

THE REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 62/2017 OF 10TH JULY, 2017

BETWEEN

PARITY PERFORMANCE & COMPLIANCE LIMITED.....Applicant

AND

**MINISTRY OF DEVOLUTION AND PLANNING,
STATE DEPARTMENT OF DEVOLUTION.....Procuring Entity**

Review against the decision of the Ministry of Devolution and Planning, State Department of Devolution in the matter of Tender No. MODP/SDD/KDSP/15/2016-2017 for the Consultancy Services to Design and Develop Computerized Management Information System (MIS) for Kenya Devolution Support Programme (KDSP).

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Mr. Paul Ngotho - Member
3. Mrs. Josephine W. Mongare - Member
4. Mrs. Gilda Odera - Member
5. Mrs. Rosemary Gituma - Member

IN ATTENDANCE

1. Philip Okumu - Holding Brief for Secretary
2. Maryanne Karanja - Secretariat

PRESENT BY INVITATION

Applicant: Parity Performance & Compliance Limited

1. Mwaniki Gachuba - Advocate, Onyoni Opini & Gachuba Advocates

Procuring Entity: Ministry of Devolution and Planning, State Department of Devolution

1. Jackson Mwangi - State Counsel
2. Sebastian J. Mooka - AD, SCMS

Interested Parties

1. Eric Orende - Advocate, Prestige Management
2. Lydia Muthoni - Consultant, Prestige Management
3. Viola Odhiambo - Consultant, Prestige Management
4. Lawrence Muthuri - Director, Market Edge Ltd.
5. Evans Okech - Consultant, IPE Global (Africa) Limited
6. John Seno - CEO, OTB Africa Limited
7. Edwin Seno - Director, OTB Africa Limited

BOARD'S DECISION

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

BACKGROUND OF AWARD

INTRODUCTION

The tender for Consultancy Services to Design and Develop Computerized Management Information System (MIS) For Kenya Devolution Support Programme (KDSP) was advertised in the print media on 10th January 2017 as an Expression of Interest (EOI) for the Consultancy Services - Tender No. MODP/SDD/KDSP/EOI/12/2016-2017 Design, Development and Implementation of Data Capture Analysis and Reporting Tool for the Kenya Devolution Support Programme (KDSP). The EOI was evaluated and successful bidders were shortlisted and invited to tender for the Requests for Proposal (RFP) Consultancy Services to Design and Develop Computerized Management Information System (MIS) For Kenya Devolution Support Programme(KDSP)-TENDER NO. MODP/SDD/KDSP/RFP/15/2016/2017.

The names of the invited bidders are as shown in the Table I below: -

TABLE I: SHORTLISTED FIRMS

SERIAL NO.	FIRM NAME
1.	Aurecon Kenya Limited
2.	Eskay Communications Limited
4	KPMG Advisory Services Limited
6	Market Edge Ltd
9.	Alliance Technologies Consulting Limited
12.	Attan Enterprise Solutions Limited
13	OTB Africa Limited
14	Exeva Consulting Limited
16	Prestige Management Solutions Limited
19	Synergy International Systems
20.	Next Technology Limited

SERIAL NO.	FIRM NAME
21.	Parity Performance & Compliance Limited
23.	IPE Global (Africa) Limited

Bidders above were invited through a letter ref no. Ref No.: MDP/DD/CONF/2304 (A) Vol. III (410) dated 2nd May, 2017 to collect the complete set of Tender Documents for Request for Proposal (RFP) from the Supply Chain Management Unit office situated at the 1st Floor, Wing C of the Telposta Towers, Kenyatta Avenue, Nairobi.

The bidders were required to submit their tenders manually (hard copy) which was to be deposited in the tender box. The tender attracted responses from bidders both in the IFMIS and in hard copy before the closing date and time.

Table below shows the names and addresses of the bidders who responded to the invitation for the RFP tender.

TABLE II: BIDDERS WHO RESPONDED AND SUBMITTED THEIR BIDS for CONSULTANCY SERVICES TO DESIGN AND DEVELOP COMPUTERIZED MANAGEMENT INFORMATION SYSTEM (MIS) FOR KENYA DEVOLUTION SUPPORT PROGRAMME (KDSP)- TENDER NO. MODP/SDD/KDSP/RFP/15/2016/2017

S/NO	NAME OF THE FIRM
1.	Attain Enterprise Solutions Ltd
2.	OTB Africa
3.	Eskay Communications Limited
4.	Market Edge
5.	Prestige Management Solutions
6.	IPE Africa
7.	Parity IT Consultant
8.	Exeva Consulting Limited

TENDER EVALUATION

The evaluation was carried out as per the Detailed Evaluation Criteria and the Terms of Reference (TOR) set in the RFP tender documents.

The technical evaluation was carried out in a two stage process;

- (a) Preliminary evaluation stage: - it was a requirement that the proposal meets all the mandatory requirements to proceed to the next stage (technical evaluation stage).
- (b) Technical evaluation stage: - requirement that the bidders attain a minimum score of 70% to proceed to the next stage (Financial evaluation stage).

Preliminary Evaluation Stage

Consultants were required to meet ALL the mandatory requirements to qualify for Detailed Technical Evaluation. The Table below shows the matrix of the mandatory requirements and how each of the eight (8) bidders was scored (evaluated).

Mandatory Requirements Evaluation Matrix

S/No.	Mandatory Requirements
1.	Request for Proposal Document is submitted in the right format (Original and Copy).
2.	The Tenderer MUST not modify, substitute, and alter/change the STANDARD TENDER DOCUMENT for Request for Proposal. The Consultant must ensure the proposal meets the provisions of section 135 (6) of the PPAD Act, 2015 as regards the preparation and signing of the Procurement Contracts.
3.	The Tenderer MUST submit copies of Certificate of Incorporation/Registration of Business Name from AG Chambers.

S/No.	Mandatory Requirements
4.	Tenderer MUST submit copy of Tax compliance certificate (PLUS Value Added Tax (VAT) Certificate and PIN No. certificate).
5.	Form of Tender MUST be dully filled, stamped and signed by the applicant/an authorized representative who has a power of attorney (and evidence provided thereof).
6.	Confidential Business Questionnaire MUST be dully filled, stamped and signed by the applicant/an authorized representative who has a power of attorney (and evidence provided thereof).
7.	The Anti-Corruption Declaration Commitment/Pledge MUST be dully filled, stamped and signed by the applicant/an authorized representative who has a power of attorney (and evidence provided thereof).
8.	Valid Trade License/s - copies MUST to be attached as appropriate.
9.	Reliable communication services e.g. fixed line telephone, fax, P.O. Box, Cellphone Numbers, Emails and Website address, etc.
10.	Evidence of past performance from various Institutions or related Government Ministries/Departments for the past three (3) years
11.	All pages in the bid document should be serialized
12.	Tenderers shall be required to furnish a Tender/Bid Security of 2% (Two Percent) of the Tender Sum
13.	Proof of Sound financial standing and adequate access to bank credit line by furnishing the Procuring Entity with Audited Financial Statements for a period of at least three (3) years preceding the current audit year and/or Bank Statement for a period of at least Two (2) Years up to a month preceding the date of this Request for Proposal (RFP). A letter from a Commercial Bank signifying the financial support if the consultant becomes successfully and is awarded to execute this consultancy.
14.	Litigation History of the Company (both court and arbitration cases (if any) relating to procurement matters.
15.	Responsiveness

Analysis of results

Five (5) bidders were found unresponsive at the mandatory evaluation stage as per requirements and were disqualified from further evaluation. The remaining three (3) who met the mandatory requirements proceeded to the technical evaluation stage.

Non responsive bidders after mandatory evaluation stage

BIDDER NO.	NAME OF THE FIRM AND ADDRESSES
1	Attain Enterprise Solutions Ltd
2	OTB Africa
3	Eskay Communications Limited
4	Market Edge
6	IPE Africa

Responsive bidders after mandatory evaluation

BIDDER NO.	NAME OF THE FIRM AND ADDRESSES
5	Prestige Management Solutions
7	Parity IT Consultant
8	Exeva Consulting Limited

Technical Evaluation

Those three (3) remaining bidders were subjected to detailed technical evaluation based on the criteria in the tender document.

The following matrix was developed from the technical evaluation criteria as contained in the tender documents TOR and shows the scoring criteria of the technical evaluation.

Technical Evaluation Criteria

No.	Evaluation Criteria	Weight	Maximum Points
1.	Qualifications (20 marks)	20%	20
	Team Leader: Master's degree (4 marks) First Degree in Information Technology (IT)related (6 marks)		10
	Other Consultants with minimum Bachelor's Degree in IT (Minimum 2)		10
2.	Firm Experience	30%	30
Relevant Experience Minimum 10 Years' experience in systems development and implementation (2 marks for each contract/LPO attached)	10		
Should have undertaken a similar assignment in the last 5 years (Contracts/LPOs attached) 2marks for each contract/LPO attached	10		
Experience in developing an online MIS system (1 mark for each contract/LPO)	5		
3.	Methodology	40%	40
Understanding of the Terms of Reference a. Specific Objectives (total 5 marks -each objective 1 mark) b. Functional Requirements(total 5 marks -each	15		

	objective 1 mark) c. System Performance Requirements(total 5 marks - each objective 1 mark)		
	Proposed Methodology System development lifecycle stages <ul style="list-style-type: none"> • Requirement analysis-2 marks • System design-3 marks • Implementation-2 marks • Testing-2 marks • Deployment-2 marks • Training-2 marks • Maintenance-2 marks 		15
	Presentation of the a work plan <ul style="list-style-type: none"> • Requirement analysis-2 marks • System design-2 marks • Implementation-2 marks • Testing-1 mark • Deployment-1 mark • Training-1 mark • Maintenance-1 mark Allocated time for each item using Gantt Chart or any other method		10
4.	Competences	10%	
	Analytical skills and report Flow of the report in comparison to client's TOR		5
	Certification in computing by various association e.g. CCMA, MCSE etc		2
	Experience in Design and development of programs- Web design, stand-alone programs e.g. JOOMLA, COBOL etc		3
	Total	100%	

The scores of a particular bidder as given by each evaluator were then averaged to get the mean score for the bidder. According to instructions to tenderers, only bidders who scored at least 70% at technical evaluation stage would proceed to financial stage.

Exeva Consulting Limited scored 48.204, which was less than the required 70% pass mark, and therefore was disqualified from further evaluation. The remaining Two (2) firms scored above 70% and were therefore qualified for financial evaluation. These firms are as shown in the table below.

Technically Responsive Bidders

Bid No.	Firm Name	Technical Scores	Remarks
5.	2. Prestige Management Solutions Limited	93.682	Responsive
7.	3. Parity Performance & Compliance Ltd	87.996	Responsive

Financial Evaluation

The consultants who qualified for financial evaluation were notified accordingly and invited for the opening of the financial proposals on 29th June 2017 at 3.00 p.m. The proposals were then opened in the presence of Ministry officials, the consultants and/or their representatives who chose to attend.

The name of the individual consultant, the technical score and the proposed fees (financial proposal) were read out aloud and recorded. The evaluation

committee prepared minutes of the opening of the financial proposals. The minutes and the registers thereof were filed accordingly.

The table below shows the summary of the technical and financial scores of the proposal from the two (2) technically responsive bidders.

Technical & Financial Scores

Bid No	Bidders Name	Financial Proposal (Ksh.)	Technical Scores	Validity Period	Ranking
5	Prestige Management Solutions Limited	28,796,369.25	93.682	180 days	1
7	Parity Performance & Compliance Ltd	34,730,980.00	87.996	180 days	2

Bidder No. 5 has quoted Kshs. 28,796,369.25 which is lower compared to Bidder No. 7, Parity Performance & Compliance Limited, who quoted Kshs. 34,730,980.00. Bidder no. 5 was ranked number one (1) while bidder no. 7 was ranked number two (2).

Recommendation

Prestige Management Solutions Limited of P. O. Box 1357-00618 Nairobi being the lowest evaluated bidder as per Section 2.8 of the Appendix to Instructions to Consultants was recommended to be awarded the tender for Consultancy Services to Design and Develop Computerized Management Information System (MIS) for Kenya Devolution Support Programme (KDSP) at its quoted sum of Kshs. 28,796,369.25 (Kenya Shillings Twenty

Eight Million, Seven Hundred and Ninety Six Thousand, Three Hundred and Sixty Nine Cents Twenty Five only).

Accordingly, Bidder no. 7 was deemed to be the most economical. However, the tender process was suspended by this Board before the professional opinion was written.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Parity Performance & Compliance Limited on 10th July, 2017 in the matter of the Tender No. MODP/SDD/RFP/15/2016-2017 for the Consultancy Services to Design and Develop Computerized Management Information System (MIS) for Kenya Devolution Support Programme (KDSP). The Applicant seeks for the following orders:

- 1. The procurement proceeding be annulled and the Procuring Entity be directed to start the process afresh and in compliance with the Act.*
- 2. The Respondent pays costs of this application and interest thereof.*

Ground for Review

The Applicant raised one ground of review, that is breach of Sections 126(3) and 176(1)(c) of the Public Procurement and Disposal Act, 2015 (hereafter referred to as "the Act")

The Applicant alleged that the Procuring Entity breached the provisions of Section 126(3) and 176(1)(c) of the Act as read together with Section 7(2)(b) of the Fair Administrative Actions Act, 2015 by failing to evaluate the proposals submitted to it within 21 days.

Counsel for the Applicant stated that it was generally common ground by all the parties that this tender closed/opened on 22nd May 2017 and yet the Procuring Entity had not made a final award of the tender as at the date when this Request for Review was filed.

Counsel for the Applicant further submitted that the delay made any action taken in this procurement after the expiry of the 21-day statutory evaluation period a nullity. He relied on the case of **Republic -vs- Public Procurement Administrative Review Board & Another [2008] eKLR** where the court *inter-alia* held as follows:-

- a) **"The Board did commit an error of law by failing to address mandatory provisions of the procurement law."**
- b) **"Failure to address the applicable law...in reaching a decision does render the decision... devoid of legality and therefore void."**
- c) **"There cannot be greater prejudice ... than failure by the decision maker to comply with positive law."**
- d) **"Failure to adhere to the applicable law gives rise to a presumption of bias and prejudice"**

The Applicant contended that the above decision was directly applicable to this case because it was dealing with failure by a Procuring Entity to comply with the procurement law relating to the time for evaluation of tenders and urged the Board to hold similarly in the review before it.

In response to the above submissions Counsel for the Procuring Entity stated that the procurement process for this tender was not complete but further stated that the Applicant had not suffered any prejudice to warrant the grant of the orders it was seeking from the Board. He further argued that during

the financial opening of the bids, the Applicant was represented and witnessed the opening of the bid when it transpired that its Financial Bid was higher than its only competitor and that was the reason why it was trying to frustrate the process with a view to pre-empting the conclusion of the same.

The Procuring Entity additionally argued that failure to complete the evaluation process in time was not fatal to the procurement process as long as such a delay did not prejudice or occasion preferential treatment to any of the bidders. He finally submitted that the application had been brought in bad faith and that the same should not be allowed.

The interested party M/s Prestige Management Solutions Limited associated itself with the submissions made by the Procuring Entity and stated that the Applicant had not suffered any prejudice as a result of the Procuring Entity's failure to conclude the procurement process herein within 21 days from the date of tender opening.

Counsel for the said interested party therefore urged the Board to dismiss the Request for Review which he termed as an afterthought.

Mr. Lawrence Muthuri for Market Edge Limited, Mr. Evans Okech for IPE Global (Africa) Limited and Mr. John Seno who appeared on behalf of OTB Africa Limited left the matter to the determination of the Board.

The Board has considered the submissions made before it by all the parties and finds that it was generally conceded by all the parties who appeared before it that this tender closed on 22nd May, 2017 and that the tender was for the provision of professional services and ought to have been evaluated and an award made within a maximum period of twenty one (21) days from the

said date under the provisions of Section 126(3) of the Public Procurement and Asset Disposal Act. All the parties were also in agreement that no award of the tender had been made by the Procuring Entity to date.

The only matter that was in issue was therefore whether the failure by the Procuring Entity to make an award of the tender in favour of any of the bidders was fatal and or prejudicial to the procurement process.

The Board has considered the decision of the High Court in the case of **Republic -vs- Public Procurement Administrative Review Board and Kenya Revenue Authority (2008) eKLR** which is binding on it and finds based on the above decision that a failure to evaluate a tender and make an award within the period provided for in the statute is fatal. The Board cannot therefore hold otherwise in view of the above decision.

The Board further finds that the provisions of Section 176(1)(c) of the Public Procurement and Disposal Act constitute the failure by a Procuring Entity to complete the evaluation process within the stipulated time an offence. The said Section 176(1)(c) of the Act provides as follows:-

“176. (1) A person shall not –

(c) delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations;

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Based on the above decision and the provisions of the Act, this Request for Review succeeds and is allowed on the following terms.

FINAL ORDERS

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) **This Request for Review succeeds.**

- b) **The tender no. MODP/SDD/RFP/15/2016-2017 for the provision of Design and Develop Computerized Management Information System (MIS) Services for Kenya Devolution Support Programme (KDSP) is hereby nullified and the procurement process is terminated forthwith.**

- c) **Owing to the delay already occasioned, the Board directs the Procuring Entity to invite fresh tenders from bidders who were pre-qualified by the Procuring Entity to submit fresh tenders for the provision of the professional services in question and further directs the Procuring Entity to complete the entire procurement process including the making of an award within a period of not more than forty five (45) days from today's date.**

- d) **In view of the orders made above, the Board directs that each party shall bear its own costs of this Request for Review.**

Dated at Nairobi on this 27th day of July, 2017.


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CHAIRMAN
PPARB


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SECRETARY
PPARB