

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 56/2015 OF 12th NOVEMBER, 2015

BETWEEN

SYMPHONY TECHNOLOGIES LIMITED (KENYA) &
UNITED TELECOMS LIMITED (INDIA).....Applicant

AND

NATIONAL TRANSPORT AND SAFETY
AUTHORITY.....Procuring Entity

The Review against the decision of National Transport and Safety Authority in the matter of Tender No. NTSA/ICB-014/2014-2015 for the supply, delivery, installation and maintenance of second generation smart card based driving license and associated services.

Board members present

- | | |
|--------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Rosemary Gituma | - Member |
| 3. Nelson Orgut | - Member |
| 4. Paul Ngotho | - Member |
| 5. Hussein Were | - Member |

In attendance

- | | |
|-----------------------|---------------|
| 1. Mr. Stanley Miheso | - Secretariat |
| 2. Ms. Shelmith Miano | - Secretariat |

Present by invitation

Applicant - SYMPHONY TECHNOLOGIES LTD (KENYA)

1. Allan Kosgei -Advocate
 2. Edward Budoh - Lawyer
 3. BildahKagai -G. M
-

**Procuring Entity - NATIONAL TRANSPORT AND SAFETY
AUTHORITY**

1. Prof. Albert Mumma -Advocate
2. Charles Agwara - Advocate
3. Justus Omollo - Lawyer
4. Patrick Wanjuki - Head of Procurement
5. Wanda Akinyi - Legal Officer

Interested Parties

1. SisuleMusungu - Advocate, National Bank
 2. Ruth Mabele - Advocate, National Bank
 3. Kevin Masigwa - Business Development
 4. Abraham Macharia - Manager Technology, Lantech Ltd
 5. John Kere - Director, ISOL EA Ltd
 6. Umesh Knot - Sr. Consultant, Copy Cat
 7. Symon Yatich - 4G Identity Solutions Ltd, Country Rep
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The Board's decision

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

The Background of the award

The National Transport and Safety Authority (NTSA) set aside funds for Supply, Delivery, Installation and Maintenance of Second Generation Smart-Card Based Driving Licenses and Associated Services during the financial year 2014/2015.

- 1.1 Implementation of the project will ensure that qualified drivers are issued with the new driving licenses, controlling issuance and production of fake driving licenses and will therefore, improve road safety and reduce carnage caused by incompetent drivers.
- 1.2 The method of Procurement used was that of an open tender advertised in the local daily newspapers. The closing date for the submission of the bids was extended from 15th April, 2015 to 22nd April, 2015.
- 1.3 Proposals were received and opened in the presence of Tenderers /or their representatives at 10.00 a.m. on 22nd April, 2015 at NTSA board room on 4th floor of Hill Park Plaza. The Proposals were opened as stipulated in the Public Procurement and Disposal Act, 2005 only Technical proposals were opened and the names of the tenderers and the bid securities read out aloud.

Thereafter the proposals were numbered consecutively, stamped and endorsed by the tender opening committee.

Twenty three (23) firms submitted their bids/tenders.

Evaluation of tenders

Evaluation methodology

The Committee carried out a two stage evaluation process namely:

- 1 Preliminary/Mandatory evaluation
- 2 Technical evaluation
- 3 Financial Evaluation
- 4 Site Visit

1 Preliminary evaluation

In the preliminary evaluation phase, the proposals were evaluated on the basis of their responsiveness to the evaluation criteria as indicated below:-

- i). Confirmation of Submission of a 2-envelope Bid
- ii). Provision of a Valid Tender Security/Bid Bond
- iii). Confirmation of the inclusion of a Confidential Business Questionnaire.
- iv). Confirmation of the existence of a Power of Attorney
- v). Confirmation of the existence of a Certificate of Incorporation/Registration
- vi). Confirmation of the existence of Manufacturer's Authorization
- vii). Confirmation of the existence of an Organization Chart
- viii). Confirmation of the Provision of key Staff Competency (CVs) Profiles.
- ix). Confirmation of the existence of the last 3 years Audited Accounts
- x). Physical Address Details

- xi). A statement of Experience for at least Five (5) years in the procurement item.
- xii). Details of clients where the bidder has implemented Smart Card system for at least five million (5,000,000) cards.
- xiii). Valid Tax Compliance Certificate
- xiv). A sworn Anti- corruption affidavit
- xv). Provision of proof of ISO/IEC 18013 Card standard

Notes on the Preliminary evaluation above

On preliminary evaluation, five (5) bidders met all the requirements and eighteen (18) bidders were non-responsive to the mandatory criteria.

The bidders that failed to qualify at the preliminary stage did not proceed to the technical evaluation phase.

The details of the preliminary evaluation are as follows:

Bidder No. 1 - Lantech Africa Limited

- The bidder did not provide evidence of implementation of smart card system for at least 5 million cards as stipulated in the bid document.
- The projects alleged by the bidder to have implemented were in conflict with the evidence provided. Abnote Ltd testimonial was attached instead of their partner M/S M2sys.

Bidder No. 2 - M-TECH Innovations Ltd and Backup International Kenya Ltd

- The bidder did not provide evidence that it had implemented smart card system for at least 5 million cards. Evidence provided indicated that the bidder has implemented the system for only 480,000 cards which was below the threshold.

Bidder No. 3 - J. S. Engine Ltd

- The bidder did not submit a bid security
 - Audited accounts not submitted
 - Statement of experience for at least five years not provided.
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- Details of implementation of Smart system card not provided
 - ISO/IEC 18013 card standard not provided

Bidder No. 4 - Concepts of lifestyle Limited

- The bidder did not provide evidence of implementation of smart card system for at least 5 million cards as stipulated in the bid document

Bidder No. 5 - SuperCom Limited

- Sworn Anti - Corruption Affidavit not endorsed by a commissioner of oaths
- Tax compliance of the partner not submitted
- ISO/IEC 18013 card standard not provided

Bidder No. 6 - Morpho South Africa Limited

-
- Power of Attorney was not endorsed by a commissioner of oaths
 - The sworn Anti - Corruption Affidavit was not endorsed by a commissioner of oaths
 - The submitted ISO /IEC 18013 not related to the Bidder, the certificate is for Smart Chip Limited and not SafranMorpho

Bidder No. 7 - RLB Systems Limited

- The bidder did not provide evidence of implementation of smart card system.
- ISO/IEC 18013 card standard not provided.

Bidder No. 8 - Digit Print Supplies SRL

- Statement of experience for at least five years not provided
- Manufactures authorization certificate was not submitted
- The bidder did not provide evidence of implementation of smart card system for at least 5 million cards
- ISO/IEC 18013 card standard provided not relevant to the bidder

Bidder No. 9 - Webtribe Ltd and Watch Data

- Power of attorney was not submitted
- Manufactures authorization certificate was not submitted
- Organization Chart not submitted
- The bidder submitted audited accounts for only two years
- Sworn Anti - Corruption affidavit was not submitted
- ISO/IEC 18013 card standard not provided

Bidder No. 10 - National Bank of Kenya Ltd

- The bidder complied with all the mandatory requirements

Bidder No. 11 - Manyota Limited

- Manufactures authorization certificate was not submitted
- Statement of experience for at least five years not provided
- The bidder did not provide evidence of implementation of smart card system for at least 5 million cards
- ISO/IEC 18013 card standard not provided

Bidder No. 12 - 4G Identity Solutions Ltd

- The bidder did not provide evidence of implementation of smart card system for at least 5 million cards. The evidence provided belongs to

M/S Rosemerta and there is no teaming agreement between the two firms.

Bidder No. 13 - Madras Security Printers Ltd

- The bidder complied with all the mandatory requirements
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Bidder No. 14 - Copy Cat Limited

- The bidder did not provide evidence of implementation of smart card system for at least 5 million cards as stipulated in the bid document

Bidder No. 15 - Semlex Group

- The bidder complied with all the mandatory requirements

Bidder No. 16 - Symphony Technology Ltd

- The bidder complied with all the mandatory requirements

Bidder No. 17 - National Data Base and Registration Authority

- ISO/IEC 18013 card standard not supported

Bidder No. 18 - Equity Bank Ltd

- The bidder did submit a bid security
 - ISO/IEC 18013 card standard not provided
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Bidder No. 19 - Compulynx Ltd

- The bid bond submitted is invalid, it will expire on 7th September, 2015
 - The bidder did not provide evidence of implementation of smart card system for at least 5 million cards
 - Key staff competency(CVs) were not provided
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Bidder No. 20 - IRIS Corporation Berhad

- A valid Tax compliance certificate was not attached.

Bidder No. 21 - Gemalto SA

- The bidder complied with all the mandatory requirements

Bidder No. 22 - Face Technologies Ltd

- The bidder did not provide evidence of implementation of smart card system for at least 5 million cards

Bidder No. 23 - Techno Brain Global

- The bidder did not provide evidence of implementation of smart card system for at least 5 million cards. The recommendation on the implementation of the system was from M/S Laser and not H.I.D who issued the manufacturers authorization certificate.

2 Technical evaluation

At the technical evaluation phase, the bids were evaluated on the basis of the key criteria as follows:-

- i) Card must be Contact Chip and Polycarbonate
- ii) Evidence of Security features
- iii) A proven record of deployment of smart card solution to a minimum of 5,000,000 units either as one project or an aggregate of several projects
- iv) Proof of ISO 18013 units either as one project or an aggregate of several projects
- v) Smart Card Management (application software and operating system)
- vi) Ability to integrate with other third party applications
- vii) Technical capacity by the vendor. The vendor must attach at least 5 CV's of the implementation team, two of which should be software developers

- viii) Training proposal for technical and business teams
- ix) Ability to encode driver information and categorize that information into four (4) wallets Namely:
 - General information (biometrics) wallet
 - Driver's history and
 - Demerits points wallet
 - Payment Wallet
- x) Memory - the smart driver License microchip should have a minimum of 64kb storage

The above mentioned parameters were weighted and each evaluator carried out the evaluation individually and presented his score per bidder. The final score was then determined from the aggregate. A score of 65% was the minimum mark for a bidder to qualify for financial evaluation. The Committee used the formulae stipulated in the bid document.

Mandatory Technical Evaluation scores

S/NO	Requirement	Bidder Number				
		10	13	15	16	21
1	Card must be Contact Chip and Polycarbonate	√	X	√	√	√
2	Evidence of Security features	√	X	√	√	√
Overall Results		P	F	P	P	P

Legend

√ - Indicates conformity

X - Indicates non conformity

From the above analysis, Madras Security Printers Ltd failed to comply with the requirements and therefore could not proceed to the next evaluation stage.

Technical Individual and Combined Evaluation scores

Bidder Number	Name of Bidder	Total Score	Mean Score	Rank
10	National Bank of Kenya Ltd	497	71	2
15	Semlex Group	462	66	3
16	Symphony Technology Ltd	455	65	4
21	GEMALTO SA	518	74	1

In the technical evaluation stage as analyzed above, all the four (4) firms qualified to proceed to the financial evaluation phase having obtained a minimum score of 65% and above.

3 Opening of the financial proposals

Bidders who had obtained the minimum pass mark of 65% in the technical evaluation were invited for opening of the financial proposal on 12th May, 2015 at 10.00A.M. The successful bidders were as follows:

- a) National Bank of Kenya Ltd
- b) Semlex Group
- c) Symphony Technology Ltd and United Telecom Limited
- d) Gemalto SA

The Financial Proposals were opened in the presence of the bidders/Representative, as stipulated in the Public Procurement and Disposal Act, 2005, the names of the tenderers, the bid securities and the tender sum were read out aloud.

Thereafter the bids were numbered consecutively, stamped and endorsed by the tender Evaluation committee.

4 Evaluation of financial proposals

As with the technical evaluation exercise, the financial evaluation process was aimed at conducting a comprehensive analysis of the financial bids in

an open, accountable and fair manner. The Committee applied standard formulae for determining the financial score as well as the combined technical and financial score.

Notes on Financial Evaluation

Bidder No: 21 - Gemalto SA

- On evaluation of the proposals, it was noted that M/S GEMALTO had not submitted a Form of Tender. The Proposal was therefore treated as non-responsive as per clause 2.9 and 2.10 of the tender document.

Bidder No: 10 -National Bank of Kenya

- It was noted that the bidder had included in the tender sum Cost of additional licenses and cost of upgrades which were optional amounting to US\$ 2,396,343.36. This was deducted from the Tender sum.
 - The tender figure had an arithmetic error of US \$4. This was deducted from the Tender sum.
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Bidder No. 15 - Semlex Group

- It was also noted that the bidder had included in the tender sum cost for 10 laser printers amounting to US\$ 550,000.00. This was deducted from the Tender sum.
 - It was noted that the bidder did not quote for Value Added taxes (VAT) of USD 4,038,858.50 this was added to the tender sum
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Bidder No. 16 – Symphony Technology Limited

- Maintenance costs for the software for year 2&3 amounting to USD 311,822.50 had not been included in the tender sum and was therefore added to the bidder's tender sum for purposes of price comparison.
- The bid had an arithmetic error of USD3,987.50 and was added to the tender sum

Price Evaluation Methodology

The evaluated bid price was determined using the following formula:-

The formula for calculating the total combined scores is $S = St * T\% + Sf * P\%$. Where: S is the combined technical and financial score; St is the technical score; T is the weight of the technical score (80); Sf is the financial score; and P is the weight of the financial score (20)

Combined Technical and Financial weighted scores - NTSA/ICB - 014/2014-2015

Description of Item	NAMES OF BIDDERS			
	Symphony Technology Ltd.	GEMALTO SA	National Bank of Kenya	Semlex Group
Currency	US\$	US\$	US\$	US\$
Price as Read Out	15,665,847.57	19,768,357.50	23,490,629.00	25,792,865.60
Less Optional in read out price	48,899.44	1,031,704.00	2,396,343.00	550,000.00
Add Un Priced Items	311,822.50		-	-
Add/ Less Error	3,987.50	-	(4.00)	
Add Taxes (VAT @16%)		-		4,038,858.50
Evaluated Cost	15,932,758.13	18,736,653.50	21,094,282.00	29,281,724.10
Financial Scores out of 20	20.00	17.01	15.11	10.88
Technical scores out of 80	65.00	74.00	71.00	66.00
Combined Scores	85.00	91.01	86.11	76.88

Ranking	2	Non - Responsive	1	3
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From the above analysis, National Bank of Kenya scored the highest marks of 86.11 and at the Evaluated price of USD 21, 094,282.00

Arithmetic Checks and Correction of Bid Sums

The bids were checked for any Arithmetic errors and Omissions and corrected in accordance with the following procedure as stipulated in clause 3.13 of the Conditions of Bid and Instructions to Bidders.

The amounts stated in the tender sum were adjusted in accordance with the above procedure for the correction of errors and the affected bidders notified of the corrections. Failure by the bidders to accept the corrections would result to the tender being rejected and the Tender Security being forfeited.

Bidder's responses on correction of errors

The responses were as follows:

- i) Bidder No.10 M/s National Bank of Kenya - accepted the correction of the arithmetic error.
- ii) Bidder No.15 M/s Semlex Group - rejected the correction of the omitted taxes citing that there were no additional costs whatsoever and their proposal was inclusive of VAT.
- iii) Bidder No. 16 M/s Symphony Technology Ltd - rejected the corrections and indicated that the recurrent costs for year 2&3 was included in the tender sum and all other costs

5 Site visit

The Committee recommended to the Tender Committee that due diligence be carried out on the successful bidder after the award of the tender but before execution of the contract.

6 Recommendation and way forward

The committee recommended that the Tender for the Supply, Delivery, Installation and Maintenance of Second Generation Smart-Card Based Driving License and Associated Services - Tender NO. NTSA/ICB - 014/2014 -2015 be awarded to the National Bank of Kenya Ltd at their corrected tender sum of US\$ 21,094,282.00 (US Dollars Twenty One million and Ninety Four Thousand, Two Hundred and Eighty Two only) being the lowest evaluated bidder in terms of the definition and the formula set out in the tender document.

The tender committee's award

The tender committee in its meeting No. 22/2014-2015 held on Wednesday 27th May, 2015 at 11.00 a.m deliberated on the item and awarded the tender as follows:-

Firm: National Bank of Kenya Ltd

Item Description: For Supply, Delivery, Installation and Maintenance of Second Generation Smart Card Based Driving License and Associated Services - Tender No. NTSA/ICB-014/2014-2015 be awarded to the National Bank of Kenya Ltd at their corrected tender sum of US\$ 21,094,282.00 (US Dollars Twenty One million and Ninety Four Thousand, Two Hundred and Eighty Two only).

THE REQUEST FOR REVIEW

This Request for Review was lodged by Symphony Technologies Limited, Kenya and United Telecoms Limited, India on 12th November, 2015 in the matter of the tender for the Supply, Delivery, Installation and Maintenance of the Second Generation Smart Card Based Driving License and Associated Services.

The Applicant sought for the following orders:

1. *That the Respondent's failure to disqualify National Bank of Kenya for guaranteeing itself was unfair, inequitable and un-competitive;*
2. *The Respondent's decision that the applicant was not the lowest evaluated bidder in Tender No. NTSA/ICB-014/2014-2015 be set aside and nullified.*
3. *The Respondent's decision notifying the Applicant that they had not been successful in Tender No. NTSA/ICB-014/2014-2015 by way of the letter dated 5th November 2015 be set aside and nullified.*
4. *The Board be pleased to review all records of the procurement process including the mandatory, technical and financial evaluation relating to Tender No. NTSA/ICB-014/2014-2015 and do substitute the decision of the Review Board for the decision of the Respondent and award the Tender to the Applicant.*
5. *The Respondent be ordered to negotiate and sign a contract with the Applicant in accordance with the Tender and the decision of the Board.*
6. *The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and*

7. Such other or further relief or reliefs as this board shall deem just and expedient.

During the hearing of the Request for Review the Applicant was represented by Mr. Allan Kosgey advocate while the Procuring Entity was represented by Prof. Albert Mumma Advocate who appeared together with Mr. Charles Agwara Advocate. The successful bidder was on the other hand represented by Mr. Sisule Musungu and M/s Ruth Mabele Advocates. Several Interested parties whose names and particulars have been set out at page 2 of the background to this decision also appeared before the Board.

The Applicant set out a total of 22 grounds in support of the Request for Review. The Board has considered the 22 grounds of review and finds that grounds 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the Request for Review constitute statements of fact which do not allege any breach and which will therefore be set out below.

The Applicant's case

Mr. Allan Kosgey who appeared on behalf of the Applicant in this Request for Review relied on the grounds and the facts set out in the Request for Review, the Affidavit and the Replying Affidavit sworn by Mr. Bildad Kagai together with the documents annexed thereto. He also relied on the Applicant's written submissions which were filed with the Board on 1st December, 2015 and the contents of which he highlighted in his oral submissions.

On the issue of tender security, it was the Applicant case that under Clause 2.14.1 of the Instructions To Tenderers (ITT) that the tender document required that a tender must be accompanied by a tender

security in the form of a cash deposit, a bank guarantee or a letter of credit.

Counsel for the Applicant stated in his submissions based on the contents of paragraph 7 of the Request for Review a statement that was also set out in paragraph 8 of the Supporting Affidavit of Bildad Kagai that all the tenders which had been submitted to the Procuring Entity were opened on 22nd April, 2015 when the Applicant was represented by Bildad Kagai and Esther Ocharo. The Applicant stated that during tender opening, the tender securities submitted by all the bidders were read out and that at that meeting, the Applicant's representatives noted that the successful bidder had submitted a tender security in the form of a Bank guarantee which had been issued by itself meaning that the successful bidder instead ought to have submitted a guarantee by a third party.

Mr. Kosgey on behalf of the Applicant submitted that the action by the Procuring Entity to accept a tender guarantee issued by the successful bidder and not by a third party was in breach of the Provisions of Section 2 of the Public Procurement and Disposal Act whose objective was to promote fairness, competition and equal treatment of all the bidders as none of the other bidders had the advantage of guaranteeing their own performance.

He further submitted that the Bank guarantee issued by the Applicant makes nonsense of the Provisions of Section 57 (3) of the Act which sets out the procedures for forfeiting a tender security. He submitted that if a bidder is guaranteeing itself and is unable to perform, it will make nonsense of Section 57(3) as it would render the tender security useless.

Counsel for the Applicant urged the Board to scrutinize the tender security form appearing at page 72 of the Request for Review and stated that it was apparent from a close examination of the tender security that the tender document envisaged a situation that would involve 3 distinct parties namely the tenderer, the Procuring Entity and a third party. He stated that what the successful bidder had done in this particular instance was at odds with the Procuring Entity's own format.

Turning to the Procuring Entity's response on the issue of the tender security and particularly the Procuring Entity's response that the framework that governs the issue of a Bank guarantee is separate from those that govern the operations of a bidder as a legal entity, Counsel for the Applicant submitted that the said distinction was illusory and that the argument by the Procuring Entity that they issued an addendum to clarify that a Bank could issue its own guarantee would make a mockery of the law and the addendum could not change the law of guarantees. Counsel for the Applicant referred the Board to the definition in the Blacks law dictionary appearing at page 8 of it's skeleton submissions which defines a guarantee as a promise to answer for the payment of some debt or performance of some duty in respect to failure of another who is liable in the 1st instance.

He submitted that the definitions set out above underscored the fact that there must be 3 separate and distinct persons in order for a Bank guarantee to be valid.

Counsel for the Applicant also referred the Board to the Provisions of Section 11(1)(b) of the Banking Act and stated that the said Provision prohibits a Bank from guaranteeing itself.

Counsel for the Applicant stated that the Applicant's interpretation of the said Provision was that whereas the successful bidder could issue a guarantee in favour of another institution or a Bank, it could not issue a guarantee to an institution or a company in which it has more than 25% shareholding. He further submitted that the Act describes this as fraudulent and reckless under Section 11 of the Act and where such a situation arose, then this was a matter for banking supervision and should be reported to the Central Bank of Kenya.

While responding to the Procuring Entity's and the successful bidder's contention that the Applicant had notice of the nature of the guarantee given by the successful bidder as early as 22nd April, 2015 and therefore ought to have filed a Request for Review within 7 days from the said date when it became aware of the alleged breach, Counsel for the Applicant stated that Regulation 73 of the Public Procurement and Disposal Regulations (2006) as amended gives the Applicant an election to either come before the Board when it becomes aware of the breach or within 7 days after notification under Section 67 of the Public Procurement and Disposal Act.

He relied on the Board's decision in the case of **Civicon Ltd =vs= Kenya Pipeline Company Ltd and JGH Marine A/S Western Marine Services Ltd & 2 Others (PPARB Appl. No. 18 of 2015)** delivered on 21st April, 2015 in support of that proposition.

Counsel for the Applicant therefore urged the Board to find that the award of the tender made to the successful bidder was void and further that its Request for Review was properly before the Board under the Provisions of Regulation 73 of the Regulations.

On the second ground on whether the Applicant was the lowest evaluated bidder the Applicant stated that the Procuring Entity had altered the Applicant's price on account of alleged errors which in turn altered the Applicant's bid price without consultation or seeking clarification from the Applicant. Counsel for the Applicant referred the Board to the letter dated 20th May, 2015 from the Procuring Entity appearing at page 121 of it's Request for Review in which the Procuring Entity notified the Applicant of the errors.

The Applicant while relying on it's response dated 21st May, 2015 rejected the correction of the errors and informed the Procuring Entity that there was no such errors in it's bid price and concluded that the price of USD 15,665, 848 quoted was the total price for the supply delivery installation and maintenance of the second generation smart card based driving licence and associated services.

Counsel for the Applicant submitted that whereas the Procuring Entity can make corrections of errors, price is sacrosanct and what a Procuring Entity cannot do is to supplant a bidder's financial proposal under the guise of correction of an error. Counsel for the Applicant stated that the Applicant had taken the maintenance cost and multiplied it with the next 3 years and the price was not therefore for 1 year.

On the effect of the rejection of the Applicant's correction of the alleged errors, Counsel for the Applicant submitted that the Procuring Entity should be taken to have accepted the clarification and that is why the Applicant was not disqualified at that stage nor it's tender security forfeited. Counsel for the Applicant submitted that the Applicant was evaluated to the end. On the issue of being the lowest evaluated bidder

Counsel for the Applicant concluded his submissions by stating that the tender under consideration was a very important tender for the Country. He urged the Board to consider that the difference in price between what the Applicant was offering and what the successful bidder was offering was almost 800 Million Shillings.

Counsel for the Applicant therefore urged the Board to allow the Request for Review in terms of the prayers sought.

The Procuring Entity's submissions

The Procuring Entity opposed the Applicant's Request for Review and filed a written memorandum of response with the Board on 18th November, 2015. Counsel for Procuring Entity also filed written submissions with the Board on 3rd December, 2015 which he highlighted at the hearing of the Request for Review.

Professor Mumma who led submissions on behalf of the Procuring Entity started off his submissions by stating that this Request for Review raised two issues namely; the validity of the tender Security provided by the successful bidder and the correction of arithmetic errors.

On the issue of the validity of tender security, Counsel for the Applicant submitted that there was no law that prohibits a Bank from issuing a Bank guarantee to guarantee obligations where the Bank was a bidder. Professor Mumma submitted that contrary to the Applicant's Counsel's interpretation of Section 11 of the Banking Act, the Procuring Entity's understanding of that Provision was that the Section prohibits a Bank from issuing a financial guarantee to another Company in which that Bank has more than 25% shareholding.

Counsel for the Procuring Entity submitted that the successful bidder does not have any shares in itself and that the shareholders of the successful bidder are the Kenyan Government, the Social Security Fund and other people. He submitted that the Provisions of Section 11 were not therefore relevant nor applicable to in the present case and would only be applicable if the successful bidder had a subsidiary company which it did not.

Counsel for the Procuring Entity further submitted that under the Provisions of Section 57 of the Public Procurement and Disposal Act, the Act gives a Procuring Entity the discretion to determine the form and the amount of tender security and while relying on the Provisions of Clause 2.14.1 appearing at page 15 of the tender document, Counsel for the Procuring Entity submitted that his client provided for three forms of tender security namely; cash deposits, a bank guarantee and a letter of credit. He stated that the successful bidder elected to give a Bank Guarantee which was part of the three forms of security provided for and that it would therefore have been discriminatory for the successful bidder to be disqualified from the process because of it's status.

Counsel for the Procuring Entity additionally submitted that on 10th April, 2015 the Procuring Entity issued an addendum No. 2 pursuant to the Provisions of Clauses 2.5 and 2.6.1 pursuant to a request by a potential bidder for clarification on the issue of whether where a bidder is a bank, the bidder/Bank could issue a Bid Bond or does it have to get an independent party to guarantee it.

Counsel for the Procuring Entity submitted that the Procuring Entity gave the following clarification:-

“The regulatory framework that governs issuance of guarantees is separate from those that govern the operations of a bidder as a legal entity and therefore it is acceptable for the Bank to issue the Bid Bond provided that the authorized signatories to such Bid Bond are not the same ones who have been donated the Power of Attorney to sign the tender documents”.

The Procuring Entity produced the list of bidders who expressed interest in participating in this tender at pages 33 - 52 of the Request for Review and Addendum No. 2 which was annexed to the Memorandum of Response as annexure No. NTSA 2 running from pages 55 to 59 of the Request for Review.

Counsel for the Procuring Entity argued on the basis of the above facts that it was therefore clear to all bidders as early as 10th April, 2015 that it was acceptable for a Bank to issue a Bid Bond where it was a bidder.

Counsel for the Applicant further submitted that the tenders were opened on 22nd April, 2014 in the presence of all the tenderers including the Applicant's representatives when the particulars of the form of the tender securities provided by all the bidders including the successful bidder were read out.

Counsel for the Procuring Entity therefore submitted that having been aware of the addendum by 10th April, 2015 and having known that the successful bidder had provided a bid bond issued by itself, it was not therefore open to the Applicant to sit by quietly and wait until they learn that they have lost the bid and seek to later raise the same issue as a way of nullifying the tender process. Counsel for the Applicant submitted that one of the objectives of the Public Procurement Act 2005 as set out in Section 2 of the Act was to promote efficiency and economy and that

if a bidder does not raise objections timeously that would defeat the objectives of Section 2 of the Act. He further submitted that the alleged illegality did not come about on the date of notification of the results of the evaluation. He faulted the Applicant's argument that a bidder had an election under regulation 73 of the Regulations to apply for review either upon learning of the existence of the breach or upon notification of the outcome of the tender under Section 67 of the Act.

Counsel for the Procuring Entity additionally stated that in addition to the fact that the Applicant ought to have approached the Board timeously the Applicant was barred by the doctrine of estoppel from raising the issue since it had accepted to proceed with the tender process without objection even after becoming aware of the alleged breaches in April, 2015.

Still on the issue of the validity of the tender security, Counsel for the Procuring Entity submitted in paragraphs 55 and 56 of it's written submissions that the Applicant had not demonstrated the prejudice that had been occasioned to it by the use of the tender security provided by the successful bidder.

While answering the Applicant's contention that a valid guarantee must have three parties, Counsel for the Applicant referred the Board to the Provisions of Clause 2.14.1 appearing at page 9 of the Procuring Entity's response and stated that a bidder under that clause had 3 options and that it was not correct to state that there had to be three parties in order for a guarantee to be valid.

Counsel for the Applicant gave the example of a cash deposit and stated that where as in this tender a bidder decided to put in a cash deposit, that would not require the participation of a third party because there is

no requirement that the cash deposit must be placed with a 3rd party. He stated that this would apply to the other form of guarantees and that as long as a Procuring Entity had chosen a certain form of tender security, the bidders would be within their rights to choose the form prescribed.

Finally Counsel for the Procuring Entity submitted that if there was any doubt left regarding the interpretation of the Provisions of the Public Procurement and Disposal Act (2005) and the Provisions of the Banking Act or any other law on tender security in a Procurement process, the Provisions of Section 5 of the Public Procurement and Disposal Act (2005) provides that if there is a such a conflict between other statutes and the Provisions of the Public Procurement and Disposal Act (2005) relating to Procurement issues, then under the Provisions of Section 5 of the Public Procurement and Disposal Act (2005) then the Provisions of the said Act would prevail.

On the issue of whether the Applicant was the lowest evaluated bidder and whether the Procuring Entity acted within the law in the correction of the alleged errors in the Applicant's tender price, Counsel for the Procuring Entity submitted that it was within the Procuring Entity's mandate to correct errors under the Provisions of Section 63 of the Act. He submitted that there is no requirement under the Provisions of Section 63 of the Public Procurement and Disposal Act to notify the bidder of the existence of an error and that it was the mandate of the Procuring Entity to determine whether there exists an error and that it was not the mandate of a bidder to engage the Procuring Entity in an argument on whether there was an error or not.

He submitted that the response dated 21st May, 2015 appearing at page 124 of the Request for Review was argumentative and it was not acceptable because Section 63 of the Act is quite clear that the Procuring Entity may correct an error and give notice to the person who submitted the tender. He submitted that in this case the correction was effected as evidenced by the letter at page 121 of the Request for Review and the notice at page 71 of the response.

Counsel for the Procuring Entity submitted that what the Procuring Entity has to determine is whether indeed there was an error.

Counsel for the Applicant referred the Board to item 2 at page 45 of the tender document headed **Section XI - price schedule for goods** and submitted that all bidders were required to indicate the recurrent costs itemized in a similar manner to the price schedules for the annual maintenance cost for software for years 1, 2 and 3 but the Applicant instead stated the itemized maintenance cost for software per lot was per annum. It was the Procuring Entity's case that the Applicant did not therefore provide the itemized maintenance costs for software for years 1, 2 and 3 but instead provided such costs for one year only being USD 155,911.25 and therefore the Procuring Entity regularly and lawfully corrected the error by applying the same amount for the other two (2) years which the Applicant had omitted.

It was therefore the Procuring Entity's case, based on the Provisions of Clause 2.27.4 that the Applicant was not the lowest evaluated bidder as defined in the tender document and that the lowest evaluated bidder was the successful bidder. Counsel for the Procuring Entity further stated that in determining who the lowest evaluated was, the Procuring Entity took into account the correction of the errors mentioned above.

Counsel for the Procuring Entity finally submitted that under the Provisions of Section 63 of the Act, a bidder who chooses to reject the correction of an error is liable to be eliminated from the tender process. The Procuring Entity submitted both based on Counsels oral submissions and the submissions appearing at page 27 of the Procuring Entity's written submissions that the Applicant ought to have been declared as non-responsive upon the rejection of the correction and that based on that ground, the Applicant could not seek to be awarded the tender as prayed for in the Request for Review.

Counsel for the Procuring Entity relied on the case of M/s Electrical Company Limited =vs= The Ministry of Roads and Public Works (PPRB No. 7 of 2005 in support of the argument that a party seeking to benefit from an order of the Review Board must approach the Board with clean hands and that an Applicant who ought to have been disqualified such as the Applicant in the instant Request for Review must approach the Board's seat of justice with clean hands.

Counsel for the Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review with costs.

The successful bidders submissions

On it's part the successful bidder opposed the Applicant's Request for Review and filed a Memorandum of Response dated 30th November, 2015, Replying Affidavit sworn by Mr. Samuel Mundia on 3rd December, 2015 and written skeleton submissions and authorities which were also lodged with the Board on 3rd December, 2015.

Mr. Sisule Musungu who argued the Request for Review on behalf of the successful bidder associated himself with the submissions made by

Counsel for the Procuring Entity and maintained that the tender in dispute had rightly been awarded to the successful bidder.

Mr. Sisule Musungu started his submissions by stating that Counsel for the Procuring Entity had fully explained the Procurement process and stated based both on the contents of the Request for Review and the submissions made by Counsel for the Applicant that the Applicant's main complaint was on the issue of the Bid Bond and the correction of arithmetic errors. Counsel for the Procuring Entity submitted that apart from these two complaints, the Applicant was not raising any issue regarding the validity of the tender document or how the Procuring Entity had undertaken the evaluation process save for the above two issues.

Mr. Sisule Musungu submitted that in the successful bidder's view, there were only 3 issues that arose from the Applicant's Request for Review namely:-

- i) Whether the successful bidder's tender security complied with the tender document.*
- ii) Whether the Applicant having rejected the correction of arithmetical errors ought to have been declared non-responsive and disqualified from the tender process on the basis of its letter dated 21st May, 2015.*
- iii) Whether the Applicant was the lowest evaluated bidder as provided for in clause 2.27.4 of the tender document on the award criteria.*

On the issue of the Bid Bond, it was the successful bidder's case that the bid bond provided by the successful bidder complied with the tender document and that under the Provisions of Section 53 of the Act

Addendum No. 2 formed part of the tender document. It was the successful bidder's further case that for the purposes of definition, the tender document constituted both the main document as well as the Addendums which were issued pursuant to the said Provisions of Section 53 of the Act.

The successful bidder's submitted that the Applicant had not challenged the validity or the legality of the tender document including Addendum No. 2 which clarified the question of who could issue the bid bond.

Counsel for the Applicant further submitted that a bid bond is essentially a contract and that under the law of contract, the bond in this case was valid and was still in force because it complied with the 3 requirements namely that it had the consent of the parties and provided for consideration and was therefore binding on the parties.

The successful bidder while relying on the doctrine of estoppel additionally submitted that the Applicant having been first aware of the clarification on whether a Bank which was a bidder could issue a guarantee as far back as 10th April, 2015 and having also been present and aware that the successful bidder had issued the bid bond, they were under an obligation to challenge the validity of the bid bond within the statutory period of Seven (7) days from the day it became aware of the breach but not at the end of the process after realizing that it had not won the tender.

On the issue of errors and the correction thereof, the successful bidder submitted while relying on the Procuring Entity's response and the submissions by Counsel for the Applicant that whereas the tender document required the Applicant to indicate the maintenance costs for 3 years, the Applicant only indicated the costs of 1 year. The successful

bidder therefore submitted that it was within the Procuring Entity's right to exercise the right conferred upon it Under Section 63 of the Act to correct the error by taking into account the fact that the Applicant had only indicated the maintenance cost for 1 year and not for the 3 years as required by the tender document.

The successful bidder additionally submitted that by rejecting the correction of the arithmetical error by its letter dated 21st May, 2015, the rejection in the successful bidders view amounted to a rejection of the correction and that the Applicant's bid was therefore deemed to have been rejected by operation of law and its security ought to have been forfeited. Counsel for the successful bidder stated that on that question, there was an automatic rejection and that the Procuring Entity has no discretion nor can the Board create a discretion to determine whether the rejection was valid or not. In the successful bidder's view therefore the tender by the Applicant stood rejected as of 21st May, 2015 when it rejected the correction.

On the issue of the Applicant being the lowest evaluated bidder, Counsel for the Successful bidder submitted that the Applicant was using the uncorrected tender sum figure to calculate the results. It was however the successful bidders case that upon the correction of the errors that the addition of the omitted 2 years added upto about 311,000 dollars and that when the correction was taken into account and using the award criteria provided for in the tender, the Applicant's bid was not the lowest evaluated bid under Clause 2.27.4 of the appendix to the instructions to tenderers. The successful bidder submitted that this clause also defined the successful bid as the bid with the highest

combined bid score upon taking into account the technical and the financial score as defined under Clause 2.27.4.

The successful bidder also stated in paragraph 35 of written skeleton submissions that under Clause 2.27.4 that bid evaluation would take into account technical factors in addition to cost factors which would account for 80% while financial evaluation would account for 20% and that bidders would conform to the specific technical requirements.

The successful bidder relied on the High Court's decision in the case of the Republic =vs= The Public Procurement Administrative Review Board Ex-parte J.G.H Marine A/s Western Marine services Ltd & CNPC Northeast Refining and Chemical Engineering Co. Ltd Pride Enterprises (Judicial Review NO. NAI HC 137 of 2015) in support of the proposition that under the Provisions of Section 66(2) of the Public Procurement and Disposal Act (2005) the Procuring Entity and bidders in a Procurement process are bound by the criteria set out in the tender document and that no other criteria should be applied in the evaluation of tenders. Counsel for the successful bidder urged the Board dismiss the Applicant's Request for Review with costs.

The position taken by the other interested parties

Although several interested parties namely M/s Lantch Ltd, ISOL EA Ltd, M/s Copy Cat Ltd and M/s 4G Identity Solutions Ltd appeared at the hearing of the Request for Review through Mr. Abraham Macharia, Mr. John Kere, Mr. Umesh Knot and Mr. Simon Yatich respectively and were given an opportunity to file documents in response to the Request for Review and or make oral or written submissions in support or opposition to the of the Request for Review, they all indicated that they would not be filling any responses and did not make submissions in

support or opposition to the Request for Review inspite of having been given an opportunity to do so at the hearing of the Request for Review being interested parties under the Provisions of Section 96 of the Act.

The Applicant's Response

In a short response to the submissions made by Counsel for the Procuring Entity and Counsel for the successful bidder, Counsel for the Applicant reiterated that the bid bond provided by the successful bidder was invalid under the Provisions of Section 11 of the Banking Act and that the Provisions of Section 53 of the Public Procurement and Disposal Act 2005 could not cure that defect.

He reiterated that the Request for Review had been filed timeously and that the Procuring Entity having allowed it to proceed upto the end of the process inspite the rejection of the error under Section 63 of the Act, the Procuring Entity and the successful bidder were estopped from raising that issue at this stage.

Counsel for the Applicant therefore urged the Board to allow the Request for Review as prayed.

Having therefore set out the respective parties arguments in support and or opposition to the Request for Review, the Board will therefore proceed to give a decision on the grounds of review raised based on the Request for Review the Affidavits in Support thereof the responses by the parties and the submissions made by the parties on the issues addressed before it by the parties.

The issues

As the Board has already observed, the Applicant raised a total of 22 grounds of in it's Request for Review. Grounds 1, 2, 3, 4, 5, 6, 8, 9 and 10

of the Request for Review constituted statement of facts which did not allege any breach either of the Constitution, the Act or the Regulations. In their submissions before the Board however both Counsel for the Applicant, the Procuring Entity and the successful bidder confined their submissions to the following three grounds, namely:-

1. Grounds 7 and 19 which raised the issue whether the Procuring Entity breached the Provisions of Sections 2 and 57 of the Act by accepting a tender security in the form of a Bank guarantee issued by the successful bidder.
2. Grounds 18, 20 and 21 which raised the issue whether the Procuring Entity breached the Provisions of Sections 63 and 66 of the Act and Regulation 50 of the Public Procurement and Disposal Regulations by failing to evaluate the Applicants technical and financial proposal in a manner that was fair thereby leading to a prejudicial decision leading to the awarding of the tender to a party which was not the lowest evaluated bidder and thereby denying the award to the Applicant which was the lowest evaluated bidder.
3. Whether the Applicant is entitled to the reliefs sought based on the Board's determination of the above two issues and on the basis that it did not accept the correction of an error under Section 63 of the Act.

The Boards findings on the grounds and the issues framed for determination.

The Board has considered the Request for Review the Supporting Affidavits, the responses and the Affidavits filed in opposition thereto,

the written and the oral submissions filed and made before it by the parties to this review who opted to respond to and or make submissions submit before it and the original tender documents and all the minutes lodged before it and makes the following findings on each of the issues framed for determination before it.

ISSUE NO. 1

Grounds 7 and 19 which raised the issue whether the Procuring Entity breached the Provisions of Sections 2 and 57 of the Act by accepting a tender security in the form of a Bank guarantee issued by the successful bidder.

It was generally common ground by the parties to this Request for Review that the bid bond provided by the successful bidder M/s National Bank Ltd was issued by itself. It was also not in dispute that the Procuring Entity issued an Addendum No. 2 pursuant to a request for clarification where the Procuring Entity clarified that a bidder who is a Bank could issue a Bid Bond provided that the authorized signatories to such a bid bond are not the same or the ones who have been donated the power of attorney to sign the tender documents.

The Board further finds that whereas the Applicant challenged the bid bond on the grounds that the same was invalid under the Provisions of the Banking Act and Sections 2 and 57 of the Public Procurement and Disposal Act 2005, Procuring Entity and the successful bidder maintained that the bid bond was proper under the Provisions of the Act and that in any event the Applicant was estopped from raising the issue after the award of the tender since the Applicant was aware of this fact as far back as on 10th April, 2015 and 22nd April, 2015 respectively when

Addendum No. 2 clarification was issued and the form of the bid bond given by all the bidders disclosed to the bidders during tender opening.

The Board has considered the oral and the written submissions made by the parties and finds that under the Provisions of Section 53 of the Public Procurement and Disposal Act 2005, a Procuring Entity is entitled to issue an Addendum before the closing date for a tender clarifying any issue raised by any bidder and that once the clarification/the Addendum is issued it becomes part of the tender document. This was the Board's holding in the case of Esther Muthoni Sospeter T/A Rwathe Construction -vs- The City Council of Nairobi (PPARB Application no. 17 of 2009).

"Section 53 of the Public Procurement and Disposal Act 2005.

53 of the Act provides as follows:-

- 1) A procuring Entity may amend the tender documents at anytime before the deadline for submitting tenders by issuing an addendum.*
- 2) An amendment may be made on the Procuring Entity's own initiative or in response to any inquiry.*
- 3) The Procuring Entity shall promptly provide a copy of the addendum to each person to whom the Procuring Entity provided copies of the tender documents.*
- 4) The addendum shall be deemed to be part of the tender documents".*

The Board further finds that under the Provisions of Section 53(1) of the Act, a Procuring Entity is allowed to amend the tender document at

anytime before the deadline for submitting tenders by issuing an Addendum.

The Board additionally finds that in exercise of the powers conferred upon it by the Provisions of Regulation 53(1) of the Act inquiring whether a bidder which is a Bank could issue a bid bond where it was a tenderer, the Procuring Entity issued Addendum No. 2 pursuant to the following question and clarification appearing at page 4 of Addendum No. 2.

“General

“Question: Where the bidder is a bank, can the bank issue the Bid Bond or does it have get an independent party to guarantee.

“Clarification/Addendum:

The regulatory framework that governs issuance of bank guarantees is separate from those that govern the operations of a bidder as a legal entity and therefore it is acceptable for the bank to issue the bid bond provided the authorized signatories to such bid bonds are not the same as the ones who have been donated the power of attorney to sign the tender documents”.

The addendum was forwarded to all the bidders via a letter dated 10th April, 2015 whose receipt the Applicant never disputed. Under the Provisions of Section 53 of the Act that clarification/addendum became part of the tender document and the next question that the Board needs to therefore answer is whether having not raised any objection or filed a Request for Review at that point or immediately it returned it's tender document it was now not open to the Applicant to raise the issue at the end of the process after its tender was declared unsuccessful.

It was the Applicant's case before the Board based on the decision delivered by the Board on 21st April, 2015 in the case of **Civicon =vs= Kenya Pipeline and JGH Marine A/S Western Services Ltd & Others (PPRB No. 18 of 2015)** that under the Provisions of Regulation 73 of the ~~Public Procurement and Disposal Regulations 2006~~, the Applicant had the election to either raise the issue upon becoming aware of the breach or upon notification under the Provisions of Section 67 of the Act.

The Board however wishes to observe that the Board's decision dated 21st April, 2015 was challenged by the unsuccessful party in High Court judicial review application No. **Nai Miscellaneous Application No. 137 of 2015 =vs= JGH Marine A/S Western Marine Services Ltd, CNPC Northeast & Chemical Engineering Co. Ltd and Price Enterprises =vs= The Public Procurement Administrative Review Board Civicon Ltd and The Kenya Pipeline Company Limited** and by a decision delivered on 10th July, 2015, the High Court quashed the decision delivered by the Board on 21st April, 2015 and remitted the Request for Review issue for reconsideration by the Board. The Board reconsidered the Request for Review and rendered another decision on 27th July, 2015. The Board wishes to observe that several parties who have appeared before it continue to rely on the decision delivered on 21st April, 2015 and the Board finds it useful to make the above observation and bring to the attention of the parties in this Request for Review and any other parties that may bring proceedings before the Board that the decision dated 21st April, 2015 was quashed by the High Court and that the decision that is now in force in that dispute in this matter is the decision delivered on 27th July, 2015.

The Board has considered the High Court's decision in judicial review Application No. 137 of 2015 which was produced by the successful bidder in its submissions and finds that the High Court while relying on several decisions both by the Board and the High Court held that under the Provisions of Sections 34 and 66(2) of the Act the Procuring Entity is bound by the Provisions of the law to prepare a tender document and thereafter evaluate and compare the tenders submitted to it using the procedures and the criteria set out in the tender documents and that no other criteria shall be used.

Turning to the circumstances of the case before the Board and the Provisions of Section 53 of the Act, it is clear that the Addendum No. 2 dated 10th April, 2015 formed part of the tender document and under the Provisions of Section 66(2) of the Act, the Procuring Entity was bound to follow the criteria set out in the tender document of which Addendum No. 2 was part of.

During the course of the submissions before the Board, Counsel for the Procuring Entity and the Counsel for the successful bidder argued that the Applicant could not raise the issue of the validity of the bid bond at the end of the tender process having become aware of the form of the tender security the successful bidder had provided way back in April, 2015.

The Board has considered the rival submissions made by the parties and agrees with the Applicant's submissions but to the limited extent that whereas under the Provisions of Regulation 73 of the Public Procurement and Disposal Regulations 2006 an Applicant can elect to file its Request for Review either upon becoming aware of the breach or upon notification of the outcome of its tender, the Board has however

held on several occasions that the election is subject to the consideration of when a bidder becomes aware of the breach. In this particular case the bidder became aware of the form of the tender security that the successful bidder had provided as way back as on 22nd April, 2015 and it is the Board's view that the Applicant ought to have challenged the successful bidder's participation in this tender within Seven (7) days of becoming aware of the alleged invalidity of the tender security or immediately it submitted its tender document. The Board therefore agrees with the submissions made by the Counsel for the Procuring Entity and the successful bidder that the Applicant is now estopped from challenging the tender process having not raised its complaint timeously.

The Applicant alternatively ought to have challenged the validity of Addendum No. 2 or the entire tender document at that stage but did not and was therefore bound by the contents of the document under the Provisions of Section 66(2) of the Act.

The Board also respectfully wishes to state based on the High Court's decision in the case of the Republic =vs= The Public Administrative Review Board Kenya Railways Corporation exparte GIBB Africa INC (Nai HC JR 92 of 2011) that a party who elects to participate in a procurement process based on what it perceives as a flawed tender document cannot at the end of the process raise issues on the propriety of the process at the end upon its bid being declared as unsuccessful.

The High Court stated as follows in the said case:-

"Finally, it is now well established that judicial review remedies are discretionary in nature. The applicants have admitted that the Procurement documents had two different scores for the technical

evaluation parameters. They nevertheless went ahead to submit their bid in a Procurement process, which in their view, was founded on a flawed document. It is only after they failed to attain the minimum technical evaluation marks that they started complaining. The document had clearly provided room for seeking clarification but they did not take this opportunity. Even if they had established grounds for review of the decision, I think they would not have been entitled to the orders sought”.

In view of the High Court's decision and Board's findings on the above issues it is therefore unnecessary to consider whether the Procuring Entity breached the Provisions of Section 11 of the Banking Act which the Board in any event finds not to be in conflict with any of the Provisions of the Public Procurement and Disposal Act 2005 and more particularly Sections 53, 63 and 66 of the said Act. This ground of the Applicant's Request for Review therefore fails and is therefore dismissed.

ISSUE NO. 2

Grounds 18, 20 and 21 which raised the issue whether the Procuring Entity breached the Provisions of Sections 63 and 66 of the Act and Regulation 50 of the Public Procurement and Disposal Regulations by failing to evaluate the Applicants technical and financial proposal in a manner that was fair thereby leading to a prejudicial decision leading to the awarding of the tender to a party which was not the lowest evaluated bidder and thereby denying the award to the Applicant which was the lowest evaluated bidder.

On the second issue framed for determination, it was the Applicants contention that it was the lowest evaluated bidder and therefore ought

to have been awarded the tender. The Board has considered the rival submissions and both the Provisions of the Act and the tender document.

The Board finds that under the Provisions of Section 63 of the Act a Procuring Entity is entitled to correct any arithmetical errors in a bidders tender so long as it's decision is in compliance with the Provisions of Section 63 of the Act.

Section 63 of the Public Procurement and Disposal Act (2005)states as follows:-

“63 (1) The Procuring Entity may correct an arithmetic error in a tender.

(2)The Procuring Entity shall give prompt notice of the correction of an error to the person who submitted the tender.

(3) If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited”.

The first question for the Board to therefore consider was whether there was an error in the Applicant's financial proposal.

The Board has considered the Provisions of the tender document and particularly Section 1x..... headed the price/schedule for goods appearing at page 45 of the tender document. The said price schedule required all bidders to comply with the following requirements under item 2 which the Board wishes to reproduce below:-

1	2	3	4	5	6	7
Item	Description	Quantity	Unit price Exc. Of Taxes	Taxes and Duties payable	Unit price of other incidental services payable	Total cost
	<p>Bidders should provide indicative recurrent costs itemized in a similar manner to the Price Schedules. Such recurrent costs shall include:-</p> <p>Itemised annual maintenance costs for the software</p> <p>Unit cost of additional licences should they be required.</p>		<p>Indicate Unit prices</p> <p>Year 1:</p> <p>Year 2:</p> <p>Year 3:</p>			

It was however the Applicant's case before the Board that it's price was all inclusive while the Procuring Entity and the successful bidder contented that the Applicant only provided for maintenance costs for 1 year.

The Board has examined page 7 of the Applicant's financial proposal against the Applicant's tender document with provided as follows:-

Itemised annual maintenance costs for software – lot per annum 134,406.25, 21,505 adding upto 144,911.25

It is therefore clear from the Applicant's own financial proposal that the Applicant provided for annul maintenance cost for 1 year while the tender document required a bidder to make Provision for year 1, 2 and 3.

The Board therefore finds on the basis of the above evidence that there was an error in the Applicant's tender document which the Procuring Entity was entitled to correct under the Provisions of Section 63 of the Act.

The Board has also examined the original tender document which provided for the formula for determination of the lowest bidder.

Under the overall evaluation criteria appearing at page 16 of the tender document, the Procuring Entity assigned 80 marks for the technical score and 20 marks for the financial score. The tender document thereafter set out the following criteria for determining the successful bidder for the purposes of this tender.

"Evaluation check list

- a) Technical Evaluation that will be scored against bidders responses will be scored 80 marks based on the tender responsive criteria.
- b) To qualify for financial evaluation, a bidder/Tenderer must score a minimum of 65 out of 80 marks.
- c) Financial evaluation

An Evaluated Bid Score (B) will be calculated for each responsive bid using the following formula, which permits a comprehensive assessment of the bid price and the technical merits of each bid.

$$\text{Where: } B = \frac{C_{low}}{C_{High}} X + T (1 - X)$$

C = Evaluated Bid Price

C_{low} = the lowest of all evaluated bid prices among responsive bid.

Thigh =the total Technical score achieved by the bid that was scored highest among all responsive bids

X= weight for the price specified in the BDS (i.e 0.2)

The bid with the highest evaluated Bid Score (B) among responsive bids shall be termed the Lowest Evaluated Bid and is eligible for Contract award.

The Board has examined the tender evaluation committees report which shows that upon taking into account the said formula, the Procuring Entity's tender committee arrived at the following final decision on the combined Technical and Financial weighted scores after taking into account the correction of errors.

NAMES OF BIDDERS				
Description of item	Symphony Technology Ltd	GEMALTO SA	National Bank of Kenya	Semlex Group
Currency	US\$	US\$	US\$	US\$
Price as read out	15,665,847.57	19,768,357.50	23,490,629.00	25,792,865.60
Less optional in read out price	48,899.44	1,031,704.00	2,396,343.00	550,000.00
Add unpriced items	311,822.50			
Add/Less Error	3,987.50		(4.00)	
Add Taxes(VAT @16%)				4,038,858.50
Evaluated Costs	15,932,758.13	18,736,653.50	21,094,282.00	29,281,724.10

Financial scores out of 20	20.00	17.01	15.11	10.88
Technical scores out of 80	65.00	74.00	71.00	66.00
Combined scores	85.00	91.01	86.11	76.88
Ranking	2	Non-responsive	1	3

It is therefore clear from the above analysis that based on the formula provided for in the tender document, the successful bidder was the lowest evaluated bidder in terms of the criteria set out in the tender document which was binding on the bidders under the Provisions of Section 66(2) of the Act as illustrated by the High Court's decision in the case of JGH Marine =vs= The Public Procurement Administrative Review Board and others (Nai HC Misc Appl. No. 137 of 2015) which has already been cited above and where the criteria for determining the successful bidder was in the same terms as that in the present tender document.

The Board finally wishes to observe that the Applicant in this case did not challenge the validity or the criteria set out in the tender document. Having not therefore done so, it was not open to the Board to go outside the contents of the tender documents. This was the holding of the court in the above cited decision where the Honorable Justice Weldon Korir held as follows under bullet 106 of his decision.

"The PP&DA and the Regulations bequeath the onus of amending a Tender Document on a Procuring Entity. When the Review Board

decides that it can ignore the express Provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it is exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the Tender Document. If the Tender document was defective, then the only order that was available to the Board was to direct the Procuring Entity to commence the tender process afresh”.

In view of the above findings the Board therefore finds that the Applicant was not the lowest evaluated bidder in view of the Provisions of Section 66(2) of the Act based on the criteria set out in the tender document and this ground of the Applicant's Request for Review therefore fails.

ISSUE NO. 3

Whether the Applicant is entitled to the reliefs sought based on the Board's determination of the above two issues and on the basis that it did not accept the correction of an error under Section 63 of the Act.

On the third issue framed for determination the Board has already determined the issue of the validity of the tender security and whether the Applicant was the lowest evaluated bidder and has dismissed the same. It is therefore unnecessary for the Board to delve into the third issue on whether the Applicant ought to have been declared non-responsive on the ground that it rejected the correction of errors. The Board however wishes to observe that even if the Board had considered

this ground, it would have been reluctant to declare the Applicant as non-responsive in the absence of a Request for Review by both the Procuring Entity and the successful bidder raising the issue and on the further ground of estoppel since the Procuring Entity did not declare the Applicant's bid as being non-responsive at the preliminary, technical and the financial evaluation stage but instead proceeded to subject it to financial evaluation which was the last stage of evaluation. The argument by both the Procuring Entity and the successful bidder on this ground therefore lacks basis and is disallowed.

Overallly however and on the basis of the Board's findings on the issues framed for determination, the Applicant's Request for Review dated 12th November, 2015 therefore fails.

FINAL ORDERS

Based on the above 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 final orders on this Request for Review.

- a) The Applicant's Request for Review dated 12th November, 2015 is hereby dismissed.
- b) The Procuring Entity is therefore at liberty to proceed with the Procurement process in accordance with the law.
- c) Inview of the Board's findings on issue no. 3 and in order not to discourage parties with prima-facie arguable grounds from lodging a Request for Review before the Board, the Board orders

that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 11th day of December, 2015

A handwritten signature in black ink, appearing to be a stylized 'P', is written over a solid horizontal line. Below this line is a dotted horizontal line.

CHAIRMAN
PPARB

A handwritten signature in black ink, appearing to be 'W. J.', is written over a solid horizontal line. Below this line is a dotted horizontal line.

SECRETARY
PPARB




