal Board established under the Exchequer and Audit (Public Procurement) Regulations, 2001 is continued under this Act as the Public Procurement Administrative Review Board.*
- (2) The composition and membership of the Review Board shall be in accordance with the regulations.*

- (3) *The Authority shall provide administrative services to the Review Board.*

The Act also created an Authority known as the Public Procurement Oversight Authority (PPOA). The functions of the Authority are set on at Section 9 which provide as follows:-

*"9. The Authority shall have the following functions –*

- (a) *to ensure that the procurement procedures established under this Act are complied with;*
- (b) *to monitor the public procurement system and report on the overall functioning of it in accordance with section 20(3)(b) and present to the Minister such other reports and recommendations for improvements as the Director-General considers advisable;*
- (c) *to assist in the implementation and operation of the public procurement system and in doing so –*
  - (i) *to prepare and distribute manuals and standard documents to be used in connection with procurement by public entities;*
  - (ii) *to provide advice and assistance to procuring entities;*
  - (iii) *to develop, promote and support the training and professional development of persons involved in procurement; and*

- (iv) to issue written directions to public entities with respect to procurement including the conduct of procurement proceedings and the dissemination of information on procurements; and*
  - v) to ensure that procuring entities engage procurement professionals in their procurement units.*
- 
- (d) to initiate public procurement policy and propose amendments to this Act or to the regulations; and*
  - (e) to perform such other functions and duties as are provided for under this Act.*

The PPOA is headed by a Director-General who is to be appointed under Section 10 of the Act. The Act also provides for the Public Procurement Oversight Advisory Board whose functions are set out under 23 of the Act which provides as follows:-

*"23. The functions of the Advisory Board are –*

- (a) to advise the Authority generally on the exercise of its powers and the performance of its functions;*
- (b) to approve the estimates of the revenue and expenditures of the Authority;*
- (c) to recommend the appointment or termination of the Director-General in accordance with this Act;*
- (d) to perform such other functions and duties as are provided for under this Act.*



Part VIII of the Act gives the Authority Powers to enforce compliance with the Act through the office of Director - General. Sections 106 and 117 of the Act gives the Public Procurement Administrative Review Board the power to review decisions of the Director- General which he may make in the course of ensuring there is compliance with the Act.

In the course of performing its functions the Authority, as a matter of necessity is required to carry out procurement functions like any other Procuring Entity. To do so, it is required to follow the Act and the Regulations as it is a State Corporation within the meaning of Section 3(1) of the Public Procurement and Disposal Act, 2005 (herein after "the Act").

The situation that faced the Board in this case arises from Section 25(3) of the Act, which requires the Authority to provide Administrative Services to the Review Board. In doing so, the Authority provides the secretarial and administrative duties to the Board through its staff.

Upon filing of this Request for Review, the Public Procurement Administrative Review Board noted that unique situation posed by this case in view of the perceived conflict, where the Authority whose decision is being challenged is required to provide administrative services.

To address this situation, the Public Procurement Administrative Review Board excluded the staff of the Public Procurement Oversight Authority from processing any aspect of this Request for Review. The Request for Review was heard and determined by the Board members without any

input from the staff of the Public Procurement Oversight Authority. At the commencement of the hearing this unique situation which the Board found itself in was explained to the parties. After highlighting this unique situation the Public Procurement Administrative Review Board proceeded to hear the matter.

The Applicant raises eleven (11) grounds of Review which the Board deals with as follows:

**Grounds 1, 9, and 11**

These grounds have been consolidated as they are general statements relating to the Tender Process.

Under these grounds, the Applicant stated that the decision of the Procuring Entity under review resulted from a procurement process that was flawed as a result of duties and obligations conferred upon the Procuring Entity by the Act and Regulations.

It further argued that the process gravely offends the fundamental overriding objectives of the Kenya Public Procurement System as set out in Section 2 of the Act. It added that the Procuring Entity contravened the Provisions of the Act and the Regulations by failing to comply with the specific requirements of the Tender documents.

In response, the Procuring Entity submitted that that grounds 1, 9 and 11 of the Request for Review breached Regulation 73(2) (a) which requires an

Applicant to state the reasons for the complaint including any alleged breach of the Act and the Regulations.

The Board has considered the submissions of the parties and the documents that were presented before it.

The Board has noted that Regulation 73 (2) (a) of the Act provides as follows:-

*"73(1)....."*

***73(2) The request referred to in Paragraph (1) shall:-***

***(a) State the reasons for the complaint including any alleged breach of the Act or these regulations."***

Arising from the foregoing requirement, the Board notes that grounds 1, 9 and 11 of the Request for Review do not expressly set out the particular Sections of the Act that have been breached by the Procuring Entity.

Consequently, the Board considers these grounds to be general statements which are not backed by any alleged breach of the Act and or the regulations. These grounds therefore fail.

**Ground 2: Breach of Section 2 of the Act**

The Applicant submitted that the procurement process did not comply with the principles of economy, efficiency, equal opportunity, transparency, integrity, fairness and value for money, as contemplated under Section 2 of the Act.

In response, the Procuring Entity stated that it had carried out the procurement process in the manner required by the Act. It submitted that it had advertised the tender, evaluated the bids according to the requirements set out in the Instructions to Tenderers and subsequently awarded the tender to the Successful Bidder. It added that the tender was donor funded and that the Procuring Entity sought approval from the donor at every stage of the process which was done efficiently and in a transparent manner. It argued that the entire tender process was conducted above board and it saved the Kenyan tax payer the sum of Kshs. 48 Million.

The Board has considered the submissions of the parties and examined the documents before it.

The Board notes that the Procuring Entity advertised the subject tender for the supply of e-Procurement Software in the Daily Nation and the Standard newspapers on 13<sup>th</sup> May 2009 and in the East African Newspaper on 18<sup>th</sup> May 2009. The Board further notes that a pre-bid meeting was held on 15<sup>th</sup> January, 2010 where the bidders sought clarifications. The Board also notes that eight bidders, including the Applicant responded by submitting their bids by 29<sup>th</sup> January, 2010 when the tender closed/opened. The Board further notes that after the tender opening, bidders were invited to carry out demonstrations on their proposed software's in line with Clause 3.2.2 of the Statement of Works.

Arising from the above observations, the Board finds that the tender process was conducted within the broad provisions of Section 2 of the Act. Further, the Board notes that Section 2 of the Act sets out the purpose of the Act and cannot be breached in isolation.

Consequently, this ground fails.

**Ground 3 – Breach of Sections 34(3) and 52(2)**

The Applicant submitted that the technical requirements prepared by the Procuring Entity did not relate to performance but rather were manifestly a replica of an already existing design. It stated that this was a breach of Sections 34(3) and 52(2) of the Act and therefore rendered the procurement process biased and unfair. It argued that the technical requirements in the Instructions to Tenderers were the exact replica of existing designs available in India, contrary to the stipulations of the Act.

It stated that the Statement of Works, as set out in the Instructions to Tenderers was a replica of similar products from the Indian States of Chattisgarh and Maharashtra. The Applicant submitted that it had carried out a comparison of the technical requirements as set out in the Instructions to Tenderers which showed that the comparisons were identical word for word. It referred the Board to a brochure by P. J. Software Ltd to demonstrate the similarities of the technical specifications of the software. It added that all the technical requirements as designed by PWC Kenya, the Consultant, were copied from existing designs in India and argued that this was in breach of Sections 34(3) and 52 (2) of the Act.

In response, the Procuring Entity denied that the technical requirements were an exact replica of what was obtained in Maharashtra and Chhattisgarh States of India. It referred the Board to the blank spaces in the comparison table showing that not all the specifications were similar.

It explained that the technical specifications as set out in the tender documents were to capture key features for each and every schedule such as the starting time, closing time, opening time and system support which were not found in the comparison tables provided by the Applicant. The Procuring Entity further explained that the technical requirements for the tender were set by a local Taskforce on Implementation of E-procurement based on the Kenyan law and procurement environment considering the existing infrastructure prevailing in the country.

On its part, the Successful Bidder associated itself with the submissions of the Procuring Entity and submitted to the Board written skeleton arguments which it adopted. In addition, it stated that the Applicant had failed to prove that the technical requirements relate to an existing design as alleged. It further stated that the tender documents had no reference to any design. Instead, the tender documents referred to universal features of any e-procurement system and had a provision for alternatives pursuant to Clause 6.1 of the Statements of Works. Indeed the technical requirements accommodated competitors with heterogeneous or differentiated though functionally acceptable products.

In conclusion, the Successful Bidder urged the Board to find that the technical requirements were neither skewed to favour of any design, brand name, trade mark nor a replica of an existing e-procurement system.

The Board has considered the submissions of the parties and examined the documents presented before it.

The Board notes the provisions of Sections 34(3) and 52 (2) provides as follows:-

***Section 34(3), the technical requirements shall, where appropriate:-***

***(a) relate to performance rather than to design or descriptive characteristics ; and***

***(b) be based on national or international standards***

***Section 52 (2) - The tender documents shall contain enough information to allow fair competition among those who may wish to submit tenders***

The Board notes the specifications as set out by the Procuring Entity in the Instructions to Tenderers contained information related to performance even though they may look similar to the ones in the two cited states of India.

Further, the Board finds that the specifications as set out by the Procuring Entity in the subject tender are performance based and neither relate to

design nor descriptive characteristics as prohibited by Section 34(3) of the Act.

The Board has taken note of the results of the combined Technical and Financial scores as depicted below:

**Combined Technical and Financial Scores  
Table X**

<b>Evaluation Area</b>	<b>Evaluation Sub-area</b>	<b>Assigned % Weight</b>	<b>Bidder No. 3 C1 India</b>	<b>Bidder No. 5 Wipro Technologies</b>	<b>Bidder No. 1 Alliance Technologies Solutions Limited</b>
Technical Evaluation (80%)	Desktop Technical Evaluation	45	41.33	42.15	39.38
	Technical and functional Demonstration of the Solution	35	20.48	30.16	26.25
<b>Technical Evaluation Totals</b>		<b>80</b>	<b>61.81</b>	<b>72.31</b>	<b>65.63</b>
Financial Evaluation (20%)	-	20	13.99	20	9.96
<b>Total</b>		<b>100</b>	<b>75.8</b>	<b>92.31</b>	<b>75.59</b>

From the above table, the Board notes that from the technical evaluation results, Wipro Technologies scored the highest at 72.31 followed by the Applicant at 65.63 and C1 India at 61.81, all out of a possible maximum of 80 Marks. The Board further notes that the Applicant's technical score was higher than that of C1 India and therefore the assertion that Indian firms had undue advantage is not justified.

The Board further finds that whereas Wipro Technologies had the highest combined score and had been duly recommended for the award by the Procuring Entity, it was found that they had been debarred by the World



Bank and therefore were not awarded the tender. From the same table, the Board notes that whereas the Successful Bidder scored lower than the Applicant in the technical evaluation, the said Successful Bidder had a combined score of 75.8 % compared to the Applicant's score of 75.59%. It is clear that the Applicant's bid was not successful because its combined technical and financial score were not the highest.

In view of the above the Board finds that the Applicants allegation that the specifications favoured the Indian firms lacks merit and that this ground also fails.

**Ground No. 4 - Breach of Sections 2 and 43**

The Applicant submitted that there was a possibility of conflict of interest in that the consultant advising the Procuring Entity had been involved in the provision of the same services in the State of Andhra Pradesh in India. It stated that, the consultant Pricewaterhousecoopers (PWC) was a business partner of one of the bidders in the present procurement process which fact, was a breach of Sections 2 and 43 of the Act.

The Applicant argued that the Consultant, M/s. Pricewaterhousecoopers (PWC) who was engaged by the Procuring Entity to draw up the technical requirements of the tender had what may appear to be an existing relationship with one of the bidders. It added that the issue of conflict of interest came to its attention in the course of responding to the tender prompting it to send an email on 19<sup>th</sup> January, 2010 to the Procuring Entity on the subject matter on possible conflict of interest. It stated that, in its

said e-mail, it drew the attention of the Procuring Entity to the fact that according to the information that was available on the websites, one of the bidders had not only been a partner of the consulting firm in the proceedings but had been involved in the implementation of the e-procurement solution in India, which was a similar solution that the Procuring Entity was due to procure.

It argued that the above fact indeed confirmed the existence of a conflict of interest between the Successful Bidder namely C1 India and PWC. The Applicant informed the Board that the Procuring Entity did not take action on its letter until it received a letter dated 19<sup>th</sup> February, 2010 from the Permanent Secretary - Ministry of Finance raising the same issues.

It further argued that the responses that were received by the Procuring Entity after it had written to the parties on the subject matter contained disparities regarding their relationship and when it ended as one party referred to the year 2001 while the other referred to 2004.

It submitted that the Procuring Entity ought to have fully investigated the issue relating to the alleged conflict of interest.

It finally stated that the mere existence of a possibility of conflict of interest impacted negatively on the tender process and was a breach of Section 43(1)(a) and (2) of the Act.

In response, the Procuring Entity stated that it had indeed received a complaint from the Applicant on the 19<sup>th</sup> of January 2010 before the opening of the bids on 9<sup>th</sup> February, 2010. It added that the complaints related to the alleged conflict of interest. It further stated that after

receiving the complaint, it decided not to interfere with the tender process which was ongoing. It submitted that on 23<sup>rd</sup> February, 2010, it received a letter from the P.S. Ministry of Finance on the same issue of alleged possible conflict of interest requesting the Ag. Interim Director-General review the matter and take the necessary action. It further submitted that the Procuring Entity wrote letters to the concerned parties who subsequently responded. It argued that the consultant hired by the Donor (USAID) was PWC (K) and not PWC India. The Procuring Entity submitted that after carrying out the investigation, it did not find any possibilities of existence of a conflict of interest between the alleged parties.

On its part, the Successful Bidder, namely C1 India, also associated itself with the submissions of the Procuring Entity in opposing this ground. It stated that the Procuring Entity had complied with the provisions of the Act and the Regulations in the subject tender even though it was a donor funded tender.

On the issue of the conflict of interest, it submitted that the Applicant had failed to demonstrate that there was actual conflict of interest but a mere "possibility" of such a conflict. It argued that the information relied on by the Applicant to support its contention was a printout of a website which was posted in the year 2001.

Citing the meaning of the term "conflict of interest" from The Black's Law Dictionary, the Successful Bidder submitted that the Applicant had failed to prove that there was a business relationship between itself and PWC Kenya which could have benefited the Consultant if the tender is awarded

to the Successful Bidder. It therefore urged the Board to find that the alleged conflict of interest has no merit.

The Board has considered the foregoing submissions by the parties and examined the documents placed before it.

The Board notes that PWC (K) was contracted by USAID to prepare the statement of works for the subject tender. On the other hand, the Board finds that, the consultant contracted to advice on the e-procurement software solution in the year 2001 in India was PWC India. The Board observes that the alleged conflict of interest between PWC India and C1 India has no bearing to PWC Kenya which was the consultant in the subject tender although the two firms operate under the same umbrella name, each of them is a separate entity with distinct partners and operations. Further, the Board finds that the alleged possible conflict of interest between PWC India and C1 India related to the periods 2001 and 2004 in some states in India and therefore does not affect the subject tender.

In the circumstances, the Board finds that this allegation on possible conflict of interest lacks merit and therefore this ground also fails.

#### **Ground No.5 Breach of Section 50 - 53 of the Act**

The Applicant submitted that the Procuring Entity failed and/or neglected to keep and circulate minutes of the pre-Bid meeting held on the 15<sup>th</sup> January, 2009 to the bidders as required under Clause 10 of the ITT. It

further submitted that the Procuring Entity also failed and neglected to respond to queries and concerns raised by the Applicant. It stated that the Procuring Entity circulated notes on clarifications to bidders purporting to be the minutes. It argued that the said clarifications were not a true reflection of what transpired at the pre-bidding meeting. It further argued that the clarifications had many disparities and also contained sections that conferred power to the Evaluation Committee, to decide on the price, contrary to what was contained in the Bid documents.

Finally, the Applicant stated that the failure to comply with the stipulations of the Tender document on keeping of minutes and purporting to change the terms of the tender process was a travesty that went against the provisions of instructions to Bidders and therefore rendered the process null and void. It submitted that this was against the spirit of Sections 50-53 of the Act.

In response, the Procuring Entity stated that the minutes of the pre-bid meeting were circulated to all bidders in line with the requirements of Clause 10 of the Instructions to Bidders. It argued that although the document did not have the title "Minutes", the contents were a true record of the proceedings of the particular meeting that the Applicant was referring to. It submitted that there was neither breach of Clause 10.1 of the bid documents nor the Act or the Regulations as there was no legal requirement for a Procuring Entity to circulate the minutes as alleged by the Applicant. It further stated that the Applicant had acknowledged receipt of the document containing the clarifications made at the Pre-bid meeting which was circulated to all the bidders.

The Board has considered the submissions of the parties and the documents availed before it touching on this ground and have noted that the Pre-bid meeting was indeed held as per the requirements of Clause 10.2 of the bid documents. The Board notes that the Applicant attended the said Pre - bid meeting where issues and queries touching on the bid documents and instructions to tenderers were raised and clarified. The Board notes that the Procuring Entity prepared a record of the issues raised and the clarifications given to the bidders and circulated the records of the questions and the answers. In this regard, the Board finds that although the clarifications and answers appear not be formulated in the format of minutes, the contents of the Question and Answer document supplied to the bidders constituted clarifications made at the meeting and serve the same purpose as the minutes.

The Board further notes that when the Applicant received the document containing the aforementioned clarifications and answers it did **not** raise any issues.

Consequently, the Board finds that this ground lacks merit and is also dismissed.

#### **Grounds No. 6-Breach of Sections 66 (2), (6) and Regulation 46**

The Applicant alleged that the Procuring Entity failed to evaluate the bids within thirty (30) days as stipulated by law and hence acted in contravention of Section 66(6) of the Act as read together with Regulation 46. It argued that according to Section 66(6) evaluation was to be done

within 30 days yet the Procuring Entity exceeded the 30 days of evaluation. The Applicant further submitted that the Procuring Entity had made reference to evaluation criteria that would be determined by the Evaluation Committee other than the one set out in the bid documents contrary to the requirements of Section 66(2) of the Act.

In response, the Procuring Entity stated that it observed the statutory provisions relating to the evaluation period of 30 days. It explained that the bids were opened on 29<sup>th</sup> January, 2010 and the evaluation process proceeded thereafter as required by law until they reached the technical evaluation stage which involved the demonstration of the functional capabilities of the software solutions offered by the bidders. It stated that the financial evaluation stage was not completed in time as the investigations that had been instituted by the Ag. Director - General on the issue of the alleged possibility of conflict of interest had not been completed. The Procuring Entity further submitted that the investigation by the Ag. Director-General interfered with the evaluation period and hence the period of evaluation indeed exceeded the thirty (30) days. It averred that this extension of time was partly caused by the Applicant who raised the issue of possibility of conflict of interest which involved parties outside Kenya hence required sometime to reach them and get a response.

The Board has considered the parties submissions under this ground and finds that the Procuring Entity closed/opened the bids on 29<sup>th</sup> January 2010 and started the process of evaluation. The Board notes that, while the said process was in progress, the Applicant wrote an e-mail to the Procuring Entity raising concerns about there being a possibility of conflict of interest

among some of the bidders. The Board also notes that the Procuring Entity was on course in handling the issues raised by the Applicant which were serious and called for investigations.

The Board further notes that the investigations by the Ag. Director-General involved parties who were outside Kenya and therefore it took quite some time to finalize the investigations and make the necessary report.

In the circumstances, the Board finds that whereas it is true the evaluation process exceeded the mandatory thirty (30) days period, the delay was caused by the Applicant's complaint leading to the investigations. The Board notes that it was necessary to stop the evaluation process pending the completion of the investigations.

The Board notes the High Court's decision in a Judicial Review Civil Application No. 540, where Justice Nyamu states that '*... .. the Board should not have disregarded a mandatory provision. In addition to the issue of prejudice the court is of the view that prejudice should be presumed in the circumstances, in that taking longer than the period given does give rise to a long shadow touching on issues of impartiality and integrity of the evaluation process.*'

The Board observes that this finding questioned the Board's rationale of stating that an Applicant suffers no prejudice where a Procuring Entity takes longer than the stipulated thirty (30) days for technical evaluation of bids received as long as the evaluation is completed and award made within the tender validity period. The Board further notes that Justice



Nyamu's decision requires the Board to investigate reasons as to why a Procuring Entity has taken longer than the stipulated period for evaluation, when he states as follows:-

*"The Board did not at all probe into why a longer period that provided in the Statute was necessary notwithstanding the underlying information that an earlier similar tender had been cancelled and therefore vital information on procurement bids was now in the hands of the bidders including the two finally selected for evaluation."*

The Board therefore finds that this ground of Appeal lacks merit and therefore fails.

#### **Ground 7**

The Applicant submitted that the Procuring Entity failed to inform it of the mode, method and reasons for the disqualification of its bid. It argued that, it had requested the Procuring Entity through its letter dated 8<sup>th</sup> July, 2010 to give it the reasons for the disqualification of its bid, but got no response.

In conclusion it stated that in its view the Procuring Entity did not have any reason for disqualifying its bid.

In response, the Procuring entity submitted that, it notified the Applicant, together with other bidders on the outcome of the tender through its letter dated 14<sup>th</sup> June, 2010. It stated that thereafter, the Applicant wrote a letter to the Procuring Entity requesting for information regarding the technical evaluation, the criteria used to evaluate the tenders and the final financial

figure for each evaluated bid. The Procuring Entity submitted that it responded to the said letter on 14<sup>th</sup> June, 2010 and provided the information in line with Regulation 66(2) and (3) of the Public Procurement and Disposal Regulations, 2006.

The Board has considered the representations of the parties and the documents presented before it.

The Board has noted that the Applicant requested for information on the evaluation of the tenders through its letter dated 9<sup>th</sup> June, 2010. The Board further notes that the Procuring Entity responded to the request by its letter referenced PPOA/10 VOL. IV (124) dated 14<sup>th</sup> June, 2010. A copy of the letter is as set out below:

*"Alliance Technologies Solutions Ltd.*

*1<sup>st</sup> Floor, Block B*

*Methodist Ministries Centre*

*Oloitoktok Road, Valley Arcade*

*P.O. BOX 6126 - 00100*

**NAIROBI**

*Tel: +254 (20) 3860986*

*Fax: +254 (20) 3861615*

*E-mail: [info@at.co.ke](mailto:info@at.co.ke)*

*Dear Sir/Madam,*

**RE: TENDER NO. NO. PPOA/ICB/05/2009-2010 FOR SUPPLY OF E-  
PROCUREMENT SOFTWARE**

*Your letter dated 8/7/10 requesting for information regarding the evaluation of your tender refers.*

Regulation 66(2) of the Public Procurement and Disposal Regulations, 2006 provides that "Where so requested by an unsuccessful tenderer, a procuring entity shall, within fourteen days after a request, provide written reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful". Further, Reg. 66(3) provides that "The reasons given under paragraph (2) shall not contain any information on any other tender other than information that is publicly available from tender openings or published notices". We can therefore only provide you with information regarding evaluation of your tender which was as below:-

**a) Preliminary Evaluation**

Your tender was found responsive at this stage and therefore proceeded to the next stage of evaluation

**b) Technical Evaluation**

This was undertaken in two stages.

i) Desktop technical evaluation

Below is a summary of your scoring at this stage.

No.	Specification	Marks (200)	Alliance Technologies
1	Technical Capability	15	12.00
	Technical Staff	15	12.00
2	Implementation	25	21.00
3	Reference	5	3.00
4	Procurement planning;	15	13.00
5	Supplier registration and management;	15	14.00
6	Requisition and Purchase order management;	15	14.00
7	Catalogue management;	10	8.67
	e-Tendering;	30	29.00
Phase II			
1	Contract management;	10	9.67
Phase III			
1.	e-Payments; and	5	0.00
2.	e-Auction;	10	9.33
9	Technical Specification	30	29.33
<b>Total</b>		<b>200</b>	<b>175.00</b>
<b>Out of 45</b>		<b>45</b>	<b>39.38</b>
<b>%</b>		<b>100</b>	<b>87.51</b>

You scored above 70% at this stage and proceeded to the next stage of technical evaluation.

ii) Technical and Functional Demonstration of the Solution

Below is a summary of your scoring at this stage.

No.	Specification	Marks (200)	Alliance Technologies
4	Procurement planning;	10	7.33
5	Supplier registration and management;	10	8.00
6	Requisition and Purchase order management;	10	7.67
7	Catalogue management;	10	8.33
	e-Tendering;	20	13.83
Phase II			
1	Contract management;	10	6.67
Phase III			
1.	e-Payments; and	5	3.50
2.	e-Auction;	5	3.50
9	Technical Specification	20	16.17
<b>Total</b>		<b>100</b>	<b>75.00</b>
<b>Out of 35</b>		<b>35</b>	<b>26.25</b>

c) **Financial Evaluation**

The tender document had specified that the price quoted as the bid price should be the price for implementation of phase 1 and this will be the price considered at the financial evaluation. The financial evaluation was done using the costs of implementing phase one and awarded 20 marks. You scored 12.58 at this stage.

d) **Combined Technical and Financial Score**

Your combined technical and financial score was as follows:-

Evaluation Area	Evaluation Sub-area	Assigned % Weight	Alliance Technologies
Technical Evaluation (80%)	Desktop Technical Evaluation	45	39.38
	Technical and functional Demonstration of the Solution	35	26.25

<b>Technical Evaluation Totals</b>		<b>80</b>	<b>65.63</b>
Financial Evaluation (20%)	-	20	12.58
<b>Total</b>		<b>100</b>	<b>78.21</b>

Your tender was therefore unsuccessful as two of the other tenderers had more marks than you and one of them was therefore recommended for award.

Section 66(2) of the Public Procurement and Disposal Act, 2005 provides that "The evaluation and comparison shall be done using the procedures and criteria set out in the tender document and no other criteria shall be used". The evaluation was therefore strictly done using the criteria set forth in the tender document which read in part :

"Bidders are advised that while PPOA/USAID seeks a system that is capable of implementing phases 1, 2 and 3 of our proposal as indicated in our proposed implementation approach , section 1.3 of this statements of works, at this stage bidders are requested to note that we shall be contracting the implementation of phase 1 only at the beginning .Therefore their prices should only reflect the implementation cost of phase 1. The price quoted as the bid price should therefore be the price for implementation of phase 1 and will be the price considered at financial evaluation."

Yours faithfully,

**M. J. O. JUMA**  
**Ag. INTERIM DIRECTOR-GENERAL**  
**PUBLIC PROCUREMENT OVERSIGHT AUTHORITY**

From the response by the Procuring Entity, the Board finds that the Applicant was given information regarding the evaluation of its tender under the headings; Preliminary Evaluation, Technical Evaluation, Financial Evaluation and the Combined Technical and Financial Evaluation. The Board is alive to the requirements of Regulation 66 (2) and (3) of the Regulations, 2006 which state as follows:

*“(2) Where so requested by unsuccessful tenderer, a Procuring Entity shall, within fourteen days after a request, provide written reasons as to why the tender proposals or application to be Pre-qualified was unsuccessful.*

*(3) the reasons given under paragraph (2) shall not contain any information on any other tender other than the information that is publicly available from tender opening or published notices.”*

In this case, the Board finds that the Procuring Entity provided the information requested for in line with the requirements of Regulations 66(2) and (3).

Consequently, the Board finds no fault on the part of the Procuring Entity therefore this ground also fails.

#### **Ground 8 - Breach of Section 64 of the Act.**

The Applicant alleged that its bid was innovative and responsive as contemplated by Section 64 of the Act. The Applicant submitted that it had supplied “**open source software**” which did not imply a proprietary bid even if it was Kshs. 48 Million higher than the Successful Bidder’s price. It further argued that its price as offered was not going to increase over the period of the tenders. It therefore urged the Board to find that its bid made economic sense as envisaged by Section 2 of the Act.

In response, the Procuring Entity stated that although the proposal offered by the Applicant was technically responsive having scored higher than the

one of the Successful Bidder, it was financially not economical as it was priced Kshs. 48 Million higher than that of the Successful Bidder.

The Board has considered the foregoing arguments and notes that indeed the Applicant's bid was innovative and responsive on technical parameters. However, its combined technical and financial scores were lower than that of the successful bidder. The Board finds that the tender was to be awarded to the bidder with the highest combined technical and financial score in accordance with Clause 28.4 of the Instructions to Bidders.

Accordingly, this ground also fails.

#### **Ground No.10- Loss and Damage**

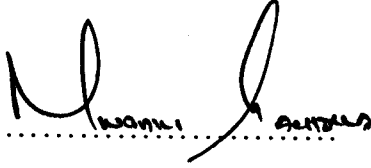
The Applicant alleged that the breaches cited in the Request for Review had occasioned loss and damage in excess of Kshs. 1.2 million together with anticipated future Cash flows.

In response, the Procuring Entity stated that the alleged loss suffered by the Applicant would not be attributed to it as it joined the bidding process on its own volition, being aware of the chances and consequences of losing the bid.

The Board has held in several past decisions that the cost associated with bidding are business risks borne by people in business. The Board finds that the Applicant participated in the tender process being aware of the risks involved and cannot hold the Procuring Entity liable for such economic risks.

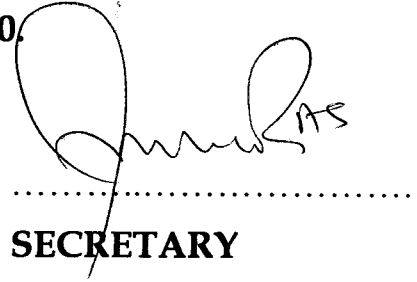
Taking into consideration of all the above matters, this Request for Review fails. The tender process may proceed.

Dated at Nairobi on this 13<sup>th</sup> day of July, 2010.



A handwritten signature in black ink, appearing to be 'N. Mwangi', written over a horizontal dotted line.

**CHAIRMAN**  
**PPARB**



A handwritten signature in black ink, appearing to be 'J. M. AS', written over a horizontal dotted line.

**SECRETARY**  
**PPARB**