

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 48/2015 OF 21ST SEPTEMBER, 2015

BETWEEN

INDRA LIMITED.....Applicant

AND

KENYA CIVIL AVIATION AUTHORITYProcuring Entity

Review against the decision of Kenya Civil Aviation Authority in the Matter of Tender No. KCAA/030/2014-2015 for Supply, Installation and Commissioning of ADS-B and MLAT System

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant - Indra Limited

1. Benson Ngugi - Advocate, Igeria & Ngugi Advocates

Procuring Entity - Kenya Civil Aviation Authority

1. Cyril S. Wayong'o - Advocate, KCAA
2. William Kiptum - Procurement Manager
3. Dennis Kimani - Procurement

BOARD'S DECISION

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

BACKGROUND OF AWARD

The Kenya Civil Aviation Authority (hereinafter "the Procuring Entity") is a State Corporation established under the Kenya Civil Aviation Act, 2013 with a mandate to plan, develop, manage, regulate and operate a safe, economically sustainable and efficient civil aviation system in Kenya. Among the services offered by KCAA is the provision of surveillance radar data within the Kenyan airspace. In order to reduce incidences or accidents the Procuring Entity set out to procure a back up surveillance radar system to act a fall back system in case of radar failure. It considered the Automatic Dependent Surveillance-Broadcast (ADS-B) and Multilateration (MLAT) Systems as the best alternative for

secondary surveillance radar. The systems were also said to be easier and less expensive to deploy than ground radar. KCAA therefore floated an international open tender for Supply, Installation and Commissioning of ADS-B and MLAT system.

Tender invitation and opening

This was an international open tender advertised in the *Daily Nation* and *Standard* newspapers on 9th February 2015, *People Daily* on 6th February 2015 and the *East African* issue of 7th to 13th February 2015. The tender initial closing date was 17th March 2015 but was extended to 9th April 2015. The tender was a two envelope tender process where the bidders were supposed to provide the technical proposal and the financial proposal in separate envelopes. The tender opening of technical proposals was done on 9th April 2015 in the presence of bidders' representatives who chose to attend. Out of the twelve bidders who obtained bidding documents only seven submitted their bids.

TENDER EVALUATION

The Tender Processing Committee carried out the evaluation of the submitted tenders in three stages namely the mandatory tender requirements, technical capability assessment and financial evaluation.

Mandatory Requirements Evaluation

The bidders were required to comply with all the mandatory requirements in order to proceed to the next stage of technical evaluation.

Table 1: Mandatory Requirements Evaluation

No.	Description of Requirements	Bidder						
		1	2	3	4	5	6	7
1	Validity of bid security for 120 days	√	√	√	√	√	√	√
2	<p>Suitability of Tenderer</p> <ul style="list-style-type: none"> • Should be a manufacturer or system integrator with manufacturer's authorization. • Foreign bidders should have a reputable local agent 	X	√	√	√	√	√	√
3	Provided a tender security of Kshs 3,000,000/- or its equivalent in easily convertible foreign currency based on Central Bank of Kenya rates as at opening day in form of a banker's cheque, bank guarantee or Insurance Guarantee from a reputable insurance company recognized by PPOA for local bidders.	√	√	√	√	√	√	√
4	Submitted 1 original of the technical proposal and financial proposal separately and 1 other copy of each marked as copy and placed in one envelope. The documents should be clearly marked as technical or financial. Technical documents should be in one envelope and financial documents should be in another envelope.	√	√	√	√	√	√	√
5	Financial Resources Submit last two years audited accounts	X	√	√	√	√	√	√
	Financial ratios to be evaluated Current Assets to current liabilities: should be more than one (1)	X	√	√	√	√	√	√
	Average turnover should be at least USD 2M	X	√	√	√	√	√	√
6	Reputation Proof of satisfactory service. Recommendation letters from at least	X	√	√	√	√	√	√

	3 contracts within the last 5 years, each with a value of at least USD 2 million that are similar to the proposed plant and installation services. The similarity is based on the size, complexity, methods/technology or other characteristics							
7	Data link shall be 1090 extended squitter	√	√	√	√	√	√	√
8	Certification of incorporation (registration)	√	√	√	√	√	√	√
9	Correctly filled confidential questionnaire (indicate all the directors and respective shares)	√	√	√	√	√	√	√
10	Duty signed sworn Anti-corruption affidavit	X	√	√	√	√	√	√
11	The bidder should provide a proposal for a service and maintenance agreement for the systems proposed commencing at the end of the 3 year warranty period. This service and maintenance agreement should be for a 5 year period and should be costed separately as appropriate. This cost shall not be part of contracts price but shall be used for comparison purposes during tender evaluation to determine life cycle costs for the systems and cost effectiveness of the offer. The cost proposed shall remain fixed for the post warranty period and shall be effected for the eventual winning bidder.	X	√	√	√	√	√	√
	Overall Response (Pass/Fail)	F	P	P	P	P	P	P

Key: P - Pass, F - Fail

√- Met requirement, X - Did not meet requirement

Out of the seven bidders who submitted their bid documents, six bidders including the Applicant, met the mandatory requirements and were evaluated further under the technical evaluation criteria.

Technical Evaluation

In order to increase objectivity in the evaluation, technical scores were awarded on a weighted basis whereby each evaluated item was assigned weights. Bidders were required to obtain a minimum technical score of 90% to proceed to financial evaluation.

a) Technical evaluation results for ADS-B System

All the six bidders attained the minimum technical score of 90% for the ADS-B system.

b) Technical evaluation results for MLAT System

All the six bidders attained the required minimum technical score of 90% for the MLAT system.

c) Summary of Technical Evaluation

All the six (6) bidders who were evaluated under technical evaluation criteria for the ADS-B and MLAT systems attained the required minimum technical score of 90% and were therefore evaluated further under the financial evaluation criteria.

Financial Evaluation

Opening of the financial proposal

The financial proposals of the bidders who attained a minimum technical score of 90% were opened on 22nd May 2015 in the presence of all the successful bidders. The summary of the financial proposals as read out were as follows: -

Table 2: Financial Proposals as read to the bidders

Bidder No.	Bidder's Name	Currency	Amount
2	Selex Es	Euros	3,346,300
		Kshs	77,558,220
3	Thales Air Systems S.A.S	Euros	3,690,149
		Kshs	46,985,220
4	Indra Limited	Euros	3,074,000
5	Nanjing Les Information Technology Company Limited	USD	2,927,995.99
6	Saab Sensis Corporation	USD	4,963,600
7	Symphony	KES	469,568,476

- Bid price for bidder 2 and 3 comprised of two figures, one in foreign currency and the other in local currency.

The bid prices were checked for arithmetic errors, converted into the evaluation currency namely KES and added up to get the total bid price (Kenya shillings) as presented in the table below:

Table 3: Currency Conversion to Kenya Shillings and ranking

Bidder No. (a)	Currency (b)	Corrected/ discounted bid price (c)	Exchange Rates* to KES. (d)	Evaluation currency		Rank
				Bid price conversion to Ksh. $e=c \times d$	Total bid price KES.	
2	Euros	3,346,300	99.7344	333,741,222.72	411,299,442.72	3
	Kshs	77,558,220	N/A	77,558,220		
3	Euros	3,690,149	99.7344	368,034,796.43	415,020,016.43	4
	Kshs	46,985,220	N/A	46,985,220		
4	Euros	3,074,000.07	99.7344	306,583,552.58	306,583,552.58	2
5	USD	2,927,995.99	92.6847	271,380,429.93	271,380,429.93	1
6	USD	4,963,600.00	92.6847	460,049,776.92	460,049,776.92	5
7	KES	469,568,476.00	N/A	469,568,476.00	469,568,476.00	6

* The Exchange rates used were those prevailing during the date of bid opening (9th April 2015) as obtained from Central Bank of Kenya.

Due Diligence

As part of the evaluation process, a due diligence exercise was carried out for the lowest evaluated bidder namely Nanjing LES Information Technology Company Ltd in accordance with the Public Procurement and Disposal (Amendment) Regulation, 2013 regulation 5(4)(c). The purpose of the due diligence was to verify technical, commercial and other aspects contained in the bid submitted by Nanjing LES Information Technology Ltd, which were considered critical in assessing the capacity of the bidder to effectively Supply, Install and Commission the ADS-B and MLAT System if awarded the tender.

The evaluation committee visited the factory of Nanjing Les Information Technology Company Limited and confirmed that the bidder is a manufacturer of ADS-B and MLAT system. The committee also visited South Area Air Traffic Control Bureau of CAAC, SanYa where Nanjing Les Information Technology Company Limited has installed an ADS-B station and MLAT system for South China Sea and found that the system installed complies with KCAA's technical requirements. The company is fully owned by agencies of the Chinese government.

Recommendation

Based on the evaluation results and the due diligence findings, the Evaluation Committee recommended M/S Nanjing LES Information Technology Ltd of No. 1 Guanghua Road, Nanjing, PR China be

awarded the contract for the Supply, Installation and Commissioning of ADS-B and MLAT System at USD 2,927,995.99 (US Dollars two million nine hundred twenty seven thousand nine hundred ninety five cents ninety nine only) equivalent to KES 271,380,429.93 (Kenya Shillings two hundred seventy one million tree hundred eighty thousand four hundred twenty nine cents ninety three only) being the lowest evaluated bidder.

TENDER COMMITTEE'S DECISION

The tender committee in its meeting No.230 held in the on 3rd September, 2015 deliberated, considered and approved the award of contract for the supply, installation and commissioning of ADS-B and MLAT System to M/S Nanjing LES Information Technology Ltd of No. 1 Guanghuan Road, Nanjing, PR China at a total cost of USD 2,927,995.99 (US Dollars two million nine hundred twenty seven thousand nine hundred ninety five cents ninety nine only) equivalent to KES 271,380,429.93 (Kenya Shillings two hundred seventy one million tree hundred eighty thousand four hundred twenty nine cents ninety three only) inclusive of VAT and other applicable taxes (INCOTERMS DDP 2010) being the lowest evaluated bidder.

REQUEST FOR REVIEW

The Request for Review was lodged by M/s Indra Limited (hereinafter "the Applicant") on 21st September, 2015 in the matter of Tender Number KCAA/030/2014-2015 for Supply, Installation and Commissioning of ADS-B and MLAT system for Kenya Civil Aviation Authority (hereinafter "the Procuring Entity"). The Applicant sought for the following orders:

1. *That the Board set aside the decision of the Procuring Entity to award the tender to another tenderer.*
2. *That the Board does substitute the decision of the Procuring Entity awarding the Tender No. KCAA/030/2014-2015 for Supply, Installation and Commissioning of ADS-B and MLAT systems to the winning bidder, and award the said tender to the Applicant.*
3. *That the Board does grant the Applicant costs of the review.*

During the hearing of the Request for Review the Applicant was represented by Mr. Benson Ngugi, Advocate while the Procuring Entity and was represented by Mr. Cyril Wayong'o Simiyu, Advocate.

PRELIMINARY ISSUE

The Board observed at the outset of the hearing of the Request for Review that Counsel for the Procuring Entity, in its memorandum of response to the Request for Review had challenged the jurisdiction of the Board to hear and determine the matter before it. The Procuring Entity had argued that the Request for Review was lodged with the Board after the lapse of the mandatory period of seven days thus denying the Board the jurisdiction to hear and determine the matter. When the Procuring Entity was given the opportunity by the Board to argue the Preliminary Objection, Counsel for the Procuring Entity stated that he was abandoning the preliminary issue and that he did not wish to pursue it any further. The Board, noting that the Applicant had no objection to the abandonment of the preliminary objection by the Procuring Entity, proceeded to allow the parties to submit on the merits of the review.

The Applicant raised four grounds in support of the request for review as namely: -

1. **THAT** the Procuring Entity did not take into consideration that the bid price submitted by the Applicant had a tax element, namely VAT, and ought to have deducted/ignored the said tax element during its price evaluation process. The Applicant submitted that this was in contravention of Clause 2.24.2 of the Request for Proposal, which stated as follows:-

“the Procuring Entity will exclude and not take into account:

(a)...in the case of equipment manufactured in Kenya or equipment of foreign origin already located in Kenya sale and other similar taxes, which will be payable on the goods if a contract is awarded to the tenderer”.

The gross price given by the Applicant (inclusive of VAT) was Kshs 306,583,552.58, and the net price exclusive of VAT was Kshs 264,296,166.02 which amount according to the Applicant was the lowest evaluated and therefore the winning bid when compared to the prices submitted by the other bidders.

2. **THAT** the Procuring Entity failed to appreciate that the mischief, tenor, spirit and intent of Clause 2.24.2 in the Request for Proposal was to create a level playing field for all bidders, be they local or foreign and as a result erred and unfairly penalized the Applicant for being a local company by considering its sales tax (VAT)

inclusive price of Kshs 306,583,552.58 in the price comparison during the financial evaluation.

3. THAT The procuring Entity failed to recognize that the VAT is not a cost, based on the VAT operative mechanism which provides for all qualifying input VAT paid to be offset against output VAT and, therefore, failed to create an equal playing ground for both locally incorporated and foreign companies.
4. THAT the only effective cost element as bid by the Applicant was Kshs 264,296,166.02 which was the lowest bid (the winning bid declared by the Procuring Entity was Kshs 271,380,429.93 as notified to the Applicant on 15th of September 2015). Therefore the Applicant's bid should be declared the winning Bid.

Arising from the grounds in the application, the Board has identified one issue that has arisen and which relates to the complaint that the Procuring Entity failed to take into consideration the tax component of VAT in the Applicant's bid price during the evaluation of the Applicant's bid. The Board has therefore framed the following issue for determination in this review: -

"Whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the evaluation criteria set out in Clause 2.24.2 of the tender document contrary to the Provisions of Sections 66(2) of the Act."

THE APPLICANT'S CASE AS SUBMITTED BY COUNSEL

Mr. Benson Ngugi, counsel for the Applicant submitted on the issue framed for determination that the Procuring Entity failed to deduct the VAT tax element in the Applicant's bid price during the evaluation process and which, according to the Applicant, was in contravention of Clause 2.24.2 of the tender document. The said clause states as follows: -

"the Procuring Entity's evaluation of a tender will exclude and not take into account: (a)... in the case of equipment manufactured in Kenya or equipment of foreign origin already located in Kenya sale and other similar taxes, which will be payable on the goods if a contract is awarded to the tenderer."

The Applicant in its submissions averred that its gross price (inclusive of VAT) was Kshs 306,583,552.58, and the net price (exclusive of VAT) was Kshs 264,296,166.02 which amount, compared to other bids, was the lowest evaluated and therefore the winning bidder.

The Applicant stated that the Procuring Entity failed to appreciate the spirit and intent of Clause 2.24.2 of the tender document which was to create a level playing field for all bidders - local and foreign. It argued that by considering its sales tax (VAT)-inclusive the price of Kshs.306,583,552.58 in the price comparison during the financial evaluation, the Procuring Entity erred and unfairly penalized the Applicant for being a local company.

Stating that VAT is not a cost by virtue of the VAT operative mechanism which provides for all qualifying input VAT paid to be offset against output VAT, the Applicant contended that the Procuring Entity failed to

recognize this fact and hence failed to create an equal playing ground for locally incorporated and foreign companies.

In conclusion the Applicant reiterated that the only effective cost element in its bid was Kshs 264,296,166.02 which was the lowest bid and that it ought to have been declared the winning bidder. The Applicant therefore urged the Board to allow the application and award it the cost of the Review.

THE PROCURING ENTITY'S RESPONSE AS SUBMITTED BY COUNSEL

In response to the Applicant's submission, Mr. Cyril Wayong'o for the Procuring Entity submitted that Clause 2.10.2(i) of the tender document required the bid price to be quoted inclusive of all customs, duties and sales and other taxes already paid or payable. He added that the same was stated in the Form of Tender, the Price Schedule and the Appendix to Instructions to Tenderers under Clause 2.10.

The Procuring Entity submitted that the price quoted in the Form of Tender of the Applicant's bid clearly indicated the price as Euros Three Million and Seventy Four Thousand (Euros 3,074,000.00) which, when converted, amounted to Kenya Shillings Three Hundred and Six Million Five Hundred and Eighty Three Thousand Five Hundred and Fifty Two Cents Fifty Eight (Kshs. 306,583,552.58), inclusive of VAT. It added that the figure used by the Applicant in its tender form, was the only figure that ought to have been considered in determining whether or not the Applicant's bid price was the lowest bid as alleged. To emphasize the

importance of the bid price as quoted in the Form of Tender, the Procuring Entity cited a previous decision of the Board in Application No. 10/2008 between Revital Health Care (EPZ) Limited and Ministry of Health, as follows: -

'...that the (incompleteness) of the Form of Tender was a critical issue and would render a contract formation impracticable. The Form of Tender comprises the offer in contract formation.'

The Procuring Entity stated that the same position was emphasized in all standard tender documents issued by the Public Procurement Oversight Authority. Counsel for the Procuring Entity further added that all bid prices quoted were inclusive of VAT and that the Applicant's assertion that it was the lowest evaluated bidder was misguided as shown in the results financial evaluation below.

1. Nanjing Les I.T. Co. Ltd	Kshs. 271,380,429.93
2. Indra Limited	Kshs. 306,583,552.58
3. Selex ES	Kshs. 411,299,442.72
4. Thales Air Systems SAS	Kshs.415,020,016.43
5. Saab Sensis Corporation	Kshs. 460,049,776.92
6. Symphony	Kshs. 469,568,476.00

The Procuring Entity stated that Tender Number KCAA/030/2014-2015 was an international open tender necessitated by the fact that the ADS-B and MLAT Systems are high-end technologically advanced equipment only manufactured on order and customized to the client's specifications and that the same are neither locally produced nor available as off-the-shelf products. It stated further that the Applicant's assertion that the

systems it offered or manufactured in Kenya or that the equipment were already located in Kenya was misleading. Noting that the Applicant had indicated in its bid that the IndraSistemas S.A, whose premises and factory were at Ctra Loeches, 9 Tottejon de Ardoz 28850 Madrid Spain, were the manufacturers of the Indra ADS-B and WAM/MLAT Systems that the Applicant intended to supply.

~~The Procuring Entity disagreed with the contention of the Applicant~~ which disregarded VAT as a cost and argued that Section 5(1) of the Value Added Tax Act, 2013 defines VAT as a charge imposed on the supply of taxable goods or services made or provided in Kenya and on the importation of taxable goods or services into Kenya. It further argued that taxable and exempt goods and services were contained in the various schedules to the VAT Act and that any request for exemption MUST be granted by the Commissioner-General pursuant to the VAT Act. The Procuring Entity averred that the ADS-B and MLAT Systems were neither VAT exempt nor had the Applicant been granted an exemption to justify exclusion of the cost from its bid price.

The Procuring Entity concluded its response by urging the Board to dismiss the Applicant's Request for Review with costs.

THE APPLICANT'S REPLY

In reply to the submissions made by counsel for the procuring entity the Applicant stated that it bid in its full name Indra Limited and was going to be the contractor as defined under Section 3 of the Act which defines a contractor as the person who enters into a contract with a procuring entity. The Applicant further stated that a local contractor was

one who was registered in Kenya which was the case with the Applicant as its registration certificate which was annexed to the Request for Review showed that Indra Limited was registered in Kenya way back in 1995 and has been operated in Kenya for the last 20 years.

The Applicant further stated in response that suitability of tenderer under the mandatory requirements item (ii) was going to be evaluated based on a tenderer being a manufacturer or system integrator with manufacturer's authorization, adding that Indra Limited did not bid as a local agent or foreign entity but as a system integrator of a manufacturer with a manufacturer's authorization. It argued that the Procuring Entity should have found the bids by the other bidders non-responsive for not having price schedules with specifying taxes as required under clause 2.10.2 of the tender document. The said clause required the price schedule to separate the prices, the taxes and other costs. Agreeing with the submissions by counsel for the Procuring Entity that it was important that this procurement process be urgently concluded and noting that Indra Limited was had scored the highest marks technically than the winning bidder and that its capacity was not therefore in issue, the Applicant contended that this was the right case for the application of Section 98 (c) of the Act to award the tender to the lowest evaluated bidder.

THE BOARD'S FINDINGS

The Board has considered all the submissions made and the documents placed before it and finds that the Procuring Entity floated an Open International tender for Supply, Installation and Commissioning of ADS-B and MLAT system on 9th February 2015 which was opened on 9th

April 2015. The tenders were evaluated in three stages namely the mandatory, technical and the financial stages. Six bidders made it past the technical evaluation stage and proceeded to the financial evaluation stage.

The Board further finds that technical evaluation and the scores therein were not in dispute. The financial evaluation is the matter that was in dispute. The parties in dispute gave different interpretation of the provisions of Clause 2.24.2 of the tender document and how the Provisions were to be factored into the financial evaluation. The clause in contention states as follows:

Clause 2.24.2 "the Procuring Entity's evaluation of a tender will exclude and not take into account:

(a) in the case of equipment manufactured in Kenya or equipment of foreign origin already located in Kenya, sales and other similar taxes, which will be payable on the goods if a contract is awarded to the tenderer;

(b) any allowance for price adjustment during the period of execution of the contract, if provided in the tender."

In determining if the Procuring Entity acted in accordance with the law, the Board is guided by the provisions of section 66 of the Act which states as follows:

(1)

(2) *The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.*

(3)

(4) **The successful tender shall be the tender with the lowest evaluated price.**

The Board observes that Clauses 2.10.2 and 2.10 of the Appendix to instructions to tenderers plus the Price Schedule and the Form of Tender required that the prices quoted be inclusive of all applicable taxes. The Board further finds that the prices the Procuring Entity used to evaluate all the bidders were the once indicated in the bidders' forms of tender and price schedules and which prices were presumed to include all applicable taxes. Apart from the Applicant, no bidder indicated that the prices in their tender were exclusive of applicable taxes, VAT included.

The Board also observes that Clause 2.24.2 of the tender document required the Procuring Entity's evaluation to exclude sales and other similar taxes of equipment manufactured in Kenya or equipment of foreign origin already located in Kenya. The Board also observes that the Applicant's tender document had a Manufacturer's Authorization that indicated that the factory is in *"Ctra. Loeches, 9 Torrejon de Ardoz. 28850, Mdrid. Spain"*. The Applicant did not provide proof that the equipment it offered to supply was *"manufactured in Kenya or equipment of foreign origin was already located in Kenya"* as required in Clause 2.24.2 of the Tender Document.

Nevertheless it is not lost on the Board that since the items to be procured were highly specialised and of technical nature, the items are only manufactured on order and it would not therefore have been

possible for the Applicant to state that it had the items in store before it is awarded the tender. It is clear that the Form of Tender of the Applicant's bid had the figure of Euros 3,074,000 (KShs 306,583,552.58), the same figure the Procuring Entity used in its evaluation of the Applicant's bid. The Board notes that the Procuring Entity did not consider or use the figure of Kshs. 264,296,166.02 which was net of VAT during its evaluation.

The Board observes that for Clause 2.24.2 to be applied the Applicant needed to satisfy the requirements specified namely:- that the system it was offering was manufactured in Kenya or the equipment was already located in Kenya. The Board however observes that Clause 2.24.2 was not clear on when the equipment was to be in store in Kenya. By the Procuring Entity's own submission, Tender Number KCAA/030/2014-2015 was an international open tender necessitated by the fact that the ADS-B and MLAT Systems are high-end technologically advanced equipment only manufactured on order and customized to the client's specifications and that the same are neither locally produced nor available as off-the-shelf products. By the Procuring Entity's own admission, this highly specialised equipment that is only produced on order could not possibly be in store somewhere in Kenya before the tender was awarded and the users specifications provided to the successful bidder. It is the Board's view that Clause 2.24.2 was not capable of being enforced before the tender was awarded or a contract signed since there were no local manufacturers of the equipment sought to be procured and equipment of foreign origin could not be imported into the country until the tender has been awarded and the user specifications issued to the winning bidder.

As regards the issue of whether the Applicant is a local company or not, the Board finds that the Applicant was incorporated in Kenya on 13th July 1995 as Iber Africa Systems Limited, which changed its name to Soluziona (Kenya) Limited on 17th May 2000 and changed again from Soluziona Kenya Limited to Indra Limited on 22nd September, 2009. The Board is satisfied that the Applicant is a local company having been in Kenya for more than twenty years. As to whether the Applicant was to be evaluated as a systems manufacturer or not, the Board observes that the Applicant submitted its bid as a system integrator with manufacturer's authorization. This therefore qualified the Applicant to be evaluated and passed at the mandatory requirements stage.

The Board holds that the Procuring Entity's evaluation of the Applicant's bid ought to have excluded and not taken into account Value Added Tax in the Applicant's bid. The bid of the Applicant inclusive of VAT was Kshs 306,583,552.58 and exclusive of VAT was Kshs 264,296,166.00. The successful bidder's price was Kshs 271,380,429.93. The Board notes that the Applicant's bid was therefore the lowest evaluated bid.

In view of the foregoing the Board finds that the Procuring Entity's evaluation of the Applicant's tender was not in accordance with Section 66 of the Act. This ground of the Applicant's Request for Review therefore succeeds and is allowed.

FINAL ORDERS

In view of all 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 orders on this Request for Review:-

- a) **The Request for Review filed with the Board by the Applicant on 21st September, 2015 in the matter of Tender Number KCAA/030/2014-2015 for Supply, Installation and Commissioning of ADS-B and MLAT system for Kenya Civil Aviation Authority is hereby allowed.**
- b) **The award of the tender subject of this Request for Review made to M/s Nanjing LES Information Technology Ltd of No. 1 Guanghuan Road, Nanjing, PR China by the Procuring Entity be and is hereby annulled.**
- c) **In view of the Board's finding that the Applicant is the lowest evaluated bidder, the Board hereby substitutes the decision of the Procuring Entity with the decision of the Board and awards the tender to Messrs Indra Limited.**
- d) **The Procuring Entity is directed to award and enter into contract for for Supply, Installation and Commissioning of ADS-B and MLAT system with Messrs Indra Limited at the bid price in the Applicant's Form of Tender, less VAT that is Kshs 264,296,166.00 and complete the process within 30 days of this decision.**
- e) **The Board makes no orders as to costs.**

Dated at Nairobi on this 16th day of October, 2015

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**CHAIRMAN
PPARB**

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**SECRETARY
PPARB**