

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

**APPLICATION NO. 7/2014 OF 24TH MARCH, 2014
AND NO. 10/2014 OF 9TH APRIL, 2014**

BETWEEN

BCX KENYA LIMITED(1st Applicant)

AND

LANTECH (AFRICA) LIMITED (2nd Applicant)

VS

NAIROBI CITY COUNTY..... (Procuring Entity)

SEVEN SEAS TECHNOLOGIES LIMITED..... (Interested Party)

APPLICATION NO. 10/2014 OF 9TH APRIL, 2014

LANTECH (AFRICA) LIMITED.....(Applicant)

VS

NAIROBI CITY COUNTY..... (Procuring Entity)

SEVEN SEAS TECHNOLOGIES LIMITED..... (Interested Party)

**Item: Supply, Installation, Configuration and
Implementation of Data Centre and
Structured Cabling Infrastructure**

Tender No: NCC/ICT/RFP/113/2013-2014

BOARD MEMBERS PRESENT

Mr. Paul Gicheru - Chairman
Mr. Nelson Orgut - Member
Mrs. Rosemary K, Gituma - Member
Mr. Peter Bitia Ondieki - Member

IN ATTENDANCE

Pauline Opiyo - Secretary to the Board
Phillip Okumu - Secretariat
Judy Maina - Secretariat

PRESENT BY INVITATION

1st Applicant - BCX Kenya Limited

S.O. Owino - Advocate
Amutala - Advocate
Lion Makumu - Clerk

2nd Applicant - Lantech (Africa) Limited

S.O. Owino - Advocate
Abraham Macharia - Business Consultant

Procuring Entity - Nairobi City County

Parick Murage - Advocate
S. Okello - Head, Supply Chain Management
George Ombua - ICT Manger

Interested Parties

Njoroge Regeru	-Advocate, Seven Seas Tech Ltd
Wilson Mwihuri	- Advocate, Seven Seas Tech Ltd
Albert Mandera	- Seven Seas Tech Ltd
N. Wachira	- Seven Seas Tech Ltd
E. Mujera	- Seven Seas Tech Ltd
M. Mukira	- Seven Seas Tech Ltd
Dickens Ondiek	- A/C Manager, Copy Cat Ltd.

PRELIMINARY MATTERS

This decision relates to the Request for Review No. 7 and 10 of 2014 which were lodged before the Board on 9th April 2014 respectively. The two Requests for Review related to tender NO. NCC/ICT/RFP/113/2013 -2014 for the supply, installation, configuration and implementation, casting infrastructure for the Nairobi City County. The two Request for Review were lodged before the Board by BCX Kenya Limited and Lantech (Africa) Limited respectively who were tenderers and therefore candidates within the meaning of Section 3 of the Public Procurement and Disposal Act 2005. The Applicants in the two Requests for Review were challenging the award of the above tender to M/s Steven Seas Technologies Limited the Interested Party-by a letter of-award-dated 14th March, 2014.

The Board in appreciation of the fact that the two Request for Review related to the same tender and in exercise of the powers conferred upon it

by Regulation 82 of the Public Procurement and Disposal Regulations 2006, the Board directed that the two Requests for Review be consolidated and be heard together. The Board also took cognisance of the fact that though the two Request for Review related to the same tender, the Request for Review were based on different grounds and allegations of alleged breaches of the Act and the Regulations.

Prior to the substantive hearing of the Request for Review No. 7 of 2014, Mr. Njoroge Regeru, learned Counsel for the Interested Party, pointed out that the Applicant in that request had filed a notice of withdrawal of the Request for Review No. 7/2014 on 9th April, 2014. The Board however brought to the attention of Counsel for the Interested Party that the issue of whether or not that Request for Review had validity been withdrawn had been the subject matter of an interlocutory decision and an order for directions made on 11th April, 2014.

Counsel for the Interested Party then requested the Board to Review its decision and order for directions, but Counsel for the Applicant in the Request for Review No. 7 of 2014 objected to the Review of the directions given by the Board on 11th April, 2014 and indicated that the Applicant now wanted to proceed with its Request for Review on merits and that in any event there was no application for Review filed before the Board challenging the orders made on 11th April 2014 and that the Board had no powers to Review any of its earlier decisions under the provisions of Section 98 of the Act.

The Board noted that the decision and the Order for Directions was contained in a separate decision given on 11th April 2014 and in the absence

of a formal application for Review lodged before it, the Board could not make any order Reviewing or varying the said Directions.

The parties then proceeded to address each of the two Requests for Review on merits.

When the two Requests for Review therefore came up for hearing before the Board on 17th April, 2014 the parties argued the consolidated Requests for Review separately one after the other at one sitting and the Board will therefore consider and determine each Request for Review distinctly on its own merits.

THE BACKGROUND

As would be expected in Request for Review arising from the same tender, the background facts giving rise to both applications were largely similar and are as follow:-

The Procuring Entity, the Nairobi City County, invited Request for Proposals, from eleven (11) prequalified firms which had been shortlisted for the supply, installation, configuration and implementation of the data centre and structured cabling infrastructure. The invitation was carried out as envisaged by the law and Requests for proposals were sent out to the said firms. The Head of the Procuring Entity appointed a five member tender committee to open the tenders but prior to the opening of the tenders the Procuring Entity invited all those who submitted Requests for proposals for a pre-bid conference meeting which was held on 21st and 22nd November, 2013 but following concerns and the submissions by the tenderers the Procuring Entity decided to extend the tender

opening/closing date from 3rd December 2013 to 10th December, 2013 and issued an addendum to that effect.

The fact that the tender closing/opening date was extended was not disputed by any of the parties to both Request for Review and both the Procuring Entity and the Interested Party produced the addendum extending the tender closing/opening date signed by Mr. John Okuku the Director of the Procuring Entity's Procurement Department.

Following the decision to extend the closing/opening date for the Request for proposals, proposals were opened on 10th December 2013 by the tender committee at the Procuring Entity's Human Resource Boardroom. The tender attracted eight (8) bidders out of the eleven (11) who had been invited to submit proposals.

The eight bidders were:

	FIRM
1.	Computech Limited
2.	Seven Seas Technologies Limited
3.	Eastra Solution Ltd and Kryce Ltd
4.	System & Information Technology (Kenya) Ltd
5.	The Copy Cat Ltd
6.	Gestalt Gild Limited
7.	Lantech (Africa) Limited
8.	Business Connection (BCX)Kenya Limited

The Procuring Entity noted at the tender opening that Bidder No. 4 (System & Information Technology (Kenya) Ltd) did not submit a bid bond as required.

The Tender Opening minutes dated 10th December, 2013 were signed by all the five members of the Tender Opening Committee.

The eight proposals were then subjected to a preliminary evaluation in which the submission and validity of each bidder's bid bonds was considered. Bidder, No. 4, (M/s System & Information Technology (Kenya) Limited) was disqualified at this stage for not having submitted a bid bond as was required and was thus considered to be non-responsive.

The rest of the seven bids were thereafter subjected to technical evaluation in which four bidders were disqualified. Two bidders, namely bidder No. 3 (M/s Eastr Solution Ltd and Kryce Ltd) and Bidder No. 5 (M/s The Copy Cat Ltd) were disqualified after the Evaluation Committee observed that the teaming agreements for both sets of bids were signed by the same person, and some CVs provided by both bidders were for the same persons. The two bids were therefore disqualified for misleading the Procuring Entity and contravening the provisions of Clause 2.3.3 of the Request for Proposals.

Bidders No. 1 and 6 (M/s Computech Limited and M/s Gestalt Gild Limited, respectively) were disqualified for failing to attain the pass mark for the technical score. The results of the technical evaluation for the three bidders who proceeded for the financial evaluation were as follows:-

Table of Outcome of Technical Evaluation:

		B2	B7	B8
	Maximum	Seven Seas Technologies Ltd	Lantech (Africa) Ltd	BCX Kenya Limited
Desktop	30	27.25	24.65	26.05
Demos	25	23.83	19.83	22.83
Site Visits	25	18.33	16.17	24.50
Total	80	69.42	60.65	73.38

FINANCIAL OPENING

The Financial Proposals were opened on 4th February, 2014 and a record prepared by the Procuring Entity indicated that the three (3) prices for the three remaining bidders were as follow:-

	FIRM	AMOUNT	REMARKS
1.	Lantech (Africa) Limited	322,126,632.96	Kshs. Incl. Tax
2.	Seven Seas Technologies Limited	2,439,309.70	USD incl. Tax
3.	BCX Kenya Limited	263,169,437.79	Kshs. Incl. Tax

The bid prices were read out at the financial opening. The Financial Bid for M/s Seven Seas Technologies Limited was in US Dollars and was converted at the Central Bank of Kenya's mean rate of Kshs. 86.5839 per US Dollar. During the financial evaluation the prices were subjected to the formula as provided for in the Request for proposal document and the following was recorded as the result of each of the bidders financial score.

Ref #	Bidder	Financial Bid	Financial Proposal Score (100%)
1	B2- Seven Seas Technologies Limited	211,204,947.13	100%
2	B7 - Lantech (Africa) Limited	322,126,632.96	66%
3	B8 - Business Connections Kenya Limited	263,169,437.79	80%

The tender evaluation committee then tallied the aggregates of the Technical and Financial scores and arrived at the following combined aggregates and ranked the bidders accordingly.

Ref #	Bidder	Financial Proposal Score (20%)	Technical Proposal Score (80%)	Final Score/ Aggregate Score	Ranking
1	B2- Seven Seas Technologies	20.00	69.42	89.42%	2
2	B7 -Lantech (Africa) Limited	13.11	60.65	73.76%	3
3	B8 - BCX Kenya Limited	16.05	73.38	89.43%	1

Based on the aggregate and the Procurement being a Procurement under part VI (c) of the Act (Request for proposals) the Evaluation Committee recommended that the contract be awarded to M/s BCX Kenya Limited at the price of Kshs. 263,169,437.79 subject to negotiations pursuant to the Provisions of Section 82 (5) and 84 of the Act.

It was generally agreed by the parties to the two Requests for Review a fact which was also confirmed by the minutes of the Tender opening Committee held on 10th December 2013 that the bid bonds for the three parties to the two Requests for Review whose technical and financial scores were finally evaluated and aggregated were as follow:-

- (i) Seven Seas Technologies Limited provided a bid bond of Kenya Shillings One Million (Kshs. 1,000,000.00) from Co-operative Bank with a validity period of up to 3rd March, 2014.
- (ii) BCX Kenya Limited provided a bid bond of Kenya Shilling One Million (Kshs. 1,000,000.00) from CFC Bank with a validity period upto 2nd April 2014.
- (iii) Lantech (Africa) Limited provided a bid bond of Kenya Shillings One Million (Kshs. 1,000,000.00) from Eco bank with a validity period of upto 10th March, 2014.

The documents placed before the Board by all the parties show that the recommendation for the award of the tender to the bidder with the successful Request for proposal was forwarded to the tender committee of the Procuring Entity which deliberated on the matter on 6th February, 2014. Upon being presented with the recommendation, the tender committee

noted some alleged inconsistencies in the evaluation which it communicated to the evaluation committee via a letter/memo dated 7th February, 2014 and requested the evaluation committee through its secretary to clarify the issues raised.

The evaluation committee considered all the issues raised and in a letter dated 10th February 2014 gave a clarification on all the issues. The evaluation committee gave the following clarification to each of the issues raised:-

NCC/ICT/RFP/113/2013 -2014-REQUEST FOR PROPOSAL FOR SUPPLY INSTALLATION, CONFIGURATION AND IMPLEMENTATION OF DATA CENTRE AND STRUCTURED CABLING INFRASTRUCTURE

Tender Committee concerns	Evaluation Committee Clarification
<p>a) It was noted that there was no consistency in the information provided in the teaching agreement as stated in the tender document.</p>	<p>We wish to clarify as follows:-</p> <ol style="list-style-type: none"> 1. A teaming agreement was not mandatory for all bidders. It was only mandatory if the prequalified firm chose to partner with other firms to enhance its capabilities. 2. There is a teaming agreement between BCX Kenya Limited and specialized Infrastructure Solutions (SIS) South Africa Ltd. 3. There is also a teaming agreement between BCX Kenya Limited and Ultimate Engineering Kenya Ltd. 4. The three parties are teaming to provide the following: <ul style="list-style-type: none"> • BCX Kenya to provide overall project management and managed services

	<p>support.</p> <ul style="list-style-type: none"> • SIS to build the data centre and provide training and knowledge transfer. • Ultimate Engineering to implement structure cabling. <p>5. BCX Kenya is a subsidiary of Business Connections Pty South Africa and therefore can draw on its international experience, capabilities and technical resources.</p>
<p>b) The winning firm did not demonstrate capacity to offer support daily.</p>	<p>We wish to clarify as follows: _</p> <ol style="list-style-type: none"> 1. From our site visits we noted that the winning firm has 7 local technical staff and are in the process of recruiting more. 2. This tender includes the implementation of Data Centre and LAN infrastructure as well as managed services/support for a period of 3 years. The managed services will be governed by a service level agreement which was included in the tender document and will subsequently form part of the contract. 3. It will be up to the Vendor to ensure the agreed support service level agreement is met at their costs - whether by local or consultant from South Africa NCC will not bear additional costs for any support staff that may need to be flown in for support or maintenance. 4. The winning bidder demonstrated a Data Centre Building Management System which is a monitoring solution with early warning capability that can be accessed remotely from anywhere in the world. 5. The evaluation committee noted that it is customary for expertise to be sourced internationally in large scale ICT infrastructure

	<p>projects. The high level of expertise demonstrated by the winning bidder was not demonstrated by any local bidder. This was an open tender and mandate of the evaluation committee was to select the best solution for the County regardless of the source.</p>
<p>c) They lacked material evidence of relevant projects executed locally in the development of data centre which required 99.9% up time.</p>	<p>We wish to clarify as follows:-</p> <ol style="list-style-type: none"> 1. The requirements in the tender document and evaluation criteria did not limit the bidder's relevant experience to only local experience/projects. 2. Clauses 2.3.3 of the tender document stated that "if a firm considers that it does not have all expertise for the assignment, it may obtain a full range of the expertise by associating with individual consultant (s) and/or other firms or entities in a joint venture or consultancy as appropriate". This clause does not prevent firms from associating with firms who have international expertise. 3. The bidder provided evidence that they have been awarded a contract for the design and implementation of a data centre for Kenya Airways.
<p>d) They also did not provide the local percentage share holding.</p>	<p>We wish to clarify as follows:-</p> <ol style="list-style-type: none"> 1. There was no mandatory requirement to provide local percentage shareholding. 2. Clause 2.8.4 of the RFP requires that firms provide proof of local incorporation and citizenship in the financial proposal only if the firm wishes to be considered for preferential bias in evaluation of financial proposals. 3. Of the top 3 bidders whose financials were opened, only bidder 7 provided evidence of the percentage of local shareholding in the financial

	<p>proposal for the purpose of being considered for preferential bias in evaluation of financial proposals. Section 39(8) of the Public Procurement and Disposal Act 2005 and Section 28(1) of the Public Procurement Regulations, 2006 outline circumstances under which preference to local firms is given. This particular tender falls above the prescribed threshold of Kshs. 200 Million for such preference to apply.</p> <p>4. Nevertheless, the winning firm (bidder 8) provided a breakdown of their shareholding in their technical proposal.</p>
<p>e) It is also opinion of the tender committee, that the technical Evaluation scoring be justified.</p>	<p>We wish to clarify as follows:-</p> <ol style="list-style-type: none"> 1. The technical scores assigned to each bidder is a reflection of the strength of each bidder based on the evaluation criteria specified in the tender documents. The evaluation process involved technical evaluation through desktop review of the bidder's proposal document, demonstration of the firm capabilities and proposed solution; and site visits to locations where the firm had implemented similar solutions. At each stage, individual scores were consolidated and averaged to determine the final score. 2. The technical score of the winning bidder is therefore a reflection of their relative strengths and weaknesses which have been detailed in evaluation minutes. The winning bidder emerged top technically because in the view of the evaluation committee, based on the evaluation criteria, they provide the best solution for the county. Bidder 8 is providing a consortium of firms and skills that are specialized in the areas required under this tender. <ul style="list-style-type: none"> • Management of Data centres in one of Business Connections specialties. Business connections is currently maintaining and managing their own

	<p>certified Tier 4 Data Centre. None of the other bidder has built or managed a Tier 4 data centre.</p> <ul style="list-style-type: none"> • Ultimate Engineering is a Kenyan firm specializing in LAN and Electrical Cabling. • SIS has a factory which manufactures Data Centre components according to specifications such as generators, racks and containerized data centre. <p>No other bidder demonstrated the breadth of capacity, skills and experience in building and managing data centres comparable to Bidder 8.</p>
<p>f) It was further noted that members of opening did not initializing some important areas in the document, this anomaly was not observed by the evaluation.</p>	<p>We wish to clarify as follows:-</p> <ul style="list-style-type: none"> • Section 60(7a) states that "Each member of tender opening committee shall sign each tender on one or more pages as determined by the tender opening committee". • All the documents which were opened were initiated as agreed by all members of the opening committee.
<p>g) Considering the above facts, it is the opinion of the Tender Committee that the evaluation panel give clarification on information given.</p>	<p>Clarifications have been provided as requested.</p>
<p>h) Were all the</p>	<p>1. All firms were required to demonstrate their</p>

<p>firms required to show the international engagement.</p>	<p>relevant experience in delivering, similar project.</p> <ol style="list-style-type: none"> 2. All experience demonstrated by the firms in the desktop and demonstration stages of the evaluation were considered in the scoring. 3. During the site visit stage, firms were required to recommend sites which demonstrated capability to deliver the project. The committee requested firms to provide local sites for the purpose of visits due to time constraints. Bidder 8 did not have a local site with a completed data centre. Since there was no requirement in the tender documents that only local experience was relevant, the committee felt it would be unfair to visit other bidder's local sites and not visit any bidder 8's sites. Hence the committee made the decision to visit an international site for Bidder 8.
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In spite of the above clarifications which were forwarded to the tender committee vide the Evaluation Committee's letter dated 10th February 2014, the tender committee was still not satisfied and wrote two further letters dated 12th and 13th March, 2014 seeking for further clarifications. It is noteworthy that the tender committee chairman while seeking clarification from the evaluation committee in his memorandum dated 12th March 2014 also recommended that the award of the tender be made to the Interested Party based on the alleged fact that though the Applicant in Request No. 7 of 2014 and the Interested Party were both technically responsive, the difference in their financial proposals was Kshs. 51,964,490.66.

Prompted by the two memoranda dated 12th and 13th March, 2014 from the tender committee, the tender evaluation committee met on 13th March 2014

long after it had made the recommendation for the award of the tender to BCX Kenya Limited and invoked the provision at page 44 of the tender document headed **"Right of acceptance and Rejection"** and purported to waive the evaluation criteria based on overall aggregate score (total scores for Technical and Financial proposals) and recommended the award of the Request for proposals to M/s Seven Seas Technologies Limited which is the Interested Party in both Requests for Review.

The minutes of the evaluation Committee dated 13th March 2014, were however not without protest. The minutes indicate that one Margaret Musyoki, questioned the need for further discussion to address differences in costs while the recommendations of the tender evaluation committee were clear and were based on rules contained in the evaluation criteria of the Request for Proposals documents. She further protested that the evaluation committee had in a subsequent memo advised the County to negotiate with the winning bidder, failure to which the county was free to engage the second best, thus adequately addressing the issue of costs. She asked that her objection be recorded in the minutes which was done.

The tender committee later met on the same day, namely; 13th March, 2014 and resolved that the tender the subject matter of the Request for Proposals be awarded to M/s Seven Seas Technologies Limited at a total bid sum of Kshs. 211,204,947.13 being the lowest responsive evaluated bidder.

On 14th March, 2014, one day after making the award the Procuring Entity's County Secretary one Lillian W. Ndegwa in a letter produced by the Procuring Entity in its response to the Request for Review wrote to the Director General of the Public Procurement Oversight Authority giving a detailed account of what had taken place from the commencement of the

entire process to the stage of the tender award and inter-alia requested as follows:

“Your authority is therefore sought for approval and award preferably to the locally based firm as you will observe in the tender committee recommendation whereas the county will also earn the best value for money”.

The Applicants in the two Requests for Review were dissatisfied with the decision of the Procuring Entity and lodged two separate Requests for Review before the Board challenging the award of the tender to M/s Seven Seas Technologies Limited.

The Board wishes to observe that though the two Requests for Review arise from the same Request for Proposals documents and from substantially the same set of facts, circumstances and background, the grounds set out in the two Requests for Review are distinct and involve a consideration of separate and distinct grounds of Review.

Having therefore summarised the background of the facts, the Board will now proceed to consider and render separate decisions on each of the two Requests for Review.

**REQUEST FOR REVIEW NO. 7 OF THE 2014 FILED ON 24TH MARCH
2014**

BETWEEN

BCX KENYA LIMITED.....APPLICANT

VS

NAIROBI CITY COUNTYPROCURING ENTITY

AND

SEVEN SEAS TECHNOLOGIES LIMITED.....INTERESTED PARTY

THE REQUEST FOR REVIEW

This Request for Review was lodged by M/s BCX Kenya Limited (hereinafter referred to as "the Applicant) on 24th March, 2014 against the decision of the Nairobi City County in the matter of Request for Proposals No. NCC/ICT/RFP/113/2013-2014 for the Supply, Installation, Configuration and Implementation of Data Centre and Structured Cabling Infrastructure to the Interested Party.

The 1st Applicant sought for the following reliefs from the Board:-

- 1. THAT the Board declares that the Applicant submitted the successful proposal;**
- 2. THAT the Respondent do enter into a contract with the Applicant pursuant to the terms of reference and Section 85 of the Public Procurement and Disposal Act, 2005;**

3. **THAT, in the alternative, the procurement proceedings be annulled in their entirety;**
4. **THAT the Board grants any other relief which it may deem fit and just;**
5. **THAT the Board grants the Applicant the costs of this Review.**

The Board has considered the Applicant's Request for Review and notes that the Request for Review was based on two basic grounds which can be summarised as follows:

- a) **Whether the Applicant was served with a notification of the outcome of the tender as required by Section 83 of the Act.**
- b) **Whether the Procuring Entity breached the Provisions of Sections 82 and 84 of the Act.**

The Parties Submissions

The Applicant in this Request for Review began its submissions by inviting the Board to note that under the provisions of the Public Procurement and Disposal Act 2005, the Procuring Entity had the option to chose a procurement procedure and that where the Procuring Entity had chosen a particular procurement procedure, the Procuring Entity was bound to follow that particular procedure to the end and comply with the provisions of the Act and the Regulations that govern that particular Procurement procedure to the end.

The Applicant submitted that for the purposes of this procurement, the procuring Entity had chosen to procure the services the subject matter of this dispute under part VI (c) of the Act headed "**Requests for Proposals**"

and was therefore bound to comply with the provisions of Sections 76 to 87 of the Act and the Regulations governing the criteria and the procedure for the evaluation and an award of a tender as far as Requests for proposals are concerned.

The Applicant further submitted that once a Procuring Entity had prepared and submitted tender documents, then both the Procuring Entity and the tenderers to that tender were bound to follow the criteria set out in the tender documents/Requests for Proposal. According to Counsel, a mandatory criterion in such document could not be waived and it was not also permissible for a Procuring Entity to introduce a new evaluation criteria that had not been notified to the bidders.

The Applicant further submitted that in awarding the tender the subject matter of this dispute to the Interested Party, the Procuring Entity breached the provisions of Sections 82, 83, and 84 of the Act and Clause 2.8.5 of the tender document.

On the issue of notification, the Applicant submitted that by the time it lodged this Request for Review it had not received any notification that its Request for Proposal was unsuccessful.

On the issue of none compliance with the provisions of Section 82 and 84 of the Act, the Applicant stated that the Procuring Entity breached the Provisions of Section 82(5) and Clause 2.8.5 of the tender document/Request for Proposals in that under the provisions of the said section and clause, the Procuring Entity was bound to award the tender to

the Applicant which had the highest combined score on technical and financial evaluation. The Applicant contended that out of the three bidders who made it to the last stage of the evaluation, the Applicant obtained a combined aggregate score of 89.431 against the second highest score which was 89.420 and that the percentage difference between the parties was a none issue since the Procuring Entity had already ranked it number 1.

The Applicant referred the Board to the Provisions of Clause 2.8.5 which sets out the formula for arriving at the combined aggregate technical and financial score and the consequences that would flow from that determination.

Clause 2.8.5 of the Request for proposals reads as follows:-

"The formulae for determining the Financial Score (Sf) shall, unless an alternative formulae is indicated in the Appendix "ITC", be as follows:-

Sf = 100 X F_m/F where Sf is the financial score; Fm is the lowest priced financial proposal and F is the price of the proposal under consideration. Proposals will be ranked according to their combined technical (St) and financial (Sf) scores using the weights (T=the weight given to the Technical Proposal; P=the weight given to the Financial Proposal; T + P = 1) indicated in the Appendix. The combined technical and financial score, S, is calculated as follows:- $S = St \times T\% + Sf \times P\%$. The firm achieving the highest combined technical and financial score will be invited for negotiations."

In the section referred to as "Appendix to Information to Vendors" in the tender document, the information provided under Clause 2.8.5 indicated that:-

"The weights given to the Technical and Financial Proposal are:

T = _____ 0.80

P = _____ 0.20"

The Applicant submitted that the tender evaluation committee rightly recommended the award of the tender to the Applicant based on this criteria but in spite of this earlier recommendation, the evaluation committee acting pursuant to the recommendations of the tender committee decided to recommend the award of the tender to the Interested Party on the grounds that it was the lowest evaluated bidder having provided a price proposal of Kshs. 211,204,947.13.

The Applicant submitted that being the tenderer with the highest evaluated aggregate technical and financial score, the procuring Entity was bound to declare it the successful tenderer and invite it for negotiations pursuant to the mandatory provisions of Section 84 of the Act.

The Applicant consequently asked the Board to find that the Procuring Entity had breached both the provisions of the Act and the Regulations and urged the Board to allow its Request for Review.

The Procuring entity filed a response to the Applicant's Request for Review. The procuring entity both in its response and the oral submissions made by Mr. Murage learned counsel for the Procuring Entity confirmed that the Procuring Entity had elected to use an alternative procurement procedure namely a Request for Proposals under part VI (c) of the Act. The Procuring Entity at paragraph 7 of its response significantly admitted that

after the entire process of evaluation, the Applicant was found to have the highest combined technical and financial score of 89.43% as compared to the Interested Party's score of 89.42% and was therefore initially recommended for the award of the tender by the Procuring Entity's tender evaluation committee.

The Procuring Entity however defended its decision to change its earlier recommendation to award the tender to the Interested Party on the basis that the difference between the two scores was a minimal 0.01% while the difference in price was found to be huge. The difference in the financial proposals submitted by the Applicant and the Interested Party was 51,964,490.066 and that by awarding the tender to the Interested Party, the Procuring Entity and taxpayers stood to save the said sum of money.

While not denying that the tender evaluation committee had initially recommended an award of the tender to the Applicant, the Procuring Entity further justified its later decision to award the tender to the Interested Party and contended that the evaluation committee had rightly invoked the provisions of the tender document which allowed the procuring entity to accept or reject any or all proposals. The Procuring Entity averred as follows in paragraph 11 of its response:-

"Right of acceptance and rejection; Nairobi City County reserves the right to accept or reject any or all proposals and waive any formalities and deviations, which in its opinion, best serve the interest of the Nairobi City County. Nairobi City County is not bound to accept your proposal".

"The evaluation committee therefore waived the criteria which states that the successful Tenderer will be ranked based on overall score and recommended that the lowest evaluated responsive financial bidder M/s Seven Seas Technologies Ltd be awarded the tender at a total price of Kshs. 211,204,947.13".

The procuring Entity did not comment on the issue of whether or not the Applicant was notified that its proposal was unsuccessful both in its response to this Request for Review nor in its oral submissions as presented by counsel.

On his part counsel for the Interested Party Mr. Njoroge Regeru associated himself with the submission of the Procuring Entity and additionally submitted that the procuring entity acted within the provisions of the Act, the Regulations and the Tender Document in declaring the Successful Bidder's proposal as the successful proposal.

Mr. Regeru however started his submissions by urging the Board to find that it had no jurisdiction to hear and determine the Request for Review before it on the grounds set out in the Interested Party's notice of preliminary objection dated 9th April 2014. The substance of the Preliminary Objection was that the Request for Review had been filed out of the prescribed period of time and was therefore incompetent, bad in law and did not lie and as such ought to be struck out with costs on the following grounds:-

1. That the Applicant was notified on 14th March, 2014 of the outcome of the tender.
2. That the Request for Review was filed on 24th March, 2014.

3. That the intervening period was three (3) days, outside the 7 days stipulated by Regulation 73(2)(ii) of the Public Procurement and Disposal Regulations, 2006.

While not denying that the tender evaluation committee had made a recommendation to award the tender to the Applicant, the Interested Party contended that the Procuring Entity was justified and had rightly invoked the Clause at page 44 of the tender document headed.

Right of acceptance and rejection; which states that the Nairobi City County reserves the right to accept or reject any or all proposals and waive any formalities, informalities and deviations, which in its opinion, best serve the interest of the Nairobi City County. Nairobi City County is not bound to accept your proposal.”

The Interested Party therefore submitted that the tender evaluation committee had therefore rightly waived the criteria in the tender document which states that; **vendors will be ranked based on overall score** and had consequently rightly recommended that the tender awarded to the tenderer with the lowest evaluated bid namely M/s Seven Seas technologies Ltd.

The Interested Party further argued that in view of the difference in price between the Applicant and the Interested Party and the fact that the overall score between the two parties translated to a minimal 0.01%, the Procuring Entity was empowered by the provisions of Section 66(4) of the Act to award the Interested Party the tender being the lowest evaluated bidder.

The Interested Party quoted the provisions of Section 66(4) of the Act verbatim in paragraph 9 of its response. The said provision stipulates as follows:-

"Section 66 (4) - The Successful tender shall be the tender with the lowest evaluated price."

The Interested party further stated that the assumption by the Applicant that it would be the successful bidder just because it had obtained the highest aggregate technical and financial score was misconceived and had no basis both in fact and law and that the differential of 0.01% between the Applicant and the Interested party was so infinitesimal, so minute as to be indiscernible thereby placing the scores by the Applicant and the Interested Party effectively at par and consequently the aggregate combined technical and financial scores by the Applicant and the Interested party were evenly matched.

Counsel further urged the Board to consider the wider public interest which was that if the Applicant had been awarded the tender, the taxpayer would have had to pay an additional price of Kshs.51, 964, 498.66 which was the difference in the financial proposals made by the Applicant and the Interested Party.

Counsel for the Interested Party concluded his submissions by referring the Board to the decision in the case of **H. Young & Company (E.A) Ltd = vs = East Africa Portland Cement Company Limited (Application for No. 43 of 2009)** for the proposition that price alone is not the only factor to be considered when awarding the tender and for the further proposition that the lowest evaluated bid is the bid that is most advantageous to the Procuring Entity when all factors including price are considered.

The Applicant gave a brief response to the submissions made by the Procuring Entity and the Interested Party. Counsel for the Applicant submitted that once a procuring entity had elected a particular procurement procedure it was bound to follow it to the end and further that the Right of acceptance or rejection was not an evaluation criteria as no score could be assigned to it. The Applicant further argued that if a Procuring Entity were allowed to exercise the Right of acceptance or rejection after the conclusion of evaluation, there was no need to invite tenderers to tender since such an exercise would simply be an exercise in window dressing.

On the provisions of Section 66(4) of the Act, the Applicant submitted that this Provision was not Applicable to Requests for proposals but to open tendering under Part V of the Act.

Counsel concluded his submissions by distinguishing the decision in the case of **H. Young & Company (E.A) Ltd =vs= East Africa Portland Cement Company Limited (Application for No. 43 of 2009)** which had been cited by Counsel for the Interested Party in support of his client's case and his simple answer was that the case cited related to a procurement under Part V of the Act but not to a Procurement process under Part VI of the Act that governs the law and the procedure to be followed while evaluation a Request for Proposals.

THE DECISION OF THE BOARD

The Board has considered all the documents lodged before in the Request for Review, the rival submissions made by the parties and the authorities relevant to the issues in contention and takes the following view on the two issues that fell for determination in this Request for Review.

- 1. ISSUE NO. 1 Whether or not the procuring entity breached the Provisions of Section 83(2) of the Act on notification and consequently whether or not the Requests for Review before the Board was filed out of time thereby depriving the Board of the jurisdiction to hear and determine the same.**

As rightly submitted by Mr. Njoroge Regeru on behalf of the Interested Party, the Board has consistently held that a Request for Review must be filed with the Board within the prescribed period of Seven (7) days and where it is filed outside that period then the Board has no jurisdiction to hear and determine the Request for Review.

The Board has also consistently held that the time for filing a Request for Review starts to run from the next day following service of a notification on the Applicant that its tender or Request for proposal has been unsuccessful. The burden of proving that an applicant was served with the requisite notification either under the Provisions of Section 67(2) or 83(2) of the Act lies with the Procuring Entity which must produce acceptable evidence of service to prove, that the notification was served. In the absence of such prove the time for the filling of a Request for Review cannot start running.

The Applicant consistently submitted during the course of the proceedings before the Board that it was not and has never been served with the notification that its proposal was unsuccessful. The Procuring Entity did not respond to this allegation in its written response.

During the course of the hearing however, the Procuring Entity through its Procurement Officer who appeared before the Board alleged that the notification was served on the Applicant on 19th March 2014 an allegation that the Applicant still contested.

Going by the Procuring Entity's own admission and without determining whether there was service of the notification at all or whether such service, if any, was proper, the preliminary objection by the Interested Party cannot stand for the following reason:-

The Request for Review before the Board was lodged on 24th March 2014. If the Procuring Entity served the Applicant with a notification on 19th March 2014 as alleged, the period of seven (7) days within which the Applicant was required to file the Request for Review started running on 20th March 2014 and the Request for Review was therefore filed after only five (5) days from the date of the alleged service of the notification and therefore within the statutory period of seven (7) days. In view of this finding it is not therefore necessary to consider the issue on whether the notification was served or whether such service, if any, was proper.

The Board therefore holds that the Preliminary Objection dated 9th April, 2014 cannot stand and is therefore dismissed.

The Board further finds and holds that though the Applicant alleged that it was not served with the notification at all, it did not suffer any prejudice

since it was able to lodge this Request for Review within the prescribed period as provided for in Regulation 73(2)(c)(ii) of the Public Procurement and Disposal Regulations 2006 as amended by Legal Notice No.106 of 2013.

2. ISSUE NO.2: Whether or not the procuring entity breached the provisions of Section 82 (5) of the Act and Clause 2.8.5 of the Tender document/The Request for proposals.

It was not disputed before the Board that this procurement was based on Requests for Proposals under part VI (e) of the Act. It was also not disputed that the tender evaluation committee evaluated all the Requests for proposal and zeroed on the three tenderers who are the parties to this Request for Review.

As admitted by the Respondent in paragraphs 6 and 7 of its response to the Applicant's Request for Review, the Applicant achieved the highest aggregate combined score after both the technical and financial evaluations and was therefore initially recommended for the award of the tender by the Procuring Entity's tender evaluation committee.

The Board notes from a perusal of the evaluation documents which were placed before it that the tender evaluation committee carried out a full preliminary, technical and a financial evaluation to the point of making a recommendation for the award of the tender to the Applicant using the criteria provided for in the Request for Proposals, the Act and the Regulations.

The Tender Evaluation Committee forwarded its recommendation on the award of tender to the Tender Committee on 7th March, 2014 but the tender committee however felt that certain issues needed to be clarified. The

tender evaluation committee promptly and in detail responded to each of the issues raised and forwarded back the clarifications to the tender committee on 10th March, 2014.

The tender committee was still not satisfied and sought further intervention from the tender evaluation committee by its two letters dated 12th and 13th March, 2014 and even recommended that the tender evaluation committee be disbanded and a new one be set up to re-evaluate the tenders.

The tender evaluation committee apparently succumbed to the sustained interventions and instead of standing by its first recommendation for award of the tender to the Applicant now made a second recommendation that the tender be awarded to the Interested Party under the criteria set out in Section 66(4) of the Act.

The Board has considered the issues raised in this ground and finds that the Procurement in this tender was one based on Request for Proposals and was therefore governed by the provisions of Sections 76 to 87 of the Act. A Procuring Entity which chooses to use a special procurement method instead of open tendering does so in appreciation of the fact that both the technical and financial components of the proposals would give it certain advantages and so places scores on each component in an attempt to achieve the said objective.

The Tender Evaluation Committee in the last paragraph of clarification number (e) captured the spirit and objective of this procedure when it stated that no other bidder demonstrated the breath of capacity, skills and experience in building data centres comparable to Bidder 8.

The Board also wishes to observe that the criteria for evaluation was so clearly set out in the Tender Document/Request for Proposal Document whose evaluation criteria bound the parties.

Under the provisions of clause 2.8.5 appearing at pages 12 and 13 of the tender documents/Request for proposals, the Procuring Entity provided the formulae for the determination of the successful tenderer and this was to be **"the firm achieving the highest combined technical and financial score"**. The same clause further stipulates that this was the firm that would be invited for negotiations.

As the Board has already noted, the Procuring Entity's evaluation committee followed through the evaluation diligently in regard to the Applicant herein to the point where it made a recommendation that the Applicant was the successful bidder and notes that problems only started arising when the tender committee sought two further sets of clarification whereas the evaluation committee had already forwarded to it a detailed table of clarifications on 10th March, 2014.

A summary of those clarifications which the Board has set out in the background to this decision contained detailed reasons for the recommendation. The Board has considered the reasons given and finds them to be valid. The Board also notes that one of the members of the evaluation committee recorded her protest to the constant interventions by the tender committee which the Board finds and holds was determined to ensure that the Interested Party was awarded the tender, the provisions of the Act, the Regulations and the Tender Document notwithstanding.

The Board wishes to point out that under the provisions of Section 81 of the Act which governs the criteria for evaluation of Requests for proposals, the Act requires the procuring entity to among other things set out the procedures and criteria to be used in evaluating and comparing proposals.

Section 82 (5) of the Act then stipulates that the successful candidate should be the tenderer with the highest combined Technical and financial score. It does not state that such tenderer shall be the tenderer with the lowest evaluated tender price.

Section 84 of the Act then requires that the Procuring Entity invites the successful tenderer for negotiations and that in the event that the negotiations are not successful, the procuring entity should then invite the tenderer whose proposal would have been successful had the successful proposal not been submitted.

The negotiations envisaged under the provisions of Section 84 of the Act are meant to address a several range of issues one of which can be price, additional services to be provided among other requirements that can be the subject of negotiations considering the nature of the works or services sought to be procured.

Regulation 11 of the Public procurement and Disposal Regulations 2006 limits the Tender Committee's powers on what it can or cannot do following a recommendation by the Evaluation Committee.

Regulation 11 (2) reads as follows:-

"(2) the tender committee shall not:-

a) Modify any submission with respect to the recommendations for a contract award or in any other respect.

b) Reject any submission without justifiable and objective reasons."

Regulation 11(3) further provides as follows:-

"(3) where the tender committee rejects the recommendation of the evaluation committee, the decision shall be reported to the head of the procuring entity or to the accounting officer."

The net effect of the above Regulation is therefore that a tender committee cannot reject the tender evaluation committee's recommendation of an award of tender. The tender committee can also not reject any other submission without justifiable and objective reasons. Where there is such rejection the decision should also be reported to the head of the procuring entity or to the accounting officer.

The Board has perused the documents submitted to it and has not seen any report made by the tender committee to the head of the procuring entity or to the accounting officer informing him/her of any decision rejecting the decision of the evaluation committee recommending the award of the tender to the Applicant. The tender committee could not in any event modify any submission by the evaluation committee for the award of a tender.

The decision of the tender committee which was eventually adopted by the tender evaluation committee that the award be made to the lowest evaluated bidder was unjustifiable and was not based on any objective

reason and was contrary to the express provisions of the tender document, Sections 81, 82 and 84 of the Act and the Regulations. A tender committee cannot act contrary to the law.

It was held in the cases of **Landor Associates =vs = Kenya Power and Lighting Company Ltd (PRB Application NO. 42 of 2009)** and in the case of **Runji & Partners Consulting Engineers Limited = vs = Kenya Rural Roads Authority (PRB Application No. 35 of 2010)** that where the procurement was undertaken under a Request for proposal, the procurement was entirely to be governed by the provisions of Sections 76 to 87 of the Act and that the provisions of Section 66 of the Act were not applicable to it.

The Board further held that a recommendation of the award of tender to a successful bidder could only be made in favour of the bidder that scored the highest aggregate combined Technical and financial score in accordance with Section 82 (5) of the Act.

These two decisions therefore render the case of **H Young & Company (E.A) Ltd = vs = East African Portland Cement Company Ltd (No. 23 of 2009)** cited by the Interested Party distinguishable since that case related to a procurement undertaken under part V of the Act, namely open tendering.

In the case of **Richardson Company Ltd = vs = The Registrar High Court of Kenya PRB Application No. 43 of 2008**, the Board held that the parameters of evaluation must be set out in the tender documents and further that the criteria in the tender documents, once established could not be waived. The Board additionally held that the tender committee cannot

modify any submissions of the evaluation committee with respect to the contract award or in any other respect.

The Board also heard the argument that the Applicant exercised the **“right of acceptance or rejection”** and that it was an evaluation criteria and that based on that purported right, the Procuring Entity had waived the clause in the tender document that required it to award the tender to the tenderer with the highest aggregate combined technical and financial score.

The Board has read the contents of the clause on the **Right of Acceptance and Rejection** set out at page 44 of the tender document and notes that the clause cannot be interpreted in a manner that would permit a procuring entity to waive an evaluation criterion which is set out in the tender document.

What the tender evaluation committee purported to waive was the recommendation of the award of the tender to the Applicant under Section 82(5) of the Act and substituted that requirement with the recommendation that the tender be awarded to the tenderer with the lowest evaluated tender price.

Under the clause relied upon by both the Procuring Entity and the Interested Party, the Procuring Entity is only allowed to waive any formalities, informalities and deviations. A recommendation for the award of a tender is neither a formality, an informality nor a deviation and is not therefore capable of being waived.

The Board has already set out the provisions of Regulation 11 of the Public Procurement and Disposal Regulations, 2006 and finds that such right cannot be exercised long after evaluation of tenders and a recommendation

for an award has been made. To do so would be unreasonable and unjustifiable and would lead to a breach of the provisions of the law and more particularly to a breach of Sections 76 all the way to 87 of the Act. A tender evaluation committee cannot exercise a purported right in breach of the law and in a manner that is discriminatory and prejudicial to one bidder.


A tenderer who enters the tender race by purchasing and returning a tender document which is evaluated has a legitimate expectation that the evaluation process would lead to either an award or a recommendation that it's tender has been unsuccessful. It would be a waste of public resources, man power and taxpayers money to invite the public to tender, then evaluate the tender and make a recommendation for an award and so soon thereafter proceed to reject a particular tender or proposal merely because the tenderer who succeeded is not the one that the Procuring Entity contemplated.

The provisions of Article 227 of the Constitution of Kenya 2010 and both the Act and the Regulations enjoin Procuring Entities to procure goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost effective and the Board is enjoined to ensure that this is done.

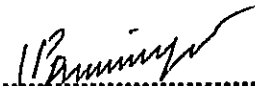
The upshot of all the above findings and in order to give effect to the above objective the Request for Review by the Applicant in application No. 7 of 2014 succeeds and pursuant to the powers conferred upon the Board by the provisions of Section 98 of the Act, the Board makes the following orders:-

- a) The Applicant BCX Kenya Limited be and is hereby declared to have submitted the successful proposal and the award of tender made by the procuring Entity to the Interested Party in it's letter of award dated 14th March, 2014 be and is hereby annulled.
- b) Pursuant to the provisions of Section 84 of the Act, the Procuring Entity be and is hereby directed to enter into negotiations with the Applicant as provided for under Section 84 of the Act.
- c) The Procuring Entity is hereby directed to complete the Procurement and render an award as respects this tender within fifteen (15) days from the date of this decision.
- d) For the purposes of giving effect to this decision, the procuring entity shall take steps to extend the tender validity period and the bid bonds for such period of time as shall be required to complete the remaining stages of this procurement.
- e) The Board makes no orders as to costs as against any party to this Request for Review.

Dated at Nairobi this 22nd day of April, 2014.


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Chairman
PPARB


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Secretary
PPARB

APPLICATION NO. 10/2014 OF 9TH APRIL, 2014

LANTECH (AFRICA) LIMITED.....(Applicant)

VS

NAIROBI CITY COUNTY..... (Procuring Entity)

SEVEN SEAS TECHNOLOGIES LIMITED..... (Interested Party)

REQUESTS FOR REVIEW NO. 10/2014

This Request for Review was lodged by M/s Lantech (Africa) Limited Applicant) on 9th April, 2014.

The Applicant requests the Board for the following orders

- 1. THAT M/s Seven Seas Technologies Limited be disqualified.**
- 2. THAT the 2nd Applicant's Request for Proposals be declared the successful proposal.**
- 3. THAT the Respondent do enter into a contract with the 2nd Applicant or invite the 2nd Applicant for negotiations.**
- 4. THAT the Board issues/grants any other relief that the Board may deem fit and just.**
- 5. THAT the Board grants the cost of this Review.**

The Applicant's application was based on three grounds namely that by the time it filed the Request for Review the applicant had not been notified that its bid was unsuccessful contrary to the provisions of Section 83 (2) of the Public Procurement and Disposal Act 2005.

The Applicant also contended that the Procuring Entity breached the provisions of note (ii) at page 46 of the tender document which provided that each tenderer submit a bid bond with a validity period of 90 days, it was argued by the Applicant that the Interested Party which was declared the successful bidder provided a bid bond whose expiry date was 3rd March 2014 giving it a validity period of only 83 days. The Applicant additionally submitted that the requirement that a bid bond be valid for 90 days was a mandatory requirement in the tender document/Request for proposals which could not be waived.

The Applicant also stated that the Procuring Entity breached the provisions of Section 82 (5) of the Act by awarding the tender to a bidder using a criteria that was not in compliance with the provisions of Section 82 (5) of the Act that required it to award the tender to the bidder with the highest aggregate Technical and Financial score.

Both the Procuring Entity and the Interested Party opposed the Request for Review.

~~The Interested Party raised a preliminary objection to the Request for Review on the grounds that the Request for Review had been filed outside the period of 7 days provided for under the provisions of Regulation 73 (2) (c) (ii) of the Public Procurement and Disposal Regulations 2006.~~

According to the Interested Party the Applicant was allegedly notified that its bid was unsuccessful on 14th March, 2014 yet it's Request for Review was lodged on 9th April, 2014.

The Procuring Entity supported the Interested Party's preliminary objection and produced a Certificate of Postage and an attached list to demonstrate that all the bidders were notified of the outcome of their tenders on 19th March, 2014.

The Procuring Entity through its Procurement Officer informed the Board that of all the eight tenderers who submitted their Requests for Proposal the Procuring Entity elected to call the successful bidder by phone inviting him to collect the letter of award from its office which it did and signed the collection register which was produced before the Board by the Applicant.

On the issue of the bid bond, it was generally not contested that under note (ii) (a) at page 46 of the tender document all tenderers were required to submit their proposals with a bid bond from a reputable bank duly registered in Kenya for a fixed amount of Kshs. 1,000,000 (One Million Kenya Shillings). The bid bond was to be valid for ninety (90) days after the proposal submission date. The bid bond was to be placed in a separate envelope and would be opened with the technical proposal.

The Interested Party while not disputing that its bid bond was valid upto 3rd March, 2014 nonetheless argued that its bid bond still fell within the period of 90 days stated in the tender document. The Interested Party further submitted that it forwarded it's Request for Proposals to the

Procuring Entity on 3rd December 2013 which was the initial date for the closing and the opening of the Request for proposals and that counting the number of days from that date, it's bid bond was valid for 90 days after the **proposal submissions date.**

The Interested Party provided the Board with a tabulation of days in paragraph 8 of its response dated 16th April, 2014 to demonstrate that its bid bond indeed fell within the tender validity period of ninety (90) days.

For the purposes of this Request for Review, the Board wishes to observe that it was not contested that the tender validity period for the submissions of the Request for Proposals was extended from 3rd December 2013 to 10th December 2013 and the Interested Party produced the addendum extending the tender closing/opening date as annexure D to its response dated 16th April, 2013. The addendum which speaks for itself states that the extension was given after a meeting held by the bidders at a pre-bid conference held on 21st November and 22nd November 2013 respectively where the period for the tender closing/opening date was extended after the Procuring Entity had considered representations and concerns from the bidders.

In addition to the above submissions, the Interested Party drew the attention of the Board to the requirement in item 2.5.4 appearing at page 17 of the tender proposal document which stipulated as follows:-

"2.5.4 Proposals must be submitted not later than the following date and time; 12.00 noon on 03 December 2013."

The Interested Party therefore urged the Board to interpret the above clause literally and give it its ordinary and natural meaning based on a reading of the time and the date set out above and relied on the case of **Republic vs= The Principal Secretary Ministry of Industrialization and Enterprises Development and Another Exparte Rishit Metals Limited (2013) EKLR** in support of that proposition.

The Procuring Entity largely associated itself with the Interested Party's submissions in its response dated 16th April, 2014 and which was lodged with the Board on the same day and on its oral submissions.

In response to both the Procuring Entity's and the Interested Party's submissions, the Applicant invited the Board to look at the requirements of clause 2.2.2 at page 8 of the tender document which allowed the Procuring Entity to extend the time for the submissions of the Request for Proposals.

The said clause reads as follows:-

2.2.2 At any time before the submission of proposals the client may for any reason, whether at his own initiative or in response to a clarification requested by an invited firm amend the Request for Review. Any amendment shall be issued in writing through addenda. Addenda shall be sent by email cable, telex or facsimile to all invited consultants and will be binding on them. The client may at his discretion extend the deadline for the submission of proposals".

The Applicant further referred the Board to the Provisions of clause 2.5.4 of the tender document which provides as follows:-

2.5.4 The completed technical and financial proposal must be delivered at the submission address on or before the time and date sated in the Appendix "ICT". Any proposal received after the closing time for submission of proposal shall be returned to the respective consultant unopened".

Based on the above provisions, the Applicant urged the Board to hold that the tender closing and opening date was the date as extended namely 10th December 2013 and not the initial date of 3rd December 2013.

The Applicant finally urged the Board to find that the extension was granted pursuant to a meeting held between the bidders and the Procuring Entity on 21st and 22nd November 2013 before the Interested Party had allegedly submitted its bid and there was nothing that prevented it from providing a bid bond that would be valid for 90 days from 10th December, 2013. The Applicant additionally stated that as at 22nd November, 2013, the Interested Party therefore already knew the new tender opening and closing date.

The Board has read all the documents lodged with it together with the oral submissions made by the parties and has framed the following three issues for determination.

- a) Whether or not the Procuring Entity breached the provisions of Section 83 (2) of the Act on notification and depending on the determination of that issue whether or not the Board therefore has jurisdiction to hear the Request for Review.**
- b) Depending on the determination of issue (a) above, whether or not the Procuring Entity breached the requirement of note (ii) at page**

46 of the tender document/Request for proposals on the requirement for the validity period for the Interested Party's bid bond.

- c) Whether or not the procuring entity breached the provisions of Section 82 (5) of the Act.**

ISSUE NO. 1

Whether or Whether or not the Procuring Entity breached the provisions of Section 83 (2) of the Act on notification and depending on the determination of that issue whether or not the Board therefore has jurisdiction to hear the Request for Review.

Where service of a notification is disputed, the burden of proving that such a notification was given lies with the Procuring Entity which must discharge the burden by proving on a balance of probabilities that the notice was indeed given. In an attempt at discharging this burden, the Procuring Entity produced a bundle of notifications, a register of collected mail, a certificate of posting and a list containing items which were allegedly delivered to the post office for dispatch.

The Board has examined all the documents submitted to it in the said Response by the Procuring Entity including the original collection register, Certificate of Posting and the original list of the items allegedly delivered to the post office for collection and has noted the following glaring anomalies, irregularities and inconsistencies.

- (i) Whereas the procuring Entity submitted that it called the successful tenderer by phone to collect its letter of notification on 19/3/2014 as

indicated on the left column of the notification, the person signing for the document indicated that the letter was collected on 18/7/2013 and that even if the Board was to give the procuring entity the benefit of doubt and assume that the date was 18/3/2014 this fell one day before 19/3/2014.

- (ii) The certificate of posting was one and did not have a serial No., the name and address of the tenderers who were allegedly notified and the Towns to which the notifications were sent.
- (iii) The List of the delivered items does not state the towns the items were to be dispatched to.
- (iv) Whereas the addresses for the bidders Computech Limited and Extra Solutions Limited and Kryce Limited are given in the notification as P. O. Box 59780-00200 and 39725-00263 Nairobi respectively the list of the items allegedly delivered to the post office shows that the following wrong addresses were given for those parties respectively P. O. Box 59789 without a postal code and 39732-00623.

The Board wishes to observe that Sections 83 (1) and (2) of the Act requires that the procuring entity shall at the same time as the person who submitted successful proposal is notified, also notify all the other persons who submitted Proposals that their Proposals were not successful.

The Board finds that the provisions of this requirement were not complied with based on the above anomalies. The Board also finds that by inviting the successful tenderer to collect his letter through the phone and not doing the same for the other tenderers amounted to preferential treatment.

A valid Certificate of Postage must also bear the name and the correct address, the correct code and the town of the tenderer allegedly notified and merely stating that 17 parcels some bearing wrong addresses and no names of towns and without a postal code were delivered to the post office for onward transmission does not amount to prove of service of notifications. The addresses for two tenderers were plainly wrong a fact that the Procuring Entity admitted. All tenderers were not therefore notified of the outcome of their tenders as required by law.

The Board therefore finds and holds that the Applicant in this application was not served with a notification as required by the provisions of Section 83 (2) of the Act and consequently the preliminary objection raised by the Interested Party is disallowed and the Board shall now proceed to determine the other remaining issues on merit. In doing so the Board takes cognisance of the now established legal position that in so far as it is possible disputes should be heard and be determined on merits.

ISSUE NO. 2

- a) Whether or not the Procuring Entity breached the requirement of note (ii) at page 46 of the tender document /Request for proposal on the requirement for the validity period for the Interested Party's bid bond.**

Regulation 57 of the Public Procurement and Disposal Regulations 2006 provides that the procedure for preliminary evaluation of open tenders set out in Regulation 47 shall apply to evaluation of proposals under Section 82 of the Act.

Regulation 47 (1) stipulates that upon opening tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether:-

“(1)(b) Any tender security submitted is in the required form, amount and validity period.”

The Board has looked at the provisions of note (ii) at page 46 and has noted that the requirement for the provision of a bid bond for the sum of Kshs. 1,000,000 valid for 90 days was a mandatory criteria. One bidder namely Bidder No. 4 (**M/s System and Information Technology (Kenya) Limited**) was disqualified at the preliminary stage because it did not submit a bid bond as required and was thus considered non responsive.

It was held in the case of **Mwangemi general Contractors =vs= Mokowe Secondary (PRB Application No. 28 of 2010)** that the provision of a bid bond is a mandatory requirement and that any such bid bond must be in the form, amount and within the tender validity period.

The Board held similarly in the case of **Avery (East Africa) Ltd =vs= Kenya Power and Lighting Company Ltd (PRB Application No. 14 of 2008)** and proceeded to disqualify the candidate who had not complied with the requirement.

As rightly submitted by Counsel for the Applicant, the purposes of a bid bond is to ensure that a tenderer complies with its obligations from the date the tender is opened for evaluation to the date when a contract is entered into.

In view of the clear and unambiguous requirements of Regulations 57 and 41 of the Regulations and Sections 53 and 60 of the Act, where the tender

opening/closing date is extended the time for the validity of a tender security shall be reckoned from the date as extended in this case from 10th December 2013.

Where the validity period for the bid bond lapses the tender dies once the validity period lapses and no award can flow from a "**dead**" tender. (See the case of **Arpland Architects =vs = Ministry of Housing (PRB Review No. 4 of 2010)**).

The Board notes that the tender validity period was extended before the Interested Party allegedly submitted its tender, namely on 3rd December 2013 after a meeting held by all tenderers as per the Interested Party's annexure marked D. The Interested Party should have taken steps to ensure that its tender would be valid for 90 days from the extended period namely 10th December 2013 but it did not.

The Board has also looked at the forwarding letter produced by the Interested Party to prove that it submitted its proposal on 3rd December, 2013 and notes that it is not stamped by the Procuring Entity as having been received.

The Board therefore finds and holds that the Interested Party's Bid Bond was valid for 83 days and the evaluation committee ought to have disqualified the Interested Party at the preliminary evaluation stage pursuant to the provisions of Regulation 47 (1) and Section 60 of the Act.

ISSUE NO. 3

Whether or not the Procuring Entity breached the provisions of Section 82 (5) of the Act.

It was common ground in this Review that the services sought to be procured were sought to be procured using the provisions of Part VI (C) of the Act, namely through Request for proposals.

The Procuring Entity instead of using the criteria set out in Section 82(5) and 84 of the Act awarded the tender to the Applicant under the provisions of Section 66 (4) of the Act on the ground that it was the lowest evaluated bidder.

In spite of this glaring breach of the law, the Interested Party urged the Board to uphold the award of the tender to it on grounds of public interest because in so doing, so the Board would save the tax payers a sum of Kshs. 51,964,490.66.

This Board and its predecessors have severally held that where a procuring entity has breached the provisions of the Act, Public interest would be better served if the Board upheld the law and that the quantum of the money to be saved is not a valid consideration. The Board would therefore be acting outside the law if it were to uphold instances of glaring non compliance with the provisions of the law and uphold an award of a tender to a tenderer who did not provide a valid tender security bid bond.

A party who elects to use an alternative procurement method does so in order to obtain a particular objective namely to achieve quality provided by bench marking the technical requirements first.

The Board therefore finds and holds that the procuring entity breached the provisions of Section 82 (5) of the Act by awarding the tender to the interested party on the basis of the criteria set out in Section 66 (4) of the Act.

It was finally argued that the Applicant in this Application was the third ranked bidder. The Board however respectfully wishes to state that any bidder is entitled to file a Request for Review so long as it meets the threshold set out in the Act. A person entitled to make an Application for Review only needs to establish that he was a candidate and had suffered or is likely to suffer loss by reason of breach of any of the provisions of the Act or the Regulations.

A candidate under the provisions Section 3 of the Act means a person who has submitted a Tender to a Procuring Entity.

For all the above reasons, either singularly or collectively, the Request for Review No. 10 of 2014 is therefore allowed and in exercise of the powers conferred upon the Board by the provisions of Section 98 of the Act, the Board makes the following orders:-

- a) The award of the above tender to the Interested Party by the Procuring Entity in its notification of award dated 14th March, 2014 be and is hereby annulled.
- b) The Interested Party be and is hereby disqualified from further participating in the tender the subject matter of this application for failing to provide a valid bid security and holds that it ought to have been disqualified at the preliminary evaluation stage.

- c) Subject to the provisions of Section 84 of the act on negotiations the Applicant's prayer No. 3 is disallowed as it is premature.
- d) Subject to the provisions of Section 84 of the Act, the Procuring Entity is hereby directed to complete the procurement process within 15 days from the date of this decision and shall take steps to ensure that the tender and the bid validity periods including that of the Applicant are extended for such period of time as is necessary to enable it complete this procurement in the event that it shall become necessary for the procuring entity to enter into any negotiations with the Applicant under the provisions of Section 84 of the Act.
- e) Each party shall bear its own costs of this Request for Review.

Dated at Nairobi this 22nd day of April, 2014.


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Chairman
PPARB


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Secretary
PPARB

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