

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
REVIEW NO. 25/2012 OF 25TH MAY, 2012

BETWEEN

IMPRIMIRIE NATIONALE.....APPLICANT

AND

MINISTRY OF STATE FOR IMMIGRATION

AND REGISTRATION OF PERSONS.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Ministry of State for Immigration and Registration of Persons in the matter of Tender No. MIRP/NRB/11/2010-2011 for Proposal for Design, Development, Supply, Installation, Testing and Commissioning of the Kenya National Registration and Identification System and Production of Smart Cards.

BOARD MEMBERS PRESENT

Mr. P.M Gachoka	- Chairman
Mr. Akich Okola	- Member
Mr. Sospeter Kioko	- Member
Ms. Natasha Mutai	- Member
Ms. Loise Ruhui	- Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Mr. L. Otieno - Secretariat
Ms. Judy Maina - Secretariat
Ms. Maurine Kinyundo - Secretariat

PRESENT BY INVITATION

Applicant, Imprimerie Nationale

Mr. C. Alibhai - Advocate, Anjarwalla & Khanna
Ms. Kananu Mutea - Advocate, Anjarwalla & Khanna
Mr. Groppi Walter - Director
Mr. Vincent Angwenyi - Lawyer

Procuring Entity, Ministry of State for Immigration

Mr. James Opundo - State Counsel
Mr. Ongeru Nicholas - State Counsel
Ms. Awino M. A - ADSCMS
Mr. Reuben Kimotho - Director NRB

Interested Parties

Zetes Ltd

Mr. Taib A. Taib - Advocate, Taib Advocates
Mr. Van Hoof - Director
Mr. Depoostene - Director
Ms. Nabiha Seif - Lawyer, Taib Advocates

National Database & Registration Authority & Gemalto

Mr. Njoroge Regeru - Advocate, Njoroge Regeru & Co
Mr. K. Marete - Lawyer, Njoroge Regeru & Co.
Mr. Shaffique Abdalla - Director
Mr. A. Signh - Director

Indra Sistemas, S.A

Mr. S. Njiru - C. Accountant
Mr. C. Maddo - Advocate, Muriu Mungai & Co

Morpho

Mr. B. Ravier - Manager
Mr. J. Chuwa - Representative

Robson Harris & Co.

Mr. Samuel Muga - Advocate

Mr. Stephen Gatama - Lawyer

Mr. Mwenda Mboka - Lawyer

OTI & Co. Ltd

Mr. Beni Zimchoni - Intl Representative

Mr. Ziv Koren - Account Manager

Mr. Albert Attias - Local Representative

IRIS

Mr. Joshua Omollo - Account Manager

Integrated CCTV Security Ltd

Mr. Mbira Mukoma - General Manager

BOARD'S DECISION

Upon hearing the representation of the parties and upon considering the information in all documents before it, the Board decides as follows;

BACKGROUND OF AWARD

The Procuring Entity, the Ministry of Immigration and Registration of Persons invited tenders from its list of prequalified candidates for Proposals for Design, Development, Supply, Installation, Testing and Commissioning of the Kenya National Registration and Identification System and Production of Smart Identity Cards. The invitations were by way of letters to the Prequalified candidates.

Closing/Opening

As at the time of tender opening on 4th November, 2011, nine (9) out of the ten (10) that were invited to tender had returned their bids. The nine firms that had returned their bids are as listed below;

1. IRIS Corporation, Copycat Limited and Electronic Card Services (ECS).
2. Daewoo International Corporation, Korea Minting Security Printing & ID Corporation (KOMSCO) & Neo Information Systems.
3. Zetes Industries.
4. Indras Sistema, SA
5. On Track Innovations & 3M- Cogent
6. NADRA & Gemalto
7. Imprimerie Nationale
8. Safran Morpho
9. Madras Security Printers and ITI Limited

EVALUATION

The evaluation process was meant to go through stages namely, Preliminary, Technical and Financial Evaluation. This appeal was filed at a stage when the Financial Evaluation process was set to begin. As such, only Preliminary and Technical Evaluations stages had been completed.

Preliminary Evaluation

The results of the preliminary evaluation are as shown in the table below;

TABLE 1

N O	Evaluation Criteria	BIDDERS RESPONSE								
		YES/NO								
		BIDDE R 1	BIDDE R 2	BIDDE R 3	BIDDE R 4	BIDDE R 5	BIDDER 6	BIDDE R 7	BIDDE R 8	BIDDE R 9
	SECTION A									
a	Bid security of 2 Million USD and valid for 120 days in form of a bank guarantee or letter of credit	Y	Y	Y	Y	Y	Y	Y	Y	Y
b	Bidder has not been associated in the past, directly with the procuring entity as a consultant for KENRIS	Y	Y	Y	Y	Y	Y	Y	Y	Y

	project									
	SECTION B									
a	Bidder has not been debarred by the Public Procurement Oversight Authority	Y	Y	Y	Y	Y	Y	Y	Y	Y

b	Declaration of current procurement Litigation or arbitration proceedings of the bidder within the immediate past three (3) years (2008, 2009 and 2010)	Y	Y	Y	Y	Y	Y	Y	Y	Y
c	Certified copies of their certificate of registration or Incorporation	Y	Y	Y	Y	Y	Y	Y	Y	Y
d	2008,2009 and 2010 certified copies of audited financial accounts in English language	Y	Y	Y	Y	Y	Y	Y	Y	Y
e	Evidence of an average annual turnover of at least USD \$ 100 million(one hundred million US Dollars) over the last immediate three(3) years (2008, 2009 and 2010)	Y	Y	Y	Y	Y	Y	Y	Y	Y
f	Copy of agreement/contract of Joint Ventures, Partnerships or Consortium duly signed with individuals having the power of	Y	Y	Y	Y	Y	Y	Y	Y	Y

	attorney for each partner.									
g	Authorization letters from manufacturers of the main system Components if such Manufacturers are not part of the Consortium	Y	Y	Y	Y	Y	Y	Y	Y	Y
h	Certifications from relevant International Bodies	Y	Y	Y	Y	Y	Y	Y	Y	Y
	SECTION C									
a	Evidence of Minimum 10 years experience in delivery of National Registration and Identification systems including a centralized database, nationwide electronic enrolment, processing, validation, verification, card personalization and delivery	Y	Y	Y	Y	Y	Y	Y	Y	Y
b	Verifiable proof of experience in the successful implementation of National Registration and Identification systems in at least one country in the past five years either as prime contractor or system integrator	Y	Y	Y	Y	Y	Y	Y	Y	Y
c	Verifiable proof of having installed a national database and issued a National ID card for not less than 10	Y	Y	Y	Y	Y	Y	Y	Y	Y

	million people.									
d	Verifiable reference of a successfully completed nationwide electronic enrolment.	Y	Y	Y	Y	Y	Y	Y	Y	Y
f	Certified details and status of National ID or similar card projects undertaken	Y	Y	Y	Y	Y	Y	Y	Y	Y
g	Proof of experience in delivery of a Civil Automated Fingerprint Identification System of not less than 10 million people.	Y	Y	Y	Y	Y	Y	Y	Y	Y
h	Capability of developing and implementing a biometrics system based on fingerprints and facial recognition.	Y	Y	Y	Y	Y	Y	Y	Y	Y
i	Capacity of integrating the existing rolled inked fingerprint images and flat live capture in the new Automated Biometric Identification System	Y	Y	Y	Y	Y	Y	Y	Y	Y
j	Provision of detailed proposal of the solution it intends to offer.	Y	Y	Y	Y	Y	Y	Y	Y	Y
k	Detailed project plan and methodology.	Y	Y	Y	Y	Y	Y	Y	Y	Y

	RESPONSIVENESS	Y	Y	Y	Y	Y	Y	Y	Y	Y
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Key-

Y- Responsive

N- Not Responsive

Findings

As per the tabulated results above, all the bidders were found to be substantially responsive to the requirements and therefore proceeded to technical evaluation.

TECHNICAL EVALUATION

The substantially responsive proposals were evaluated and the results tabulated as shown here below.

TABLE 2- Technical Evaluation

	EVALUATION CRITERIA	Max Score	SCORES								
			BIDDER 1	BIDDER 2	BIDDER 3	BIDDER 4	BIDDER 5	BIDDER 6	BIDDER 7	BIDDER 8	BIDDER 9
1	Project work plan and methodology	5	4.2	5.00	5.0	5.0	4.17	5.0	4.17	5.0	3.3
2	Card Personalization and Printing System requirements	5	4.0	5.00	4.0	4.7	5.0	4.7	3.67	5.0	3.3

3	Personalization/ Production System implementation	2	2.0	2.00	2.0	2.0	2.00	2.0	2.00	2.0	0.0
4	Smartcard ID security features requirements	5	4.7	4.86	4.9	5.0	3.00	4.9	5.00	4.9	3.1
5	Nationwide ID enrolment, Verification and Issuance System requirements	10	8.4	8.86	8.0	9.1	8.64	9.1	8.41	9.5	5.9
6	Business Information Management System requirement	5	4.5	4.00	4.0	5.0	4.50	5.0	5.00	5.0	2.5
7	Automatic Biometric Identification System requirements	10	3.6	2.99	4.2	5.8	5.28	5.0	5.00	5.6	2.0
8	Data Transmission proposal requirements	3	3.0	3.00	1.0	3.0	3.00	3.0	3.00	3.0	2.0
9	National Identification Database requirements	5	5.00	2.50	4.17	5.00	5.00	5.00	5.00	5.00	2.50
10	Network and Smartcard Security requirements	5	4.69	3.75	4.06	3.75	4.06	4.38	4.06	4.06	2.19
11	Innovation and Creativity	2	2.00	2.00	2.00	2.00	2.00	2.00	2.00	2.00	0.00
12	Stakeholders Interfaces requirements	3	2.00	3.00	3.00	3.00	2.00	3.00	3.00	3.00	3.00

13	Capacity Building, Knowledge and Technology transfer proposal	2	2.00	2.00	2.00	2.00	2.00	2.00	2.00	2.00	2.00
14	Disaster recovery requirements	2	2.00	1.50	2.00	1.00	1.00	0.50	1.50	1.50	0.50
15	Key Project Personnel Requirements	1	1.00	0.50	1.00	1.00	0.80	0.90	0.80	0.90	0.60
16	Central Data Centre requirements	5	5.00	5.00	4.23	3.46	3.08	4.23	5.00	4.23	3.08
17	Bidder Experience	10	6.00	1.00	9.00	8.00	8.00	8.00	6.00	10.00	5.00
18	Identification of the Key professional staff and their qualifications and competence for the assignment.	3	2.67	3.00	2.83	2.50	3.00	2.67	2.33	3.00	2.67

19	Operations and maintenance support	5	3.67	4.33	3.00	3.33	4.33	5.00	4.33	4.67	2.67
20	Training Support	5	3.57	4.29	5.00	4.29	3.57	5.00	5.00	5.00	5.00
21	Data migration, transition and integration	5	5.00	5.00	3.00	4.00	5.00	5.00	5.00	5.00	4.00

22	Understanding of the Project Environment	2	2.00	2.00	2.00	2.00	2.00	2.00	2.00	2.00	1.00
	TOTAL	100	80.99	75.58	80.29	84.92	80.42	88.29	84.27	92.32	56.43

TABLE 3- Summary of the Technical Evaluation Scores

BIDDER NO.	Bidder	Scores (%)
1	IRIS Corporation Limited & Electronic Card System	80.99
2	Daewoo International Corporation, Korea Minting Security Printing & ID Corporation(KOMSCO) & Neo Information Systems	75.58
3	Zetes Industries	80.29
4	Indra Sistemas	84.92
5	On Track Innovations & 3M- Cogent	80.14
6	Nadra & Gemalto	88.29
7	Imprimerie Nationale	84.27
8	Safran Morpho	92.32
9	Madras Security Printers & ITI Limited	56.43

RESULTS AND RECOMMENDATIONS

In accordance with the requirements of the RFP Document and Letter of Invitation, Section 1.16(page 9), bidders scoring 80% and above were to be recommended for consideration to the next stage.

Bidder No. 2 and 9 scored less than the stipulated 80% and were therefore not recommended for further evaluation.

Bidder No. 1,,3,4,5,6,7 and 8 were found to be technically responsive and are therefore recommended for the next stage of evaluation.

The Board notes that the Bidders who were responsive at the Technical Evaluation Stage were invited for the opening of the Financial Proposals. The dispute relates to the manner the financial proposals were opened and the disclosure of the technical evaluation scores.

THE REVIEW

The Applicant lodged this Request for Review on 25th May, 2012 against the decision of the Tender Committee of the Ministry of State for Immigration and Registration of Persons in the matter of Tender No. MIRP/NRB/11/2010-2011 for Proposal for Design, Development, Supply, Installation, Testing and Commissioning of the Kenya National Registration and Identification System and Production of Smart Cards.

The Applicant was represented by Mr. C. Alibhai and Ms. Kananu Mutea, Advocates Anjarwalla & Khanna Associates, while the Procuring Entity

was represented by Mr. James Opundo, State Counsel. The interested party National Database and Registration Authority was represented by Mr. Njoroge Rugeru, Advocate Njoroge Rugeru & Co. Advocates while Zetes Ltd was represented by Mr. Taib Ali Taib, Advocate of Taib Advocates. Robson Harris and Company Ltd was represented by Mr. Samuel Muga while another interested party Indra Sistemas was represented by Mr. C. Maddo of Muriu Munga & Co. Advocates.

The Applicant requests the Board for the following orders;

1. *The proceedings by the Respondent with respect to Request for Proposal (RFP) No. MIRP/NRB/1/2011-2012 for Design, Development, Supply, Installation, Testing and Commissioning of the Kenya National Registration and Identification System and Production of Smart Identity Cards dated 19th August 2011 be annulled;*
2. *The Respondent be ordered to re-advertise the Request for Proposal (RFP) No. MIRP/NRB/1/2011-2012 for Design, Development, Supply, Installation, Testing and Commissioning of the Kenya National Registration and Identification System and Production of Smart Identity Cards dated 19th August 2011;*
3. *Costs in favor of the Applicant; and*
4. *Such other or further relief that this Board shall deem just.*

The Applicant raised four grounds of review and the Board deals with them as follows;

GROUND 1- Breach of Section 2 of the Act.

The Applicant submitted that the Procuring Entity acted in contravention of the provisions of Section 2 of the Public Procurement and Disposal Act, (hereinafter referred to as "the Act") specifically the requirement that the process followed in procurement be fair, transparent and accountable.

In response, the Procuring Entity denied breaching Section 2 of the Act. It argued that the Applicant had not disclosed the material particulars amounting to breach of that provision and specifically the requirement of fairness, transparency and accountability.

The Board notes that the provision that is alleged to have been breached by the Procuring Entity is Section 2 of the Act which is on the general objectives of the Act. The said provision provides as follows;

Section 2;

The purpose of the Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives-

- a. To maximize economy and efficiency;***
- b. To promote competition and ensure that competitors are treated fairly;***
- c. To promote the integrity and fairness of those procedures;***

- d. To increase transparency and accountability; and*
- e. To increase public confidence in those procedures;*
- f. To facilitate the promotion of local industry and economic development.*

The Board notes that Section 2 cannot be breached in isolation. Accordingly, it deals with this matter subsequently together with the other grounds.

GROUND 2- Breach of Section 60(8) of the Act.

The Applicant stated that following invitation to it by the Procuring Entity through an undated letter to express interest in the subject tender, it picked up the said expression of interest document, completed it and submitted it to the Procuring Entity. It further stated that following this process, it was informed by the Procuring Entity vide a letter dated 7th June, 2011 that it had qualified and would therefore be invited to bid for the contract. It consequently purchased the Request for Proposal document, herein referred to as "the RFP", completed it as instructed, and submitted it to Procuring Entity which, opened the said RFP on 4th November, 2011.

The Applicant further stated that according to Clause 2.33.1 of the RFP, the Procuring Entity was required to inform bidders whose proposals did not meet the minimum qualifying mark or considered non-responsive to the RFP indicating that their Financial Proposals will be returned unopened upon completion of the award process, and further that the Procuring Entity shall simultaneously notify the bidders who have secured the

minimum qualifying mark, indicating the date and time set for opening the Financial Proposals and stating that the opening ceremony is open to those bidders who choose to attend.

It further stated that by a letter dated 4th May 2012, it was invited to attend the opening of the Financial Proposals and pursuant to this invitation, sent one of its officials, Mr. Lionel Chircop to attend and participate in the Financial Proposals opening ceremony, which took place on 11th May, 2012.

The Applicant submitted that the Procuring Entity breached Section 60(8) of the Act by failing to prepare the tender opening minutes setting out a record of the procedure followed in the opening of tenders. In support of this contention, it referred to a signed statement of Lionel Chircop, which is dated 24th May, 2012, in which he states at paragraph 7 that the Procuring Entity did not avail to the attendees the minutes of the public opening of the Financial Proposals on 11th May, 2012 as indicated in Clause 2:33.2.

In response, the Procuring Entity denied breaching or acting in Contravention of Section 60 (8) of the Act. It stated that due to the complexity, specialized and security nature of the subject procurement, the method of procurement adopted was Request for Proposal under Section 76 of the Act, together with other methods, namely, security vetting and due diligence. It submitted that contrary to the claim by the Applicant that the minutes of opening of Financial Proposals were not prepared, they had in fact been prepared strictly in accordance with the provisions of the law, and specifically Section 60 (8) of the Act. In support of this claim, the

Procuring Entity produced minutes of the Financial Proposals opening held on 11th May, 2011.

An Interested Party, namely, National Database & Registration Authority (NADRA), and GEMALTO stated that it was not privy to the minutes of the opening of the Financial Proposals as they were confidential and it could not, therefore comment on them.

Another Interested Party, namely, Zetes Industries, submitted that Section 60 of the Act was irrelevant to this procurement as that section deals with the procedures for opening tenders and not with matters related to Requests for Proposals, which was the method used by the Procuring Entity in this case. It argued that insofar as this is true, the procedures applicable in this case are those set out in Section 82 of the Act.

Another Interested Party, Indras Sistemas associated itself with the arguments by the Procuring Entity, NADRA and Zetes Industries and submitted that in terms of Section 60(8), which deals with opening of tenders, the Application was time-barred since the tender in question was opened in 2011. It averred that this being the case, any complaints arising from the tender should have been brought within the time period set forth in Regulation 73(2).

Another Interested Party, On-Track Innovations & 3M Cogent, associated itself with the submissions by the Applicant.

The Board has carefully considered the submissions by the parties and the documents presented to it and decides as follows.

The issue for determination by the Board on this ground of Request for Review is whether or not the minutes of the opening of the Financial Proposals were prepared as required by Section 60(8) of the Act.

The Board notes that upon filing of the Request for Review on 25th May, 2012, the Board Secretary requested the Procuring Entity to file its Response. In addition, the Procuring Entity was requested to give all the original tender documents, Evaluation reports and Minutes. By a letter dated 31st May, 2012 the Procuring Entity supplied the said documents.

The Board further notes that the Procuring Entity provided minutes of the meeting for the opening of the Financial Proposals. Subsequently, the Procuring Entity also provided another set of minutes for the opening of the Financial Proposals.

Accordingly, the Procuring Entity produced before the Board, two sets of different minutes purportedly prepared after the opening of the Financial Proposals.

Minute No. 2 of the first set of minutes provided as follows:

"The financial bids for all the technically responsive bidders were therefore opened and were read out in accordance with the Public Procurement and Disposal Act, 2005. Each of the bidders was further asked to check his financial bid to ensure that the documents were intact as initially submitted and all of them were satisfied. All the Bidders also confirmed the total quoted price for each proposal submitted as quoted at the time of tender submission as shown below:-"

Minute No. 2 of the second set of minutes provided as follows:

"The financial bids for all the technically responsive bidders were therefore opened and together with their technical scores were read out in accordance with the Public Procurement and Disposal Act, 2005. Each of the bidders was further asked to check his financial bid to ensure that the documents were intact as initially submitted and all of them were satisfied. All the Bidders also confirmed the total quoted price for each proposal submitted as quoted at the time of tender submission as shown below:-"

The Financial Proposals as per the bid minutes are as follows:-

BIDDER	NAME OF BIDDER	QUOTED PRICE
1	Iris Corporation Berhad	USD 109,807,873
3	Zetes Industries	Eur. 31,308,215
4	Indras Sistemas	Eur.78,627,605.42 +Ksh. 442,215,118.97
5	.On-Track Innovation&3M Congent	USD. 108,909,602
6	Nadra and Gemalto	Eur. 66,394,233
7	Impremerie Nationale	Eur. 144,233,816 +Ksh. 798,234,971
8	Safran Morpho	Eur. 82,174,540 + Ksh. 2,084,484,507

The Board notes the provisions of Section 60(8) of the Act which states that:

"The tender opening committee shall prepare tender opening minutes which shall set out -

(a) a record of the procedure followed in opening the tenders: and

(b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders."

It is also significant that an affidavit of one of the Interested Parties stated as follows at paragraphs 14, 15 and 20(c) respectively:

Paragraph 14:

"THAT though all the bidders represented at the opening of Financial Proposals including the Applicant in these proceedings were at liberty to do so none requested that the scores of the respective Technical Scores be read out aloud."

Paragraph 15:

"THAT I am informed by the Interested Party's Advocates on record which information I believe to be accurate that the failure by the bidders present to request that the respective technical proposal scores be read out aloud, waived the onus on the procuring entity to do so and such bidders are now estopped from challenging the procurement process on that account."

Paragraph 20(c):

"There is no requirement at sections 76 to 86 of the Public Procurement and Disposal Act 2005 which provides for procedure for a procurement using a request for proposals for the reading aloud of evaluations."

The Board deals with the implications of the conflicting contents of Minute No. 2 subsequently in this decision.

Turning to the issue raised by Zetes Industries that the Application is time-barred in that the tender was opened in 2011, and, accordingly, the Applicant ought to have filed the Request for Review within the period specified in Regulation 73(2)(c), the Board notes that the evaluation of the Request for Proposals was conducted in three stages, that is to say, preliminary evaluation stage, the technical evaluation stage, and the financial evaluation stage. The Board further notes that the RFPs were opened on 4th November, 2011, and thereafter evaluation using the three stages stated above took place culminating with the evaluation of the Financial Proposals, which took place on 11th May, 2012.

It is not in dispute that the Request for Review was filed by the Applicant against the actions by the Procuring Entity arising from the opening of the Financial Proposals, and not in respect to actions by the Procuring Entity which took place during the opening of the RFPs; the preliminary evaluation stage; and the technical evaluation stage. The Request for Review was filed on 25th May, 2012, which was fourteen days following

the opening of the Financial Proposals. It can be assumed that the Applicant became aware of the breach complained about on the day of the opening of the Financial Proposals which was on 11th May, thus putting the Application within the appeal window set forth in Regulation 73(2)(c)(i) which provides that the request referred to in paragraph (1) shall be made within fourteen days of:-

"the occurrence of the breach complained of where the request is made before the making of an award."

GROUND 3- Breach of Section 82(1) of the Act.

The Applicant submitted that the Procuring Entity breached Section 82 (1) of the Act by failing to comply with the Request for Proposals particularly clause 2.33.2 which provides that:

"The Financial Proposals shall be opened publicly in the presence of the bidder's representatives who chose to attend. The name of the bidder, the technical scores and the proposed prices shall be read aloud and recorded when the Financial Proposals are opened. The Procuring Entity shall prepare minutes of the public opening."

In support of this contention the Applicant cited the case of *Geodev (K) Limited versus Ministry of Education* [Application No. 37/2008], in which the Board, after considering a similar provision in the RFP in that case stated at page 10 that:-

"The Board wishes to reiterate that in procurement by way of a Request for Proposal, reading of the technical scores is critical. The RFP document always contains a clause giving the formula to be applied in arriving at the combined technical and financial scores. Therefore, before the financial proposal is opened the technical scores must be read out aloud and minutes prepared in accordance with section 60(8)."

The Applicant further cited the case of *Petroleum & Industrial Services Ltd versus National Oil Corporation [Review No. 6/2009]*, in which Clause 5.4 in that case provided that at the public opening of the financial proposals, the name of the tenderer, the technical scores and the proposed prices were to be read out aloud.

The Applicant further submitted that by failing to read out aloud the technical scores the Procuring Entity contravened Section 2 of the Act and Clause 1.8 of the RFP in which the Procuring Entity committed itself to "adhere strictly to the provisions of the Act and Regulations.

The Applicant argued that the fact of the technical scores not being read out as set out in Clause 2.33.2, was confirmed by the affidavit sworn by one Shaffiq F. Abdalla in support of one of the Interested Parties, National Database and Registration Authority, and Gemalto, who stated in paragraph 14 "That though all the bidders represented at the opening of Financial Proposals including the Applicant in these proceedings were at liberty to do so, none requested the scores of the respective Technical Scores be read out aloud." It further argued in support of this claim that paragraphs 15 and 20(c) of that Affidavit, similarly confirmed the fact that

the technical scores had not been read out aloud at the opening of the Financial Proposals.

In conclusion, it submitted that because these breaches had compromised the whole process, the Board should annul the proceedings.

In reply, the Procuring Entity submitted that contrary to the assertions by the Applicant, the process was transparent and accountable as evident from the fact that the whole process was open to public scrutiny, and further that no bidder complained. In support of this contention it argued that minutes regarding the whole process, including those relating to the opening of the Financial Proposals, were maintained. In particular, the Procuring Entity averred that contrary to the claim by the Applicant that the technical scores were not read out aloud and minuted during the opening of the Financial Proposals, this had actually happened.

The Procuring Entity further submitted that if in fact the technical scores were not read out as required under Clause 2.33.2 of the RFP, this omission should be regarded as a mere oversight and a minor deviation which do not go to the substance of the procurement in terms of Section 64 of the Act.

An Interested Party, National Database and Registration Authority, and Gemalto, submitted that the omission to read out aloud the technical scores at the opening of the Financial Proposals, if indeed that was the case, should be regarded as a mere technical hitch which should not overshadow the need to deliver substantive justice to those affected by the procurement in question. It stated that those who are affected by the tender include the

Treasury; the citizens of Kenya; the Procuring Entity and the bidders who had participated in the process.

The Interested Party averred that given the fact that the procurement in question is a highly emotive one in light of the political, social and national security context in which it was being carried out, the national interest consideration should supersede any technicalities. In this respect it referred the Board to proceedings in Parliament in March 2011, and more recently at a meeting of the Budget Committee on Revenue and Expenditure, at which the matter had been discussed.

It argued that it was incumbent on the Board to take a broader view of the matter, and in so doing weigh substantive justice against a mere technicality, paying heed in particular, to the provisions of Article 159(2)(d) of the Constitution which states that:

"justice shall be administered without undue regard to procedural technicalities."

In support of this argument, the Interested Party pointed to emerging jurisprudence, according to which, the courts in Kenya administer justice with the overriding objective of delivering substantive justice, rather than being hampered by mere technicalities, as exemplified by Section 1A of the Civil Procedure Act; and Section 4 of the Supreme Court Rules 2011 which states that:

"The Court shall interpret and apply these Rules without undue regard to procedural technicalities."

The Interested Party submitted that if the Board should find that the omission to read out the technical scores aloud at the opening of the Financial Proposals goes to the root of the procurement, then the Board should invoke its powers under Section 98 of the Act and give directions as to what should be done, rather than annul the whole process as prayed for by the Applicant.

The Interested Party further submitted that according to public records, it was obvious that the Applicant is a subcontractor of Thales Inc, which is the present provider to the Government of the services presently being procured and, as such, had every motive to ensure that the procurement proceeding at issue is annulled so that the Applicant can continue to benefit from its current arrangement with the Government. In support of this allegation, it referred the Board to an article which the Interested Party had downloaded from the internet which reads in part:

"Part of the consortium led by Impremerie Nationale - which launched the e-passport just five weeks after the contract award. Thales supplied the graphic and electronic data personalisation system for the new electronic passport....."

Finally, the Interested Party while associating itself with the submission by the Procuring Entity that the matter was still on-going, stated that the Application was premature and sought only to pre-empt the outcome of the process.

It concluded by urging the Board to dismiss the Application.

Another Interested Party, Zetes Industries, in opposing the Application argued that failure to read the technical scores aloud during the opening of the Financial Proposals was a technicality which did not have a substantial effect on the outcome of the process. It submitted that while recognizing the importance of procedure as noted by Lord Denning to the effect that "*procedure is the handmaiden of justice and that without it there can be no justice,*" it was necessary to take cognizance of the provisions of Article 159(2)(d) of the Constitution which requires that justice be administered without undue regard to procedural technicalities. The Interested Party stated that this provision has dual purposes, namely that while it protects procedural technicalities on the one hand, on the other, it recognizes that they should not take precedence over substance.

The Interested Party further submitted that the Applicant had ulterior motives for lodging the Request for Review. In this connection, it observed that, the Applicant had not complained during the early stages of the process; and no other bidder except the Applicant had complained.

Regarding the application of Section 60(8) to the instant procurement, it argued that the procedures under the section could not be exported to Section 82 as they do not relate to the procurement using the Request for Proposals method.

In conclusion, it urged the Board to take judicial notice of the fact that elections are approaching and that to annul the process would result in disenfranchising Kenyans.

Another Interested Party, Indras Sistemas, associated itself with the submissions by the Procuring Entity; NADRA; and Zetes Industries. It stated that the motive of the Applicant in lodging this Request for Review was to seek the nullification of the tender, which was misguided. It argued that concerning Clause 2.33.2, there was no time frame within which the minutes should be prepared, and therefore it was premature for the Applicant to complain that there were no minutes recording the proceedings during the opening of the Financial Proposals. It supported the contention by NADRA that the Board had powers under Section 98(b) to make orders other than that requested by the Applicant, namely, annulment.

Another Interested Party, On-Track Innovations & 3M-Cogent, supported the Application. It submitted that there was no doubt that there was no reading of the technical scores during the opening of the Financial Proposals, as required under Clause 2.33.2. In its view the reading of technical scores was fundamental in the evaluation and award process. It argued that if there was a reading of the scores, the fact that the Procuring Entity had produced two sets of minutes which contradicted themselves rendered both minutes invalid.

The Interested Party further submitted that Section 82(5) of the Act is specific that in assessing a successful tender one had to use the technical score and the financial score. In its view, therefore, the issue of technical scores is not merely a technicality but a substantial matter, and as such, the Procuring Entity erred in not reading them out aloud during the opening

of the Financial Proposals, as set out under Clause 2.33.2 of the RFP. In this respect it argued that the word "shall" made the reading mandatory and thus this could not be merely a technical requirement.

On the question of public interest, the Interested Party averred that public interest requires that a procurement process must be transparent, having regard to Article 201 of the Constitution which states that application of public funds must be transparent and fair. It stated that furthermore the wording of Article 227 of the Constitution requires that there is transparency and fairness in the procurement system, for the purpose of avoiding manipulation of the procurement process.

In reply, the Applicant stated that the very fact that there were two contradictory sets of minutes produced by the Procuring Entity, each of them claiming to be the authentic record of the proceedings, was testimony to the fact that the whole process was contaminated and proof that there was no fairness in the evaluation of the RFPs. It argued that the failure to read out aloud the technical scores, and to record them, was not merely a matter of technicality but one of substance which went to the root of the whole process.

As to the allegation that the Applicant brought this Request for Review in order to maintain the status quo, it averred that it had no relationship with the current supplier of identity cards, Messrs Thales Inc, other than that of a sub-contractor to the Applicant, which was not unusual. The Applicant stated that Thales was a completely different company and, accordingly, the insinuation in the affidavit sworn by Shaffiq F. Abdalla in opposition to

the Request for Review claiming that the Applicant is a sub-contractor to the Thales Inc, was completely misleading. In this regard it pointed out that it has a similar commercial relationship with NADRA, which is one of the Interested Parties in these proceedings, and who was opposing the Application. It pointed out that the article which was downloaded by NADRA and on which it relied to link the Applicant with Thales Inc, was dated 2006, and was therefore of no value.

Regarding the assertion by NADRA, one of the Interested Parties opposing the Request for Review, that national interest should take precedence over what NADRA alleged to be a mere technical hitch, the Applicant argued that failure to read out aloud the technical scores was a matter of substance and not merely a technicality. Accordingly, it urged the Board to ignore this assertion.

In conclusion, it submitted that use of Section 98(b) of the Act to cure the flaw in the process, as urged by the Procuring Entity and other interested Parties opposing the Request for Review, was not sustainable and urged the Board disregard the plea.

Finally, it urged the Board to order that the process be annulled.

After listening carefully to the submissions by the Parties and considering the documents presented to it, the Board makes the following findings and observations. Towards this end, the issues for determination by the Board are the following:

1. Were the technical scores read out aloud during the opening of the Financial Proposals?

2. Were opening minutes prepared by the tender opening committee?; and

3. If the minutes of the technical scores were not read out aloud, was this omission merely a technicality or did it go to the substance of the process?

Regarding the question as to whether the technical scores were read out aloud, the Board notes that according to an undated report prepared by the Procuring Entity, technical evaluation of the Request for Proposals of bidders who submitted their completed Request for Proposals was carried out by an inter-ministerial evaluation committee between 23rd November and 2nd December, 2011. Arising from this exercise, seven out of nine bids evaluated were found responsive having scored above 80%, which was the cut off mark.

The Board further notes that by a letter dated 4th May 2012, the Procuring Entity invited the seven bidders, who had been found to be technically qualified to attend the opening of the Financial Proposals which was scheduled to take place on 11th May, 2012. Pursuant to this letter the seven bidders attended the opening of the Financial Proposals.

The Board further notes that upon the Request for Review being filed by the Applicant, the Procuring Entity was requested by the Secretariat of the Board vide a letter dated 25th May, 2012, to submit all the documents pertaining to the Request For Proposal as required under the Act and the Regulations, and that the Procuring Entity duly complied by forwarding

the said documents vide a letter dated 31st May, 2012. Among the documents supplied by the Procuring Entity is a document dated 20th May, 2012 purporting to be the minutes of the opening of the Financial Proposals.

According to Min. No. 2 of the said minutes it was recorded that:

"The financial bids for all the technically responsive bidders were therefore opened, and were read in accordance with the Public Procurement and Disposal Act, 2005. Each of the bidders was further asked to check his financial bid to ensure that the documents were intact as initially submitted and all of them were satisfied. All the Bidders also confirmed the total quoted price for each proposal submitted as quoted at the time of tender submission as shown below:-"

The Board further notes that subsequent to receipt of these minutes, another set of minutes were presented which in all particulars were similar to the one referred to above, except that the words "**and together with their technical scores**" had been inserted, so that Minute No. 2 read as follows:

"The financial bids for all the technically responsive bidders were therefore opened, and TOGETHER WITH THEIR TECHNICAL SCORES were read in accordance with the Public Procurement and Disposal Act, 2005. Each of the bidders was further asked to check his financial bid to ensure that the documents were intact as initially submitted and all of them were satisfied. All the Bidders also confirmed the total quoted price for each proposal submitted as quoted at the time of tender submission as shown below:-"

At the hearing of the Request for Review the Procuring Entity confirmed that the signatures on the two rival minutes were the same thus giving rise to the question as to which of them was authentic, in light of the difference in meaning and substance that is manifest in Minute No. 2 of the two documents.

It is clear to the Board that the authentic document is the one which does not contain the words "**together with their technical scores**" as these are minutes that were first presented to the Board upon request by the Secretary to the Board. The Board is of the strong view, and so finds, that the second Minutes of which contains the words "**together with their technical scores**" was forged after the filing of the Request for Review by the Procuring Entity in order to create the impression that the technical scores were read out aloud during the opening of the Financial Proposals. The Board believes that the sole purpose for this forgery was to satisfy the requirements of Clause 2.33.2 of the Request for Proposal. It is noteworthy, that at the hearing the Procuring Entity was at pains to explain how there existed two sets of Minutes and could not offer any explanation.

The conclusion to be drawn from this is that the technical scores were not read out during the opening of the Financial Proposals in breach of Clause 2.33.2 of the Request for Proposal. Indeed, the Board asked all the bidders present at the hearing whether or not they were informed, or were aware of, their technical scores and they all answered in the negative. Further the Board notes that one of the Interested Parties NADRA, through an

Affidavit sworn by Mr. Shaffiq F. Abdalla at paragraph 14, 15 and 20(c) stated as follows;

Paragraph 14:

"THAT though all the bidders represented at the opening of Financial Proposals including the Applicant in these proceedings were at liberty to do so none requested that the scores of the respective Technical Scores be read out aloud."

Paragraph 15:

"THAT I am informed by the Interested Party's Advocates on record which information I believe to be accurate that the failure by the bidders present to request that the respective technical proposal scores be read out aloud, waived the onus on the procuring entity to do so and such bidders are now estopped from challenging the procurement process on that account."

Paragraph 20(c):

"There is no requirement at sections 76 to 86 of the Public Procurement and Disposal Act 2005 which provides for procedure for a procurement using a request for proposals for the reading aloud of evaluations."

It is clear from the wording of those paragraphs that the technical scores were not read as argued by the Procuring Entity.

The Board observes that the Request for Proposal method is one which entails the use of a two envelopes system. Further it also uses a weighting

formula, and in this particular case the technical proposal had a weight of 80% and the Financial Proposal 20%. The method also requires that a formula for combining the technical scores and the financial scores be indicated in the Request for Proposal which in this tender was in Clause 2.37.3.

The method requires that for bidders who do not attain the cut off mark in the technical proposal, their bid should be rejected and their financial proposal be returned unopened. Thereafter, the bidders who have attained the cut off mark in the technical proposal are invited to attend the opening of financial proposals. Before the opening of the financial proposals the Procuring Entity is required to read out aloud the technical scores to the bidders. The Board notes that in this tender the procedure was provided for in Clause 2.33.2 of the Request for Proposal which states as follows:

"The Financial Proposals shall be opened publicly in the presence of the bidder's representatives who chose to attend. The name of the bidder, the technical scores and the proposed prices shall be read aloud and recorded when the Financial Proposals are opened. The Procuring Entity shall prepare minutes of the public opening."

The purpose of this elaborate procedure is to ensure that the process is not manipulated by the Procuring Entity by doctoring the technical scores. This is the cornerstone of procurement using the Request for Proposal method in that it ensures transparency, fairness as set forth in Section 2 of the Act.

The question which then arises is whether or not the reading of technical scores was a mere technicality or an issue of substance in the tender. As the

Board has pointed out in the past in the cases cited by the Applicant, it is important that the technical scores are read out aloud at the opening of the financial proposals in order to prevent the mischief that may be visited upon the bidders when this method of procurement is used. In the case of *Geodev* cited above, the Board observed at page10 that ***"...before the financials are opened the technical scores must be read out aloud and minutes prepared in accordance with section 60(8). This ensures that there is transparency and eliminates the possibility of manipulation of technical scores."***

This view was reiterated in the case of Petroleum and Industrial Services Ltd cited above and also in the case of ***Gibb Africa td & Canarail Consultants Inc v Kenya Railways [Application No. 7/2011]***.

In view of the foregoing it is clear that the question of reading of technical scores is not a mere technicality but is one of substance that goes to the root of the process. Indeed the Board notes that Article 227 of the Constitution states that;

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

It follows from the above that there can be no transparent and fair process unless the technical scores are read out at opening of the Financial Proposal stage.

Regarding the question as to whether minutes of the opening of the Financial Proposals were kept by the tender opening committee in accordance with section 60(8) of the Act, as the Board has already stated above, the minutes were indeed kept. However, the Procuring Entity had two sets of conflicting minutes for the opening of the Financial Proposals. The Board notes the argument by the Interested Parties opposing the Application who submitted that insofar as this was a procurement falling under Section 82 of the Act, the procedures set out in Section 60(8) did not apply. The Board finds no merit in this argument. Section 45 of the Act which deals with procurement records, states as follows:

"A procuring entity shall keep records of each procurement for at least six years after the resulting contract was entered into or, if no contract resulted, after the procurement were terminated."

The section goes into great detail as to what type of records a procuring entity is supposed to preserve for the specified duration. Section 45(2)(d) states that:

"for each tender, PROPOSAL or quotation that was submitted -

(i) the name and address of the person making the submission; and

(ii) the price, and a summary of the other principal terms and conditions of the tenders, proposals or quotations"

Section 45(2)(g) further requires procuring entities to keep ***"a copy of every document that this Act requires the procuring entity to prepare."***

Significantly, the section falls under the part of the Act which is headed "General Procurement Rules." This implies those rules refer to any method of procurement and are not limited only to procurement by open tenders. Minutes are an important part of a tendering process for it is they that document the process by which a procuring entity has reached its decision, whether that decision is in respect to an open tender, a request for proposals, or any method which a procuring entity has chosen to use. As a famous British statesman once observed regarding politics: "war is politics by other means." The same can be said of request for proposals: "request for proposals is procurement by other means." The procedures governing the methods may differ, but the fundamental principles and objectives governing them are the same. These are set out in Section 2 of the Act. The recording of minutes is one way of manifesting these principle and objectives.

In view of the above the Board finds that the Procuring Entity failed to comply with Section 60(8) of the Act and Clause 2.33.2 of the Request for Proposal by failing to keep a true and authentic record of the procurement records of the Financial Proposals opening and reading of the technical scores.

Turning to the third issue raised by NADRA, one of the Interested Parties, namely, whether failure by the Procuring Entity to read the technical scores was a mere technicality, the Board notes the high profile and urgent nature of this procurement and observes that the matter came before it in the year 2009 in the case *of National Database & Registration Authority (NADRA)*

Pakistan versus Ministry of state and Registration of Persons [Review No. 35/2009]. In that case, after hearing the submissions by the parties, the Board nullified the decision of the Procuring Entity and ordered it to retender.

The Board notes with concern the amount of time which has elapsed since it made the aforementioned order. In terms of time which has elapsed, three years have passed since the procurement of the same goods first started, the first expression of interest having first been advertised in the East African Standard and the Nation Newspaper on 15th April, 2009.

It is not clear why the process has taken such a long period of time to come to a definitive conclusion. The Board notes that according to an exhibit annexed to the affidavit of one of the Interested Parties in these proceedings, the Minister for State For Immigration and Registration of Persons , who is in charge of the Procuring Entity, informed Parliament on March 2, 2011 that "***..the process of the third generation identity cards contract has been slowed down by court cases, appeals to the Public Procurement Oversight Authority (PPOA) and we have been frustrated several times. So, we have been extending this contract against our wish since 2005 to date.***" This is according to the National Assembly Official Report of 2nd March, 2011. In short, blame for failure by the state to procure these security documents and their associated technologies since 2005, is being put on the Judiciary and the Board without any concrete evidence to support this claim.

The question that needs to be answered is why should the Board be blamed for difficulties encountered in completing a procurement process which commenced in 2005, when it never got involved until 2009 when a complaint was brought before it for adjudication? Having disposed of the matter in September 2009, why did it take the Ministry nearly a year and a half to commence the procurement proceedings?

The Board observes that its role is only to adjudicate disputes brought before it by parties who are aggrieved by the decision of a procuring entity. In discharging this function it hears the parties, examines the tender and other related documents, and applies the Act and the Regulations based on the evidence before it, and makes orders as to what should be done based on its powers as set out in Section 98 of the Act. According to the Act under which it operates it must hear and determine matters brought before it within the statutory period of thirty days. It is in this context that it heard and determined the Application brought before it on this matter on 8th September 2009.

Having discharged its role as stated above, the Board reiterates its concern as to why this procurement has taken so long to complete, given the fact that its order was given in September 2009, and yet, the procurement process which is before it now did not commence until 8th March 2011.

As already mentioned, the Procuring Entity and the Interested Parties opposing the Application for review have invoked the national interest as their main argument for opposing the nullification of the process, as requested by the Applicant.

In determining the question as to what constitutes public interest, it should be appreciated that the term is one which admits of a wide difference of opinion as to what constitutes national interest. First, it should be noted that our procurement law does not contain any provision which deals with the concept of national interest. This is to be contrasted with such jurisdictions as Tanzania, Zimbabwe and Seychelles, among others, where the applicable procurement law allows a procuring entity to swear an affidavit stating that a particular procurement is of national interest, and thus permit the procurement in question to continue, while the matter is being litigated. The safeguard in those laws is that should the procuring entity lose the case and is found to have breached the law, then the complainant is entitled to damages.

The Board has been faced with a similar argument of national interest before in the case of *Lantech (Africa) Limited v. The Ministry Of Finance [Application No. 2/2007]*. In that case the Ministry of Finance argued, among other things, that the procurement in question, which was for the Supply, Installation and Commissioning of Optic Fibre Network, was in the public interest, and as such should be allowed to continue. In rejecting this plea the Board stated at page 14 that:

"It is not lost on the Board that this is a tender of great significance to the country. However, it is important for the Procuring Entity to handle such a tender with great care and attention that it deserves including strict adherence to the Regulations. The Board wrestled with this issue and decided that it is more important in the long term public interest and for

future good governance and propriety in public procurement, that critical legally established procedures are adhered to. A bad precedent on an important procurement could well lead to backsliding in adherence to procedures in procurements of lesser importance. Early prevention of a malady is better than attempting to cure it later."

The Board also takes note of the statement made by Justice Burrough in the case of Richardson v. Mellish (1824), 2 Bing. 229, D. C. at page 252, when discussing the question of public policy, a subject which is analogous to public interest. In that case he observed that *"I , for one, protest against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."*

The point made by Justice Burrough in the last sentence quoted above, applies to this case. There was nothing easier for the Procuring Entity to do than just comply with the provisions of Clause 2.33.2 by reading out aloud the technical scores, and recording them, at the opening of the Financial Proposals. It has not offered any explanation for this omission. Instead it has sought refuge in minutes which it knows very well were forged, as is evident from the fact that minute No. 2 in the two versions produced at the hearing clearly stand in argument with each other. But even the minutes themselves, unworthy as they are, failed to record the technical scores which the Procuring Entity claims to have read out aloud as is required by Section 60(8) of the Act.

After carefully considering the matter, the Board finds that the Procuring Entity breached Section 60(8) of the Act; and Clause 2.33.2 of the Request for Proposal. Accordingly, this ground of Request for Review succeeds.

Taking all the above into account, the Request for Review succeeds.

The Board orders pursuant to Section 98(1) that the proceedings with respect to the Request for Proposals are hereby annulled.

The Procuring Entity may retender.

The Board makes no orders as to costs.

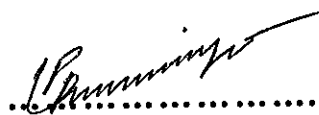
Dated in Nairobi on this 25th Day of June, 2012.



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CHAIRMAN

PPARB



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FOR: **SECRETARY**

PPARB

