

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 36/2015 OF 13<sup>TH</sup> JULY, 2015**

**BETWEEN**

**MICROHOUSE TECHNOLOGIES LIMITED.....Applicant**

**AND**

**NATIONAL INDUSTRIAL TRAINING  
AUTHORITY.....Procuring Entity**

Review against the decision of the National Industrial Training Authority in the Matter of Tender No. NITA/29/2015-2016 for Supply, Installation, Implementation, Testing, Training and Commissioning of an Enterprise Resource Planning (ERP) System

**BOARD MEMBERS PRESENT**

- |                         |            |
|-------------------------|------------|
| 1. Mr. Paul Gicheru     | - Chairman |
| 2. Mr. Hussein Were     | - Member   |
| 3. Mr. Nelson Orgut     | - Member   |
| 4. Mrs. Gilda Odera     | - Member   |
| 5. Mrs. Rosemary Gituma | - Member   |

**IN ATTENDANCE**

- |                       |               |
|-----------------------|---------------|
| 1. Mr. Stanley Miheso | - Secretariat |
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2. Ms. Maureen Namadi - Secretariat

**PRESENT BY INVITATION**

**Applicant - Microhouse Technologies Limited**

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1. Evans Obonyo - Advocate  
2. Charles Gathii - MD  
3. Francis Mungai - Director  
4. Levy Ovento - IT  
5. Chris Kivati - IT  
6. Roy Clepluya -  
7. Jerry Kenyansa - Court Clerk

**Procuring Entity - National Industrial Training Authority**

1. Carolyne Kibiwott - Senior Legal Officer  
2. Jeremiah Mugambi - ICT Manager  
3. Irine Mogamba - Manager, Legal Affairs  
4. Purity M. Mwirigi - Manager, Supply Chain  
5. Jeremiah Mugambi - Manager, ICT

**Interested Parties**

1. Charles Agwara - Advocate, Coretech  
2. Maryanne Thande - Kenyaweb.Com  
3. Jacqueline Aseka - Kenyaweb.Com  
4. Ruth Katuke - Next Technologies  
5. Roy Clepluya -

## **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

The National Industrial Training Authority (NITA) invited bids from eligible and experienced IT solutions providers to Supply, Carry out Implementation, Customization, Training, Testing, and Commissioning of an Integrated ERP System that will enhance financial management, records management, process workflow , industrial training and NITA core mandate operations for efficient service delivery. The tender which is the subject matter of this Request for Review was advertised as an open tender in the *Daily Nation* newspaper on 17<sup>th</sup> and 21<sup>st</sup> April, 2015 and in the *Business Daily* on 21<sup>st</sup> April, 2015. The pre-bid conference was held on 28<sup>th</sup> April, 2015. Tenders were opened on 5<sup>th</sup> May, 2015 in the presence of the bidders or the bidder's representatives. Eleven bids were returned and opened.

## **TENDER EVALUATION**

### **Tender Processing Committee**

The Director General, National Industrial Training Authority, constituted a Tender Processing Committee on 4th May 2015 to evaluate the submitted tenders vide the appointment letter Ref NITA/ADM/04/05/7. The evaluation was done from 8<sup>th</sup> May to 16<sup>th</sup> May 2015.

This evaluation was allegedly based on the procedures and criteria set out in the tender documents under the appendix to instructions to tenderers clause 2.12.2, 2.24.1 and the Evaluation Criteria appendix as per clause 6.16 in the following stages: -

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- (a) Mandatory Requirements
- (b) Technical Evaluation 100 % - (Technical Weight 0.8 of Total Score)
  - i. Technical Evaluation (100 points)
  - ii. Pitch presentations and system demonstration (10 points)
- (c) Financial Evaluation: 100% for the lowest evaluated - (Weight 0.2 of Total Score)
- (d) Installation Site Visits for due-diligence
- (e) Final Total Score and Recommendation for Award

#### **Mandatory Evaluation Criteria**

Tenders were evaluated to determine conformity to the mandatory requirements of this tender. The following were the Mandatory Criteria Requirements as per the tender document

- (a) Company Registration Certificate
- (b) Kenya Revenue Authority PIN Certificate
- (c) Kenya Revenue Authority Valid Tax Compliance Certificate
- (d) Valid Business Trading License
- (e) Tender Form
- (f) Confidential Business Questionnaire, duly filled and signed
- (g) Audited financial statement reports for the past three years.
- (h) For clarity, the past three years refers to the last three continuous

audited periods of the bidder including or immediately preceding the year referenced in the issue date of this tender.

- (i) Provide evidence of adequacy of working capital for this contract e.g. balance sheet, access to line(s) of credit or availability of financial means, With an Annual Turnover of at least Kshs 50 Million
- (j) Provide a copy of valid manufacturer certification / authorization from the manufacturer or distributor to do business as an authorized vendor for the proposed ERP software system and database system.
- (k) Information regarding any litigation, current or during the last five years, in which the Bidder is involved, the parties concerned and disputed amount, the outcome of the litigation if any.
- (l) Experience in providing services of a similar nature and size to at least five organizations and details of work under way or contracted. Attach the names, addresses and contact details of these reference organizations.
- (m) Duly signed qualifications and experience (CV) of key management and technical personnel proposed for the contract and an undertaking that they shall be available for the contract.
- (n) Work Plan (Schedule of work, delivery of services and equipment).
- (o) The Tender security
- (p) Two Envelopes for Technical and Financial Proposal
- (q) Proven Physical location of the company/Firm (attach evidence e.g. title deed, lease agreements, business permit or utility bills)

## Mandatory Evaluation Results

All Bidders were evaluated to determine conformity to the mandatory requirements. Five (5) Bidders were Not Responsive. The Non Responsive bidders did not meet the mandatory tender requirements as stipulated in the tender documents. Six (6) Bidders provided Mandatory Requirements were thus determined to be responsive and thus qualified to proceed to the next stage of evaluation (Technical Evaluation).

## Technical Evaluation

The bidders were purportedly evaluated based on the criteria specified in the tender document Appendix I Technical Evaluation Criteria. The Technical Evaluation was stated by the Procuring Entity to have focused on capacity to deliver the requirements, experience in similar projects, qualifications, methodology and the compliance of their proposed system as stated in system functional requirements and need specification. The Technical Evaluation Criteria was stipulated in the tender document. All the six bidders' documents were stated to have been subjected to technical evaluation as per the criteria and were awarded the following lumpsum/aggregate points by the evaluators as per the table below.

**Table: Technical Evaluation Score**

Evaluator	Technical Evaluation Score					
	Bidder 1	Bidder 2	Bidder 3	Bidder 6	Bidder 9	Bidder 10
Evaluator 1	65	90	55	95	75	48
Evaluator 2	71	88	50	89	72	47
Evaluator 3	72	90	51	90	67	49

<b>Evaluator 4</b>	69	90	64	96	72	55
<b>Evaluator 5</b>	60	94	53	91	66	42
<b>Evaluator 6</b>	72	96	54	92	66	48
<b>Evaluator 7</b>	66	89	61	86	77	64
<b>Average</b>	<b>67.86</b>	<b>91</b>	<b>55.43</b>	<b>91.29</b>	<b>70.71</b>	<b>50.43</b>
<b>Ranking</b>	<b>4</b>	<b>2</b>	<b>5</b>	<b>1</b>	<b>3</b>	<b>6</b>

The tenders that allegedly met all the requirements at this stage and scored a minimum score of 70 out of 100 marks proceeded to the next stage of evaluation that was Pitch Presentation.

**Technical Non Responsive Bids:**

There (3) Bidders (Bidder No: 1, 3, & 10) were stated to have scored less than seventy (70) out of one hundred (100) points and were considered non-responsive to Technical evaluation and were thus disqualified from further evaluation:

- Bidder 1. Kenya Web.com Ltd (Kenya web and Peak Vision Consortium)
- Bidder 3. Micro House Technologies Ltd
- Bidder 10. Gravity Solutions ltd

**Technical Responsive Bids:**

Three (3) Bidders were stated to have attained a pass mark of seventy (70) points at the technical stage and were thus declared responsive. This included Bidder No: 2, 6, 9 namely:

- Bidder 2. CoreTec Technologies Ltd
- Bidder 6. Attain Enterprise Solutions Ltd

- Bidder 9. Next Technologies Ltd (Next Technologies and TransSys Solutions Consortium)

The qualified bidders at the Technical Evaluation stage were invited to make pitch presentations on their system capabilities to meet NITA requirements. The system demonstration was allegedly based on the system requirements as enumerated in the Technical Specification matrix in the tender document. This accounted for 10 points of the total technical score.

The criteria of the presentation were:

- Bidder Background Information, company profile & Presentation - 3 points
- Comprehensiveness and suitability of Proposed ERP System Solution - 5 points
- Qualification and Experience in offering ERP solution - 2 points

The Three (3) bidders were subjected to Pitch Presentation (Demo) and were awarded a maximum 10 Points as follows.

<b>Pitch Presentation Evaluation Score</b>			
	<b>Bidder 2</b>	<b>Bidder 6</b>	<b>Bidder 9</b>
<b>Evaluator 1</b>	10	8	8.5
<b>Evaluator 2</b>	10	9.5	9.5
<b>Evaluator 3</b>	8.5	9.5	10
<b>Evaluator 4</b>	8	9	9
<b>Evaluator 5</b>	9	9	9
<b>Evaluator 6</b>	8.5	9	10
<b>Evaluator 7</b>	8.5	8	7.5



Average	8.93	8.86	9.07
Ranking	2	3	1

### Combined Technical Evaluation Score

The following bidder's scores from the technical and pitch

Combined Technical Evaluation Score				
	Max Score	Bidder 2	Bidder 6	Bidder 9
Technical Evaluation Score	100	91	91.29	70.71
Pitch Presentation Evaluation Score	10	8.93	8.86	9.07
Total / 110	110	99.93	100.15	79.78
Total / 100%	100%	90.85	91.05	72.53
Ranking		2	1	3

demonstration were combined as shown below.

### Technical Evaluation Recommendation

All the three (3) Responsive bidders attained the required minimum Technical score and were recommended to proceed to the Financial Evaluation Stage.

### FINANCIAL EVALUATION

The Financial bids of the three bidders were opened on 2<sup>nd</sup> June 2015 at 11.00 a.m. at the Board of Directors Room Block B in the presence of the bidders or bidder's representatives who chose to attend the opening and the following prices read to the bidders.

### Currency Conversion of bidder's tender sum

No	Name of Bidder	Submitted Tender Sum
1	Bidder 2	Kshs 16,914,796.41
2	Bidder 6	Kshs 29,495,781.87
3	Bidder 9	USD 1,794,952.66

Bidder no. 9's quote was in USD and it's quote was converted, as per the requirement in tender document clause 2.11.1 which states that: *"Prices quoted in foreign currency will be converted to Kenya Shillings using the selling exchange rate published by the Central Bank of Kenya at the date of opening of the financial proposal."* as tabulated below:

### Currency Conversion

Amount In Dollars	USD Exchange Rate as at 2 <sup>nd</sup> June 2015	Total Amount In Kshs
1,794,952.66	97.65	175,277,127.25

### Prices converted in Kshs.

No	Name of Bidder	Submitted Tender Sum Kshs
1	Bidder 2	16,914,796.41
2	Bidder 6	29,495,781.87
3	Bidder 9	175,277,127.25

### Compliance to Financial Proposal Submission Requirements

Name of Bidder	Compliance to Financial Proposal Submission Requirements	Compliance
Bidder 2	• Financial proposal submission forms provided , dully filled and signed	Complied
Bidder 6	• Financial proposal submission forms provided , dully filled and signed	Complied
Bidder 9	• Financial proposal submission forms provided , dully filled and signed	Complied

## **Financial Proposal Observations**

All the three bidders were observed to have the following:

1. The Bidders complied with Financial Proposal Submission Requirements.
2. The Bidders provided for all requirements as per the tender document.
3. Annual Maintenance (1<sup>st</sup>one year after Commissioning) was provided and included in the total tender sum.

## **Correspondence of Technical Proposal to Financial Proposal**

**Bidder 2:** The version of ERP System proposed on the Technical Proposal was Microsoft Dynamics NAV 2015, while on the Financial Proposal the bidder indicated Microsoft Dynamics NAV 2013, thus a need for clarification.

Bidder 6 and Bidder 9 were clear thus no clarification was required.

On 3<sup>rd</sup> June, 2015 CoreTec Systems and Solutions responded to the letter and clarified that the version in its financial proposal was erroneous and the version proposed was Microsoft Dynamics NAV 2015.

## **Summary of Financial Comparison**

The Evaluation Committee determined whether the Financial Proposals were complete (i.e. whether the consultant had cost all the items of the corresponding technical proposal and corrected any computational errors. Upon this exercise being carried out the financial bids were weighted as follows:-

No	Name of Bidder	Submitted Tender Sum Kshs	Corrected Tender Sum Kshs	Error Adjustment Factor %	Correspondence of Technical Proposal to Financial Proposal	Financial Score % FS=((FM/F)X100)
1	Bidder 2	16,914,796.41	16,914,796.41	NIL	CORRESPONDS	100
2	Bidder 6	29,495,781.87	29,495,781.87	NIL	CORRESPONDS	58
3	Bidder 9	175,277,127.25	175,277,127.25	NIL	CORRESPONDS	10

**KEY: FS** - Financial Score.

**FM** - Lowest Price.

**F** -Price of Proposal under Consideration.

### Summary of Combined Technical and Financial Evaluation

No	Name of Bidder	Tech Score Max 100%	Tech Weighted %	Weighted Tech Score (WTS) (Max weight 80%)	Financial Score Max 100	Financial Weighted %	Financial Weighted (WFS) (Max weigh20%)	Total Score (WTS + WFS)	Rank
1	Bidder 2	90.85	0.8	72.68	100	0.2	20	92.68	1
2	Bidder 6	91.05	0.8	72.84	58	0.2	11.6	84.44	2
3	Bidder 9	72.53	0.8	58.02	10	0.2	2	60.02	3

### Detailed Analysis

From the tables above the following observations were made by the Procuring Entity's tender processing committee.

#### M/S Coretec Systems & Solutions Ltd (Bidder No.2)

- The 1st lowest responsive bidder with the highest combined score of 92.68 %.
- Submitted the lowest bid of Kshs.16, 914,796.41 only
- The Financial Proposal are complete and responded to the Technical Proposal.

- This tender sum had no arithmetic error.
- The tenderer had conformed to all the Mandatory and Technical requirements of the tender.
- Attained a Financial Score of 100.

**M/S Attain Enterprise Solutions Ltd (Bidder No.6)**

- The 2nd lowest responsive bidder with the 2nd highest combined score of 84.44%.
- Submitted a bid of Kshs. 29,495,781.87 only.
- The Financial Proposal are complete and responded to the Technical Proposal.
- This tender sum had no arithmetic error.
- The tenderer had conformed to all the Mandatory and Technical requirements of the tender.
- Attained a Financial Score of 58.

**M/S Next Technologies Ltd (Next Technologies and TransSys Solutions Consortium) (Bidder No.9)**

- The 3rd lowest responsive bidder with the 3rd highest combined score of 60.02.
- Submitted the highest bid of Kshs. 175,277,127.25 only
- The Financial Proposal was complete and responded to the Technical Proposal
- This tender sum had no arithmetic error.
- The tenderer had conformed to all the Mandatory and Technical requirements of the tender.
- Attained a Financial Score of 10.

### **The Tender Processing Committee's observations.**

Based on all the foregoing analysis and allegedly as per the criteria set in the tender document, the Committee observed that all the three tenderers that made it to the financial evaluation stage were considered responsive after meeting both the Mandatory requirements and after passing the Technical Evaluation Stage however, the one that presented the highest combined Technical and Financial score shall be deemed to be the lowest evaluated tenderer.

The awarded amount as per the instructions to tenderers notes clearly stated that annual licensing and maintenance cost for the 1st one year after commissioning would form part of the total tender price.

### **The tender processing committee's recommendations**

The tender processing Committee therefore recommended **M/S CoreTec Systems & solutions Ltd (Bidder No.2) of P.O. Box 10,067- 00100 Nairobi**, having presented the lowest evaluated bid of Kenya Shillings Sixteen Million, Nine Hundred and fourteen Thousand Seven Hundred and Ninety six Shillings and forty one cents (**Kshs.16, 914,796.41**) only for the award of the tender.

### **TENDER COMMITTEE DECISION**

The tender committee at its 46<sup>th</sup> meeting held on 16<sup>th</sup> June, 2015, awarded the tender to **M/S CoreTec Systems & Solutions Ltd (Bidder No. 2)** at their tender price of Kenya Shillings Sixteen Million, Nine Hundred and fourteen Thousand Seven Hundred and Ninety Six Shillings and forty one cents (**Kshs.16,914,796.41**), being the lowest

evaluated bid. The committee further directed that due diligence/site visit be conducted before the contract is executed.

### **THE REQUEST FOR REVIEW**

The Request for Review was lodged by M/s Microhouse Technologies Ltd (hereinafter "the Applicant") on 13<sup>th</sup> July, 2015 in the matter of the tender for the Proposed Supply Installation, Implementation, Testing, Training and Commissioning of Enterprise Resource Planning (ERP) System for N.I.T.A.

The Applicant sought for the following orders:

1. *The Procuring Entity be directed to stop the implementation of the award of Tender No. NITA/29/2014/2015 For the Proposed Supply Installation Implementation, Testing, Training and Commissioning Of Enterprises Resource Planning (ERP) System N.I.T.A by entering into contract, procuring and or in any manner dealing and or seeking the services meant to be supplied through the said tender by CORETECH SYSTEMS AND SOLUTIONS LTD or any other person whatsoever.*
2. *That the awarding of tender No Tender No NITA 29/2014/2015 For Proposed Supply Installation Implementation , Testing , Training and Commissioning Of Enterprises Resource Planning (ERP) System be evaluated and/or be dealt with in the manner that it deems fit and just in the circumstances do review and re-evaluate whole tendering process.*
3. *That the current tender committee of the respondent be disbanded and the members be barred from holding the office.*

4. *That any other orders that may be deemed just , fit and necessary in the circumstances made for the purposes of ends of justice , good governance and fair administration in tendering process by the Respondent herein .*

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5. *The cost for all previous Bids be factored and Microhouse be reimbursed for all development done since 2012 and cost for all bids from 2012 to 2015.*

6. *Costs of this petition be provided for.*

During the hearing of the Request for Review the Applicant was represented by Mr. Evans Obonyo advocate while the Procuring Entity and the successful bidder were represented by M/s Caroline Kibiwott and Mr. Charles Agwara Advocates respectively.

Two other Interested Parties namely M/s Kenyaweb.com and M/s Next Technologies Limited appeared before the Board at the hearing of the Request for Review but they both indicated through their representatives who have been named at page 2 of this decision that they did not wish to make any submissions in the proceedings.

Before delving into the merits of the Request for Review, the Board wishes to observe that Counsel for the Procuring Entity in addition to filling a written memorandum of response to the Request for Review also filed a notice of Preliminary objection dated 3<sup>rd</sup> August 2015 challenging the Applicant's Request for Review on the grounds that it had been filed out of time but he abandoned the Preliminary objection at



the hearing of the Request for Review. The Board therefore proceeded to hear the Request for Review on its merits.

The Board further wishes to observe at this early stage that the Applicant raised a total of 16 grounds in support of its Request for Review. Most of these grounds however gave a factual background of the genesis of the dispute leading upto the making of an award in the tender that was the subject matter of the Applicant's Request for Review.

The Board has considered all the 16 grounds set out by the Applicant and finds that for the purposes of the determination of the Request for Review before it, the said grounds can be consolidated into the following three broad grounds:-

1. **Grounds 2, 14 and 15** which relate to the Applicant's complaint that it was not notified of the outcome of its tender and was not given the reasons why its tender had been declared as unsuccessful.
2. **Grounds 1 and 3** which challenged the evaluation process that was used in the evaluation of the tenders and which led to the Applicant's tender being declared as non-responsive.
3. **Ground 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 16.** These grounds gave a chronological history of how the Procurement process in this tender had been carried out and also challenged the impartiality of the Procuring Entity's tender processing committee members and their competence to properly evaluate the subject tender.

The Board will therefore consider the submissions made by the parties on the basis of the above three broad grounds as a basis for coming up with its decision in this matter.

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### THE APPLICANT'S CASE

#### **1. The consolidated grounds 2, 14 and 15 of the Request for Review.**

Mr. Evans Obonyo advocate who appeared in these proceedings on behalf of the Applicant started off his submissions on this consolidated grounds of review by stating that the Applicant had not been notified upto the date when the Request for Review came up for hearing of the outcome of its tender.

Counsel for the Applicant stated while referring to the bundle of annexures marked as "NITA 1" to the Procuring Entity's response, that this was the first time that the Applicant was seeing the letter of notification dated 3<sup>rd</sup> July, 2015 and which was addressed to the Applicant. He reiterated his submission that this letter was not posted or in anyother way delivered to his client contrary to the Provisions of the Act which requires that both the successful and the unsuccessful bidders be notified of the outcome of their tenders simultaneously.

Turning to the contents of the said letter, Counsel for the Applicant submitted that he had looked at the letter and that the same did not contain any reasons as to why the Applicant's bid was declared as unsuccessful other than the general statement that the Applicant's tender was unsuccessful upon Technical evaluation.

Counsel for the Applicant submitted that the reason contained in the said letter was too general and one could not discern the exact reasons why his client had been declared to have been unsuccessful by merely looking at the said letter.

Counsel for the Applicant additionally submitted based on the Procuring Entity's failure to serve the Applicant with a letter of notification that the entire exercise had been conducted in secrecy and that the award made to M/s Coretech Systems and solutions Limited contravened the Provisions of the Act on notification and the requirement for the giving of reasons under Regulation 66(2) of the Regulations as amended.

## **2. Consolidated grounds 1 and 3 of the Request for Review.**

Counsel for the Applicant submitted under the consolidated grounds 1 and 3 of the Applicants Request for Review that the entire evaluation process of this tender was flawed and was done in contravention of the Provisions of the Public Procurement and Disposal Act 2005 and the Regulations made thereunder. Counsel for the Applicant stated that the issue of evaluation of Requests for Proposals was governed by the Provisions of Section 82 of the Act which set out the steps that were to be taken while evaluating the tenders and which the Procuring Entity had failed to comply with while evaluating the subject tender.

Counsel for the Applicant while referring to the evaluation report marked as annexure "NITA 3" and which was served upon him at part of the Procuring Entity's response stated that the Applicant had learnt from the said report for the first time that it was awarded an aggregate technical score of 50.43. Counsel for the Applicant however stated that upon

looking at the evaluation report one could not tell how the tender processing committee members had arrived at the said aggregate score since the scores assigned to the Applicant by each individual evaluator had not been set out in the said report. The Applicant further submitted that no reasons were given as to why the Applicant had attained the said aggregate technical score of 50.43 marks.

Turning to the evaluation criteria, Counsel for the Applicant submitted that Clause 6.16 of the tender document and more particularly Appendix 1 thereof had clearly provided for the evaluation criteria to be used in the evaluation of this tender. Counsel further stated that Clause 6.16 of the tender document and more particularly Appendix 1 thereof had clearly provided for the evaluation criteria, setting out the various aspects of evaluation that were to be considered and the marks that were to be assigned to each individual requirement in the criteria. While still relying on the evaluation report, Counsel for the Applicant stated that there was no indication of how the Applicant's bid had been evaluated and scored on each of the individual requirements stipulated under the criteria set out in the tender document.

Counsel for the Applicant finally submitted on the basis of the evaluation report marked as "NITA 3" and the letter of appointment of the members of the tender processing committee dated 4<sup>th</sup> May, 2015 and which was annexed to the Procuring Entity's response as "NITA 6" that whereas the Procuring Entity's Director General had appointed Eight (8) members to sit in the tender processing committee, the evaluation report however showed that only Seven (7) members participated in the entire process to the exclusion of one Mr. James Kamau, a fact that he stated rendered the entire process irregular.

### 3. The Consolidated grounds 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 16.

The Applicant argued in support of these consolidated grounds that the Procurement process for this project begun in 2012 with **Tender Number DIT/001/2011-2012** and that the Applicant was one of the two shortlisted companies with the highest technical score and the lowest bid price. The Applicant however stated that the Procuring Entity repeated the same tender in 2013 under **Tender Number NITA/02/2012-2013** and that the Applicant again emerged among the two shortlisted companies and had the highest technical score and the lowest bid price. The Applicant stated that the second tender notwithstanding, the Procuring Entity in 2014 advertised a repeat of the same tender under **Tender No. NITA 16/2013-2014**.

The Applicant however stated that the Procuring Entity cancelled **Tender No. NITA 16/2013-2014** and re-advertised the same tender yet again after one of the bidders protested on April 28<sup>th</sup>, 2014 that the bid document had been doctored by the Procuring Entity's ICT Manager Mr. Jeremiah Mugambi to favour one of the bidders, namely Messrs Coretech Systems & Solutions Ltd.

While still submitting on the issue of the number of tenders floated in respect of the same procurement, the Applicant stated in the Request for Review and the sworn supporting statement that the Procuring Entity again repeated the tender in 2014 under **Tender Number NITA/04/2014-2015** and appointed a new team to come up with a credible bid document and a professional evaluation. The Applicant stated that it was invited to demonstrate all the modules it was offering to the technical team at KCB Karen and emerged as the bidder with the highest technical score in both

presentations and also in compliance with the technical requirements and in addition emerged with the lowest bid price. The Applicant added that its financial proposal was at Ksh 25,225,296.00 while the successful bidder herein offered the sum of Kshs. 45,500,000. The Applicant stated that this notwithstanding, it was not awarded the tender because some two members of the Procuring Entity's Board members attempted to manipulate it by introducing new and extraneous requirements that were not in the tender documents and on that basis it was required to increase its bid price to the sum of Ksh 45 million in breach of the Provisions of section 42 (1) (a) of the Act. The Applicant stated in the sworn supporting statement that it refused to do so since this would amount to a waste of the taxpayers money and because such an escalation of the bid price was not permitted by the tender document.

The Applicant contended that the Procuring Entity, for undisclosed reasons, cancelled the Tender No. NITA/04/2014 - 2015 by a letter dated 4<sup>th</sup> March, 2015 and, once again, re-advertised the subject procurement under Tender No. NITA/29/2014-2015 which was the tender being challenged before the Board. The Applicant however stated that this time round, the Procuring Entity's tender document omitted key core modules that were outlined in the previous tender Tender No. NITA/04/2014-2015. The Applicant contended that it had developed all the modules for NITA from 2012 to 2015 adding that the Procuring Entity decided to exclude the core modules in the Tender Number NITA/29/2014-2015 in order to ensure that the successful bidder won the bid since the successful bidder did not have the modules required in the previous tender. The Applicant

additionally stated that the Procuring Entity did not invite it for demonstrations which were secretly done at a location in Athi River without the Applicant being informed of this fact.

Counsel for the Applicant additionally stated that the Procuring Entity appointed the same ICT Manager who had doctored the cancelled Tender No. NITA 16/2013-2014 to evaluate Tender No. NITA/29/2014-2015 which is the tender the subject matter of this Request for Review. The Applicant additionally stated that the tender processing committee lacked the technical capacity to evaluate the tenders which related to the Provision of specialised services and that the tender processing committee deliberately decided to exclude the Applicant from the process at a very early stage in the day so that it could not reach the financial stage of evaluation and the demonstration of the systems.

Finally the Applicant urged the Board to consider that it had passed the requisite technical evaluation threshold in all the other tenders relating to the same Procurement and had infact been declared the bidder with the highest technical score in the said tenders which had been evaluated pursuant to the several advertisements and that there was therefore no way that it could have failed to attain the pass mark in this tender if the tender had been evaluated fairly and without any bias.

Counsel for the Applicant therefore urged the Board to allow it's Request for Review and award it the costs of the Request for Review.

## THE PROCURING ENTITY'S RESPONSE

M/s Caroline Kibiwott learned Counsel for the Procuring Entity in response to the consolidated grounds 3, 14 and 15 of the Request for Review submitted that contrary to what the Applicant had stated, the Applicant was duly notified of the outcome of it's tender. She produced and relied on the bundle of the letters of notification dated 3<sup>rd</sup> July, 2015 which the Procuring Entity produced as annexure "NITA 1" and pointed out that one of the letters in the bundle was addressed to the Applicant. She further stated that none of the other bidders had complained that they had not been served with letters of notification and urged the Board to find that the Applicant had been similarly served.

On the issue of reasons, Counsel for the Procuring Entity stated that the letter dated 3<sup>rd</sup> July, 2015 addressed to the Applicant contained the reason why it's tender had been declared as being non-responsive namely that the Applicant's tender has been determined **"to be unsuccessful upon technical evaluation"**.

In response to the consolidated grounds 1 and 3 of the Request for Review, Counsel for the Procuring Entity submitted that the tendering process in this case was carried out in a fair, transparent and accountable manner and in compliance with the criteria set out in the tender document and in strict compliance with the provisions of the law. She further submitted that the tender document allowed for competitiveness and that no eligible bidder was locked out of it at any stage. Counsel for the Procuring Entity stated that as per the tender document, bidders had to attain a minimum score of 70 out of 100 marks at the technical evaluation stage in order for them to proceed to the next stage of evaluation which was the "Pitch



**Presentation and System Demonstration”** and that the Applicant did not meet the minimum technical score having scored an aggregate score of 50.43 marks and that therefore the Procuring Entity was not under any obligation to invite the Applicant for any demonstration.

Counsel for the Procuring Entity referred the Board to the evaluation report which it produced and annexed to its written response to the Request for Review and Appendix 1 of the tender document and urged the Board to find that the Procuring Entity’s tender processing committee had fully complied with the evaluation criteria set out in the tender document while evaluating the subject tender. She particularly referred the Board to page 11 of the evaluation report in support of her submission that the Applicant was declared unsuccessful at the technical evaluation stage because it had only attained a technical score of 50.43 marks which was below the minimum score of 70 out of 100 marks and that is why it was disqualified from the process and did not therefore proceed to the next stage of evaluation namely the pitch presentation.

In response to the consolidated grounds 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 16 of the Request for Review, Counsel for the Procuring Entity admitted that the Procurement process for this project began in 2012 but that the current tender namely **Tender No. NITA/29/2014 -2015** was independent and added that the assumption by the Applicant that it would be the successful bidder just because it had obtained the highest aggregate technical scores in the previous tenders was misconceived and had no basis both in law and fact. Counsel for the Procuring Entity further contended that it had the competence and the capacity to determine the modules needed based on demand for its operations and the Applicant

could not come up with modules and impose them on the Procuring Entity adding that at no time did it require the Applicant to develop any modules for it.

Counsel for the Procuring Entity averred that the scope of the tender was clearly stated in the tender document as per the NITA automation needs emphasizing priority process modules as per the current process re-engineering witnessed through the ISO process and that all bidders were required to bid against similar specifications and that there was therefore fairness in the process.

On the issue of **Tender Number NITA/02/2012-13** Counsel for the Procuring Entity stated that the tender was declared non-responsive at the technical evaluation stage thus the financial bids were returned unopened and that it was absurd for the Applicant to allege that it had the highest technical score and the lowest bid price in the said tender. She further stated that the Applicant was insincere in that this assertion contradicted the Applicant's supporting affidavit which stated that the financial bid was not opened due to vested interest.

On **Tender Number Counsel for NITA/04/2014-2015** Counsel for the Procuring Entity averred that the bids submitted were not responsive as per the requirements in the tender documents and denied that the Procuring Entity introduced extraneous and new requirements in the tender document. Counsel for the Procuring Entity further submitted that the Procuring Entity requested the technically qualified bidders, the Applicant included, to align the financial bids to conform to the conditions outlined in section IV (part 9), V (part 5.2) and as per Financial Submission Form requirements.

On the issue of **Tender Number NITA 16/2013-2014** Counsel for the Procuring Entity denied that there was any doctoring of the tender document and stated that the cancellation of the Tender was done to allow for verifications arising from a complaint raised by one of the bidders. She added that the Applicant had not shown or disclosed how the criteria used was designed to exclude it in favour of the successful bidder.

In answer to the allegation that the Procuring Entity's ICT Manager Mr. Jeremiah Mugambi had deliberately prepared the tender document for this particular tender in order to favour the successful bidder, Counsel for the Procuring Entity admitted that this tender was cancelled pursuant to one of bidder's complaints regarding the manner in which the tender document was prepared, but she stated that the allegation made against the Procuring Entity's ICT Manager was false baseless, malicious and defamatory and was calculated to injure the good reputation of the manager.

When asked why the Procuring Entity had not filed an affidavit by Mr. Mugambi to rebut this allegation which had been made by the Applicant under oath, the Procuring Entity stated that an affidavit of rebuttal was not necessary because the Procuring Entity considered the denial in its statement of response as sufficient.

Mr. Mugambi who was afforded an opportunity to comment on the matter by the Board at the hearing confirmed that he had participated in the preparation of the disputed tender document and that there was a complaint raised by one of the bidders alleging that the tender document was skewed. He also confirmed that the said tender was cancelled by the Director General one week after the said complaint.

On the issue of conflict of interest and the competence of the members of the tender processing committee, Counsel for the Procuring Entity denied that there was any bias or conflict of interest on the part of any member of the tender processing committee and asserted that it was the sole prerogative of the Procuring Entity to decide the composition of the members of the tender processing committee and that the Applicant's complaint in this regard therefore lacked basis.

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

#### **THE INTERESTED PARTY/THE SUCCESSFUL BIDDER'S RESPONSE**

Counsel for the Successful bidder fully associated himself with the Procuring Entity's submissions and added that the Applicant's application lacked merit. He stated that the issues raised about the previous tenders were issues of the past and that the time to challenge the various complaints relating to the past cancellations and terminations had already elapsed under the Provisions of Regulation 73 of the Public Procurement and Disposal Regulations 2006. In respect of the argument that the Applicant was entitled to information pertaining to tender evaluation, Counsel for the Successful bidder argued that under Article 35 of the Constitution access to such information was limited to the information to be given to a natural citizen but not to a company such as the Applicant.

Counsel for the successful bidder further submitted that the argument by the Applicant on the issue of the qualification of the members of the tender processing committee was an issue that purely belonged to the

Procuring Entity and that it was not a ground in law to nullify a tender process. He further contended that Section 44 of the Act prohibits disclosure of confidential information that the Applicant was seeking. He further stated that the main complaint by the Applicant was that since it had qualified in the previous tenders then it must similarly qualify and be awarded the subject tender but he argued that this was not a sufficient ground to warrant a cancellation of the present tender process or the award made in favour of the successful bidder.

On the issue of notification, Counsel for the successful bidder stated that the reason for notification was to allow the Applicant to bring its application to the Board on time and that is what was anticipated under the Provisions of Section 67 of the Act and that the Applicant having been able to bring its request for review within time, it had not therefore demonstrated that it had suffered any prejudice.

Counsel for the successful bidder further stated that the successful bidder had been evaluated just like any other tenderer in the tender process and the successful bidder had therefore legitimately won the tender and it ought not to be denied the fruits of that success without any sufficient ground being offered by the Applicant. He finally stated that since the tender had been ongoing since the year 2012 there was need to bring it to a conclusion within the shortest possible period in the public interest. He therefore urged the Board to dismiss the Applicant's Request for Review with costs.

## THE APPLICANT'S REPLY

In a short reply to the submissions made by Counsel for the Procuring Entity and Counsel for the successful bidder, Counsel for the Applicant stated that based on the contents of the evaluation report viewed against the criteria set out in the tender document, it was not clear how much marks the Applicant scored on each item that was to be evaluated and that the Applicant did not know how the final technical score was arrived at and the reasons for it.

He further submitted that although Counsel for the Procuring Entity was alleging that the Applicant had been served with the letter of notification informing it that its tender was unsuccessful, the Procuring Entity did not produce any evidence before the Board to show that the Applicant had been served with the notification and reiterated that the Applicant learnt of the existence of the letter of notification through the Procuring Entity's response to the Request for Review. He therefore prayed that the Applicant's Request for Review be allowed as prayed.

## THE BOARD'S FINDINGS

The Board has considered the submissions made by the parties and has examined all the documents that were submitted to it by all the parties. The Board has identified the following issues for determination in this Request for Review arising from the consolidated grounds of review.

- (i) **Whether the Procuring Entity breached the provisions of Sections 67 (2) and or 83 (2) of the Act by failing to notify the Applicant of the outcome of its tender as alleged in grounds 1, 14 and 15 of the Request for Review.**

- (ii) Whether the evaluation of the Applicant's tender was flawed and was not conducted in accordance with the evaluation criteria set out in the tender document contrary to the Provisions of Sections 66(2) and or 82 of the Act as alleged in grounds 1 and 3 of the Applicant's Request for Review.
- (iii) Whether any member of the Procuring Entity's Board of Directors or member of the tender processing committee breached the Provisions of Section 39(1) of the Act and acted in conflict of interest at any stage of the procurement process and or was or were not competent to carry out the evaluation process in respect of the tender in dispute as alleged in grounds 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 16 of the Applicants Request for Review.

#### ISSUE NO. 1

Whether the Procuring Entity breached the provisions of Sections 67 (2) and or 83 (2) of the Act by failing to notify the Applicant of the outcome of its tender as alleged in grounds 1, 14 and 15 of the Request for Review.

The Board has established the following facts which are relevant to the determination of this and the other issues framed for determination from the documents and the submissions made before it by the parties.

- a) That the tender number NITA/29/2014 - 2015 was advertised on 17<sup>th</sup> and 21<sup>st</sup> April, 2015 in the *Daily Nation* Newspaper and on 21<sup>st</sup> April, 2015 in the *Business Daily* newspaper and eleven tenders were opened on 5<sup>th</sup> May, 2015.

- b) That the tender opening committee produced a Tender Opening Register and Minutes of Tender Opening signed by all members
- c) That the tender was evaluated from 8<sup>th</sup> to 16<sup>th</sup> May, 2015 and was purportedly conducted in accordance with Clause 6.16 of the tender document and in the following stages: -
- 
- i) Preliminary/Mandatory Requirements (Qualifying Criteria)
- ii) Technical Evaluation 100% - (Technical Weight 0.8 of Total Score)
- Technical Evaluation (100 points)
  - Pitch presentations and system demonstration (10 points)
  - Installation Site Visits for due-diligence
- iii) Financial Evaluation: 100% for the lowest evaluated - (Weight 0.2 of Total Score)
- iv) Final Total Score and Recommendation for Award
- d) That five bidders were declared non-responsive at the preliminary evaluation stage.
- e) That six bidders, including the Applicant, fulfilled the Mandatory Requirements and thus qualified to proceed to technical evaluation.
- f) That according to the tender document, bidders were required to score a minimum of 70 out of 100 marks to proceed to the Pitch Presentation stage.
- g) That three bidders allegedly scored above 70 marks at the technical evaluation stage and proceeded to the next stage while two bidders who included the Applicant allegedly scored below 70



marks and were disqualified from proceeding to pitch presentation. The Applicant allegedly scored 50.43 marks.

- h) That the successful bidder was alleged to have passed all the subsequent stages of the evaluation and was declared the lowest evaluated bidder and awarded the tender by the tender committee at its meeting held on 16<sup>th</sup> June, 2016.
- i) That the Procuring Entity wrote letters dated 3<sup>rd</sup> July, 2015 bearing the addresses of the successful and unsuccessful bidders purportedly notifying them of the outcome of the tender process.
- j) That the letter of notification addressed to the Applicant informed the Applicant that its tender had “been determined to be unsuccessful upon technical evaluation”.
- k) That the Applicant filed this request for review on 13<sup>th</sup> July 2015 against the decision of the Procuring Entity declaring it’s tender as non-responsive at the technical evaluation stage.

Before proceeding to determine the first and the other issues framed for determination and owing to the number of tenders that were floated in respect of this Procurement, the Board wishes to note that there was a considerable level of confusion as to whether the tender which was the subject matter of this Request for Review was an open tender or a tender undertaken pursuant to the Request for Proposal method.

This confusion was caused by the advertisement notices dated 17<sup>th</sup> April, 2015 and 21<sup>st</sup> April, 2017 which described the tender as an open tender, the tender document, the evaluation criteria contained therein and the

evaluation report show that the method used was that of a Request for Proposals.

In view of the above confusion, the Board will therefore consider whether a notification of the outcome of this tender was served on the Applicant under both the Provisions of Section 67(2) and or Section 83(2) of the Act which govern the manner of service of a notification in an open tender and in a Request for Proposals respectively.

Both the Provisions of Section 67(2) and 83(2) of the Public Procurement and Disposal Act require that at the same time as the person submitting the successful tender is notified, the Procuring Entity shall notify all other persons submitting tenders that their tenders were not successful.

The Board notes that both the Provisions of Sections 67 (2) and 83(2) of the Act take effect when an award has been made. In the tender the subject matter of this Request for Review, the Board finds that an award of the tender was made to the successful bidder on 16<sup>th</sup> June, 2015. The Board further finds that the Procuring Entity prepared letters dated 3<sup>rd</sup> July 2015 addressed to the Applicant and the other unsuccessful bidders. The letter of notification of award addressed to the successful bidder also bears the same date. The Board was however not provided with any documentary evidence such as a certificate of posting, a delivery book or any other evidence at all to prove that the letter of notification was sent or delivered to the Applicant. In the absence of such evidence of service, the Board is left with no other option but to find that the letter of notification was not sent to the Applicant as required by Provisions of

Sections 67 (2) or 83(2) of the Act. The Board additionally finds that the letter of notification addressed to the Applicant and which was produced by the Procuring Entity in its bundle in response to the Applicant's Request for Review did not contain the specific reasons for the Applicant's disqualification as required by the Provisions of Regulation 66 (2) of the Public Procurement and Disposal Regulations 2006 as amended. Regulation 66(2) of the said Regulations states as follows:-

*Regulation 66(2) "A procuring Entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be prequalified was unsuccessful"*

The Board wishes to observe that it was not enough for the Procuring Entity in this case to merely state that the Applicant was not successful upon technical evaluation as the Procuring Entity sought to do in this case. Such a statement is in the Board view too general and the Procuring Entity ought to have given the particulars of the aspects which rendered the Applicant's bid unsuccessful at the technical evaluation stage to enable it know and consider whether the reasons were valid or not.

As the Board has previously held in its several previous decisions, the purpose of a letter of notification is to enable a bidder know exactly why its tender was unsuccessful in order to enable it decide whether the reasons given are valid in order to decide whether to challenge the

decision of the Procuring Entity through a Request for Review. A mere statement that a bid was not successful at the technical evaluation stage without any mention of the reasons for the failure cannot address the mischief sought to be cured by the Provisions of Regulation 66 of the Regulations which was amended to serve a particular purpose.

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On the issue of notification therefore, the Board finds and holds that the Procuring Entity failed to inform the Applicant of the outcome of its tender at all and further finds that the Procuring Entity also failed to provide the Applicant with the reasons why its tender was unsuccessful and in so failing breached the Provisions Sections 67 (2) and 83(2) of the Public Procurement and Disposal Act and Regulation 66 (2) of the Regulations as amended. Accordingly, the consolidated grounds 1, 14 and 15 of the Applicant's Request for Review as set out under issue No. 1 succeed and are allowed.

## ISSUE NO. 2

**As to whether the evaluation of the Applicant's tender was flawed and was not conducted in accordance with the evaluation criteria set out in the tender document contrary to the provisions of Sections 66(2) and or 82 of the Act as alleged in grounds 1 and 3 of the Applicant's Request for Review.**

The Board has considered the arguments made by the parties in support and in opposition to the second issue and finds that the evaluation criteria which was the basis of the evaluation of the subject tender is found at Clause 6.16 of the Tender Document. The tender document provided for the criteria for technical evaluation in respect of each of the

items of technical evaluation that were to be considered and scored and gave the marks that were to be assigned to each item. The table which appears at Appendix 1 of the tender document and which the Board considers it necessary to reproduce owing to it's bearing on this issue provides as follows:-

## Appendix 1

### Technical Evaluation Criteria

No.	Description	Max Points	Score
1.	<b>Bidder Background Information &amp; Firm Capacity</b>	17	
	Firm Capacity to deliver the Consultancy	2	
	Core Business and Company Profile	2	
	Organizational structure and staffing	2	
	References of Successful ERP Implementation in at least 5 Corporate Public Service Industry sites in last 3 years in Kenya and East Africa.	3	
	Minimum of one quality Certificate (ISO, CMMI Certified) to be furnished by the bidder.	2	
	The Bidder must have a local office in Kenya that has been in operation for more than five (5) years and have a minimum of 20 qualified staff on various IT technologies.	2	
	Demonstrate Financial Ability and Capacity for project - The Bidder having a minimum of 5 signed contracts with a value in excess of 120 Million shs in the last Five (5) years in the area of IT services of Software Solutions.	2	
	Vendor Certification and Authorizations for ERP and Database.	2	

2.	<b>Technical Specifications and Comprehensive Proposed ERP System Solution.</b>	40	
	Understanding of User requirements & Response.	2	
	<b>Solutions completeness:</b>	2	
	<ul style="list-style-type: none"> <li>• Scope and conceptual relevance to requirements as articulated in tenderer's technical narrative of the proposed solution.</li> </ul>		
	Architecture Design and Infrastructure requirements e.g Web based, Database, version of system proposed.	3	
	<p>Compliance to system specifications &amp; Provision of all modules as listed below:-</p> <ol style="list-style-type: none"> <li>1. Financial Management.</li> <li>2. Supply chain management (Procurement Services) and inventory management.</li> <li>3. Human Resources Management.</li> <li>4. Payroll Services with web based Employee Self Service.</li> <li>5. Trade Testing Management.</li> <li>6. Training Levy Administration.</li> <li>7. Employers, Trainers and Examiners Registration Management.</li> <li>8. Student Information Management System: student Registration and fees management integrated with Finance.</li> <li>9. Process Workflow and Alerts.</li> <li>10. Business Intelligence BI Analytics and Reporting.</li> <li>11. General Administration and IT Helpdesk.</li> </ol>	33	
3.	<b>Implementation Methodology, Training Service and Support Strengths.</b>	25	

	Implementation Approach and Methodology.	6	
	Training: user and Technical Training Offerings.	5	
	Work Plan and Implementation Schedule and deliverables.	5	
	Documentation and Labelling	2	
	Maintenance and After Sales Support.	5	
	Bidder to demonstrate compliance with proposed vendor skill certification criteria(s) - Be certified and have certified staff.	2	
4.	<b>Qualification and Experience.</b>	8	
	Project team and Key professional staff qualifications and competence for current assignment: CVs or Certs of at least 5 key staff.	5	
	Implementation Team Strength and Roles - All Consultants Deployed on the Project should have a minimum of 2 Full Implementation Life Cycles Experience on the latest sought release.	3	
5.	<b>References</b>	10	
	References of Successful ERP Implementation in at least 5 Corporate Public Service Industry sites in last 3 years.	3	
	Customer References - 5 Corporate references with Similar or larger than NITA and utilizing the latest versions of the ERP software being sought.	3	
	Successful Implementation of Complete ERP Successful go-live and support.	2	
	Any other relevant details that will enrich the proposed assignment (Value Added Service).	2	

The Board finds that the issue of the evaluation of tenders where the tender proceeds by way of a Request for Proposals is provided for in Section 82 of the Act. Sections 82(1) (2) and (4) of the Act provide as follows:-

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*Section 82(1) "The procuring entity shall examine the proposals received in accordance with the request for proposals".*

*Section 82(2) "For each proposal, the procuring entity shall evaluate the technical proposal to determine if it is responsive and, if it is, the procuring entity shall assign a score to the technical proposal, in accordance with the procedures and criteria set out in the request for proposals".*

*Section 82(4) "If the request for proposals provides for additional methods of evaluation, the procuring entity shall conduct such methods in accordance with the procedures and criteria set out in the request for proposals."*

The Provisions of Regulation 16 (4), (5), (6), (7) and (8) of the Public Procurement and Disposal Regulations 2006 as amended on the other hand provide the manner in which the tender evaluation process is to be carried out. These provisions which the Board finds it necessary to reproduce in this decision state as follows:-



**Regulation 16:**

**(4) The Committee shall:-**

- a) *adhere to the compliance and evaluation criteria set out in the tender documents in undertaking the technical and financial evaluation of the tenders or proposals received by the Procuring Entity;*
  - b) *evaluate the tenders within a period of Fifteen days after the opening of the tenders; and*
  - c) *carry out the tender evaluation with all due diligence.*
5. *Each member of the committee shall evaluate the tenders or proposals received by the Procuring Entity independently from the other members of the committee.*
6. *A member of the committee shall not communicate with a tenderer who has submitted a tender or proposal that is under the consideration of the evaluation committee.*
7. *A tender processing committee shall prepare an evaluation report on the analysis of the tenders received, and the final ratings assigned to each tender and submit the report to the tender committee.*
8. *The report prepared under paragraph (7) shall include;-*
- a) *the results of the preliminary evaluation, with reasons why any tender or proposal was rejected;*
  - b) *the scores awarded by each evaluator for each tender or proposal;*
  - c) *a summary of the relative strengths and weaknesses of each tender or proposal;*
  - d) *the total score for each tender or proposal; and*

*e) a recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score.*

The Board has however perused the tender evaluation report signed by the members of the tender processing committee on 9/6/2015 and finds that the tenders were scored at the technical evaluation stage in a lump sum/aggregate manner as shown below:-

Technical Evaluation Score Table

Evaluator	Bidder No.					
	1	2	3	6	9	10
1	65	90	55	95	75	48
2	71	88	50	89	72	47
3	72	90	51	90	67	49
4	69	90	64	96	72	55
5	60	94	53	91	66	42
6	72	96	54	92	66	48
7	66	89	61	86	77	64
Average	67.86	91	55.43	91.29	70.71	50.43
Ranking	4	2	5	1	3	6

The Board however finds that the scoring criteria set out in Appendix I of the tender document provided for the award of marks for each

every item listed. This criteria for the award of marks was not followed by the evaluation committee and the table in the evaluation report does not show what components of the criteria went into determining the total lump sum/aggregate score.

In addition to the failure to assign marks to each item as set out in the technical evaluation criteria, the evaluation report did not contain the following matters which are required to be contained in the final evaluation report:-

- i) The scores awarded by each evaluator for each tender or proposal.
- ii) A summary of the relative strengths and weaknesses of each tender or proposal.

In the absence of these particulars, the Board finds it difficult to comprehend how the tender processing committee arrived at the aggregate scores set out in the above table and how the tender committee could proceed to endorse the tender processing committee's decision in view of the glaring omissions and defects in the evaluation report.

The requirement to compile an evaluation report and give the details of the matters contained in Regulation 16 (8) of the Regulations is meant to bring certainty, ensure fairness and avoid arbitrariness in the award of marks in the evaluation process and is also meant to check against the possible manipulation of the results of tender

evaluation in favour of any bidder by awarding arbitrary marks which are not based on the evaluation criteria set out in the tender document.

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The Board further finds that the Procuring Entity's tender processing committee did not give the reasons why the Applicant attained the score it did or why its proposal was rejected contrary to the Provisions of Regulation 16(8) (a) of the Regulations.

In view of the above findings, the Board finds that the Procuring Entity breached the Provisions of Section 66(2) and or 82 of the Act which enjoin it to evaluate tenders in accordance with the criteria set out in the tender document and compile a report that complies with the Provisions of Regulation 16 of the Regulations as amended.

The Board has severally held that a tender can only be awarded as per the criteria set out in the tender document. One of such cases is the case of **Societe Generale De Surveillance S. A (SGS) = vs= The Kenya Bureau of Standards (2008 - 2010) PPRB report at page 716** where the Board held that a Procuring Entity can only award a tender based on an evaluation carried out in accordance with the criteria set out in the tender document.

The Board observed as follows in the said decision.

*"The Board notes that this conversion was contrary to the requirements of Section 66(2) of the Act which requires that the evaluation and comparison of the tenders shall be done using the procedures and the criteria set out in the tender documents*

*and no other criteria shall be used. The Board finds that there was no criteria for conversion provided for in the tender document and the assumptions made by the Procuring Entity in the conversion were arbitrary and were not based on any requirement in the tender document".*

Inview of all the foregoing findings therefore, the consolidated grounds 1 and 3 of the Applicant's Request for Review as set out in issue No. 2 succeed and are hereby allowed.

### ISSUE NO. 3

Whether any member of the Procuring Entity's Board of Directors or member of the tender processing committee breached the Provisions of Section 39(1) of the Act and or acted in conflict of interest at any stage of the procurement process and or was or were not competent to carry out the evaluation process in respect of the tender in dispute alleged in grounds 4, 5, 6,7, 8, 9, 10, 11, 12, 13 and 16 of the Applicants Request for Review.

The Applicant raised several other pertinent issues in this Request for Review. It emerged both from the Applicant's application and the sworn supporting statement and during the hearing of the Request for Review that the Applicant had advertised the tender for the Provision of an intergrated information management system to support automation of the operation of the Directorate of Industrial Training five times between the year 2011 to 2015.

The tender was first advertised through an expression of interest dated 25<sup>th</sup> November, 2011. Various bidders purchased and submitted their Requests for Proposal in respect of the said tender which was designated as tender reference number **DIT/001/2011 - 2012** and the tender had a closing date of 13<sup>th</sup> April, 2012.

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It was clear from paragraphs 31, 32, 33 and 34 of the Supporting Statement sworn by Mr. Charles Gathii Nganga on 10<sup>th</sup> July, 2015 that this first tender went through the process of evaluation which was preceded by five presentations of the proposals made by various bidders.

The Procurement process did not however proceed to conclusion and no award was made but instead, the Procuring Entity re-advertised the tender for the Provision of the same services in the Daily Nation Newspaper of 25<sup>th</sup> February, 2013 under the heading **“National Industrial Training Authority “Tender No. 02/2012 - 2013.**

It is clear from the documents placed before the Board that the second tender went through the various stages of evaluation but upon the conclusion of the technical evaluation, the tender processing committee did not open the financial proposals but instead re-advertised the same tender for the third time under the tender reference number **NITA 16/2013 - 2014** and that upon purchasing and perusing the tender document for the re-advertised tender, one of the bidders raised a complaint that the tender document was tailor made to favour one bidder. The Applicant through it's Director stated under oath that the

Procuring Entity hired a new ICT Manager one Mr. Jeremiah Mugambi who developed the contested the tender document and customized it to ensure that the tender document would favour the successful bidder in this Request for Review.

The Applicant submitted during the hearing of the Request for Review that based on the above complaint, the Procuring Entity cancelled the tender after one week through a Newspaper advertisement. The Applicant produced the letter of complaint as document number 9 which was referred to in paragraph 47 of Mr. Gathii's sworn statement.

It was the Applicant's further case that the Procuring Entity again re-tendered for the same services in 2014 under **Tender Number NITA/04/2014 - 2015** and that the Procuring Entity appointed a new team which carried out both the technical and financial evaluation of the tenders. The Applicant submitted that upon the evaluation of the tenders, the Applicant emerged with the highest technical score and the lowest bid price of Kshs. 25,225,296 against it's nearest competitor which quoted a price of Kshs. 45,500,000. The Applicant however stated that two members of the Procuring Entity's Board attempted to manipulate the Applicant's price by asking the Applicant to increase the bid price from the sum of Kshs. 25,225,296 to the sum of Kshs. 45 Million which the Applicant refused to do as the requirement was not only a waste of the taxpayers money but it was also inappropriate and was not part of the tender document.

The Applicant therefore submitted that as a result of the refusal to adjust the price, the Procuring Entity cancelled the tender through a letter dated 4<sup>th</sup> March, 2015 which the Applicant produced as document number 11 in it's Request for Review. The Applicant stated that having emerged as the overall winner in tender No. NITA/04/2014 - 2015, the Procuring Entity ought to have awarded the tender to it but not to review the earlier evaluation by varying the prices already quoted.

The Applicant additionally submitted that upon the Procuring Entity failing to award tender number NITA/04/2014 - 2015 to it even after evaluating the same to conclusion, the Applicant re-advertised the tender in 2015 as Tender Number NITA/29/2014 - 2015 and which is the tender the subject matter of this Request for Review. The tender was evaluated and eventually awarded to the successful bidder on the basis of the facts which the Board has already stated in the background to this decision. The Applicant was however dissatisfied with the said award on the basis of the grounds and the facts set out above and some of which the Board has already determined.

In it's response to the specific allegation on the numerous number tenders and the reason for their cancellation without the making of an award, Counsel for the Procuring Entity conceded in her submissions before the Board that this tender was indeed repeated for a total five (5) times. Counsel for the Procuring Entity who was supported by Counsel for the successful bidder however submitted that the Board could not entertain any alleged violations relating to the first four tenders since the allegations were out of time under the Provisions of Regulation 73 of the



Public Procurement and Disposal Regulations 2006 as amended and that the Board ought to therefore have confined itself to the complaints relating to the tender under contention, namely **Tender number NITA/29/2014-2015**.

On the reasons for the “cancellations” of the previous tenders, Counsel for the Procuring Entity generally submitted that this was because the said tenders were found to be non-responsive.

On the issue of tender number **NITA/16/2013 - 2014**, Counsel for the Procuring Entity conceded that the tender was cancelled pursuant to a complaint by one of the bidders against the conduct of one Mr. Jeremiah Mugambi the Procuring Entity’s ICT Manager. Mr. Mugambi who appeared before the Board during the hearing of the Request for Review confirmed that he indeed participated in the preparation of the tender document for that particular tender but he stated that he found it unnecessary to swear an affidavit to rebut the complaint that the tender document was tailor made to favour one of the bidders because the response filed by the Procuring Entity was sufficient. He however acknowledged that **Tender No. NITA/16/2013 - 2014** was cancelled pursuant to the said complaint.

The Board has considered the submissions made by all the parties regarding this issue and wishes to clarify that the tender that is under challenge before this Board is tender number **NITA/29/2014 - 2015** as demonstrated by the prayers set out in the Applicant’s Request for Review. The Board however wishes to add that the Procuring Entity’s

conduct in so far as the circumstances under which the previous tenders were cancelled is a relevant consideration and what the Applicant sought to demonstrate through it's application, the sworn supporting statement and in it's submissions before the Board was that the Procuring Entity was abusing and trying to unfairly manipulate the tender process with the aim of coming up with a pre-determined winner.

The Board has perused the various documents for the various tenders and finds no reason whatsoever why one procurement had to be repeated five times over a period spanning four years.

The Board has noted from the documents produced by the Procuring Entity that the Procuring Entity did not formally terminate any of the tenders pursuant to the Provisions of Section 36 of the Act or declare the tenders as non-responsive and serve notification on the bidders informing them of this alleged fact pursuant to the Provisions of 65 of the Public Procurement and Disposal Act 2005.

The Board additionally finds that what the Procuring Entity was engaged in clearly amounted to an abuse of the procurement process which was done at great public expense and at great expense to the bidders. The Procuring Entity and bidders were made to expend enormous resources in preparing one tender document after another. This conduct on the part of the Procuring Entity fundamentally defeats the objectives of Procurement as set out in Article 227 of the Constitution and Section 2 of The Public Procurement and Disposal Act 2005.

The Board wishes to state that procurement is a serious process and that once a Procurement process has commenced, the Procuring Entity is bound by law to evaluate the tenders submitted to it to their logical conclusion unless the process is terminated or all the bids are declared as non-responsive and notifications given in accordance with the Provisions of Section 65 of the Act. The law does not therefore envisage a situation where a tender is advertised and upon the submission of tenders, a Procuring Entity unilaterally decides to “cancel” and restart the process endlessly merely because the bidder who won or is likely to emerge the winner is not the bidder that the Procuring Entity desires to award the tender to. The Provisions of the Act and the Regulations do not permit for an endless tender process and where this happens such as it did in the present case, the process cannot be said to be fair, transparent or economical. Such a process does not also inspire public confidence in the Procurement process.

Turning to the Procuring Entity’s conduct, the Applicant made the following in specific allegation at paragraph 16 of the sworn supporting statement in respect of tender No. NITA/04/2014 - 2015.

*“16 that I can testify that at least two Board members appeared to be in charge of the evaluation process in all bids and demanded favour in order for microhouse to be awarded if we were to refund Kshs. 20 Million if we increase the Bid price to Kshs. 45 Million”.*

The Applicant further stated in paragraphs 45, 46 and 47 of the sworn Supporting statement and in the submissions made before the Board

that the reason why Tender No. NITA/16/2013 – 2014 was cancelled was because the Procuring Entity's ICT Manager Mr. Jeremiah Mugambi had prepared a tender document that was skewed in favour of one bidder.

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The Board has looked at the Procuring Entity's response dated 20<sup>th</sup> July, 2015 and which was filed with the Board on 21<sup>st</sup> July, 2015 and finds that none of the Procuring Entity's Board members or Mr. Jeremiah Mugambi swore any affidavit to rebut these very serious accusations. Mr. Mugambi himself in fact confirmed before the Board that he prepared the tender document in contention and the Procuring Entity also confirmed that the tender was cancelled a week after the complaint was made. The Board finds that the complaint made about the skewed tender document was well founded since the Procuring Entity could not have just cancelled the impugned tender without any reason.

The nearest the Procuring Entity came to answering the above accusations was in paragraph 12 of the Procuring Entity's Memorandum of Response where the Procuring Entity stated as follows:-

*"12 The Respondent further avers that the allegations by the Applicant against the Respondent's ICT Manager are false, baseless, malicious, defamatory and calculated to injure the good reputation of the Manager".*

It is however noteworthy that the said response did not even name the person who had signed it and that the Procuring Entity confirmed that this denial was not contained in any affidavit sworn by Mr. Mugambi.

Turning to the relevance of the above allegations to the evaluation of tender No. NITA/29/2014 - 2015, the Board has looked at the letter of appointment of the tender processing committee for tender No. NITA/29/2014 - 2015 dated 4<sup>th</sup> May, 2015 which was signed by the Procuring Entity's Director General together with the evaluation report signed by the members of the tender processing committee and finds that Mr. Jeremiah Mugambi was appointed on 4<sup>th</sup> May, 2015 as the Chairman of the tender processing committee and in fact chaired all the meetings where the subject tenders were evaluated.

The Board has considered Mr. Mugambi's position and finds that while evaluating the current tender, Mr. Mugambi sat in the tender processing committee in a position a kin to that of a decision maker as any decision made by him in his pivotal position as the chairman of the tender processing committee would inevitably affect the rights of bidders and his conduct as set out above ought to be measured using the same yardstick as would be applicable to any other decision maker. This test was stated in the case of **Republic vs Bow Street Metropolitan Stipendiary Magistrate & Others Ex parte Pinochet Ugarte [1999] All Er (the Pinochet case)** as follows:-

*"We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this, do the circumstances give rise to a reasonable apprehension in view of a reasonable fair-minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially".*

The Board finds from the facts of this case that Mr. Mugambi's previous conduct would give rise to a reasonable apprehension in the view of the Applicant, other bidders and a reasonable fair-minded person that he did not apply his mind and will not apply his mind impartially to an evaluation or re-evaluation process if the Board is minded to order one.

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The Board therefore finds on the basis of the accusations made against the Procuring Entity's said ICT Manager that his participation in this tender process amounted to a conflict of interest and he could not be said to have been an independent evaluator in this tender having shown his inclination towards one of the bidders, a factor that led to the cancellation of tender number NITA/16/2013 - 2014.

On the issue of the composition and the competence of the tender processing committee, the Board finds that whereas the Director General appointed eight (8) members to the tender processing committee, only Seven (7) members took part in the process and no sound explanation was given as to why one Mr. James Kamau never took part in the process at all.

On the issue of the competence of the members of the tender processing committee, the Board finds that the Applicant specifically raised this in ground 16 of the Request for Review. The Board finds that the Procuring Entity ought to have produced evidence to show that the people who evaluated this tender were indeed possessed of the necessary competence since this was a fact that was specially within the Procuring Entity's knowledge. It was therefore not enough for the

Procuring Entity to merely state that it is within its mandate to decide who should evaluate tenders. The position taken by the Applicant on the issue of competence is further fortified by the Board's findings on the manner that the evaluation process was undertaken as set out in its findings on issue number 2 above.

The Board additionally wishes to state that the tender in question involved the Provision of specialized services, namely the supply, installation, implementation, testing, training and the commissioning of enterprises Resources planning (ERP) system which is a highly specialized field.

If the Procuring Entity therefore sought to achieve any meaningful evaluation of such a tender, it ought to have incorporated the services of persons who were technically qualified to evaluate the tender and who had no bias towards any bidder.

Finally, the Board noted that the Procuring Entity in its response annexed and served on the Applicant and the successful bidder with the entire evaluation report signed on 9/6/2015 containing the evaluation results of all the bidders who took part in this tender.

The Board wishes to observe that Section 44 (1) forbids a procuring entity, its agents or employees or a member of a board or a committee of a procuring entity from disclosing confidential information relating to a procurement save for disclosure to an applicant seeking a review which shall constitute only the summary of the evaluation and comparison of the

tenders, proposals or quotations, including the evaluation criteria used under section 45 (2) (e) of the Act.

The disclosure of the evaluation report by the procuring entity therefore goes against the provisions of sections 44 and 45 of the Act.

The above observation however notwithstanding, the consolidated grounds 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 16 of the Applicant's Request for Review as set out in issue number 3 therefore also succeed and are 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:-

1. That the Applicant's Request for Review dated 10<sup>th</sup> July, 2015 and which was filed with the Board on 13<sup>th</sup> July, 2015 is hereby allowed on the following terms:-
  - (a) The award of the tender no. NITA/29/2014 - 2015 for the Supply, installation, implementation, testing, training and commissioning of an enterprise resource planning (ERP) system made to M/s Coretec Systems and solutions Ltd by the Procuring Entity vide its letter dated 3<sup>rd</sup> July, 2015 together with any action



taken pursuant to the said award are hereby set aside and annulled

- b) The Procuring Entity is directed to re-evaluate all the proposals submitted to it that made it to the technical evaluation stage and conclude the entire process including the making of an award of the subject tender within Fifteen (15) days from today's date.
- c) The Procuring Entity is hereby directed to reconstitute the tender processing committee which evaluated tender No. NITA/04/2014 – 2015 which shall carry out the re-evaluation of the tenders starting from the technical evaluation stage in accordance with the criteria set out in tender document and taking into account the findings of the Board on the issues of the application of the evaluation criteria without any interference whatsoever and without bias towards any bidder. For the avoidance of doubt no member of tender processing committee appointed vide the letter dated 4<sup>th</sup> May shall sit in the fresh re-evaluation team.
- d) The Procuring Entity is hereby directed to extend the tender validity period and take steps to extend the bid bonds provided by the bidders in order to enable it complete the re-evaluation process within the period set out in order (b) above.

2 In view of the Board's finding on the prolonged nature of this procurement and on the issue of conflict of interest, the Board directs the Director General of the Public Procurement Oversight

Authority to carry out an investigation to establish whether the Procuring Entity acted in breach of any of the Provisions of the Act and Regulation with a view of taking any such remedial or further action as he may deem fit and appropriate in the circumstances of this case.

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- 3 The Procuring Entity shall pay the Applicant the costs of this application which are assessed at sum of Kshs. 150,000 each within Fifteen (15) days from the date hereof.
- e) The Procuring Entity shall furnish this Board through its Secretary with the evidence of compliance with the above orders at the expiry of the period of Fifteen (15) days from the date hereof.

Dated at Nairobi on this 12<sup>th</sup> day of August, 2015

  
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**CHAIRMAN  
PPARB**

  
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**SECRETARY  
PPARB**