

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 53/2015 OF 22<sup>ND</sup> OCTOBER, 2015**

**BETWEEN**

**CIRCUIT BUSINESS SYSTEMS LIMITED ..... APPLICANT**

**AND**

**COMMUNICATIONS AUTHORITY**

**OF KENYA ..... PROCURING ENTITY**

Review against the decision of the Communications Authority of Kenya in the matter of Tender No CA/PROC/OT/06/2015-2016 for Supply, Installation, Maintenance of Local Area Network (LAN), Solar Energy Solutions and E-Resource Centres

**Board members present**

1. Mr. Paul Gicheru - Chairman
2. Mr. Peter Ondieki, MBS - Member
3. Mrs. Gilda Odera - Member
4. Mr. Nelson Orgut - Member
5. Mrs. Rosemary Gituma - Member

**In attendance**

1. Philip Okumu - Secretariat

2. Shelmith Miano - Secretariat

**Present by invitation**

**Applicant - Circuit Business Systems Ltd**

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1. Stephen Owino - Advocate
2. Eric Abius - Op Manager
3. Godfrey Owino - CEO

**Procuring Entity Communication Authority of Kenya**

1. Alex Inyangu - Advocate
  2. Jane Rotich - Manager, Procurement
  3. Godfrey Muhatia - Assistant Manager, CTMA
  4. Winnie Eguchi - Legal Assistant
  5. Peter Koech - Legal
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**Interested Parties**

1. Simon Ngara - Advocate, Extra Net Communication
2. Peter Mwondi - CEO Direct Communication Systems Ltd
3. Chris Namukhula - CEO Direct Communications System Ltd
4. Thomas Wanyonyi - CMO "
5. Peter Mbuva - Sales executive, Specicom

## Board's decision

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

### Background

#### **Advertisement**

##### **1.0 Introduction**

The tender for the supply, delivery and installation of Local Area Network, Solar Energy Solutions and associated maintenance of the E-resource centres was advertised by the Communications Authority of Kenya through Open Tender in *The Star* and *The People* newspapers on 22<sup>nd</sup> and 25<sup>th</sup> July, 2015 respectively with a closing date of 19<sup>th</sup> August, 2015 at 2.30 p.m.

Seventeen (17) firms returned their tender documents at the date and time of closing the tender as shown in the table below:-

**Table 1: List of bidders**

<b>NO</b>	<b>FIRM</b>	<b>ADDRESS</b>	<b>TELEPHONE</b>
B1	Com Twenty One Limited (Com 21)	Box 15818 -00100 Nrb	0706732200
B2	Wasp System E.A	Box 52816-00200 Nrb	0703472072
B3	Direct Communications System Limited	Box 10623-00100 Nrb	0202647919
B4	Jigsys Technologies Ltd	Box 2151-00202	0723729842
B5	Smoothel Data Solutions Ltd	Box 13789-00100 Nrb	0721361163
B6	X-treme Electronics Ltd	Box 33318-00600 Nrb	0722740718
B7	Specicom Technologies Limited	Box 4428-00100 Nrb	020-2228465
B8	Xtranet Communications Ltd	Box 27346-00100 Nrb	0202490999

B9	Plexus Energy	Box 24241-00502 Nrb	0720202040
B10	Future Tech Business Solutions Ltd	Box 104108-00101 Nrb	0722811827
B11	Jo World Ltd	Box 62589-00200 Nrb	0722521416
B12	Electro Watts Ltd	Box 48289-00100 Nrb	0722520592
B13	Attain Enterprises Ltd	Box 18286-00100 Nrb	0720857899
B14	Network Source Ltd	Box 48998-00100 Nrb	0713855483
B15	Circuit Business Ltd	Box 48867-00100 Nrb	20-3754670
B16	Taicom Solutions Ltd and Solar Works Ltd	Box 103799-00100 Nrb	0712070760
B17	Matrix Vision Systems Ltd	Box 6030-00200 Nrb	0721779429

## 2.0 Evaluation criteria

Pursuant to paragraph 23.4 of the Tender Document the tenders submitted were to be evaluated in four (4) stages namely:

- a. General Mandatory Evaluation –Pass/Fail
- b. Technical Compliance Mandatory Evaluation – Complied/Not complied
- c. Technical Capacity Evaluation- Pass Mark- 75%
- d. Financial Evaluation – Lowest cost evaluated bidder for each lot.

## 2.1 General Pre-Qualification (Mandatory Requirements)

At the general prequalification stage bids were to undergo a general pre-qualification process in order to determine the bid compliance to the set preliminary qualification merits. All the requirements at the general prequalification stage were mandatory and any firm not meeting any one of them was to be disqualified at this stage.

The results of the prequalification stage were as shown in Table 2.

Table 2: General Prequalification Evaluation

No	Description of requirement	B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11	B12	B13	B14	B15	B16	B17
1	Attach copy of certificate of registration /Incorporation	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓
2	Attach a Valid Tax Compliance Certificate.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓
3	MUST be a CA's licensed operator	✓	✓	✓	X	✓	✓	✓	✓	X	✓	X	X	✓	✓	✓	X	✓
4	Bid Bond of Kshs 100,000.00 must be in form of Bank Guarantee from a reputable bank or an Insurance Bond from Insurance Company and approved by Public Procurement Oversight Authority (PPOA)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓
5	Submit a CR12 Form obtained from Attorney General's office showing the shareholders of the firm or submit a list of directors or shareholders or a sworn affidavit of the directors of the company.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
6	Manufacturer's Authorization letter for the equipment's to be supplied as detailed in the tender document.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Remarks		P	P	P	F	P	P	P	P	F	P	F	F	P	P	P	F	P

From the table above, the following five firms B4, B9, B11, B12 and B16 failed to meet all or one of the mandatory requirements and were therefore disqualified at this stage, as per the following reasons:-

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B4 - Did not submit/have a CA Contractor license

B9 - Did not submit/have a CA Contractor license

B11 - Did not submit/have a CA Contractor license

B12 - Did not submit/have a CA Contractor license

B16 - Did not submit/have a CA Contractor license

Subsequently, the following B1, B2, B3, B5, B6, B7, B8, B10, B13, B14, B15 and B17 qualified to proceed to the Technical Compliance Evaluation stage.

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## 2.2 Technical Compliance Evaluation

As per the tender document, all the bids admitted at the general pre-qualification (mandatory requirements) stage were subjected to technical compliance evaluation based on the set criteria. The technical compliance evaluation was on the basis of **Complied/Not complied**. Any bid failing at this stage was not eligible for the Technical Capacity Evaluation. The results of technical evaluation is as shown in tables 3, 4 and 5 below:

Table 3: Technical Compliance Evaluation- LAN

Item	Description	B1	B2	B3	B5	B6	B7	B8	B10	B13	B14	B15	B17
Cabinets	22u Metal Lockable, Central Glass Door, Ventilation 6 Power Points and Earthing Clamp	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Patch panel	Patch Panel 48 port Cat 6 T568A/B wiring. 1U complete with 24 high density RJ 45 certified front termination	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Cable manager	Cable Manager, 1U	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Patch cable	Cat 6, 1m patch cable (RJ45-RJ45), Double-ended, 4-pair modular stranded cord white jacket with colored boot, T568A/B wiring	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Patch cable	Cat 6, 3m patch cable (RJ45-RJ45), Double-ended, 4-pair modular stranded cord white jacket with colored boot, T568A/B wiring	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Data outlets	Minimum Data dual outlets with blank, Angled module with T568A/B wiring includes a protective rubber door	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Trunking cable roll	Cable Cat 6, 305 m Roll	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Voice	Voice Ports	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Head sets	Executive Headsets	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Switch	PoE 48port Manageable Gigabit Switch	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Ups	APC Smart-UPS 3000VA USB & Serial RM 2U 230V	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Item	Description	B1	B2	B3	B5	B6	B7	B8	B10	B13	B14	B15	B17
Metal trunking	100mm x 50mm 2 Compartment. 2.4m Metal Trunking	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Knock out plate	100mm x 50mm Twin Knock-out plate	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Knock out plate	100mm x 50mm Single Knock-out plate	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Metal trunking	50mm x 50mm 1 Compartment. 2.4m Metal Trunking	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Accessories	Accessories (screw, cable ties, labels, tapes etc)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Documentation	Configuration, Testing and documentation	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Cable	10mm twin with Earth Flex power cable	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Cable	2.5mm 2 Single core power cable (100m roll)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Consumer unit	4-Way Consumer Unit	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Sockets	Twin Socket power outlets for UPS Clean power ( corresponding to data points)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Circuit breaker	30 amp Circuit Breaker	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Appliance	WI-FI services outdoor service- Active Device	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Software	<ul style="list-style-type: none"> <li>Central management console-web based</li> <li>Administrator dashboard should be able to issue Tokens to resource users</li> <li>Wifi access via token issuance pegged on mac address</li> </ul>	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓



Item	Description	B1	B2	B3	B5	B6	B7	B8	B10	B13	B14	B15	B17
Firewall	LAN Wi-Fi identity base appliance with licenses-ACTIVE DEVICE	√	√	√	√	√	√	√	√	√	√	√	√
Remarks		P	P	P	P	P	P	P	P	P	P	P	P

Table 4: Technical Compliance Evaluation- Solar Energy Solution

ITEM	Minimum requirements Solar power solution (Per site)	B1	B2	B3	B5	B6	B7	B8	B10	B13	B14	B15	B17
Panels	• 32 x 120W solar panels	√	√	√	√	√	√	√	√	√	√	√	√
Inverter	• 3KVA pure sine wave inverter system	√	√	√	√	√	√	√	√	√	√	√	√
Batteries	• 14 x 200AH sealed deep cycle rechargeable batteries	√	√	√	√	√	√	√	√	√	√	√	√
Controller units	• 3 x 80A Charge controller	√	√	√	√	√	√	√	√	√	√	√	√
Remarks		P	P	P	P	P	P	P	P	P	P	P	P

Table 5: The technical compliance evaluation for Electrical Indoor and Outdoor Installation

ITEM	DESCRIPTIONELECTRICAL CABLING FOR POWER	B1	B2	B3	B5	B6	B7	B8	B10	B13	B14	B15	B17
Cables	10mm twin with Earth Flex power cable	√	√	√	√	√	√	√	√	√	√	√	√
cables	2.5mm 2 Single core power cable (100m roll)	√	√	√	√	√	√	√	√	√	√	√	√
Consumer unit	4-Way Consumer Unit	√	√	√	√	√	√	√	√	√	√	√	√

ITEM	DESCRIPTIONELECTRICAL CABLING FOR POWER	B1	B2	B3	B5	B6	B7	B8	B10	B13	B14	B15	B17
sockets	Twin Socket power outlets for UPS Clean power (1 corresponding to data point)	√	√	√	√	√	√	√	√	√	√	√	√
Circuit breaker	30 amp Circuit Breaker	√	√	√	√	√	√	√	√	√	√	√	√
Accessories	Accessories (cables ties, screws, etc.)	√	√	√	√	√	√	√	√	√	√	√	√
Lightings	Outside security lights 6 wall mounted round building, fluorescent tubes (6*7=42)	√	√	√	√	√	√	√	√	√	√	√	√
Charging unit	1 Phone charging unit each branch	√	√	√	√	√	√	√	√	√	√	√	√
Remarks		P	P	P	P	P	P	P	P	P	P	P	P

From table 3, 4 and 5 above, all the thirteen firms qualified to proceed to the technical capacity evaluation stage.

### 2.3 Technical Capacity Evaluation

As indicated in the tender document the bidders that qualified at the Technical Evaluation stage were to be subjected to Technical Capacity Evaluation. The results of the Technical Capacity evaluation were as shown in the Table 6.

Table 6: Technical Capacity Evaluation

Item under Evaluation		Max Score	B1	B2	B3	B5	B6	B7	B8	B10	B13	B14	B15	B17
<b>I.</b>	<b>Experience</b>	40	5	5	5	5	5	5	10	5	0	5	5	10
a	Firm's years of experience with LAN cabling. Proof of having dealt with Solar Energy Solution will also be considered – <i>five (5) years and above max points.</i>  Relevant professional qualifications of the workers ( <i>Attach evidence</i> ).	10	5	5	5	5	5	5	10	5	0	5	5	10
b	List and contacts of corporate clients for LAN cabling and Solar Energy Solution - at least two (2) services provided in the last 2 years.	10	5	5	5	5	5	5	10	5	0	5	5	10
c	Three (3) recommendation letters from corporate clients one (1) MUST be a <b>Government Institution</b> - <i>Provide letters of recommendation from clients you've offered the services.</i>	20	15	15	15	0	15	15	15	10	0	10	15	10
2	<b>Human Resource Capacity</b>	20												

Item under Evaluation		Max Score	B1	B2	B3	B5	B6	B7	B8	B10	B13	B14	B15	B17
	Proof of full time technical support arrangement for the project (CVs of technical staff).	20	10	20	10	10	10	10	20	10	10	10	10	20
3	<b>Proposed work plan</b>	25												
a	Schedule of activities - Give a proposal on how you will be able to schedule the proposed activities.	5	5	5	5	5	3.6	3	5	5	4.4	5	5	5
b	Adequacy of staff per activity- Propose staff allocation based on the entire project.	10	10	5.4	10	7	0	5.2	10	5.8	5	5	7.6	6.6
c	Comprehensiveness of the work plan - Give a proposal, which covers the entire period of the project to hand over.	10	10	9.8	10	6.4	0	5.2	10	5	4.8	5.2	9.8	9.8
4.	<b>Financial status</b>	15												
a	Bidders are required to have an average annual turnover of Kshs 10 million and above as per annual audited accounts for the last 3 years	15	15	15	5	15	15	15	15	15	15	15	15	15
<b>Total Score</b>		<b>100%</b>	<b>75</b>	<b>80.2</b>	<b>65</b>	<b>53.4</b>	<b>53.6</b>	<b>63.4</b>	<b>95</b>	<b>60.9</b>	<b>39.2</b>	<b>60.2</b>	<b>72.4</b>	<b>86.4</b>

As illustrated in Table 6 eight firms B3, B5, B6, B7, B10, B13, B14 and B15 failed to score 75% and above and were disqualified at this stage. Subsequently, four firms B1, B2, B8 and B17 qualified to proceed for Financial Evaluation.

## **2.0 Evaluation committee's recommendation**

The Evaluation Committee recommends that the tender for supply, delivery and installation of Local Area Network (LAN), Solar Energy solutions and associated maintenance of the E-Resource Centres be awarded as follows:

- M/s Xtranet communications to supply Lots 1, 2 and 4 (Rift Valley, Central and Upper Eastern, and Nyanza and Western Regions) at their total tender sum of Kenya shillings thirty five million and seventy four thousand, one hundred and eleven and thirty four cents (Kshs. 35,074,111.34),
- M/s Com Twenty One Limited (Com 21) to supply deliver and install in Lot 3 and 5 ( Coast, Lower Eastern and Rift Valley) at their total tender sum of Kenya Shillings Thirty Seven Million, Three Hundred Seventy Three , Four Hundred Eighty Nine and Fourty Cents. (Kshs 37,373,489.4)

### **The tender committee's decision**

The Procuring Entity's Tender Committee in its meeting No. 291 held on 30<sup>th</sup> September, 2015 approved the award for the supply, delivery, and installation of Local Area Network (LAN), Solar Energy solutions and associated maintenance of the E-Resource centres as follows:

- M/s Xtranet Communications to supply as follows:
  - Lots 1, 2, and 4 (Rift Valley, Central and Upper Eastern, and Nyanza and Western Regions) at their total tender sum of Kenya Shillings Thirty Five Million and Seventy Four Thousand, One Hundred and Eleven and Thirty Four Cents (Kshs 34,074,111.34)
  - Maintain the equipment for the three lots at an annual cost of Kshs 200,000 per lot totalling to Kshs 600,000 for the three lots per annum for a period of two years.
- M/s Com Twenty One Limited (Com 21) to supply, deliver and install
  - Lot 3 and 5 (Coast, Lower Eastern and Rift Valley) at their total tender sum of Kenya Shillings Thirty Six Million, Four Hundred and Thirty Four Thousand, Eight Hundred and Ninety Three and Thirty Five Cents (Kshs 36,434,893.35)

- o Maintenance of LAN and Solar at an annual cost of Kshs 948,596.05 per annum for a period of two years.

### THE REVIEW

The Applicant, M/s Circuit Business Systems Limited, whose address for the purposes of this Request for Review is P. O. Box 48867-00100, Nairobi, lodged this Request for Review on 22<sup>nd</sup> October, 2015 against the award of the Tender No. CA/PROC/OT/06/2015-2016 for the Supply, Delivery and Installation of Local Area Network, Solar Energy Solutions and Associated Maintenance at E-Resource Centres.

The Applicant requested the Board for the following Orders:-

1. *The tender of the Applicant be declared the successful tender in respect of lots 1, 2 and 3.*
2. *The Respondent do enter into a contract with the Applicant in respect of tender for lots 1, 2 and 3.*
3. *Any other relief that the Board may deem fit and just to grant.*
4. *Costs of the Review.*

At the hearing of this Request for Review, the Applicant was represented by Mr. Stephen Owino of M/s S. O. Owino & Associates, Advocates while the Procuring Entity was represented by Mr. Alex

Inyangu of Ameli Inyangu & Partners, Advocate, while the Interested Party (Successful Bidder Xranet Communication) was represented by Mr. Simon Ngara, Advocate.

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The Applicant raised a total of 15 grounds of Review but when the Application came up for hearing, the Applicant consolidated all the grounds into one ground only namely whether or not there was a requirement for recommendation letters for Solar Energy Solution in Lots 1, 2, 3 and 4 as contained in the tender document as the four lots were for LAN.

The Board will now set out each party's case as presented before it before arriving at its final decision in this matter.

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### **The Applicant's Submissions**

Mr. Stephen Owino learned counsel for the Applicant started off his submissions by stating that under the Provisions of Regulation 49(1) of the Public Procurement and Disposal Regulations 2006, the evaluation committee was enjoined to conduct the technical evaluation of each tender in accordance with technical requirements of the description of goods and works and services as set out in the tender document. He additionally submitted that under the



Provisions of Section 34(1) and (2) of the Act as read together with Regulation 49(1), the Procuring Entity was required to prepare specific requirements for goods and for the services to be procured.

While inter-alia referring to pages 19 and 21 of the tender documents this procurement was done in lots. He submitted that each lot had separate requirements and was for different services. He submitted that lot 1, Rift valley indicated that the service sought was LAN (Local Area Network) as was the case for lots 2, 3 and 4 which covered other parts of the Country. He however submitted that lot No.5 which covered the North Eastern and some specific parts of Rift Valley was for both LAN and Solar Energy Solutions. He additionally stated that the requirement for lots was replicated at page 27 of the tender document which covered stage 4 of the tender document headed (Financial evaluation).

Counsel for the Applicant submitted that each of the lot ought to have been evaluated separately and the requirement on experience for Solar Energy Solution installation ought not to have been imported into lots 1, 2 and 3 which were the subject matter of the request for review.

With regard to item 1(c) of the tender document (Experience) - reference page 6 of the Applicant's document, the Applicant stated that it submitted 16 letters of recommendation (6 from Government) while the tender document only required 3 letters (one from a Government Institution) in order to be entitled to a score of 20 marks. The Applicant stated that for this, the Applicant was only given a score of 15 marks. Mr. Owino contended that the Procuring Entity, referring again to paragraph 21 of the Procuring Entity's submissions, amended the requirements on experience during evaluation and if the Applicant had been awarded the full 20 marks instead of the 15 marks awarded to it would have scored a total of 77.4 marks instead of the marks 72.4 and thereby achieving the threshold of 75% under the Technical Capacity evaluation stage and would have thereafter proceeded to financial evaluation. This in the Applicant's view would have enabled the Applicant to complete, and possibly won at least two of the lots that only required LAN as it believes that its financial quote was competitive enough. Counsel for the Applicant urged the Board to consider the Applicant's submissions and find that it passed the threshold and look at what lots the Applicant would have won and award it accordingly.

### Procuring Entity's Submissions

Mr. Alex Inyangu, learned Counsel for the Procuring Entity stated that this was an integrated tender the contents of which the parties were aware of during the tendering process. He further submitted that under Clause 23.5(b)(ii) - Technical Compliance Evaluation - Solar Energy Solution page 20 of the tender document, a bidder of the tender document a bidder had to comply with by supplying recommendation letters for both the LAN and Solar Energy Solutions in order to proceed to the technical evaluation state. Counsel for the Applicant contended that there was no tendering in lots as such and a bidder could only move to the next stage after qualifying in the preceding part. He submitted that if the Applicant was not very clear about the language of the tender document, it should have sought clarification on what exactly it was bidding for. He stated that there was no letter in the file to show that this was done by the Applicant. He reiterated that the bidders were made aware of the evaluation criteria in the tender document and they were supposed to comply with that criteria. He further stated that Section 34 of the Act requires the Procuring Entity to prepare tender requirements which should be correct and a complete description of what is being procured and should allow for open competition among all the bidders. He submitted that the Procuring Entity complied with both technical

evaluation in respect of LAN cabling and solar energy solutions in all the other categories meaning they knew exactly what they were bidding for. He referred the Board to page 26, stage 2, of the tender document which states as follows; *"To be eligible to proceed to the technical capacity evaluation, a firm must COMPLY in all items in the technical compliance evaluation for both LAN and Solar Energy Solution"*. Mr. Inyangu maintained that, at stage 3- Technical Capacity Evaluation, all bidders were aware that they were bidding for both LAN and Solar Energy Solutions and therefore were required to provide recommendation letters showing that they had done similar jobs before. According to him this implied the letters presented should have expressed the experience the bidders had in executing jobs for both LAN and Solar. The Procuring Entity however conceded that the Applicant presented 16<sup>th</sup> letters of which were all in respect of LAN when the evaluation criteria required experience in both areas. The remaining 3 letters - one of evaluation criteria required experience in both areas. The remaining 3 letters - one of which must come from a Government Institution and for LAN the allotted marks were 10 and for the remaining 2 from corporate clients they attracted 5 marks each for LAN and Solar. Mr. Inyangu, however, admitted that the marks were not apportioned in the tender document but because experience had to be demonstrated there had

to be a way of awarding these marks ending in the Applicant scoring 15 marks owing to the fact that all the letters were for LAN only. Mr. Inyangu asked the Board not to look at Item 1(c) in isolation - *“Three (3) recommendation letters from corporate clients one (1) MUST be a Government Institution - provide letters of recommendation from clients you have offered service 20 marks”* but in the context of the whole technical capacity evaluation under stage 3 where bidders were bidding for both LAN and Solar and required to demonstrate experience in both. When asked why the tender document was not clear about lots 1-4 requiring letters of experience in solar whilst lot 5 was specific, Mr. Inyangu stated that it would have been costly for the Procuring Entity to prepare separate tender documents for each lot and repeated that one could not bid for LAN alone but needed to bid for both LAN and Solar as competence for both was required.

Mr. Inyangu concluded his submissions by stating that the Applicant was challenging the award because it did not win and that there was no Section of the law that the Procuring Entity breached. He therefore urged the Board to dismiss the application and allow the tender process to proceed.

### **Submissions by the Interested Party - Xranet Communication**

Counsel for the Interested Party, Mr. Simon Ngara, associated himself with the submission made by Counsel for the Procuring Entity. He referred the Board to Section 93(2)(a) of the Act and reiterated that the tender document was explicit that bidders had to comply with both the requirements for LAN and Solar and under Clause 5 where he alleged that the said clause provided for any prospective tenderer requiring any clarification of the tender document was supposed to notify the Procuring Entity and this the Applicant failed to do. Mr. Ngara additionally submitted that Section 34(2)(3) of the Act empowered the Procuring Entity to make it mandatory for the evaluation of all bids to comply with both LAN and Solar Energy Solutions and the Applicant failed to fully meet those conditions. He therefore urged the Board to dismiss the Applicant's request for review.

### **The other interested parties submissions**

During the hearing of the request for review two other interested parties namely M/s Direct Communications System Ltd and M/s Specicom Technologies Limited appeared before the Board and were represented by Mr. Peter Mwodi and Mr. Peter Mbuvi respectively who made submissions on their behalf. The two Interested Parties

supported the submissions made by Counsel for the Applicant although they claimed that they had not been served with the letters of notification by the Procuring Entity notifying them that their tenders were unsuccessful. The Submissions by the two Interested parties were therefore brief and were limited to only stating that they had learnt of the existence of the request for review from the Board and that they were generally supporting the Applicant.

### **The board's decision**

As already stated in this decision, the only issue which fell for determination before the Board was whether it was a requirement of this tender for a bidder to demonstrate experience in LAN and Solar Energy Solutions for lots 1 to 4 and consequently whether the Applicant was properly declared as having been non responsive in lots 1, 2 and 3 on account of it's failure to produce letters of recommendation for both LAN and Solar Energy Solutions as purportedly required by the Provisions of Clause 1(c) of the tender document.

The Board has perused the tender document annexed to the request for review and has also perused the response filed by the Procuring entity on 2<sup>nd</sup> November 2015. The Board has also considered the

submissions made before it by the parties and finds that although the tender document issued to the parties and which was annexed by the Applicant as annexure "G" and which is headed a Tender for supply, installation, maintenance of Local Area Network (LAN) and Solar Energy Solution for E-Resources, combined the two tenders, the tender document broke the tender into 5 Lots, namely:-

**Lot 1- Rift Valley Region-LAN**

No	Library	County	Town	Physical Address
1.	Eldoret	Uasin gishu	Eldoret	Iten Road/Uganda Road Junction
2.	Gilgil	Nakuru	Gilgil	Opposite Gilgil Market, Bondeni Estate
3.	Kabarnet	Baringo	Kabarnet	Nakuru-Iten Road
4.	Kapsabet	Nandi	Kapsabet	Kapsabet-Eldoret Road, Opposite Kapsabet District Hospital
5.	Kericho	Kericho	Kericho	Along Kisumu Road, opposite South Western College
6.	Meisori	Baringo	Marigat	Marigat-Lake Baringo road, 10 km from Marigat town
7.	Narok	Narok	Narok	Along Narok-Sotik Road, Opposite St. Mary School.

**Lot 2- Central and Upper Eastern Region - LAN**

No	Library	County	Town	Physical Address
1.	Chinga	Nyeri	Othaya	Othaya-Muranga Road, 3km from Kariki junction next to Chinga Boys High School
2.	Karatina	Nyeri	Karatina	Along Nyeri-Nanyuki Highway, next to Karatina Law Courts
3.	Munyu	Nyeri	Narumoru	Off Nanyuki-Nyeri road, 12km from Narumoru



4.	Nyeri	Nyeri	Nyeri	Kenyatta Avenue, opp. Barclays Bank
5.	Olkalou	Nyandarua	Olkalou	Gilgil/Nyahururu highway, opposite the Olkalou town council office.
6.	Rumuruti	Laikipia	Rumuruti	Off Nyahururu/Maralal road, opp. Pagan girls secondary.
7.	Embu	Embu	Embu	Kenyatta Road.
8.	Meru	Meru	Meru	Kenyatta Highway
9.	Mikumbune	Meru	Nkubu	Nkubu-kionyoo road, 6km from Nkubu town
10	Timau	Meru	Timau	Off Nanyuki/Meru Road, opp. Timau Catholic.

### Lot 3-Coast, Lower Eastern and Nairobi Region - LAN

No	Library	County	Town	Physical Address
1.	Kilifi	Kilifi	Kilifi	Bosa Road, near Chief's office
2.	Malindi	Kilifi	Malindi	Lamu Road.
3.	Mombasa	Mombasa	Mombasa	Haille Selassie Ave, Msanifu Kombo Street
4.	Wundanyi	Taita taveta	Wundanyi	Along Mombasa Highway, 30 km from Kibwazi town
5.	Kinyambu	Makueni	Kibwezi	Along Mombasa highway, 30 km from Kibwezi town.
6.	Kithasyu	Makueni	Kibwezi	8 km off Mombasa highway, next to Kithasyu Primary school and chulu national park
7.	Mutyambua	Makueni	Sultan Hamud	13 km off Mombasa highway from Sultan Hamud Next to education/ chief's office
8.	Kibera	Nairobi	Nairobi	Albert road going to Raila houses, next to Soweto Primary School
9.	Thika	Thika	Thika	Next to Mount Kenya University/

**Lot 4-Nyanza and Western Region - LAN**

No	Library	County	Town	Physical Address
1.	Awendo	Migori	Sare	500 m from Kisii-Migori highway, next to Soni Complex Primary School
2.	Kisii	Kisii	Kisii	Kisii/Kisumu road, behind Barclays bank
3.	Kisumu	Kisumu	Kisumu	Ochieng Road, next to Kisumu Social Centre
4.	Koru	Kisumu	Koru	Dr. Robert Ouko Memorial Library
5.	Nyilima	Siaya	Nyilima	Off Bondo Road, 12 km along Ndori - Uyoma road
6.	Rambula	Siaya	Ugunja	Off Ugunja Road via Ukwala
7.	Ukwala	Siaya	Ukwala	Port Victoria Ugunja Road via Ukwala
8.	Kakamega	Kakamega	Kakamega	Off Muruli road, along Library road, behind Mwalimu centre
9.	Kimilili	Bungoma	Kimilili	Kitale-Bungoma Road, next to Kimilili District Hospital

**Lot 5-North Eastern and Rift Valley - LAN and Solar Energy Solution**

No	Library	County	Town	Physical Address
<b>A</b>	<b>LAN and Solar Energy Solution</b>			
1.	Bute	Wajir	Moyale	500m off Moyale-Wajir Road, next to Bute Girls High
2.	Griftu	Wajir	Griftu	20 km off Wajir-Moyale Road
3.	Lelechonik	Bomet	Chebole	Litein-Bomet road, 50 km from chebole centre
4.	Masalani	Garissa	Garissa	Along Bura-Hola road, Next to Masalani Primary School
5.	Mbalambala	Garissa	Garissa	Adjacent to Mbalambala District Hospital
6.	Silibwet	Bomet	Silibwet	Along Litein-Bomet road
7.	Tarbaj	Wajir	Tarbaj	800m off Mandera - Wajir road, next to Tarbaj district hospital
8.	Kibera	Nairobi	Nairobi	Albert road going to Raila houses, next to Soweto Primary School
<b>B</b>	<b>LAN ONLY</b>			

1.	Garisa	Garissa	Garissa	Miraa Road, Off Garissa-Daadab road, opp. Central Administration Police
2.	Moyale	Marsabit	Moyale	3km off Moyale-Addis Ababa road, located within Ministry of health offices compound
3.	Wajir	Wajir	Wajir	100m off Garissa-Mandera Road
4.	Isiolo	Isiolo	Isiolo	600m from Isiolo-Moyale highway, next to Isiolo IEBC offices

A glance at page 27 of the tender document fortifies the above position and states that upon financial evaluation, the tenders were to be awarded to the successful bidders per lot. The tender document further states that the tender for lots numbers 1, 2, 3 and 4 were for LAN while lot number 5 was for LAN and Solar Energy Solution.

It was further common ground by the parties to this request for review that the tender was to be evaluated in four stages namely;

- (a) The General mandatory Evaluation which carried a pass/fail mark.
- (b) A Technical compliance mandatory evaluation where a bidder had to comply with all the requirements at that stage.
- (c) A Technical capacity evaluation which was to carry a passmark of 75%.

(d)The Financial Evaluation stage where it was stated that each lot was to be awarded to the lowest evaluated bidder.

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The Board has perused the evaluation report of the meeting held on 14<sup>th</sup> to 18<sup>th</sup> September 2015 and finds that both the Applicant and the successful bidders met the conditions stipulated under stage 1 and 2 of the evaluation namely the General Mandatory Evaluation and the Technical Compliance Stage (Stage 2) but the dispute arose at stage 3 headed Technical Capacity Evaluation where the Applicant contends that it supplied 16 letters of recommendation as required by item 1(c) of the tender document but the Procuring entity only awarded it 15 marks instead of 20 marks because it did not produce any recommendation letter in the Solar energy solution category for lots 1, 2, 3 and 4.

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It was the Applicant's case that the Procuring Entity acted in error since a recommendation for solar energy solution was only applicable to lot 5 which was for Solar Energy Solution.

It was however the Procuring Entity's case that a bidder had to provide recommendation letters for both LAN and Solar Energy Solution in all the five (5) lots in order to be eligible.

The procuring entity relied on the sentence appearing at page 20 of the tender document which stipulated as follows:-

*“To be eligible to proceed to the technical capacity evaluation stage, a firm must comply in all items in the technical compliance evaluation for both LAN and Solar Energy Solution.”*

The Board has considered the rival submissions on the issue of whether recommendation letters for Solar Energy Solution were required in lots 1, 2, 3 and 4 and finds that this requirement was set out under item 1(c) at stage 3 (Technical capacity evaluation) of the tender document.

The said requirement reads as follows:-

*“Bidders will be evaluated based on the following parameters”*

(a).....

(b).....

(c) Three (3) recommendation letters from corporate clients one (1) must be a Government Institution - provide letters of recommendation from clients you've offered services.

According to the tender document, the Procuring entity assigned 20 marks to this item although there was no breakdown of how these marks were to be apportioned.

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The Board has looked at the evaluation report and the tender document in respect of the requirements in each category and finds that indeed it is only lot 5 which dealt with Solar Energy Solution and not the other 4 lots which were entirely for LAN cabling.

The Board further notes that Clause 1(c) of the tender document dealing with the Technical capacity Evaluation did not explicitly state that a bidder in respect of Lots 1 to 4 had to provide a recommendation letter for Solar energy solution. The Board finds that in the absence of an express provision to that effect it would have been unreasonable for a bidder to be required to provide such a recommendation letter in relation to services relating to an item where Solar Energy Solution was not an issue.

The Board further finds that under the Provisions of Section 34 of the Public Procurement and Disposal Act 2005, a procuring entity is required to prepare specific requirements relating to goods, works or services being procured and emphasizes that the description must be

clear, correct and complete in order to allow for fair and open competition among bidders.

Section 52(2) of the same Act further provides that tender documents shall contain enough information to allow for fair competition among those who may wish to submit tenders while S.52(3) of the Act re-emphasizes the need for clarity and full information to be set out in the tender documents.

Section 66(2) of the Act additionally requires that the evaluation and comparison of tenders shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

In view of the above provisions of the law and if the procuring entity required a bidder in lots 1 to 4 to provide recommendation letters both for LAN and Solar Energy Solution, then it ought to have set out this requirement in clear and explicit terms in clause 1(c) of the tender document but it did not do so.

In the absence of such a specific requirement and in view of what the Board has already stated, the Board is therefore inclined to accept the

Applicant's argument that a recommendation for a Solar Energy Solution was not a requirement under Item 1(c) under stage 3 of the evaluation criteria.

The above position is further fortified by the requirements under stage 3 (1)(a) and (b) where the procuring entity was explicit. These clauses referred to experience both for LAN Cabling and Solar Energy Solution. The two clauses read as follows:-

(c) Stage 3; Technical capacity Evaluation Bidders will be evaluated based on the following parameters:-

Item under Evaluation		Max Score
<b>1.</b>	<b>Experience</b>	<b>40</b>
a	Firm's years of experience with LAN cabling. Proof of having dealt with Solar Energy Solution will also be considered - five (5) year and above max points.  Relevant professional qualifications of the workers (Attach evidence).	10
b	List and contacts of corporate clients for LAN cabling and Solar Energy Solution - at least two (2) services provided in the last years.	10



Turning to the procuring entity's reliance on the sentence at the end of stage 2 of evaluation appearing at page 20 of the tender document, namely that in order for a bidder to proceed to the technical capacity evaluation stage, a firm must comply in all items in the technical compliance evaluation for both LAN and Solar Energy Solution, the Board has read this sentence/extract from the tender document and finds that the same only relates to compliance to LAN and Solar Energy Solution in respect for stage 2 namely the Technical Compliance Evaluation while the dispute herein relates to stage 3 namely the Technical Capacity Evaluation.

The Board further notes that the issue of the recommendation letters was a criteria in stage 3 and not in stage 2 of evaluation to which the sentence/reference relates.

The procuring entity's submissions on the meaning of the above paragraph of the evaluation criteria was not therefore correct or relevant to stage 3 of evaluation.

Turning to the Applicant's request for review and the nature of the prayers sought, the Board finds that the Applicant only challenged the award of the tenders for Lots 1, 2 and 3 and sought that the Board

awards it any or all of the 3 lots in the event that it finds that the Applicant was the lowest bidder in any or all of the lots.

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The award of the tenders in respect of Lots 4 and 5 were not therefore challenged and are not in dispute and the Board cannot therefore interfere with the said awards.

On the issue of the direct award of lots 1, 2 and 3 to the Applicant, the Board finds that the Applicant's financial proposals in the three (3) lots were not evaluated since the Applicant was declared as none responsive at stage 3. The Board therefore finds that it would be premature to award any of the lots at this stage and that this is a proper case to remit back the tenders for lots 1, 2 and 3 to the Procuring Entity for both the technical and financial re-evaluations with the finding that recommendation letters were for Solar Energy Solution was not required for lots 1, 2 and 3.

**Final orders:**

In view of all the foregoing findings and in the 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 on this request for review:-

1. *The Request for Review filed by the Applicant on 22<sup>nd</sup> October 2015 is allowed.*
2. *The award of the tender for lots 1 and 2 to M/s Xtranet Communications Limited is hereby annulled.*
3. *Similarly the award of the tender for lot 3 to M/s Com Twenty one Limited (Com 21) Ltd is hereby annulled.*
4. *The award of the tender for lot 4 to M/s Xtranet Communications Ltd is hereby upheld and should proceed. Similarly, the award of the tender for lot 5 of the same tender to M/s Com Twenty One Limited (Com 21) is also upheld and should proceed. The procuring entity is therefore at liberty to enter into a contract with M/s Xtranet Communications Ltd and M/s Com Twenty One limited (Com 21) in respect of lots 4 and 5 respectively.*
5. *The Procuring Entity is hereby directed to carry out a technical and financial re-evaluation for the tender for lots 1, 2 and 3, taking into account the Board's findings above and award any or all of the lots to the Bidders who qualify on the basis of the criteria set out in the tender document.*
6. *The Procuring Entity is directed to complete the entire process, including the making of an award, within a period of fifteen*

*(15) days from the date of this decision and file with the Board a report notifying the Board of the completion of the process at the end of the period of fifteen (15) days.*

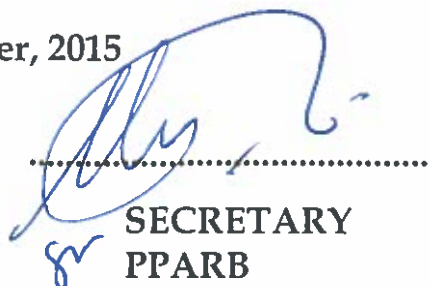
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7. *In view of the nature of the orders made above, the Board orders that each party shall bear it's own costs of this request for review.*

Dated at Nairobi on this 19<sup>th</sup> November, 2015

  
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CHAIRMAN  
PPARB

  
.....

SECRETARY  
PPARB