

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 21 OF 2017 DATED 28<sup>TH</sup>FEBRUARY, 2017**

**COMNETTE TECHNOLOGIES LIMITED .....APPLICANT**

**AND**

**KENYA LOCAL ORGANISING COMMITTEE  
IAAF WORLD U 18 CHAMPIONSHIPS 2017 .....PROCURING ENTITY**

Review against the decision of the Kenya Local Organising Committee  
IAAF World U 18 Championships 2017, in the matter of Tender No.  
WU18-2017(013/2016-17 in respect of a Tender for Supply, Delivery &  
Installation of Synthetic Athletics Track Surface.

**BOARD MEMBERS PRESENT**

- |                    |            |
|--------------------|------------|
| 1. Paul Gicheru    | - Chairman |
| 2. Rosemary Gituma | - Member   |
| 3. Nelson Orgut    | - Member   |
| 4. Peter Ondieki   | - Member   |
| 5. Gilda Odera     | - Member   |

## **IN ATTENDANCE**

1. Philemon Kiprop - Secretariat
2. Maryanne Karanja - Secretariat

## **PRESENT BY INVITATION**

### **Applicant – Comnette Technologies Limited**

3. Elijah N.Ireri - Advocate ,Ireri & Co.Advocate
4. Irene Rubia - Representative
5. Boniface Waweru - Pupil

### **Procuring Entity – Kenya Local Organising Committee**

#### **IAAF World U 18 Championships 2017**

6. John W.Njogu - State Counsel ,MOSCA
7. Mwangi Muthee - CEO
8. Duncan V.Ashubwe - SSCMO ,MOSCA

### **Interested Parties**

9. Wanjohi Githae - Reporter,Nation Media
- 10.Caeser Wanjao - Advocate,Wanjao Wanjau Advocate.

## **BACKGROUND**

### **Supply, Delivery and Installation of Synthetic Athletics Track Surface at Moi International Sports Centre- Kasarani**

Bidders were invited through newspaper advertisement on 6<sup>th</sup> December, 2016 by The CEO local Organising Committee for Supply, Delivery and

Installation of Synthetic Athletics Track Surface at Moi International Sports Centre- Kasarani in preparation for the upcoming

## **SCOPE OF WORKS**

### **MAIN STADIUM**

- a) Supply, delivery and installation of synthetic surface IAAF blue in colour approved class 1 sandwich system 13.5mm thickness according to supplier's specifications and IAAF requirements.
- b) 150m<sup>2</sup> stress areas 20mm thickness line marking including certificates.
- c) Institute testing for IAAF class 1 certificates (Linsm)
- d) Supply, delivery and installation of artificial turf (indoor) as shown on the diagram attached
- e) Supply, delivery and installation of artificial turf (outdoor) as shown on the diagram attached
- f) Provide for pre- shipping factory inspection for four (4) technical persons

### **WARM- UP STADIUM**

- a) Supply, delivery and installation of synthetic surface IAAF red approved class 2 sandwich system 13.5mm thickness according to supplier's specifications and IAAF requirements
- b) 150m<sup>2</sup> stress areas 20mm thickness line marking including certificates.
- c) Institute testing for IAAF class 2 certificates

- d) Provide for pre-shipping factory inspection for four (4) technical personnel

**KENYATTA UNIVERSITY TRAINING TRACK**

- a) Supply, delivery and installation of synthetic surface IAAF red approved class 2 sandwich system 13.5mm thickness according to supplier’s specifications and IAAF requirements
- b) 150m<sup>2</sup> stress areas 20mm thickness line marking including certificates.
- c) Institute testing for IAAF class 2 certificates
- d) Provide for pre-shipping factory inspection for four (4) technical personnel

**TENDER OPENING**

Tenders were received and opened on 20<sup>th</sup> December, 2016 at 11.00am at the Director General -Sports Kenya Boardroom,1<sup>st</sup> floor –pursuant to Section 78 of the Public Procurement and Asset Disposal Act 2015.

Three (3No.) bidders returned their tender documents as indicated in the tabulations of their Bid Sums as shown in table below.

**Tender Opening Results**

<b>Supply, Delivery And Installation Of Synthetic Athletics Track Surface At Moi International Sports Centre- Kasarani</b>			
<b>Name of Firm</b>	<b>Bid Price (Kshs)</b>	<b>Price</b>	<b>Bid Bond (Kshs)</b>

<b>Supply, Delivery And Installation Of Synthetic Athletics Track Surface At Moi International Sports Centre- Kasarani</b>		
<b>Name of Firm</b>	<b>Bid Price (Kshs)</b>	<b>Bid Bond (Kshs)</b>
Comnette Technologies Ltd.	290,655,400/-	Monarch Insurance 6,000,000/-
Multi Construction Ltd.	346,459,190/-	Intra Arfica Assurance Co. 7,000,000/-
Wilkori building & civil engineering contractor	274,425,167/-	Amaco Assurance Company 6,000,000/-
<b>Engineers Estimate</b>	<b>319,840,431/-</b>	

### **EVALUATION OF BIDS**

The evaluation team was appointed by the Chief Executive Officer, WU18-2017 Championships Nairobi letter reference number IAAFWU18C/2017/TC/13(3) dated 19<sup>th</sup> December, 2016 pursuant to section 46 of the Public Procurement and Asset Disposal Act 2015.

The evaluation committee comprised of eleven members chaired by

F.M Kingori, Principal Superintending QS. The evaluation committee undertook the evaluation exercise between the 20<sup>th</sup> December 2016 to 23<sup>rd</sup> December 2016.

### MANDATORY REQUIREMENT AND TECHNICAL EVALUTION

S/ NO	Criteria	Description / Requirement	Max.Score
1.	Mandatory requirements	Company profile, indicating Company Registration certificate, Tax compliance certificate or other, Tax compliance certificate or other, Bid bond 2% of the total bid.	Pass  Fail
2.	Management Structure	Management structure of your company by providing organizational chart and CVs of key management staff.	15
3.		The company must been registered for over 5 years and have 5 years' experience in supply services.	10
4.	Audited Accounts	Audited accounts for the last 3 years (2015,2014,2013)	15

5.		Proof of at least minimum of five IAAF tested and certified tracks that the manufacturer has installed.	15
6.		Proof of General Liability, Quality Assurance and Professional Indemnity.	15
7.		Litigation History	5
8.		Annual Turnover of Kshs. 300M	10
9.		The products being supplied must be IAAF Certified.	15

**Results of Mandatory requirements** ✓

Bidder No.	Bidder.	1	2	3	4	5	6	7	8	9	<u>Remark</u> <u>s</u>
<u>1</u>	Comnete Technologies Ltd.	✓	✓	✓	✓	✓	✓	✓	✓	✓	<u>R</u>
<u>2</u>	MMulti Construction Ltd.	✓	✓	✓	✓	✓	✓	✓	✓	✓	<u>R</u>
<u>3</u>	Wilkori building & civil engineering contractor	✓	✓	✓	✓	✓	✓	✓	✓	✓	<u>R</u>

✓ - implies conditions fulfilled;

**R** – Implies Responsive, **X**- Implies conditions not fulfilled.

**NR** – Implies Not Responsive a to j – Denotes mandatory requirements on pg 4 of this report

From table above, all bidders were responsive and therefore qualified for further evaluation.

**Technical Evaluation**

In accordance to the instruction to tenderers, the responsive Bidders were subjected to further technical evaluation as was set out in the evaluation criteria on page IT/32 of the tender instructions.



The analysis with the scores awarded is as shown in table below. The pass mark is 70%.

**Technical Evaluation scores by the different evaluators**

No	Name of Firm	Evaluator							Total	Mean
		1	2	3	4	5	6	7		
1	M/S Comnete Technologies Ltd.	85	95	88			95	87	450	90
2	M/S Multi Construction Ltd.	54	52	50			53	52	261	52
3	M/S Wilkori building & civil engineering contractor	71	59	76			76	73	355	71

From table above, the following was observed;

**M/S Multi Construction Ltd.** scored less than the pass mark of 70% as stipulated in the tender instructions. It was therefore considered non-responsive and hence did not qualify for further evaluation.

**M/S Comnete Technologies Ltd** and **M/S Wilkori building & civil engineering contractor** more than the pass mark of 70% as stipulated in the tender instructions and were therefore considered responsive and hence qualified for further evaluation.

## FINANCIAL EVALUATION.

The financial evaluation was carried out in three sections:

- a) Working mean and determination of High bids and:
- b) Material Deviations, Market Prices and Consistency of Rates
  - i) Working Mean and Determination of high bids

### a. Working mean

The average of all two (2) responsive bidders that passed technical stage were calculated as follows

### Determination of high Bids

Company	Bid No	Bid Amount	Deviation %
Comnete Technologies Ltd	1	290,655,400/-	9.124872
Wilkori building & civil engineering contractor	3	274,425,167/-	14.19935

Any bid which is 10% lower or higher than the average shall be eliminated from calculating the working Mean. From the above table, Bid No 3 is eliminated from calculating the working Mean, therefore financially non-responsive.

### b. Working mean calculation

Only one (1) responsive bidder were used to calculate the working mean as follows ; M/S Comnete Technologies Ltd at bid amount of 290,655,400/-

## **OBSERVATION**

- The official estimated cost for these works is **Three hundred and nineteen Million, Eight Hundred and forty Thousand, and four hundred and thirty one.(Kshs. 319,840,431) only.**
- The lowest most responsive bid submitted by **M/S Comnete Technologies Limited** is **nine (9%) below the official estimates.**

## **RECOMMENDATION**

In view of the foregoing analysis, the bid by **M/S Comnete Technologies Limited** of **P.O. Box 1362- 00600 Nairobi** was determined to be substantially responsive to the terms and conditions of the bid is hereby recommended to be invited for the award for the **Supply and delivery and installation of synthetic athletics track surface.**

## **PROFESSIONAL OPINION**

The Head Supplies Chain in his professional opinion considered the evaluation report recommended to the Accounting Officer that the Procurement process be terminated pursuant to Clause 63(1) (d) since the price is inordinately higher than the market price.

## REVIEW

The Applicant M/s Comnette Technologies Limited filed this Request for Review on 28<sup>th</sup> February, 2017 against the decision of the Kenya Local Organising Committee IAAF World U 18 Championships 2017 challenging the award of Tender No WU18-2017(013/2016-17) for the Supply, Delivery & Installation of Synthetic Athletics Track Surface.

The Applicant in this Request for Review was represented by Mr. Elijah Ileri, Advocate while the Procuring Entity was represented by Mr. John Njogu, a State Counsel .

**The Applicant sought for the following orders:**

- (a) The procuring entity's decision purporting to terminate the Tender, which is set out in the letter dated 20<sup>th</sup> January 2017, is hereby annulled;*
- (b) The procuring entity is hereby ordered to enter into and execute the contract with the Applicant in accordance with the relevant provisions of the Act, including Sections 80-86 of the Act;*
- (c) The procuring entity is hereby ordered to pay the Applicant the costs of and incidental to this Request for Review; and*
- (d) Such other, additional, further, incidental and/or alternative orders as the Honourable Board may deem just and expedient.*

## THE PARTIES ARGUMENTS

During the hearing of the Request for Review, Counsel for the Applicant invited the Board to look at the grounds of review set out in the Request for Review. He stated that the Applicant was one of the companies which participated in the open tender which was advertised in December, 2016 for the supply and delivery and installation of the synthetic athletic track for Moi International Sports Centre in Kasarani. He stated that the applicant's bid was received and evaluated in accordance with the provisions of the Public Procurement and Asset Disposal Act 2015.

Counsel for the Applicant further averred that the procuring entity in its response at page 2 admitted that the Applicant's bid was among the bids received and that it was the most responsive bid in the above category. It was his further contention that there was no communication as to the outcome of the tender process to the Applicant. He stated that this was done in contravention of the provisions of the law which provided for the time limit within which the award was to be made.

He further stated that instead of making an award, the procuring entity terminated the tender process and challenged the basis for the termination. He stated that the reason advanced by the procuring entity for termination was not sufficient under the provisions of Section 63(1)(d) of the Public Procurement and Asset Disposal Act and the information advanced by the procuring entity pertaining termination was not sufficient.

He averred that the Applicant had suffered substantial loss because of participating in the tender process. It was his contention that the procuring entity had not met the threshold set out in Section 2 and Article 227 of the Constitution which set out the objectives of fair competition, fair treatment of bidders, fairness in the procedures and integrity and public confidence in Public Procurement. It was his further contention that the procuring entity had not set out what was the best market prices for the tartan trucks for purpose of justification under the provisions of Section 63 of the Act. It was his view that due diligence was not done and the process was skewed to bypass the procurement method. It was his contention that the procuring entity had misled the Board that all the bidders had quoted from M/s Mondo track WS which was one of the suppliers whose standards were applicable but that his client had provided samples from Beijing Green World Sports which was in the list of certified producers of Track surfacing products.

In response to the procuring entity's contention that the Applicant's Request for Review had been filed out of time, Counsel for the Applicant stated that the procuring entity had deliberately failed to communicate its decision to terminate on time or through the most efficient method. He stated that the Applicant had filed its Request for Review within the 14 days from the date of notification of the termination as required by Section 167(1) of the Act and that the Request for Review was therefore within time. It was therefore his view that the Board had jurisdiction to hear and determine the application Request for Review.

In answer to the procuring entity's contention that the Applicant had used confidential documents in lodging its Request for Review, Counsel for the applicant stated that the documents alleged to be confidential by the procuring entity were not confidential as they did not fall within the category of confidential documents set out in Section 67 of the Act as they did not relate to the tender evaluation nor were they minutes of the evaluation committee or the tender document. He further stated that they were disclosed only for the purposes of the review as provided for under Section 67(3)(c) of the Act and were not disclosed to any other party.

In response to the submissions made by Counsel for the Applicant, Counsel for procuring entity further submitted that the Request for Review was filed out of time and ought to be struck out. He stated that the Applicant acted in breach of the provisions of Section 167(1) of the Act which is clear that a Request for Review must be filed within 14 days after issuance of the letter of termination. He further submitted that the procuring entity notified the bidders of the termination of the procurement proceedings vide a letter dated 20<sup>th</sup> January, 2017 and which was sent vide registered post on 1<sup>st</sup> February, 2017. He stated that the time for the purposes of filing a Request for Review started running from 2<sup>nd</sup> February, 2017 that the period of 14 days therefore lapsed on or about 16<sup>th</sup> February, 2017. It was his view that the Applicant's Request for Review was filed out of time since the Applicant's Request for review was filed on 28<sup>th</sup> February, 2017 a clear 12 days out of time. He stated that the procuring entity had made several attempts to notify the bidders of the outcome of its decision

through their provided telephone contacts but the attempts to notify the Applicant of the termination was futile or deliberately ignored by the Applicant.

Counsel for the procuring entity relied on the decisions in the cases of **Geomaps African Ltd –vs- National Land Commission Review (PPARB No. 3 of 2015)** and **Kleen Homes Securities Ltd –vs- Masinde Muliro University Review (PPARB NO. 31 of 2014)** in support of the proposition that where a Request for Review had been filed out of time the Board did not have the jurisdiction to hear and determine the same.

Counsel for the procuring entity further submitted that the procuring entity did not act in breach of the provisions of Section 63(1) (d) of the Act as alleged by the applicant. He stated that after evaluating the bids, the prices offered by the Applicant turned out to be higher compared to what was offered by Mondo track WS Ltd and as a result of this, the procuring entity had to terminate the procurement process in terms of Section 63(1)(d) and Section 63(2) and (4) of the Public Procurement and Assets Disposal Act.

Counsel for the procuring entity submitted that at no time did the procuring entity request for a clarification from any of the tenderers and as such there was no breach of the provisions of Section 81 of the Act as alleged in ground 2 of the Request for Review. He averred that the Applicant had not adduced any evidence to support the said allegation.



He further submitted that the procuring entity through its local organizing committee satisfied itself that it had a budget before commencing the process and the allegation of breach of the above provisions of the law were merely speculative as no evidence had been adduced by the Applicant in support of the said allegations. He stated that the Applicant might have been misled by unnamed sources into believing that the procuring entity did not have funds notwithstanding the fact that this was a confidential issue that would not be within its knowledge.

Counsel for the procuring entity therefore urged the Board to dismiss the Request for Review with costs.

In a brief response to the procuring entity's submissions, Counsel for the Applicant stated that the thickness which was in the tender document for the tartan track was 13.5 mm and in the list of IAAF approved suppliers the thickness of the tartan track proposed to be supplied by Mondo track was 13.00mm. He stated that the tartan track submitted by the Applicant corresponded with the tender documents. With regard to issue of confidentiality, Counsel for the Applicant reiterated that none of the documents mentioned were marked as confidential.

Counsel for the Applicant was of the view that since there was doubt as to when the letter of notification of the termination was sent to the Applicant, the balance of convenience should favour the Applicant in the interest of justice. He stated that the Applicant was willing to sign a contract and deliver the tartan track as per the tender document. He therefore urged the

Board to grant the prayers sought and direct the procuring entity to award the tender to the Applicant and costs of the Request for Review.

### **BOARD'S DECISION**

The Board has heard the submissions by the parties and has perused the Request for Review, the responses thereto, the tender documents and all the other documents submitted to it by the Procuring Entity. It is clear from a totality of the examination of the request for Review the Response from the Procuring Entity, the submissions made by the parties and the documents placed before the Board by the parties that this Request for Review raised three issues namely:-

- i) Whether the request for review is time barred and therefore depriving the Board of the jurisdiction to hear and determine it by dint of the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act (herein after referred to as the Act)**
- ii) Whether the procuring entity breached the provisions of Section 63 of the Act when it terminated the procurement process herein.**
- iii) Whether the Procuring Entity could lawfully execute a contract with Mondo track Ltd during the pendency of review filed by the Applicant.**

### **ISSUE NO. 1**

**Whether the request for review is time barred and therefore depriving the Board of the jurisdiction to hear and determine it by dint of the**

**provisions of Section 167(1) of the Public Procurement and Asset Disposal Act (herein after referred to as the Act)**

on the first issue framed for determination, , it was the procuring entity's case that the Request for Review the subject matter of this Request for Review was filed out of time; the Board notes as follows :-

1. The tender Bidders were invited through newspaper advertisement on 6<sup>th</sup> December, 2016 to submit tenders to the procuring entity.
2. Tenders were received and opened on 20<sup>th</sup> December, 2016 at 11.00 a.m.
3. The evaluation was carried out on or about 23<sup>rd</sup> December, 2016.
4. The Head of Procurement in its professional opinion dated 20<sup>th</sup> Janaury, 2017 recommended that this Procurement process be terminated pursuant to the provisions of Section 63(1) (d) of the Act. The opinion was approved by the Accounting Officer of the procuring entity on the same day.
5. The Procuring Entity issued termination letters dated 20<sup>th</sup> January,2017

During the hearing of this Request for Review Counsel for the Applicant produced a postage envelope showing that the letter was received by its Post Office on 7<sup>th</sup> February, 2017 and contented that the delay in posting the letter dated 20<sup>th</sup> January, 2017 was inordinate. The Board notes that the said envelope had a Postal Corporation item No. Bar code No.RD105525351 KE affixed to the said envelope. The Procuring Entity

through its CEO Mr. Muthee Mwangi submitted that the inordinate delay in posting the letter was caused by the Applicant's failure to collect the letter having been called through the mobile phone several times to no avail. He further submitted that having failed to heed the calls it decided to post the said letter on 1<sup>st</sup> February, 2017 through the Postal Corporation of Kenya as registered mail as per the attached certificate of postage.

Whereas the Board does not agree with the explanation given by the Procuring Entity for the delay, the Board wishes to pursue the registered postage of 1<sup>st</sup> February, 2017 and notes that the payment receipt No. MOO 400-02171378146, issued by Postal Corporation of Kenya Tom Mboya Street Branch with Destination being Ngara Road (00600) Item No. & wt :RD105525351KE dated 1/02/2017, Sender being IAAF Champions Addressee :M/s Comnette technologies Ltd other receipts were issued in favour of the following Addressees M/s Multi -construction Limited (RD105525348 KE) and Lexis International Limited (RD 105525229KE).

The Board is satisfied with the authenticity of the postage certificate as the item no/Bar code in the envelope produced by the Applicant corresponds with the Payment receipt submitted to the Board by the Procuring Entity.

The Board has on numerous occasions held that the burden of proof of service of a letter where receipt of the same is disputed lies on the procuring entity. The Board is satisfied based on the evidence placed before it that the procuring entity posted the letter of notification of the termination on 1<sup>st</sup> February, 2017. The procuring entity therefore discharged its duty of service of the letter of termination on 1<sup>st</sup> February,

2017 when it delivered the letter to the postal Corporation of Kenya and counting the number of days from 2<sup>nd</sup> February, 2017, the window within which the Applicant ought to have filed its Request for review lapsed on 16<sup>th</sup> February, 2017.

The Board would still wish to consider the alternative date averred by the Applicant, if notification of termination letters was stamped/received on 7/2/2017 in accordance with the applicant's submission as the date when the envelope was received at its post office the Board finds that the time would have started running from 8/2/2017 and ended on 22/2/2017. The Applicant's Request for Review which was filed on 28<sup>th</sup> February, 2017 would therefore still have been filed out of time under the provisions of Section 167(1) of the Act.

**The High Court in Nai HC JR. Misc. Application No. 17 Of 2015 Republic=vs =The Public Procurement Administrative Review Board and Zacs Construction Co. Ltd Exparte: The Teachers Service Commission the court held as follows:-**

*"In this case the decision being challenged was made on 18th December, 2014. The judicial review proceedings ought to have been commenced within 14 days from the date thereof, the last date being 1st January, 2015. Pursuant to section 57 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, these proceedings ought to have been commenced by latest 2nd January, 2015. They were however not so commenced until 21st January, 2015 which was 20 days out of time"*

Turning to the time for lodging a Request for Review before it, the Board has severally held that where a Request for Review has been filed out of time the Board lacks the jurisdiction to hear and determine the same.

The Board held as follows in the case of **Webb Fontaine Group F2-LLC – vs- Kenya Revenue Authority (PPRBA No. 27 of 2015):-**

**“The Board therefore finds and holds that the Applicant’s Request for Review which was filed on 15<sup>th</sup> June, 2015 was filed outside the prescribed period under Regulation 73 of the Public Procurement and Disposal Regulations as amended via Legal Notice No. 106 of 18<sup>th</sup> June, 2013 and the Board therefore lacks jurisdiction to hear and determine the Request for Review on merits on the sole ground that it was filed out of time”.**

The Board’s holding on this issue is further fortified by the Supreme Court’s decision in the case of **Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others [2012] eKLR** where the Supreme Court stated that jurisdiction is everything and without jurisdiction a court or a tribunal has no business inquiring into the matter before it. Without jurisdiction, the Board therefore has no business entertaining the matter however grave the allegations in respect of the procurement may be.

In the case of **Nai HC JR. No. 21 of 2015 Republic=Vs= Public Procurement Administrative Review Board Ex-parte Apex Security Services.**

The court held as follows:-

*“Having established that the Board had no jurisdiction to entertain the matter as it had been filed out of time, I do not find it necessary to explore the question as to whether the Board’s jurisdiction was ousted by the fact that a contract had been signed between the Procuring Entity and the Applicant”*

The Court further held that:-

*“The Board acted outside its jurisdiction by hearing the matter which was filed after 7 days from the date of the notification of the results of the tender. By doing so, the Board engaged in a futile exercise which amounts to nothing. The result is that the award of the Board dated 9th January, 2015 is called into this Court and quashed”*

From the foregoing findings and authorities, the Board holds that it lacks jurisdiction to hear the instant request for review on merit as the same was filed out of time contrary to the provisions of Section 167(1) of the Act. This means that the Board cannot determine issues no. 2 & 3 and therefore “down its tools” in so far as any of the two issues are concerned.

**FINAL ORDERS:-**

In view of all the foregoing findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act 2015, the Board makes the following orders on this Request for Review.

a) The Request for Review dated 28<sup>th</sup> February, 2017 and which was filed with the Board on the same day be and is hereby struck out for want of jurisdiction.

b) Each party to bear it's own costs.

Dated at Nairobi this 21<sup>st</sup> day of March, 2017.

  
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**CHAIRMAN**  
**PPARB**

  
.....

**SECRETARY**  
**PPARB**