PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 56/2012 OF 31ST OCTOBER 2012

BETWEEN

MAGAL SECURITY SYSTEMS LIMITED .....APPLICANT

AND

KENYA AIRPORTS AUTHORITY ..... PROCURING ENTITY

Review against the decision of the Tender Committee of KENYA AIRPORTS AUTHORITY in the matter of Tender No: KAA/ES/JKIA/811/E for the SUPPLY AND INSTALLATION OF CCTV SURVELLANCE SYSTEM AT JKIA.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	- Chairman
Mr. Sospeter Kioko	- Member
Eng. Christine Ogut	- Member
Mrs. Loise Ruhiu	- Member
Mr. Joshua W. Wambua	- Member

IN ATTENDANCE

Mr. Pauline Opiyo	- Ag.Board Secretary
Mr. Philemon Chemoiywo	- Secretariat
Ms Judith Maina	- Secretariat

PRESENT BY INVITATION

Applicant - Magal Security Systems Limited

Mr. Mansur M.Issa	- Advocate
Mr. Steve Iuseno	-Advocate
Mr. Raphael Nezer	-Vice President Sales

Procuring Entity – KENYA AIRPORTS AUTHORITY

Mr. Victor Arika	-legal counsel
Mr. Allan Muturi	-General Manager Procurement & logistics
Mr. James	-PM
Mr. Newton	-PM
Mr. Margaret Muraya.	-Manager Project
Ms. David Tomno	-Procurement Officer

Interested Parties

Mr. Julia Ramzanali	-Administrator, Orad control systems

BOARD'S DECISION

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

BACKGROUND OF AWARD

1. The tender for Supply and Installation of CCTV Surveillance System at Jomo Kenyatta International Airport was advertised in the print media as from 1st August 2012.

2. Opening/closing

The bids closed on 27th August, 2012 and opened on 10th September 2012 through an addendum.

3. Scope of work

The scope under this contract includes the supply, delivery, installation, configuration, testing CCTV Surveillance system as per specifications leaving an enhanced CCTV System at Jomo Kenyatta International Airport Nairobi Kenya. The scope shall include;

1.1.1 Supply and install IP CCTV Surveillance system and related Components at Jomo Kenyatta International Airport, comprising of:

- IP Indoor D/N PTZ cameras
- IP Fixed Bullet D/N cameras
- IP PTZ network Thermal cameras – wireless and wired
- IP fixed dome D/N cameras with zoom component
- System Servers
- Workstations
- Video analytics software
- Software Module (server side, client side and video analytics etc)
- Uninterrupted Power Supply for the system
- Storage media resource for recorded video feeds

1.1.2 Replacing all eight (8) wireless PTZ cameras at the airside with PTZ thermal Cameras utilizing the existing wireless infrastructure (Wireless link, Masts, aviation lights, cabling, and power feeds).

1.1.3 Testing and commissioning of the complete system installation.

1.1.4 Training of technical, administration and security personnel.

4. Bidder who responded

Out of 45 bid documents sold only 19 submitted their bids as follows: -

	Bidder's Name	Amount Quoted (Read Out)	Amount in Kshs (conversion of 84.3389 to USD & 134.9096 to ST Pound	Tender Surety
1	H. F. Fire International (K) Ltd	63,316,661.98	63,316,661.98	Provided
2	Orad Control Systems	USD 2,678,614.00	225,911,358.28	Provided
3	Horsebridge Network System (EA)	181,000,310.02	181,000,310.02	Provided
4	Central Electrical International Ltd	119,847,702.83 (From Price Schedule)	119,847,702.83	Provided
5	Azicon Kenya Limited	108,530,251.00	108,530,251.00	Provided
6	Magal Security System	USD 1,217,512.00	102,683,622.82	Provided

	Bidder's Name	Amount Quoted (Read Out)	Amount in Kshs (conversion of 84.3389 to USD & 134.9096 to ST Pound	Tender Surety
7	Gallatek (K) Limited	51,579,680.00	51,579,680.00	Provided
8	Optilan (UK) Ltd	132,504,543.00	132,504,543.00	Provided
9	G4S	254,586,800.80	254,586,800.80	Provided
10	Aviation & General Security Consultants	USD 1,669,537.88 (From Price Schedule)	140,806,988.31	Provided
11	Akkad Systems Limited	STP 1,771,495.16	238,991,703.44	Provided
12	AUA Industria Limited	153,337,219.39	153,337,219.39	Provided
13	Micro-City Computers Limited	164,857,019.20	164,857,019.20	Provided
14	Teledata Technologies Limited	148,017,064.49	148,017,064.49	Provided
15	Com Twenty One Limited	118,895,404.53	118,895,404.53	Provided

	Bidder's Name	Amount Quoted (Read Out)	Amount in Kshs (conversion of 84.3389 to USD & 134.9096 to ST Pound	Tender Surety
16	Equip Agencies Limited	600,784,340.00	600,784,340.00	Provided
17	Autobacs Limited	129,803,306.78	129,803,306.78	Provided
18	Radar Limited	99,550,736.00	99,550,736.00	Provided
19	Servetel Communication Ltd	135,333,071.22	135,333,071.22	Provided

KAA ESTIMATE 185,298,400.00

5. EVALUATION

The received bids were evaluated in three stages namely preliminary, technical and financial evaluation. The firms were subjected to this evaluation to determine compliance with the requirements of the tender and the results are as tabulated below: -

3.0 PRELIMINARY EVALUATION

The firms at this stage were subjected to preliminary evaluation to determine compliance with the requirements and the results are as tabulated below: -

Table 1 – Preliminary Requirements

		1	2	3	4	5	6	7	8	9	10
		H. F. Fire International (K) Ltd	Orad Control Systems	Horsebridge Network Systems (EA)	Central Electrical International Ltd	Azicon Kenya Limited	Magal Security System	Gallatek (EA) Limited	Optilan (UK) Ltd	G4S	Aviation & General Security Consultants
	REQUIRED INFORMATION										
1	The Tenderer shall submit One (1) Original and One (1) Copy of the tender.	□	□	□	□	□	□	□	□	□	□
2	Tender Surety of Kshs 2,000,000/= valid for 120 days from the date of tender opening in form of cash, bank quarantee, insurance quarantee with policy no, letter of credit	□	□	□	□	□	□	□	□	□	□
3	Registration/Incorporation Certificate	□	□	□	□	□	□	□	□	□	□
4	Power of Attorney of the signatory of tender to commit the tendreree	□	□	□	□	□	□	X	□	X	□
5	Valid (Current) Tax Compliance Certificate	□	X	□	□	X (Expired on 28/8/2012)	X (Not provided)	X (Expired on 2/8/2012)	X (Did not provide Local Tax Compliance Certificate)	□	□
6	Audited Financial Statements - including, as a minimum profit & loss Account, Balance Sheet and explanatory notes for the period 2008, 2009 and 2010. The balance sheet submitted must be	□	□	□	□	□	□	X (2008, 2008 not provided, Notes to the Accounts not provided)	□	□	□

		1	2	3	4	5	6	7	8	9	10
	certified by a registered accountant and supported by copies of tax returns										
7	Certified copies of CV's and certificates of key personnel herein referred to as project team members in the management and implementation of the project,	□	□	□	□	□	□	X	□	□	□
8	duly completed manufacturer's authorization form in the format provided	X (Provided from Axis, not signed nor as per required fromat, from GE Security not as per format)	□	□	□	□	□	X	□	X	□
9	duly completed form of litigation and arbitration history in the format provided - tenderers with NONE to declare	□	□	□	□	□	□	X (Not Filled)	□	□	□
10	duly completed declaration form in the format provided - tenderise not debarred to declare	□	□	□	□	□	□	□	□	□	□
11	Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system	X (Category E)	X	X (Provided General Building Works and Civil Engineering Category D)	□ (from Integrated Fire & Safety Solutions)	□	□	X	X (Not Provided)	X	X (Not Provided - Indicated that they do not fall under the category)

		1	2	3	4	5	6	7	8	9	10
12	duly completed site visit certificate as issued during site visit/pre bid meeting	X	□	□	X (Not Provided)	□	□	□	□	X	□
13	duly completed and signed form of tender	□	□	□	X (not filled)	□	□	□	□	□	X (not complete)
	RESPONSIVENESS										
	Overall Responsiveness	X	X	X	X	X	X	X	X	X	X

Preliminary Evaluation Table Continued...

		11	12	13	14	15	16	17	18	19
		Akkad Systems Limited	AUA Industria Limited	Micro-City Computers Limited	Teledata Technologies Limited	Com Twenty One Limited	Equip Agencies Limited	Autobacs Limited	Radar Limited	Servetel Communication Ltd
	REQUIRED INFORMATION									
1	The Tenderer shall submit One (1) Original and One (1) Copy of the tender.	□	□	□	□	□	□	□	□	□
2	Tender Surety of Kshs 2,000,000/= valid for 120 days from the date of tender opening in form of cash, bank quarantee, insurance quarantee with policy no, letter of credit	□	□	□	□	□	□	□	□	□
3	Registration/Incorporation Certificate	□	□	□	□	□	□	□	□	□
4	Power of Attorney of the signatory of tender to commit the tendreree	□	□	□	□	□	□	□	□	□
5	Valid (Current) Tax Compliance Certificate	□	□	□	□	□	□	□	□	□
6	Audited Financial Statements - including, as a minimum profit & loss	□	□	□	□	□	□	□	□	□

		11	12	13	14	15	16	17	18	19
	Account, Balance Sheet and explanatory notes for the period 2008, 2009 and 2010. The balance sheet submitted must be certified by a registered accountant and supported by copies of tax returns									
7	Certified copies of CV's and certificates of key personnel herein referred to as project team members in the management and implementation of the project,	□	□	□	□	□	X (Not Provided)	□	□	□
8	duly completed manufacturer's authorization form in the format provided	□	□	□	X (Provided from Delta Energy, Coralipx, Speech Technology Center but not as per the provided format)	□	□	□	X (Provided from Lilin, Protea Coin Group, Ogier Electronics but not as per the provided format)	□
9	duly completed form of litigation and arbitration history in the format provided - tenderers with NONE to declare	□	□	□	□	□	□	□	□	□
10	duly completed declaration form in the format provided - tenderise not debarred to declare	□	□	□	□	□	□	□	□	□
11	Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system	X	X (Not Provided)	□	X (Category D)	X□□(Renewal Certificate for contractors indicating several categories lumped up together was submitted, Upon confirmation	X (Attached Certificates for plumbing and drainage (Category A) and water tanks and water treatment	X (Attached General Building Works Category B from a Partner M/S H. K. Builders & General	X	X (Category E)

		11	12	13	14	15	16	17	18	19
						from Mow Website, Category C)	Category C)	Contractors Ltd.)		
12	duly completed site visit certificate as issued during site visit/pre bid meeting	□	□	□	□	□	□	□	□	□
13	duly completed and signed form of tender	□	□	□	□	□	□	□	□	□
	RESPONSIVENESS									
	Overall Responsiveness	X	X	□	X	X	X	X	X	X

3.1 notes on Non-Responsive Firms

Eighteen (18) firms did not meet the preliminary requirements and the bids were not considered further. The reasons are as indicated below: -

No	Bidder Name	Reason
1	H. F. Fire International (K) Ltd	• Provided Manufacturer's Authorization Letter from Axis which was not signed nor as per required format (not addressed or specific to the project), from GE Security not as per format (not addressed or specific to the project) • Provided Category "E" Registration with Ministry of public works in installation of CCTV Security surveillance system instead of the required Category "A" & "B" • Did not Provide Site Visit Certificate
2	Orad Control Systems	• Did not provide Valid (Current) Tax Compliance Certificate • Did not provide Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system
3	Horsebridge Network Systems (EA)	• Provided General Building Works and Civil Engineering Category "D" instead of the required Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system
4	Central Electrical International Ltd	• Did not Provide Site Visit Certificate • Did not fill Form of Tender
5	Azicon Kenya Limited	• Provided as Tax Compliance Certificate that had expired on 28/8/2012
6	Magal Security System	• Did not provide Valid (Current) Tax Compliance Certificate
7	Gallatek (EA) Limited	• Did not provide Power of Attorney of the signatory of tender to commit the tendreree • Audited Financial Statements for 2008 not provided. Notes to the Accounts not provided • Did not provide CV's and certificates of key personnel • Did not provide Manufacturer's authorization Letters • Did not fill Litigation History • Did not provide Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system

No	Bidder Name	Reason
8	Optilan (UK) Ltd	• Did not provide Local Tax Compliance Certificate • Did not provide Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system
9	G4S	• Did not provide Power of Attorney of the signatory of tender to commit the tendreree • Did not provide Manufacturer's authorization Letters • Did not provide Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system • Did not Provide Site Visit Certificate
10	Aviation & General Security Consultants	• Did not provide Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system - Indicated that they do not fall under the category • Provided Form of Tender that was NOT complete
11	Akkad Systems Limited	• Did not provide Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system
12	AUA Industria Limited	• Did not provide Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system
13	Teledata Technologies Limited	• Provided Manufacturer's Authorization Letter from Delta Energy, Coralipx, Speech Technology Center but not as per the provided format (not addressed or specific to the project) • Provided Category "D" Registration with Ministry of public works in installation of CCTV Security surveillance system instead of the required Category "A" & "B"
14	Com Twenty One	• The bidder provided Renewal Certificate for contractors indicating several categories lumped up together as Category "A". Upon confirmation from Ministry of Public Works Website on the list of "renewed contactors register as at 14th September 2012", the firm was registered under **Category "C"** on Security Surveillance (CCTV) Intruder Alarms System, and Access Control against the requirement of Category "A" & "B". http://www.publicworks.go.ke/images/stories/registeraug2012.pdf
15	Equip Agencies Limited	• Did not provide CV's and certificates of key personnel • Attached Certificates for plumbing and drainage (Category "A") and water tanks and water treatment Category "C" instead of the

No	Bidder Name	Reason
		required Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system
16	Autobacs Limited	• Attached General Building Works Category "B" from a Partner M/S H. K. Builders & General Contractors Ltd instead of the required Category "A" & "B" registration with Ministry of public works in installation of CCTV Security surveillance system.
17	Radar Limited	• Provided Manufacturer's Authorization Letter from Lilin, Protea Coin Group, Ogier Electronics but not as per the provided format (not addressed or specific to the project)
18	Servetel Communication Ltd	• Provided Category "E" Registration with Ministry of public works in installation of CCTV Security surveillance system instead of the required Category "A" & "B"

3.1 Responsive Firms

One (1) firm met the preliminary requirements and was considered in the technical evaluation as follows: -

1. **Micro-City Computers Limited**

4.0 TECHNICAL EVALUATION

The firm was subjected to technical evaluation to determine compliance with the requirements and the results are as tabulated below: -

	REQUIRED INFORMATION	13
		Micro-City Computers Limited
	REQUIRED INFORMATION	
1	Demonstration of past experience and performance-Bidders shall show proof of not less than three (3) projects on IP CCTV Surveillance undertaken successfully in the last five (5) years. A proof of a completion certificate/or commission certificate is a MUST.	□
1.1	Documentary evidence that the proposed goods and system have been successfully supplied and installed in an airport environment for the last three (3) years prior to this tender release.	□

	REQUIRED INFORMATION	13
2	Qualification and experience of key Project Team personnel. A list of project team members shall be submitted complete with alternate candidates. A form is provided and MUST be duly filled. Certified copies of academic and professional certificates must be submitted with the tender.	□□(See Note 1)
2.1	3 Technical personnel who shall execute the works. Bidders shall provide the names of at least three candidates qualified to meet the specified requirements stated for each position. A minimum qualification of Bsc in ICT or Bsc in Electrical and Electronic Engineering for a project manager and a diploma in electronic & electronics or diploma in ICT for other key 2 project members. attach certified copies of CV, Academic and professional certicates for the proposed project team.	□□(See Note 1)
3	Financial position and capability. Tenderer's MUST show capacity to have access to lines of credit, other financial resources of Kenya Shillings eighty million [Kshs. 80,000,000]. A form for Financial Capabilities in appendix to tender forms must be completed detailing the financial position, financial history, financial performance, financial focus and capability of every bidder.	□
3.1	Minimum average annual turnover of Kenya shillings three hundred million [Kshs. 300,000,000] equivalents in the above 3 years calculated as total certified payments received for contracts in progress or completed, within the last three (3) years.	□
4	Compliance with technical specifications. Bidders MUST show compliance and provide reasons for compliance as provided for in the Technical Specification Section VI	□
	RESPONSIVENESS	
	Overall Responsiveness	□

Note 1

The firm provided CV's and Certificate of five (5) personnel. The tender had required that a list of project team members shall be submitted complete with alternate candidate for 3 Technical personnel who shall execute the works. The omission of one (1) additional personnel was noted as a minor informality and waived as provided for in the tender as indicated the clause below: -

Clause 2.22.3 "The Procuring entity may waive any minor informality or non-conformity or irregularity in a tender which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any tenderer."

5.0 FINANCIAL EVALUATION

The financial proposal of the responsive bid was checked and tabulated as indicated below

				13	
				Micro-City Computers Limited	
NO	DESCRIPTION	UNIT	QTY	RATE	AMOUNT
1	Supply and install Indoor IP PTZ day/night IP Network cameras as per specifications.	No.	49	424,500	20,800,500
2	Supply, install and configure fixed IP Dome network cameras as per specifications	No.	27	320,800	8,661,600
3	Supply, install and configure bullet fixed network cameras as per specifications	No.	64	365,200	23,372,800
4	Supply, install and configure wireless PTZ Thermal Surveillance cameras specifications complete with battery backups to handle 6 hour transient time.	No.	11	2,750,200	30,252,200
5	Supply and install a wireless link system for video transmission for a radius of 5km	No.	4	375,000	1,500,000
6	Installation and configuring replaced IP PTZ Dome Wireless cameras within terminal building as directed by The Engineer.	No.	8	50,000	400,000
7	Supply, install and configure wired PTZ Thermal Surveillance cameras as per specifications	No.	6	2,570,200	15,421,200
8	Supply and install 10 meters triangular masts complete with aviation safety lights.	No.	4	550,000	2,200,000
9	Supply and install system servers complete with storage providing 24 terabyte providing a total of 128 terabytes of video storage. Three (3) of the six (6) servers shall be configured to provide redundancy	No.	6	1,350,000	8,100,000

					13
10	Supply and install video management system software (VMS) both server side and client side as specified on all the 6 servers and six (6) workstations	No.	Sum		1,270,000
11	Supply and install Video analytics to realize the specifications provided.				-
12	Supply and install client workstation Computers with Monitoring client side video management system installed and configured	No.	6	160,500	963,000
13	Structural cabling: CAT 6 platinum core (Twisted-pair cabling) for connecting cameras to switches and use laser-optimized 50/125 µm multi-mode fiber (OM3)10 GB Ethernet as Fiber backbone to link all hubs.	No.	sum		5,610,320
14	Supply and install 24 port layer 3 video switches as per specifications	No.	14	326,750	4,574,500
15	Supply and install 40 inch display screens as per specifications.	No.	8	254,150	2,033,200
16	Supply and install video transceivers	No.	Sum		675,000
17	Design and deploy professional control room complete with:	No.	Sum		5,500,000
A	Access Control Facility				
B	Secured Rack				
C	CCTV Seats				
D	CCTV Console				
E	Telephone Facility (head sets)				
F	Air Conditioning				
G	Carpet				
18	Supply and install 40KVA Uninterrupted power supply to provide uninterrupted system operations	No.	Sum	2,750,600	2,750,600

				13	
19	Allow for factory technical training for the installed system for six (6) maintenance personnel.	No.	6	SUM	4,000,000
20	Allow for factory inspection and acceptance for four (4) nominated KAA officers.	No.	4	SUM	2,000,000
21	Allow for on-site system operators training for the installed system for fifty (50) KAA security personnel.	No.	50	FREE	-
22	**SUB TOTAL**				**140,084,920.00**
23	**Add 16% VAT and any other applicable duty**				**22,413,587.20**
24	**TENDER SUM**				**162,498,507.20**

Arithmetic error was noted in the summation of Bills of Quantities where the Subtotal (Item 22) is provided as **Kshs 142,118,120** instead of the computed **Kshs 140,084,920**. The Total Price inclusive of VAT amounts to **Kshs 162,498,507.20** instead of the provided **Kshs 164,857,019.20**

The bidder was asked to concur and response dated **25/09/2012** was in the affirmative (attached).

6.0 OBSERVATIONS OF EVALUATION COMMITTEE

Micro-City Computers Ltd provided Airport implementation experience on CCTV Surveillance installations mainly at Kenya Airports Authority (Moi International Airport and Eldoret International Airport).

7.0 BUDGET

The funds were be obtained from the **Revised Budget** for the **CCTV Vote** in the **2012-2013** financial years.

8.0 RECOMMENDATIONS

The committee recommended that the lowest evaluated responsive bidder **M/S MICRO-CITY COMPUTERS LTD** be awarded the contract for THE **SUPPLY AND INSTALLATION OF CCTV SURVEILLANCE SYSTEM AT JOMO KENYATTA INTERNATIONAL AIRPORT** at the corrected sum of **Kshs 162,498,507.20** inclusive of VAT.

9.0 **THE TENDER COMMITTEE DECISION**

The Tender Committee in its 218th meeting held on 4th October, 2012 deliberated on the recommendations of the Evaluation Committee and made the following remarks. Funding would be obtained from, MIA-ksh 30million, JKIA CCTV-ksh.25 million and incinerator kshs.20 million. The balance will be obtained this year's revised budget

The evaluation committee recommended **M/S MICRO-CITY COMPUTERS LTD** to carry out the works at their quoted sum of **KShs.162, 498,507.20** inclusive of VAT

The tender committee adjudicated and approved award as recommended

THE REVIEW

The Request for Review was lodged on 31st October, 2012 against the decision of Kenya Airports Authority dated 4th October, 2012 in the matter of Tender No: KAA/ES/JKIA/811/E for the SUPPLY AND INSTALLATION OF CCTV SURVELLANCE SYSTEM AT JKIA

The Applicant was represented by Mr. Mansur M.Issa, Advocate, while the Procuring Entity was represented by Mr. Victor Arika, legal counsel The Interested Candidates present were Orad Control System represented by Mr. Julia Ramzanali –Administrator.

The Applicant requested the Board for the following orders:

1. *The Procuring Entity –Kenya Airports Authority, KAA be immediately stopped from proceeding any further with this tendering process until our appeal /request for review is head and determined.*
2. *That the Review Board duly considers our appeal in good time and orders that KAA annuls its decision to disqualify Magal Security System ltd .for the reason that the grounds stated therein are completely invalid and have no basis .*
3. *Magal Security System ltd.be reinstated as qualified tenderer for Tender No. KAA/KJIA/811/E since there is no reason stated for disqualification.*
4. *KAA be thereafter ordered to proceed to review the tenders and reach a decision on winning tender based on merits of our proposal and not erroneous preliminary consideration.*

The Applicant raised 7 grounds of review which the Board deals with as follows:-

Grounds 1, 3, 4, 5, 6&7

These grounds of review have been consolidated as they raise similar issues on whether the failure to submit Tax Compliance Certificate justified the disqualification of the Applicant which was an international bidder.

The Applicant stated that it was unfairly disqualified by the Procuring Entity on the ground that it failed to submit a Tax Compliance Certificate. It alleged that the Procuring Entity never stated in the Tender Documents or during the site visit survey that this tender was exclusively for local bidders only. It further alleged, that Clause 2.12.3 (c) of the Tender Document clearly stated that international bidders were eligible to tender and that the only condition was that the international bidder was required to appoint an Agent in Kenya duly equipped to carry out the necessary maintenance works in case the tender was awarded to it. In this regard the Applicant stated that it had duly appointed an agent and had indicated the Agents contacts within its Tender Document.

The Applicant averred that it never received the purported clarification No. 2 which the Procuring Entity alleged that this was a National Tender. It stated that it had only received clarification No.1 which had nothing to do with the eligibility of tenderers. It challenged the Procuring Entity to explain how clarification No. 2 could have been dated 30th August ,2012, and sent on 3rd September,2012 if clarification No.1, was dated 5th September, 2012 and sent on 6th September. It

argued that logic dictated that clarification No. 2 ought to have been dated and sent on a later date than clarification No. 1.

The Applicant averred that tender Clause 2.22.4 clearly stated that the Procuring Entity's determination of a tender's responsiveness is to be based on the content of the Tender Documents without recourse to extrinsic evidence. It therefore argued that in determining whether it had complied with tender requirements, the Procuring Entity should only consider intrinsic requirements, which as shown above, allowed foreign companies to tender.

The Applicant further stated that Clause 2.12.3 of the Tender Document had specified a list of the mandatory requirements that were to be met if a tender was to be deemed responsive and that the requirement to have a tax compliance certificate was not included within the list.

The Applicant submitted that Tax Compliance Certificate only appeared as a matter to be considered during the preliminary evaluation. It further submitted that although the requirement to have the Tax Compliance Certificate is understandable in case of local companies the same is not practicable for international tenderers. It therefore, argued that being an international firm it, was exempt from such requirement, and therefore its tender was wrongfully disqualified at the preliminary evaluation stage.

The Applicant alleged that the Tender Document did not required the international bidders to provide alternative Tax Compliance letters from their respective countries of origin. It further alleged that although Israel, its country of origin, did not issue Tax Compliance Certificates, the Applicant it would nevertheless have obtained an alternative Tax Compliance letter had this been required by the Tender Document. The

Applicant argued that where a Tender Document contained an ambiguity, then such an ambiguity cannot be used against a bidder as the onus of issuing a clear Tender Documents is on the Procuring Entity, as provided by pursuant Section 34 of the Act.

The Applicant stated that it had been unfairly treated by the Procuring Entity contrary to the requirement Section 2(b) of the Act. It further stated that the disqualification of its tender amounted to discrimination, which was contrary to the requirement of Section 39(1) of the Act. The Applicant referred to previous decisions by the Board in, **Application No. 20/2009 Munshiram International Business Machine & Ministry of Lands and Application Nos. 53 and 59 of 2009 Riley Falcon Security Ltd & Kenya Pipeline Company Ltd,** where the Board had ruled against the respective Procuring Entities for their failure to treat all the bidders fairly and without discrimination.

In response, the Procuring Entity stated that the Applicant was not unfairly disqualified because submission of the Tax Compliance Certificate was a mandatory requirement in the Tender Documents. It further stated that the evaluation criteria at Clause 1.3 on page 19 of the Tender Document ,clearly required bidders to submit a valid (current) Tax Compliance Certificate and that the Applicant had not complied.

The Procuring Entity averred that the Tender Documents clearly indicated that this was a National Competitive Bidding on the appendix to Instructions To Tenderers at page 15 of the tender document. It submitted that it had further issued a clarification, designated as clarification No. 2 and which was dated 30th August 2012 and sent to bidders on 3rd September, 2012 by email informing the Applicant

together with all the other Bidders that this was a National competitive bidding (NCB) which was open to local bidders only.

The Procuring Entity argued that the tender had been advertised only in the local newspapers which implied that it was intended for local bidders only. It further argued that any international bidder was free to enter into a joint venture agreement with a local bidder in order for it to qualify for this tender in line with Section 39(8) (a) of the Act. Further, the Procuring Entity argued, that Clause 2.5 of the Tender document allowed bidders to seek for clarification in case of any ambiguity in the tender document.

The Procuring Entity submitted that in determining the responsiveness of the tenders, it had used the terms and conditions set out in the Tender Document and that it followed the evaluation criteria as stipulated in Clause 2.22.4 of the Tender Documents. The Procuring Entity concluded that the Applicant's bid was found to be unsuccessful at the preliminary evaluation stage and was therefore not evaluated further in line with **Section 64(1)** of the **Act** and **Regulations 47(1) (b) & (2).**

The Board has carefully considered the submissions by the Parties, and examined the documents presented before it.

Going by the arguments advanced by the Parties in support of their respective positions, the issues for determination by the Board are;

1) Was the this tender restricted to local bidders only?
2) Was the Applicant rightly disqualified for failure to submit a valid Tax Compliance Certificate?

The Board notes as follows;

- That the tenders were advertised on 1/8/2012 in the Daily Nation and that the tender closed/opened on 10/9/2012,which allowed the bidders 40 days in which to prepare and submit their bids;
- 19 bids were received including that of the Applicant;
- The evaluation process was conducted in three stages namely Preliminary, Technical and Financial;
- 18 bids including that of the Applicant were found to be non responsive at the preliminary stage for failure to meet certain preliminary criteria as detailed in the evaluation report;
- The Applicant's bid was disqualified at the preliminary evaluation stage for failure to provide a valid (current) Tax Compliance Certificate; and
- Only one firm Micro City Computers Ltd met the preliminary requirements and hence proceeded to technical and financial evaluation stages. Consequently it was awarded the tender as being the lowest evaluated bidder.

The Board further takes note of Clauses 2.12.3(c) and 2.23.1 which provides as follows

Clause 2.12.3(c)- *"that in the case of a tenderer not doing business within Kenya, the tenderer is or will be (if awarded the contract) represented by an agent in Kenya equipped, and able to carry out the Tenderer's maintenance, repair, and spare parts-stocking obligations prescribed in the Conditions of Contract and/or Technical Specifications."*

Clause 2.23.1- *"where other currencies are used, the procuring entity will convert these currencies to Kenya Shillings using the selling exchange rate on the date of the tender closing provided by the Central Bank of Kenya."*
Clause 2.12.3(c) clearly envisaged that international bidders could participate in the tendering

The Board also takes note of Regulation 23 of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 and Section 39 (1) of the Act which provides as follows:-

Clause 23 – *"an advertisement relating to open tender under these regulations shall state that such tender is open to small and micro enterprises and to disadvantaged groups registered with the ministry of finance."*

39 (1) – *"candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations."*

From the foregoing the Board notes that;

i. Under the Preference and Reservations Regulations Procuring Entities are at liberty to reserve a tender for local bidders only. However, any such reservations must be clearly and expressly stated in the invitation to bidders in line with Regulations 23 of Public Procurement and Disposal (Preference and Reservations) Regulations, 2011

ii. The Board has also notes that the advertisement that was put in the Daily Nation Nespaper was open tender and it did not expressly state that this tender was reserved for local bidders only.

The Board has considered the Procuring Entity's assertion that this being a National Competitive Bidding (NCB); it automatically precluded any international firms from the tendering process.
The Board is not persuaded by the argument and holds that the National Competitive Bidding (NCB) does not preclude international bidders unless any such preclusion is expressly stated in the tender document. As already noted above, the Tender Documents did not specifically express any such preclusion and therefore the Board holds that this tender was open to all bidders including international ones.

The Board further notes the Procuring Entity's assertions that it had sent out a clarification to all bidders which stated that this tender was reserved for local bidders only. The Board has noted the said clarification No.2 stated that the tender was reserved for local bidders only. However, as Board has already held, the tender documents did not exclude international bidders and therefore the said clarification which the Applicant denied receipt is of no consequence.

In any event, the Board notes that the Procuring Entity disqualified the Applicants bid for failure to submit a valid Tax Certificate and not on the ground that it was a foreign bidder.
Taking into account all the foregoing the Board finds that the Applicant or any other international firm was eligible to participate in this tender.
As to the question of whether or not the Applicant was rightly disqualified for failure to submit a valid Tax Compliance Certificate the Board notes as follows:

- Kenya Revenue Authority cannot issue Tax Exemption certificates to firms that are not registered in Kenya. In this case the Applicant could therefore not be expected to submit that certificate.
- Where international firms are eligible to tender, the Procuring Entity is bound to expressly request any such international firm to submit an alternative statement issued by the relevant authority in the country of origin if it so requires such a confirmation. The Board takes note of its decision on Application no. 46/2012, where it ruled in part as follows:

  "The Board has also perused the tender documents and confirmed that international bidders were required to confirm that they are registered by the relevant body in their country of origin and is satisfied that they did not have any advantage over the local bidders".

The Board however notes that this tender did not contain any such express requirement.

The Board therefore finds that the Applicant being an international firm was not in a position to submit a valid Tax Compliance Certificate from Kenya Revenue Authority and was not expressly required to provide an alternative collaborating document by the Procuring Entity .Therefore its disqualification in this tender was unfair and it should have been allowed to proceed to technical evaluation stage .In view of the foregoing these grounds of review succeed.

Grounds 2

This ground for review provides Applicant's general factual statement without citing any breach and the Board need not comment on it.

Taking the foregoing into consideration, the Request for Review succeeds and the Board orders pursuant to section 98 of the Act that,

1. The award to the Successful Tenderer is and is hereby annulled.
2. The Procuring Entity is hereby ordered to re-evaluate all the bids including that of the Applicant and thereafter award the tender to the lowest evaluated bidder in line with Section 66(2) of the Act

Each party to bear its own cost.

Dated at Nairobi on this 21st day of November, 2012.

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CHAIRMAN
PPARB

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SECRETARY
PPARB