

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 45/2014 OF 7TH NOVEMBER, 2014

BETWEEN

COM TWENTY ONE LTD.....APPLICANT

AND

COMPTROLLER OF STATE HOUSE.....PROCURING ENTITY

AND

MFI TECHNOLOGY SOLUTIONS LTD.....INTERESTED PARTY

Review against the decision of The Comptroller of State House in the matter of Tender SH/002/2014-2015 for Supply and Installation of IP Based PABX.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Mr. Peter Ondieki, MBS - Member
3. Mr. Nelson Orgut - Member
4. Eng. Weche R. Okubo, OGW - Member

IN ATTENDANCE

1. Mr. Stanley Miheso - Holding Brief for the Secretary

PRESENT BY INVITATION

Applicant – Com Twenty One Limited.

1. Simon Ngara - Advocate
2. Evans Mwaura - Director

Procuring Entity – Comptroller of State House

1. Stephen G Wamae - A/D Supply Chain Management Services
2. Peter Njunge - Chief Structural Engineer
3. C. J. Osuru - Engineer (Electrical)
4. P. J. Osaso - Engineer (Electrical)
5. J. G. Makumi - Assistant Secretary
6. E. M. Mutari - Deputy Secretary

Interested Party

1. Animesh Solanki - Director, MFI Technology Solutions Ltd.
2. Eliud Sinowa - Manager, MFI Technology Solutions Ltd.
3. Jaswinder Singh - Tech Manager, MFI Technology Solutions Ltd.

BOARD'S DECISION

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

BACKGROUND OF THE AWARD

1.0 INTRODUCTION

1.1 SCOPE OF WORKS

The works the subject matter of this decision include but were not limited to the supply, installation, testing and commissioning of a new IP BASED P.A.B.X, wiring in the areas to be identified on site and termination of the telephone instruments.

TENDER INVITATION

10 No. Bidders were invited to tender for the works through restricted tendering.

2.0 TENDER OPENING

Nine (9 No.) bidders returned their tender documents. The bids were opened on 30th September, 2014 at the Procuring Entity's premises.

The bidders Bid Sums were as follows:-

Table 1: Tender Opening Results

Opening Order	Bidder's Name	Tender Sum (Kshs)
1	M/s Com Twenty One Ltd P.O. Box 15818 – 00100 Nairobi	19,299,620.00
2	M/s Soulco Kenya Ltd P.O. Box 26632-00100 Nairobi	19,993,879.00
3	M/s MFI Technology Solution Ltd. P.O. Box 10600-00200, Nairobi	23,581,639.00
4	M/s Pong Agencies Ltd P.O. Box 60087-00200 Nairobi	26,267,622.00
5	M/s Lekha Trading Co. Ltd. P.O. Box 7373-00100 Nairobi	29,074,500.00

6	M/s Comm. Carrier Satellite Services Ltd. (Pegrume Ltd.) P.O. Box 41093, Nairobi.	19,659,979.75
7	M/s. Rehebeam Agencies Ltd, P.O. Box 215-00200, Nairobi	35,640,544.00
8.	M/s. Telecommunications Today P.O. Box 15526-00503, Nairobi	28,036,495.00
9.	M/s. Geolea Enterprises Ltd P.O. Box 9481-00300	30,658,752.00

Determination of Responsiveness as the Minimum Qualifying Criteria

For the purpose of this tender, a responsive bid was one, which conformed to all the requirements of the tender as contained in the invitation letter and tendering instructions, without material deviations and reservations. If a tender was not substantially responsive, it should have been rejected.

All the Bidders were examined for compliance with mandatory requirements by examining the pre - qualification conditions as set out in the conditions stated in the bid document.

The bidders were evaluated to confirm their compliance with the following requirements:-

- i) Provide a properly Filled, Signed and Stamped Form of Tender
- ii) Provide a bid bond of Kshs. 240, 000.00 from a reputable bank or an insurance company valid for 150 days
- iii) Provide a duly filled technical schedule
- iv) Provide duly filled schedule of unit rates
- v) Provide a statement of compliance

Table 2: Preliminary examination results

<u>Bid No.</u>	<u>Tenderer</u>	Form of tender	Bid Bond	Dully filled technical schedule	Dully filled schedule of unit rates	Statement of compliance	Remarks
1	M/s Com Twenty One Ltd	√	√	√	√	√	R
2	M/s Soulco Kenya Ltd	√	√	√	√	√	R
3	M/s MFI Technology Solution Ltd.	√	√	√	√	√	R
4	M/s Pong Agencies Ltd	√	√	√	√	√	R
5	M/s Lekha Trading Co. Ltd.	√	√	√	√	√	R
6.	M/s Comm. Carrier Satelite Services Ltd. (Pegrume Ltd.) (Note the change of Firm name not acceptable)	√	√	√	√	√	NR
7	M/s. Rehebeam Agencies Ltd,	√	X	√	√	√	NR
8.	M/s. Telecømmunications Today	√	√	√	√	√	R
9.	M/s. Geolea Enterprises Ltd	√	X	√	√	√	NR

√ - Implies condition fulfilled, R - Implies Responsive, X- Implies condition not fulfilled.

NR - Implies Not Responsive

From table 2 above, the following was observed

Note

i) M/s. CommCarrier Satellite Services Ltd. (Pegrume Ltd.) did not produce any official documents showing the relation between the two firms and was therefore disqualified from further evaluation. The firm invited to tender was M/s Pegrume Ltd. However, M/s. Commcarrier Satellite Services Ltd submitted the tender but without enclosing any documents showing the official/legal relationship between the two firms.

ii) M/s. Rehebeam Agencies Ltd's tender did not provide a bid bond and was therefore declared as non-responsive (NR), hence disqualified from further evaluation.

iii) M/s. Geolea Enterprises Ltd submitted a bid bond without a validity period. They were disqualified from further evaluation.

The following six (6No.) bidders were declared responsive at this stage.

These were:

- M/s. Com Twenty One Ltd
- M/s Soulco Kenya Ltd.
- M/s MFI Technology Solution Ltd.
- M/s Pong Agencies Ltd.
- M/s Lekha Trading Co Ltd
- M/s Telecommunications Today

The responsive bidders were then examined for completeness of the tender document and points awarded as shown in table 3 below:-

Completeness of tender documents

Item	Qualification Parameter		M/s Com Twenty One Ltd		M/s Soulco Kenya Ltd		M/s MFI Technology Solution Ltd.		M/s Pong Agencies Ltd		M/s Lekha Trading Co. Ltd.		M/s. Telecommunications Today	
		Max. Score Possible		Points Scored		Points Scored		Points Scored		Points Scored		Points Scored		Points Scored
1.0	Tender Questionnaire	5	Form filled completely, signed and stamped	5	Form filled completely, signed and stamped	5	Form not filled, but signed and stamped	5	Form filled completely, signed and stamped	5	Form not filled, but signed and stamped	2	Form filled completely, signed and stamped	5
2.0	Key Personnel Form													
	Director of the firm Holder of degree or diploma in relevant Engineering field.....5	5	Filled the standard form and attached the evidence	5	As ditto	5	Filled the standard form but no evidence attached	5	Filled the standard form and attached the evidence	5	As ditto	2	Filled the standard form and attached the evidence	5
	At least 1No. Degree/Diploma in relevant Engineering field of Key personnel	5	As ditto	3	As ditto	5	As ditto	5	As ditto	5	As ditto	2	As ditto	5
	At least 1No. Certificate in relevant Engineering field of Key personnel	5	As ditto	3	As ditto	3	As ditto	5	As ditto	5	As ditto	2	As ditto	
	Trade test certificate of at least 2No. artisan	5	As ditto	3	As ditto	3	As ditto	5	As ditto	5	As ditto	2	As ditto	5
3.0	Schedule of Contracts completed in the last 5 years (at least 5No.)	15	5No. of similar nature, complexity and magnitude	10	5No. of similar nature, complexity and magnitude	15	3No. of similar nature, complexity and magnitude but no evidence attached	15	5No. of similar nature, complexity and magnitude	15	Form not filled, but signed and stamped	2	3No. of similar nature, complexity and magnitude but no evidence attached	15
6.0	Schedule of ongoing projects (at least	10	5No. of similar nature, complexity and	6	5No. of similar nature, complexity and	10	1No. of similar nature, comple	10	5No. of similar nature, complexity and	5	Form not filled, but signed and	2	1No. of similar nature	5

							and magnitude but no evidence attached						exity and magnitude but no evidence attached	
7.0	Schedule of contractors equipment	10	Standard form was not attached in the document	10	Standard form was not attached in the document	10	Standard form was not attached in the document	10	Standard form was not attached in the document	10	Standard form was not attached in the document	10	Standard form was not attached in the document	10
8.0	Audited financial reports	10	Standard form was not attached in the document	10	Standard form was not attached in the document	10	Standard form was not attached in the document	10	Standard form was not attached in the document	10	Standard form was not attached in the document	10	Standard form was not attached in the document	10
9.0	Evidence of financial resources	10	Not a requirement in the bidding document	10	Not a requirement in the bidding document	10	Not a requirement in the bidding document	10	Not a requirement in the bidding document	10	Not a requirement in the bidding document	10	Not a requirement in the bidding document	10
10.0	Name, address and telephone of banks	5	NOT Provided	0	Provided	5	NOT Provided	5	NOT Provided	5	NOT Provided	0	Provided	5
11.0	Litigation history	3	None	3	None	3	None	3	None	3	None	3	None	3
12.0	Sanctity of tender document	12	Document intact	12	Document intact	12	Document intact	6	Document intact	12	Document intact	12	Document intact	12
	Total points scored	100		80		90		94		100		59		95
	REMARKS		Responsive		Responsive		Responsive		Responsive		Responsive		Non-Responsive	Responsive

Note:

From the above analysis:-

i) 5 No. Bidders listed below scored above 60% and therefore qualified for further evaluation.

M/s. Com Twenty One Ltd

M/s Soulco Kenya Ltd

M/s MFI Technology Solution Ltd

M/s Pong Agencies Ltd.

M/s Telecommunications Today

1No. bidder M/s Lekha Trading Co Ltd scored 59%, which was below the mandatory pass mark of 60% and was therefore disqualified from further evaluation

3.0 TECHNICAL EVALUATION

The technical evaluation was carried out in two stages namely:-

- (i) Confirmation of Compliance with technical specifications and
- (ii) Technical examination

3.1 COMPLIANCE WITH TECHNICAL SPECIFICATIONS

The remaining bidders were assessed for compliance with technical specifications for key items that comprise the PABX installation works. This was based on the specifications stipulated in the bidding documents against the bidders' submissions in the technical schedule and in the specifications indicated in their submitted brochures.

The analysis was as shown in table 4 below.

Compliance with Technical Specifications of key items

	Bidders	M/s Com Twenty One Ltd		M/s Soulco Kenya Ltd		M/s MFI Technology Solution Ltd		M/s Pong Agencies Ltd.		M/s Telecommunications Today	
Item	Description	Type/Make	Country of Origin	Type/Make	Country of Origin	Type/Make	Country of Origin	Type/Make	Country of Origin	Type/Make	Country of Origin
1.0	Fully Digital IP Based PABX	Avaya	USA	UNIFY Openscape 4000	Germany	Alcatel-Lucent OMNI PCX	France	Avaya Aura CM	USA	KX-NS 500	Japan
2.0	Executive digital telephone instruments	Avaya 9508	USA	Openstage 20T	Germany	Alcatel-Lucent 4039	China	Avaya	USA	KXDT 346	Japan
3.0	Standard digital telephone instruments	Avaya 1408	USA	Openstage 15T	Germany	Alcatel-Lucent 4019	China	Avaya 1408	USA	KXDT 343	Japan
4.0	Executive IP telephone instrument	Avaya Flare	USA	Openstage 35G	Germany	Alcatel-Lucent 4038	China	Avaya 9611G	USA	KX NT 543	Japan
5.0	Standard IP telephone instrument	Avaya 1608	USA	Openstage 15 HFA	Germany	Alcatel-Lucent 4018	China	Avaya 9611G	USA	KX NT321	Japan
6.0	Executive Analogue telephone instrument	Panasonic	Japan	Euroset	Germany	Alcatel Temporis	China	Panasonic KXT 7705	Japan	KXTS 880	Japan
7.0	Standard Analogue telephone instrument	Panasonic 2317	Japan	Gigaset	Germany	Alcatel Temporis	China	Panasonic KXT S820	Japan	KXTS 820	Japan
8.0	Computer Based Operator console	Hp Compaq	UK	Ac Win IP	Germany	Alcatel-Lucent 4059	France	Avaya Onex	USA	KX-NT553	Japan
9.0	Backup batteries	Chloride Exide	Kenya	Ritar	UK	Vision CP 1270	China	Atlas	Japan	Chloride	Kenya
	AC Voltage stabilizer	AVS	UK	Solatek	UK	APC	China	Solatek	UK	Solatek	America
	Operator Console	Avaya 1616	USA	Ac Win IP	Germany	Alcatel-Lucent 4068	China	Avaya Onex	USA	KX-NI553	Japan
	REMARKS	ACCEPTABLE		ACCEPTABLE		ACCEPTABLE		ACCEPTABLE		ACCEPTABLE	

The evaluation committee observed that it was clear from table 4 above that all the bidders intended to supply items from reputable manufacturers and therefore of good quality and standard as per the specifications in the tender document.

They were therefore found to be responsive and therefore qualified for further evaluation.

4.2 TECHNICAL EXAMINATION

In this section, the information provided in the Technical Schedule or Brochures attached was analyzed for bidders who had qualified from section 4.1 above and points awarded as shown in table 5 below to a maximum of 70 points.

Table 5: Technical Examination of bidders

Item	Description	Bidders				
		M/s Com Twenty One Ltd	M/s Soulco Kenya Ltd	M/s MFI Technology Solution Ltd	M/s Pong Agencies Ltd.	M/s Telecommunications Today
1	Technical schedule/Brochures for IP based PABX and telephone equipment and related voice communication wiring	Relevant Manufacturer Brochures for items in the technical schedule • Avaya	Relevant Manufacturer Brochures for items in the technical schedule • UNIFY Openscape 4000	Relevant Manufacturer Brochures for items in the technical schedule • Alcatel-Lucent OMNI PCX	Relevant Manufacturer Brochures for items in the technical schedule • Avaya Aura CM	Relevant Manufacturer Brochures for items in the technical schedule • KX-NS 500
	IP based PABX ✓ Ultimate Port Capacity – required 580 extensions	✓ PABX Ultimate Port Capacity is 1350 and therefore complies	✓ PABX Ultimate Port Capacity is 4000 and therefore complies	✓ PABX Ultimate Port Capacity is 15,000 and therefore complies	✓ PABX Ultimate Port Capacity is 1350 and therefore complies	✓ PABX Ultimate Port Capacity is 1000 and therefore complies

<p>Equipment software should be able to support – system features, operator features, standard telephone features, system administration features, digital network features, data features & special application features</p>	<p>As indicated in the technical schedule and the provided brochures and therefore Complies</p>	<p>As indicated in the technical schedule and the provided brochures and therefore Complies</p>	<p>As indicated in the technical schedule and the provided brochures and therefore Complies</p>	<p>As indicated in the technical schedule and the provided brochures and therefore Complies</p>	<p>As indicated in the technical schedule and the provided brochures and therefore Complies</p>
<p>System features –</p> <ul style="list-style-type: none"> • direct inward dialing, • direct outward dialing, • dial pulse signaling, • DTMF, • direct trunk access, • class service, • flexible assignment of printer ports, • flexible assignment of extensions, • flexible tone plan, • group hunting, • multiple operator console • music on hold • network voice mail • night service dual answer • paging • tandem service dual answer • tandem trunks 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<p>As indicated in the technical schedule and the provided brochures and therefore Complies</p>

<ul style="list-style-type: none"> • tie trunks • extension features e.g. call forwarding, busy override, conference (up to 8 conferences), camp on etc. • ISDN and IP connectivity • Unified communication services 					
<p>System maintenance features –</p> <ul style="list-style-type: none"> • Line status monitoring device • station message data recording port • system working report • on site system administration using compatible terminal and attendant console • remote system administration capability • automatic on-line diagnostic testing. 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<p>As indicated in the technical schedule and the provided brochures and therefore Complies</p>	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies
<p>Executive telephone instruments to have the following operating characteristics –</p> <ul style="list-style-type: none"> • Standard telephone facilities, • Abbreviated dialing 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies

<ul style="list-style-type: none"> • Auto shift feature • Automatic ring back indication • Call logging • Calling number display • Do not disturb indication • Extension status indication • Hands free • individual speed dialing • Intercom • Large LCD display(16 characters) • Message waiting indication • Microphone unit • On hook dialing • Pass word protection. • Repeat last number • Ringing level and tune selection • Store and redial • Single key access to line features 					
<ul style="list-style-type: none"> • Standard telephone instrument to have at least the following operating characteristics- • Standard telephone facilities • Automatic 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies 	<ul style="list-style-type: none"> • As indicated in the technical schedule and the provided brochures and therefore Complies

<ul style="list-style-type: none"> ring back indication • Extension status indication • Individual speed dialing • Repeat last number • Ring level and tune selection • Store and redial • Message waiting indication 						
POWER SUPPLY TO PABX ✓ To be through-rectifier and DC-DC Converter-240V ac, 50Hz, c/smw security device for monitoring the minimum and maximum authorized values of o/p voltage	• Complies	• Complies	• Complies	• Complies	• Complies	• Complies
Total Score	70	70	70	70	70	70

All the bidders were found to be technically responsive and therefore qualified for further evaluation

4.0 FINANCIAL EVALUATION

The bidders were then subjected to financial evaluation. Financial evaluation was carried out in two stages as listed below.

1. Preliminary examination of arithmetical errors and
2. Tender sum comparisons

4.1 PRELIMINARY EXAMINATIONS

The parameters to be considered under this section included the following:

- a) Examination of arithmetic errors and
- b) Comparison of the Tender Rates

5.1.1 Examination of Arithmetic Errors

In this section, the bids were examined for any arithmetic errors contained therein.

A summary of this analysis is as shown in Table 6 below.

Table 6: Arithmetic Errors

Item	Bidder's Name	Bid Sum (Kshs)	Error (Kshs)	% error	Corrected Tender Sum	REMARKS
1	M/s Com Twenty One Ltd.	19,299,620.00	131,680	0.7%	19,167,940.00	The arithmetic errors made to his advantage
2	M/s Soulco Kenya Ltd.	19,993,879.00	0.00	0.0%	N/A	No arithmetic errors made
3	M/s MFI Technology Solution Ltd.	23,581,639.00	0.00	0.0%	N/A	No arithmetic errors made
4	M/s Pong Agencies Ltd.	26,267,622.00	0.00	0.0%	N/A	No arithmetic errors made

5	M/s Telecommunications Today	28,036,495	0.00	0.0%	N/A	No arithmetic errors made
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From table 6 above, it was observed that all bidders had no arithmetic errors except M/s Com Twenty One Ltd who had an error of Kshs. 131,680.00(0.7%) to their advantage, which was considered negligible. All the bidders were therefore declared responsive and proceeded to the next stage of evaluation.

5.1.2 Comparison of the Tender Rates

In this section a Comparative analysis of the tender rates for Major items in the BQs was done. A summary of this analysis is as shown in Table 7 below.

Table 7: comparative tender rates analysis for major items

Item	Description	BIDDER					
		Engineer's Estimates.	M/s Com Twenty One Ltd	M/s Soulco Kenya Ltd	M/s MFA Technology Solution Ltd	M/s Pong Agencies Ltd.	M/s Telecommunications Today
1	IP based PABX	19,000,000.00	10,322,760.00	13,903,601.00	16,025,566.00	20,105,526.00	21,500,00.00
2	AC Voltage stabilizer	30,000.00	17,340.00	71,432.00	60,000.00	9,048.00	7,800.00
3	Stand by battery	250,000.00	452,400.00	301,600.00	150,000.00	354,220.00	308,100.00
4	Executive digital telephone instrument	25,000.00	32,780.00	14,145.00	30,000.00	39,030.00	45,000.00
5	Standard IP telephone instrument c/w accessories ready for	35,000.00	16,480.00	20,697.00	14,377.00	14,188.00	15,000.00

	connection						
6	Standard (push button) analogue telephone instrument	6,000.00	3,650.00	4,667.00	5,500.00	870.00	757.00

From table 7 above the following was observed:

a) **M/s Com Twenty One Ltd.** offers to supply:

- IP based PABX, at a very low rate which is 45.7% below the Engineer's estimate. This was considered low for the capacity of the equipment specified.
- The other items i.e. standby batteries, AC Voltage stabilizer, Standard IP telephone, executive digital and standard analogue instruments were said to be at varying prices that did not in the evaluation committee's view compare well with the Engineer's estimate.

However, the above Bidder was allowed to proceed for further evaluation.

b) **M/s Soufco Kenya Ltd.** offers to supply:

- IP based PABX, at a low rate which is 26.8% below the Engineer's estimate. This was considered low for the capacity of the equipment specified.
- The other items i.e. standby batteries, AC Voltage stabilizer, Standard IP telephone, executive digital and standard analogue instruments were indicated to be at varying prices that compared well with the Engineer's estimate.

However, the two Bidders were evaluated further in accordance with the evaluation criteria in stage part B (ii).

c) The rest of the bidders that is, M/s. MFI Technology Solution Ltd., M/s. Pong Agencies Ltd. and M/s. Telecommunication Today Ltd. offer to supply:

- IP based PABX, at prices that are relatively comparable to the Engineer's estimate.
- The other items i.e. standby batteries, AC Voltage stabilizer, Standard IP telephone, executive digital and standard analogue instruments were found to be varying prices that were found to compare well with the Engineer's estimate.

Their rates were declared to be competitive. Therefore, the Bidders were adjudged responsive and therefore qualified for further evaluation.

5.2 ANALYSIS OF TENDER SUMS

5.2.1 Preliminary Average

In accordance with the evaluation criteria the tender sum of bidders who qualified at the previous stages and the engineer's estimate, were reduced by omitting PC sums, provisional sums and contingency from the respectful amounts. The average of the adjusted tender sums so obtained was then calculated as shown in Table 8 below.

Table 8: Tender Sum Comparisons, Deviation Factors and Marks Scored

Item	Tender's Name	Tender Sum	<u>P+C sums</u> (Provisional)	Adjusted Tender sums	Deviation from	% Deviation	Marks
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			Sums, Plus Contingency)		average	from the average	
1	M/s Com Twenty One Ltd.	19,299,620.00	1,213,120.00	18,086,500.00	4,618,223.00	20.3	0
2	M/s Soulco Kenya Ltd.	19,993,879.00	1,368,595.00	18,625,284.00	4,079,438.00	18	4.5
3	M/s MFI Technology Solution Ltd.	23,581,639.00	1,355,000.00	22,226,639.00	478,084.00	2.1	27
4	M/s Pong Agencies Ltd.	26,267,622.00	1,141,200.00	25,126,422.00	-2,421,699.00	10.6	15
5	M/s Telecommunications Today	28,036,495	1,168,000.00	26,868,495.00	-4,163,772.00	18.3	3
6	Engineers estimate	26,405,000.00	1,110,000.00	25,295,000.00	-2,590,277.00	11.4	N/A
7	Total			136,228,340.00			
8	Average			22,704,723.00			

5.1.2 FINAL SCORE

The total score was aggregated through combined sums of Technical and Tender Sums Comparison marks as below:

Technical (Ts) + Tender Sums Comparison (TSC))

$$= Ts+TSC$$

The final score for the bidders was as shown table 9 below;

Table 9: Combination of Technical and Financial Scores

Item	Bidder's Name	Technical Score, Ts	Tender Sums Comparison, TSCs	Total Score Ts
1	M/s Com Twenty One Ltd.	70	0.0	70.0
2	M/s Soulco Kenya Ltd.	70	4.5	73.5

3	M/s MFI Technology Solution Ltd.	70	27.0	97.0
4	M/s Pong Agencies Ltd.	70	15.0	85.0
5	M/s Telecommunications Today	70	3.0	73.0

From table 9 above, M/s Com Twenty One Ltd., M/s Soulco Kenya Ltd. and M/s Telecommunications Today were determined to have had total scores of less than 75%, that is , they scored 70%, 73.5% & 73%. They were therefore declared not to be financially responsive and were not considered for further evaluation. The rest of the bidders were found to be above 75% and were considered for the award of the tender.

5.0 RECOMMENDATION

Upon concluding the exercise, the evaluation committee recommended that the subject tender be awarded to M/s MFI Technology Solution Ltd. of P.O. Box 10600-00200, Nairobi having allegedly been determined to be substantially responsive to the terms and conditions of the bid and being the lowest responsive bidder at the tender sum of Kshs. 23,581,639.00 (Kenya Shillings Twenty Three Million, Five Hundred and Eighty One Thousand, Six Hundred and Thirty Nine) only

TENDER COMMITTEE'S DECISION

The Tender Committee in its meeting held on 29th October, 2014 and awarded the tender to M/s MFI Technology Solutions at Kshs. 23,581,639.00 (Kenya Shillings Twenty Three Million, Five Hundred and Eighty One Thousand, Six Hundred and Thirty Nine) only

THE REQUEST FOR REVIEW

The Request for Review before the Board was lodged by M/s Com Twenty One Limited (Applicant) on 7th November, 2014 against the decision of the Comptroller of State House in the matter of Tender No. SH/002/2014-2015 for the supply and installation of IP based PABX at State House Nairobi.

The Applicant was represented by Simon Ngara, Advocate from the firm of M/s. Mohammed & Kinyanjui Advocates while the Procuring Entity was represented by Mr. Stephen G. Wamae, Assistant Director, Supply Chain Management Services State House and Mr. Peter Njunge. The interested party M/s MFI Technology Solutions Limited was represented by Mr. Animesh Solanki a Director and Mr. Jaswinder Singh.

The Applicant requested the Public Procurement and Administrative Review Board (hereafter referred to as the Board) to review the decision of the Procuring Entity and sought the following orders:

- 1. The decision of the Respondent to award Tender Number SH/002/2014-2015 for the supply and installation of IP based PABX at State House Nairobi to MFI Technologies Limited be nullified pursuant to the powers bestowed upon the Review Board by the provisions of section 98 (a) of the Act.*
- 2. The Review Board pursuant to powers granted to it under Section 98(c) does declare the Applicant the winner of the tender having tendered the lowest price and this Honorable Board substitutes the decision of the*

procuring entity to that effect and have the tender awarded to the Applicant.

- 3. The Review Board do summon the Chairman, National Construction Authority before it to shade more light into the issue of registration of the awarded bidder.*
- 4. The Review Board directs that the Director General of the Public Procurement Oversight Authority investigates the procurement proceedings to determine the actual reason behind failing to read the engineers estimate at the tender opening stage.*
- 5. The Review Board directs that the Director General of the Public Procurement Oversight Authority investigates the procurement proceedings to determine if the Awarded Bidder had submitted a responsive bid in accordance with Clause B (1) (i) and (ii) of the instructions to Tenders.*
- 6. The Review Board to direct the Respondent to re-evaluate the tenders submitted by the Applicant and other bidders in strict adherence with the law, the tender requirements and the relevant procurement procedures and if the circumstances so dictate, as per the outcome of this request for review.*

7. *In the alternative and without prejudice to the foregoing, the Review Board orders that failure to read the engineers estimate and its use thereof to come up with the final score as prejudicial to the applicant having tendered the lowest price and the same be dispensed away with in re-evaluating the tender.*
8. *That the review board do award the applicant costs of the application and any other reliefs it deems fit*

When this Request for Review came up for hearing before the Board and at the commencement of the hearing of the application, the Applicant sought for leave to be allowed to amend its Request for Review to include prayers Nos. 2 and 3 which the Board has already set out above. There being no objection by the Procuring Entity or by the Interested Party, the Board allowed the Application for amendment by Consent.

It was agreed by all the parties to this dispute at the hearing of the Request for Review that the request raised two grounds, namely:-

- (i) *Whether the Procuring Entity acted in breach of the Provisions of Section 64 (1) of the Public Procurement Act, (2005) and Section 15 (1) of the National Constructions Authority Act and Clause A (1) of the Instructions to Tenderers by failing to declare the Interested Party's tender non-responsive and in failing to award the tender to the Applicant which was the lowest evaluated bidder and;*

(ii) Whether the Procuring Entity acted in breach of the Provisions of Section 60 (5) of the Public Procurement Act, 2005 and Clause B (1) (i) and (ii) of the instructions to tenderers.

The Board has considered the Request for Review as amended together with all the documents filed by the Applicant and by the Procuring Entity with the Board, the original tender documents submitted to the Procuring Entity by the Applicant and the Interested Party who were the only bidders who appeared before the Board at the hearing of this Request for Review. The Board has also heard and considered the Submissions made by all the parties to this dispute and will now consider the arguments made and the documents placed before the Board by the parties and deliver its decision on each of the two grounds in the order in which they appear above:-

1. Whether the Procuring Entity acted in breach of the Provisions of Section 64 (1) of the Public Procurement Act, (2005) and Section 15 (1) of the National Constructions Authority Act and Clause A (1) of the Instructions to Tenderers by failing to declare the Interested Party's tender non-responsive and in failing to award the tender to the Applicant which was the lowest evaluated bidder and;

The Applicant argued in support of this ground of Review that under the Provisions of Section 64 (1) of the Public Procurement and Disposal Act, the Procuring Entity (the Respondent) ought to have declared the Interested Party's tender non-responsive at the Preliminary Evaluation stage since the

Interested Party had failed to meet the mandatory Preliminary requirements set out at page A – 18 of the tender document and which also appeared at the hand written page 28 of the Applicant's Request for Review.

The Applicant submitted that the subject tender contained eight criteria for the determination of responsiveness which were listed under the heading.

"Stage 1 – Determination of Responsiveness"

And which set out eight criteria which a tenderer ought to have met in order to be declared responsive. The Applicant argued that under item (i) of the said criteria a tenderer had to provide proof that it was registered as a contractor in the category of registration with the Ministry of Lands, Housing and Urban Development since the Ministry of Public Works was defunct.

The Applicant further argued that upon the re-organization in the Government, the Ministry of Public Works was now part of the Ministry of Lands, Housing and Urban Development and further that in order to regulate and co-ordinate the construction industry in Kenya, Parliament had enacted a statute known as the National Construction Authority Act to regulate and coordinate the construction Industry in Kenya.

The Applicant further argued that in addition to the requirements on qualification set out in the tender document, a contractor who sought to

tender for any services under a contract pursuant to tender award had to be registered by the Authority under the Provisions of Section 15 (1) and 16 of the National Construction Authority Act.

The Applicant however submitted that contrary to the express requirement in the tender document and the law as set out under the Provisions of the National Construction Authority Act, the Interested Party (the successful bidder) was not registered by the National Construction Authority as at September, 2014 when it submitted its bid to the Procuring Entity. The Applicant produced two letters one marked as annexure "EM 9" dated 6th November, 2014 and another dated 20th November, 2014 which was marked as annexure "EM 11" from the National Construction Authority both of which in the Applicant's opinion confirmed that the Interested Party was not so registered.

The Applicant therefore urged the Board to find that the Procuring Entity ought to have declared the Interested Party's bid as being non-responsive pursuant to the Provisions of Section 64 (1) of the Act and ought to have disqualified it from further evaluation.

Mr. Wamae on behalf of the Procuring Entity opposed the position taken by the Applicant and submitted that there was no requirement in the tender documents that required a bidder or a contractor who had decided to bid or participate in the subject tender to be registered with the National Construction Authority and that all that a bidder had to do was to comply

with the requirements set out in the tender document on the Preliminary Evaluation criteria. Mr. Wamae submitted that the successful bidder in this tender had met the mandatory requirements for eligibility which he listed as follows:-

- (i) They were registered with public works in the relevant trade.
- (ii) They were registered with the Communications Authority of Kenya.
- (iii) They had a confirmation of qualification letter from National Construction Authority No. NCA/DC/VOL. I/4/1/595 dated 15th September, 2014.
- (iv) They were issued with the tender documents free of charge like all the other bidders.
- (v) They had provided Tender Security No. MD 1427200001 from CFC Stanbic Bank dated 29th September, 2014 amounting to Kshs. 240,000.00 valid upto 24th March, 2015.
- (vi) They had provided a duly filled form of tender dated 30th September, 2014 for Kshs. 23,581,639.00.
- (vii) They had a Statement of Compliance F/23 dated 29th September, 2014.
- (viii) They had a duly filled in Confidential Business Questionnaire.
- (ix) In addition, they had provided the following:-
 - Technical schedule.
 - Schedule of unit rates.
 - List of Key personnel.
 - Schedule of contracts completed.
 - Audited financial reports.

- Evidence of financial resources.
- A Manufacturers Authorization.
- Training Schedule.
- Registration Certificate, and
- A Tax Compliance Certificate.

The Procuring Entity therefore argued that a Certificate of Registration from the National Construction Authority was not among the listed mandatory requirements of the tender and was not used in the evaluation of tenders and that it was not therefore one of the criteria that the Procuring Entity used in evaluating the subject tender.

Mr. Wamae further submitted that the Procuring Entity usually vets all the contractors that have been awarded any tender to confirm that they comply with Security and all other statutory requirements. According to Mr. Wamae, there was nothing wrong at all in first awarding a tender and then carrying out vetting after such an award.

The Procuring Entity finally urged the Board to find and hold that the Board was governed by the Provisions of the Public Procurement and Disposal Act (2005) which was distinct from the National Construction Authority Act and that the Board should therefore enforce the Provisions of the Public Procurement and Disposal Act, 2005 which governed its operations and the tender documents in the circumstances of this case

without paying undue regard to the Provisions of the National Construction Authority Act.

Both Mr. Wamae and Mr. Njunge who argued the Procuring Entity's case before the Board were however unanimous that the successful bidder did not submit a Certificate of Registration from the National Construction Authority as part of its tender document when it submitted it in September 2014 and that the Procuring Entity did not therefore base the outcome of the preliminary evaluation on any such certificate.

Mr. Solanki and Mr. Singh who were allowed to address the Board on behalf of the Interested Party associated themselves with the Procuring Entity's submissions and reiterated that the requirement for registration by the National Construction Authority was not part of the evaluation criteria. They conceded that as at the date of the submission of the Interested Party's bid, the Interested Party did not submit a Certificate of Registration from the National Construction Authority.

Mr. Solanki instead submitted that the successful bidder submitted a letter dated 15th February, 2013 from the Ministry of Public Works in which the Ministry of Public Works informed M/s MFI Office Solutions Limited that the letter would serve as a Certificate until such time that they would be issued with a formal Certificate. He further submitted that the successful bidder had also included in its tender document a letter dated 15th September, 2014 from the National Construction Authority informing it

that its application for registration had been reviewed and confirmed and that the Interested Party should collect its Registration Certificate from the National Construction Authority upon the payment of the registration fee of Kshs. 100,000.

In a brief response to the submissions made by the Procuring Entity and the Interested Party, Counsel for the Applicant reiterated that the requirement for a Certificate was both a statutory requirement and a requirement in the tender document. He urged the Board to look at the letter marked as annexure "EM 11" from the National Construction Authority and which was dated 20th November, 2014 which clearly demonstrated that it is only the Authority which had power to issue a Certificate in 2014 and not the Ministry of Public Works and also that the Authority had disowned the letter dated 15th September, 2014 which the Interested Party had included in its tender document.

The Applicant therefore urged the Board to allow this ground of Review.

The Board has carefully considered all the documents submitted to it by all the parties and the arguments made by the parties in support and in opposition to this ground of review and holds that contrary to the submissions made by the Procuring Entity, Section 31 (1) of the Public Procurement and Disposal Act, 2005 sets out the qualifications for an award of a tender and, inter-alia, requires a person seeking to be awarded a tender to provide evidence to show that he/she has the necessary

qualifications, capability, experience, resources, equipment and facilities to provide what is being procured.

Section 31 (2) of the same Act, empowers a Procuring Entity to require that a bidder provides evidence or information to establish that the criteria set out under subsection (1) have been satisfied.

In addition Section 52 (3) (a) – (k) of the Act requires a Procuring Entity to prepare a tender document containing certain information including any requirement that evidence be provided of the qualifications of the person submitting the tender.

The core mandate of the Board is to ensure that the Provisions of the Act have been complied with and this includes ensuring compliance with the Provisions of Sections 31 and 52 of the Act which deal with the issue of qualification. Under the Provisions of both these two Sections and particularly Section 31 (1) of the Act, a bidder seeking to be awarded any contract must establish that it is qualified to participate in a tender process from the beginning to the end.

One of the statutes which govern the issue of qualification to provide services as a contractor is the **National Construction Authority Act Chapter 449 A** of the Laws of Kenya which came into force on 8th June, 2012.

The Authority which is a body corporate with perpetual succession was established with the main object of overseeing the construction industry and coordinated development and some of its functions include the promotion and providing quality assurance in the construction industry and regulating professional undertakings by contractors.

Section 2 of the said Act defines a contractor as a person who is registered under the Provisions of Section 15 of the Act.

Section 15 (1), (2) and (3) of the Act stipulate as follows:-

- 1. A person shall not carry on the business of a contractor unless the person is registered by the Board under this Act.*
- 2. A person seeking registration under subsection (1) shall, in the case of a firm, be eligible for registration if at least one of the partners or directors of the firm possesses such technical qualifications, skills or experience as the Board may from time to time prescribe.*
- 3. Any person who contravenes subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding One Million Shillings, or to imprisonment for a term not exceeding three years or to both, and in the case of a continuing offence, to a fine not exceeding One Hundred Thousand Shillings for every day or part thereof during which the offence continues.*

On the mode of registration, Section 17 of the Act provides that a person intending to carry on the business of a contractor within the Republic of Kenya must make an application for registration with the Board which if

successful would lead to such a person being issued with a Certificate of Registration indicating the registration number, the class of works for which he/she is registered and the date and the duration of the registration. Sections 19 and 20 of the Act then require that the Registrar of the Authority shall enter the name of such person in the register and shall publish a Gazette Notice as soon as practicable of the names and particulars of all the persons registered by the Board.

Whereas the Applicant argued that the Interested Party ought to have been declared non-responsive at the Preliminary evaluation stage, the Procuring Entity supported by the Interested Party argued that the requirement for registration by the National Construction Authority was not a mandatory requirement in the tender document. Both the Procuring Entity and the successful bidder itself confirmed to the Board that at the time the successful bidder submitted its tender in September, 2014 it did not include a National Construction Authority Registration Certificate in its tender document.

The Board has already set out the Provisions of Sections 2, 15, 17, 19 and 20 of the National Construction Authority Act and finds and holds on the basis of the said Provisions that the Interested Party just like any other contractor seeking to carry on the business of a contractor must be registered. The Procuring Entity was enjoined by the Provisions of Section 31(1) of the Public Procurement and Disposal Act (2005) to ensure that the Applicant met the eligibility criteria on qualification. It is noteworthy that

Section 15 (3) of the National Construction Authority Act makes it an offence for a person to purport to carry on the business of a contractor when he/she/it is not registered by the Authority.

The Board therefore finds that in the absence of any proof that the Interested Party was the holder of a Certificate issued by the National Construction Authority as at the date of submission of its tender in September 2014, the successful bidder was not eligible to participate in the tender by virtue of the express provisions of the Law.

The Board wishes to further state that it would be acting against public policy if it were to hold that the Interested Party was eligible to participate in this tender as such a finding would be in contravention of the express Provisions of the National Highway Construction Act more so on the face of the clear Provisions of Section 43 of the Act which provides as follows:-

43. " where any conflict arises between the Provisions of this Act and the Provisions of any other law on training, registration and regulation of contractors and construction workers the provisions of this Act shall prevail".

It was held by the court of appeal in the case of Kenya Airways Limited – vs- Satwart Singh Flora (NAI CA NO. 54 OF 2005) it would be against public policy to enforce any action prohibited by a statute and that a party who had breached the provisions of the law could not benefit from such a

breach. The Court also held that any contract or transaction arising from such a breach was illegal and was unenforceable.

Both the Procuring Entity and the Interested Party while opposing the Applicant's argument on the issue of eligibility submitted that in an attempt to prove that the interested Party was eligible for the award of the tender the subject matter of this Request for Review, the Interested Party submitted as part of its tender document a letter dated 15th February, 2013 from the Ministry of Works which was to serve as a Certificate of Registration until such time as a formal Certificate would be issued to it and a letter dated 15th September, 2014 purportedly issued by the National Construction Authority informing the Interested party that the Authority had reviewed the Interested Party's application and confirmed its qualification. The letter further stated that the Interested Party could collect the Registration Certificate subject to the payment of the Registration fee of Kshs.100, 000.

The Applicant contested the validity and the authenticity of the two letters and produced a letter dated 18th November, 2014 addressed by the Applicant to the Executive Director of the National Highways Authority in which it sought several clarifications regarding the authenticity of the letters dated 15th February, 2013 from the Ministry of Works and the letter dated 15th September, 2014 from the National Construction Authority. The Applicant submitted that pursuant to that inquiry, the Executive Director/Registrar of Contractors confirmed to it vide his letter dated 20th

November, 2014 that the letter dated 15th September, 2014 was invalid and that the said letter did not appear in its data base.

The Board has perused the Applicant's and the Interested Party's original tender documents and has confirmed that whereas the Applicant submitted an original National Construction Authority Certificate, the Interested Party did not include any such certificate in its original tender document but instead submitted the two letters referred to above with its tender.

The Board has looked at the two letters and the clarification given by the Executive Director of the National Construction Authority on 20th November, 2014 and finds as follows:-

- a) The letter dated 15th February, 2013 was issued by the Ministry of Public Works to an Entity known as M/s MFI Office Solutions Limited. At the date when the letter was written, the statutory authority empowered to issue certificates to contractors was the National Construction Authority under the Provisions of Section 15 of the Act. The statute establishing it came into force on 8th June, 2012 and there is no way that the Ministry of Public Works could purport to write a letter dated 15th February, 2013 purporting it to be a certificate. The document dated 15th February, 2013 is in any event a letter which could not serve as a formal certificate.

- b) The letter dated 15th February, 2013 was addressed to M/s MFI Solutions Limited and not the bidder in this tender M/s MFI Technologies Limited. The Interested Party which had the opportunity to answer the issues raised by the Applicant did not file any affidavit or any other response before the Board to challenge the said issues and did not even seek for more time to do so at the hearing by requesting for an adjournment.
- c) On the letter dated 15th September, 2014, the Board has examined the letter and finds that it is not a National Construction Authority Certificate. The letter infact states as follows in the last paragraph:-

"Furthermore note that this letter does not constitute a Certificate of Registration by the National Construction Authority and is only valid for 30 days from the date of this letter".

The Board therefore finds on the basis of this statement alone that the letter dated 15th September, 2014 is not the Certificate envisaged under Section 15 of the National Constructions Authority Act.

One fundamental but serious aspect of the letter dated 15th September, 2014 is that the Executive Director of the National Construction Authority in the letter dated 20th November, 2014 disowned the document.

In the letter dated 20th November, 2014, the Executive Director of the National Construction Authority stated as follows in answer to the inquiry made by the Applicant :-

Ref: NCA 41/RCT/VOL 1/92

Date: 20th November, 2014

M/s Com Twenty One Ltd

P. O. Box 15818-00100

NAIROBI

RE: PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD,
REVIEW NO. 45 OF 7TH NOVEMBER, 2014

Reference is made to your letter dated 18th November, 2014 on the above mentioned subject:-

1. On the observation that the subject firm was registered with Public Works in the relevant trade;

The Directorate of Public Works of the Ministry of Land, Housing and Urban development did not have a mandate to register contractors in September, 2014.

2. On the observation that the firm MFI Technology Solutions had a confirmation letter from National Construction Authority Ref: Mp. NCA/DC/VOL. 1/4/1/595 dated 15th September, 2014;

We would wish to examine a copy of the said letter as it does not appear in our database. Indeed, the letter NCA/DC/VOL.1/4/1/595 was dated 21st May, 2013 and was in respect of registration of another firm.

3. *On the statement that "Section 15 (1) of the National Construction Authority that a person shall not carry on the business of contractor unless the person is registered by the National Construction Authority was not an evaluation criteria in the Tender document; The Authority submits that the provisions of Section 15 (1) of the National Construction Authority Act are not optional and no firm should be contracted by any agency to carry out any construction activity either in public or private sector without the firms registration by the Authority Board. Any procurement that ignores this provision is done out of the provisions of the law.*

Arch. Daniel O. Manduku

EXECUTIVE DIRECTOR/REGISTRAR OF CONTRACTORS

Though this letter raised very serious and substantial issues against the Interested Party, the Interested Party did not contest the contents of the letter or file an affidavit or a response to any of the issues raised by the Executive Director of the Authority.

The Interested party instead submitted from the bar that it had subsequently obtained a Certificate of Registration from the National Construction Authority on 3/10/2014 which it had paid for on the same day. The Interested Party however admitted that this Certificate was not part of the tender documents submitted by the Interested Party to the Procuring Entity.

The Board therefore finds that even if the successful bidder obtained a Certificate of Registration after submitting its tender such a Certificate could not be used as a basis for evaluation since the document did not form part of the tender document that was before the evaluation committee.

Section 59 (2) of the Public Procurement and Disposal Act (2005) bars a tenderer from changing the substance of its tender once it has submitted it.

The said section of the law reads as follows:-

59 (2)

"After the deadline for submitting tenders, a person who submitted a tender shall not change or offer to change the substance of the tender".

Lastly the Procuring Entity submitted that it was not unusual to invite tenders, evaluate them and then award the tender since the Procuring Entity would still have the liberty to vet the successful bidder and nullify the award of the tender if new issues arose vitiating the award of the tender.

The Board finds that this may well be so, but this can only be to the extent that the matter arising after award is a new issue. The requirement on the registration by the National Construction Authority is a matter of law touching on eligibility of a tenderer under the provisions of the National

Construction Authority Act and Section 31 of the Public Procurement and Disposal Act (2005).

Regulation 52 (1) of the Public Procurement and Disposal Regulations, 2006 states that where the criteria for qualification is set out in the tender document then a Procuring Entity may confirm the issue of eligibility before but not after the award of tender.

As the Board has already observed, both the Procuring Entity and the Interested Party were aware of the requirements of the provisions of the National Construction Authority Act and that is why the Interested Party submitted the letters dated 15th February, 2013 from the Ministry of Public Works and the one dated 15th September, 2014 from the National Construction Authority purporting them to be certificates of registration. This was therefore a matter within their knowledge and which is provided for by law and both parties ought to have confirmed compliance with the law on eligibility and qualification at the Preliminary evaluation stage.

The Board therefore finds and holds as follows on the first ground of review on the basis of the above findings:-

- a) The Interested Party was not registered by the National Construction Authority as a contractor on the date when it submitted it's tender to the Procuring Entity and was therefore ineligible to proceed for technical and financial evaluation.

b) The Procuring Entity therefore acted in breach of the Provisions of Section 64 (1) of the Public Procurement and Disposal Act (2005) and Section 15 and other provisions of the National Construction Authority Act by failing to declare the Interested Party's bid as non-responsive at the preliminary evaluation stage.

The first ground of the Applicant's Request for Review therefore succeeds and is allowed.

2. Whether the Procuring Entity acted in breach of the Provisions of Section 60 (5) of the Public Procurement Act, 2005 and Clause B (1) (i) and (ii) of the Instructions to Tenderers.

The Applicant while addressing the Board on the second ground of Review submitted that the Procuring Entity breached the provisions of Section 60 (5) (b) of the Public Procurement and Disposal Act (2005) in that it did not read out aloud the Engineer's estimate at the opening of the tenders as required by the above Provision of the Act.

The Applicant argued that clause B 1 (i) and (ii) appearing at page A – 24 of the tender document and which also appears at the hand written page 44 of the Request for Review that one of the parameters for evaluation was the Engineer's estimate which attracted a substantial maximum of 30 marks depending on the submitted tender prices variation from the Engineer's estimate. The Applicant submitted that the failure to read out the Engineer's estimate at the tender opening was prejudicial to the Applicant

and left room for possible manipulation that allowed the Procuring Entity room to vary the estimate depending on which bidder the Procuring Entity desired to award the tender to.

The Applicant submitted that since the Procuring Entity had set out the Engineer's estimate as one of the basis for evaluation attracting 30 marks then it was under a duty to disclose the estimate since it was one of the yardsticks against which the bidders would be measured.

In response to the Applicant's submissions, the Procuring Entity stated that it was not mandatory under the provisions of Section 60 (5) of the Act for the Engineer's estimate to be read out aloud at the tender opening as submitted by the Applicant. The Procuring Entity submitted that in any event the evaluation criteria that the Applicant was complaining about was part of the tender documents and the Applicant ought not to have participated in the tender if it was dissatisfied with the said criteria. The Procuring Entity however admitted that the Engineer's estimate was not read out to the bidders at the tender opening stage but during his submissions before the Board Mr. Wamae disclosed that the Engineer's estimate was the sum of Kshs. 26,405,000. He further confirmed that both the Applicant and the successful bidder's bids of Kshs. 19,299,620 and Kshs. 23,581,639.00 respectively fell within the Engineer's estimates. Both the Procuring Entity and the Applicant whose representatives were present during the reading out of the prices confirmed that as between the Applicant and the Interested Party, the Applicant's financial bid was the lower one.

The Board has considered the submissions made and the documents relied upon by the parties in support and in opposition to this ground of review. The Board has particularly considered the Tender Evaluation report prepared by the Ministry of Land, Housing and Urban Development – Directorate of Public Works – Electrical Department in October 2014 and notes from pages 8 to 12 of the report that both the Applicant and the successful bidder passed the technical evaluation stage since in the Procuring Entity’s own words.

“the bidders intended to supply items from reputable manufacturers and therefore of good quality and standard as per the specifications in the tender document”.

The Procuring Entity concluded its remarks on technical evaluation by stating that the two bidders among others were technically responsive and were therefore qualified to proceed for financial evaluation whose outcome appears at pages 12, 13, 14 and 15 of the Evaluation report at the end of which process the evaluation committee came up with the following findings as the basis for the award of the tender.

“Table 9: Combination of Technical and Financial Scores

Item	Bidder’s Name	Technical Score, Ts	Tender Sums Comparison, TSC’s	Total Score Ts
1.	<i>M/s Com. Twenty One Ltd.</i>	70	0.0	70.0
2.	<i>M/s Soulco Kenya Ltd.</i>	70	3.5	73.5
3.	<i>M/s MFI Technology Solution Ltd.</i>	70	27.0	97.0

4.	<i>M/s Pong Agencies Ltd.</i>	70	15.0	85.0
5.	<i>M/s Telecommunications Today.</i>	70	3.0	73.0

The evaluation committee then made the following observations and conclusions:-

"From the above table, it is observed that M/s Com Twenty One Ltd, M/s Soulco Kenya Ltd and M/s Telecommunications Today have total scores of less than 75% that is they scored 70%, 73.5% & 73% respectively. They are therefore not financially responsive and are not considered for further evaluation. The rest scored more than 75% and can be considered for acceptance.

From the Evaluation Criteria in Section A (Instructions to Tenderers) of the tender document, the evaluation committee shall recommend for award the lowest priced bidder among those who achieve a score of 75% and above. The lowest evaluated bidder in this case is M/s MFI Technology Solution Ltd who scored 97.0% and which is above the required minimum pass mark of 75%.

At the hearing of the Request for Review, the Board sought to know what procurement method the Procuring Entity had used in evaluating the tenders the subject matter of this dispute. Mr. Wamae, on behalf of the Procuring Entity, informed the Board that the method used by the Procuring Entity was that of a restricted tender, a position that was not contradicted by the Applicant or the Interested Party. The Board does not therefore have any reason to doubt Mr. Wamae's submission on the procurement method used but wishes to observe that a Procuring Entity

can engage in Procurement by means of a restricted tender under the Provisions of Section 73 of the Public Procurement and Disposal Act (2005).

The Procedure for evaluating tenders invited through open tendering and restricted tendering is set out in the Act and the Regulations.

Regulations 54 (1) of the Public Procurement and Disposal Regulations (2006) stipulates that the Provisions set out in the Act and the Regulations shall for the purposes of Section 73 (1) of the Act apply *Mutatis Mutandis* to restricted tendering.

Regulation 50 (1) of the Regulations which is therefore applicable to restricted tenders by virtue of Regulation 54 (1) of the Regulations and which deals with financial evaluation of such tenders stipulates as follows:-

50. (1) Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by:-

- a) Taking the bid price, as read out at the bid opening;*
- b) Taking into account any corrections made by a Procuring Entity relating to arithmetic errors in a tender;*
- c) Taking into account any minor deviation from the requirements accepted by a procuring entity under Section 64 (2) (a) of the Act;*
- d) Where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents.*

- e) *Applying any discounts offered in the tender;*
- f) *Applying any margin of preference indicated in the tender documents.*

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with Section 66(4) of the Act.

Section 66 (1), (2), (3) and (4) of the Act which deal with the evaluation of open and restricted tenders stipulates as follows:-

Section 66

- 1. The Procuring Entity shall evaluate and compare the responsive tenders other than tenders rejected under Section 63(3).*
- 2. The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents no other criteria shall be used.*
- 3. The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) –*
 - a) the criteria must, to the extent possible, be objective and quantifiable; and*
 - b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.*
- 4. The successful tender shall be the tender with the lowest evaluated price.*

These two provisions of the law therefore set out how financial evaluation should be carried out and the procedure and the parameters within which that should be done.

A look at the evaluation report on financial evaluation however indicates that the Procuring Entity took into account extraneous matters which fall outside what is required by Regulation 50 and by doing so ended up awarding a tender that should have been awarded to the lowest evaluated bidder to a bidder with a price which was higher contrary to the Provisions of Section 66 (4) of the Act. In doing so the Procuring Entity appeared to have brought up issues that should have been considered at the technical evaluation stage at the financial evaluation stage and even weighted scores and gave combined scores which is a requirement in Requests for proposals under the provisions Sections 76 to 87 of the Public Procurement and Disposal Act that govern the evaluation of Requests for proposals.

On the complaint that the Engineer's estimate was not read out at the financial opening, it is indeed true that this was not done. The Board also finds that this ordinarily ought not to be done at the tender opening stage pursuant to the provisions of Section 60 (5) of the Act. The Board however wishes to observe that the Procuring Entity decided to use the Engineer's estimate as a yard stick and as an evaluation criteria which attracted a substantial 30 marks. Under the provisions of Article 227 of the Constitution of Kenya and Section 2 of the Public Procurement and Disposal Act (2005) the law envisages that a procurement process shall be fair, equitable, transparent, competitive and cost effective.

Section 2 of the Public Procurement & Disposal Act, 2005 also requires that the procedures of procurement should maximize economy and efficiency, promote competition and ensure that competitors are treated fairly, promote integrity and fairness of the procedures to be used increase transparency and accountability in the procedures and increase Public confidence in procurement procedures.

Section 66 (3) (a) of the Act requires that where a Procuring Entity decides to include a criteria for evaluation in the tender document, then the criteria must be objective and quantifiable.

The Board therefore finds that by making the Engineer's estimate one of the yardsticks for evaluation then the Procuring Entity ought to have disclosed it to the bidders. Mr. Wamae who led the submissions on behalf of the Procuring Entity informed the Board that the Engineer's estimate was available to the Procuring Entity five days before the tenders were opened on 30th September, 2014.

The Board therefore finds that in the interest of transparency and fairness all the bidders including the Applicant and the Interested Party ought to have known the yardstick against which they were to be measured as this would have been the only way of upholding the objectives of Procurement as set out in the Constitution and the Act.

The Board has examined the financial evaluation report which forms part of the evaluation report and notes that the Applicant which offered the

lowest price was awarded zero (0) marks out of the maximum (30) marks. The Board further finds that the zero (0) mark was not explained and is not attributable to any of the criteria set out in Regulation 50 of the Regulations and in fact negated the Provisions of Section 66 (4) of the Act on the criteria for award.

Consequently and in view of all the foregoing findings the Applicants second ground of review is therefore also allowed.

FINAL ORDERS

In conclusion and in exercise of the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and disposal Act (2005) the Board makes the following orders:-

- a) The decision of the Procuring Entity/the Respondent awarding the Tender number SH/002/2014 -2015 for the supply and installation of IP based PABX at state House Nairobi to MFI Technologies Limited be and is hereby annulled under the Provisions of Section 98 (a) of the Act.
- b) In view of the Board's findings in grounds 1 and 2 above the Board hereby finds that the Applicant was the lowest evaluated bidder and ought to have been awarded the said tender and in exercise of the powers conferred upon it by the Provisions of Section 98 (c) of the Act and in the circumstances of this case as set out above, the Board therefore substitutes the Procuring Entity's decision awarding the

tender to the Interested Party and instead awards the subject tender to the Applicant.

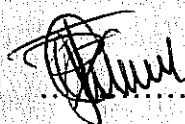
- c) The Procuring Entity/the Respondent is hereby directed to complete this Procurement process within a period of Seven (7) days from today's date in line with order (b) above.
- d) The Board declines to grant prayers 3, 4 and 5 in the Applicant's Request for Review and instead directs that the secretary of this Board shall serve a copy of this decision on the Director General of the Public Procurement Oversight Authority and the Executive Director of the National Construction Authority in view of the serious nature of the allegations raised regarding eligibility in order to assist the Procuring Entity and other Procuring Entity's in understanding and complying with the Provisions of the law when evaluating tenders.
- e) In view of the orders made under orders (b) and (c) above, the Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 25th day of November, 2014

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CHAIRMAN

PPARB


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SECRETARY

PPARB