

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 40/2018 OF 26<sup>th</sup> MARCH, 2018**

**BETWEEN**

**MEDITEC SYSTEMS LIMITED.....APPLICANT**

**AND**

**KENYATTA NATIONAL HOSPITAL..... PROCURING ENTITY**

Review against the decision of the Kenyatta National Hospital in the Matter of Tender No. KNH/T/94/2017-2018 for Supply, Delivery, Installation, Testing and Commissioning of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine.

**BOARD MEMBERS PRESENT**

1. Mr. Paul Gicheru - Chairman
2. Mr. Hussein Were - Member
3. Mr. Nelson Orgut - Member
4. Mr. Peter Bitia Ondieki, MBS - Member

**IN ATTENDANCE**

1. Stanley C. Miheso - Secretariat
2. Ms. Maryanne Karanja - Secretariat

## **PRESENT BY INVITATION**

### **Applicant - Meditec Systems Limited**

1. Kananu Mutea - Advocate, Daly & Inamdar Advocates
2. Pooja Patel - Advocate, Daly & Inamdar Advocates
3. Charles Maigwe - Advocate, Daly & Inamdar Advocates
4. Grace Kinyanjui - Advocate, Daly & Inamdar Advocates
5. Pritel Patel - Director
6. Rajveder Hans - Technical Director

### **Procuring Entity - Kenyatta National Hospital**

1. Wilfred Mutubwa - Advocate, Lubulellah & Associates Adv.
2. Eugene Lubulellah - Advocate, Lubulellah & Associates Adv.
3. Anthony Lubulellah - Advocate, Lubulellah & Associates Adv.
4. Rose Mugambi - DDSCM
5. Dr. Rose Nyabanda - CMS

### **Interested Parties**

1. Anthony Njogu - Advocate, Philips East Africa Limited
2. John Wasonga - Advocate, Philips East Africa Limited
3. Poovasen Chetty - Sales, Philips East Africa Limited
4. Ali Rakki - Sales, Philips East Africa Limited
5. Norman Zamu - Sales, Philips East Africa Limited
6. Edwin Maina - Representative, Seven Seas Technologies

## **BOARD'S DECISION**

Upon hearing the representations by 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 THE AWARD**

### **Invitation for Bids**

The Kenyatta National Hospital ("the Hospital") advertised the international tender for the supply, delivery, installation, testing and the commissioning of 3 Tesla MRI machine and MRI compatible anaesthetic machine in the newspapers on 13<sup>th</sup> and 16<sup>th</sup> January, 2018 and in the dedicated government portal for prospective bidders to bid. On 10<sup>th</sup> February, 2018 the Hospital published an addendum that extended the closing and the opening date of the tender from 20<sup>th</sup> February, 2018 to 28<sup>th</sup> February, 2018 at 12.05 hours East African time.

The tender attracted three (3) bidders as listed below.

<b>BIDDER No.</b>	<b>BIDDER NAME</b>
01	Meditec Systems Limited
02	Seven Seas Technologies Limited
03	Philips East Africa Limited

The Hospital's Tender Evaluation Committee carried out evaluation of the tender in three stages namely the preliminary technical and the financial evaluation stages and recommended the making of award at the end of the evaluation process.

## Preliminary Evaluation

This stage involved examination of the responsiveness of the bids to the mandatory requirements set out at Section 2.24 of the tender document. The mandatory requirements were as follow:-

<b>Responsive</b>	<b>Requirements</b>
MR 1	Tender Security of Kenya Shillings three million (Kshs 3,000,000.00) valid for 150 days from the date of tender opening. It can also be in currency easily convertible to Kenya Shillings
MR 2	Must submit bound bid document (spiral or book) loose documents will not be accepted
MR 3	Bid document MUST be in original and copy, for combined technical and financial bids.
MR 4	Submitted bid documents MUST be <u>sequentially serialized (paginated)</u> on every printed page
MR 5	Must Submit a copy of the Certificate of incorporation or Registration Certificate
MR 6	Must Submit a copy of Valid Tax Compliance certificate or a letter from the authority that the country of origin does not pay tax or tax exemption certificate.
MR 7	Must submit a dully filled Confidential Business Questionnaire, signed and stamped
MR 8	Must submit dully filled form of tender, signed and stamped
MR 9	Attach a current bank statement for six months to demonstrate financial ability to undertake a task of this magnitude
MR 10	Evidence of physical registered office (attach utility bills/ lease agreement /rental payment receipt/ evidence of ownership of the premises)
MR 11	Must submit site visit certificate, signed and stamped by designated Hospital official

All bidders passed the preliminary evaluation stage and proceeded to technical evaluation.

## Technical Evaluation

The three bidders were evaluated for responsiveness to the product and firm technical requirements. The product requirements were under the following headings:

1. Magnet Specifications
2. Gradient System
3. Radiofrequency Coil Receiver
4. Radiofrequency Coil Transmission
5. Shim System
6. Clinical Protocols
7. Clinical Application Packages to Be Offered
8. Coils
9. Patient Couch
10. Physiology Measurement and Gating (For Adult and Paediatric)
11. Operator Console
12. Computer System/Reconstruction
13. Connectivity
14. Advanced Visualisation Multimodality Workstations Specification
15. Filming
16. System Upgrades
17. Remote Diagnostics
18. Ancillary Equipment
19. Environment Friendly
20. Pump Injector
21. Water Cooling Unit
22. Accessories
23. Printer
24. Power Requirements
25. Ups
26. Start Ups for Testing

27. Training
28. Site Preparation Work for 3.0 Tesla MRI Unit
29. Chiller
30. Technical Manuals
31. Civil Works
32. Installation Requirements
33. Supporting Documentation
34. After Sales Service
35. Technical Specifications of Anaesthesia Machine MRI Compliant – Qty 1 No.
36. Vital Signs Monitor

All the three bidders passed the Product Technical Evaluation and proceeded to what the Procuring Entity described as the Firm Technical Evaluation. The Firm Technical Evaluation was based on the following criteria:-

S/No	Evaluation Criteria	Max Score	
1.	<b>Experience and Technical Capability</b>	a) Experience in supply and maintenance of medical equipment (letters from three referees confirming successful completion of supply contracts and three for service and maintenance) <i>5 marks for each referee up to a maximum score is 30 marks for all six referees</i>	30
		b) Provide proof of technical staff to be involved in the project implementation (certified curriculum vitae and qualification documents) <i>8 marks from each person and maximum score is 24 marks</i>	24
		c) Manufacturer authorization for appointed distributors or proof of equipment ownership <i>Total marks 11</i>	11
2.	<b>Financial Capacity</b>	a) Provide evidence to handle business of Kshs 400 million and above (Documents provided under Preliminary Evaluation – MR 8 will be used) <i>Total marks 15</i>	15
			80

The three Bidders scored 65 out of the maximum 80 marks and were allowed to proceed to financial evaluation. All the three bidders scored 80 marks and passed the Firm evaluation stage.

### Financial Evaluation

In the financial evaluation the following aspects were considered: -

- a. Cost of Supply, Delivery, Installation, Testing and Commissioning of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine.
- b. Training
- c. Pre-shipment
- d. Warranty for Two Years
- e. Post warranty of Eight years

The result of the financial evaluation was as follows:

No	Item Description	Bidder No. 1	Bidder No. 2	Bidder No. 3
1	Supply, Delivery, Installation, Testing And Commissioning of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine	401,682,361.64	347,063,481.12	293,447,784.26
2	Pre-shipment Cost	-	-	1,102,275.00
	<b>Sub Total</b>	<b>401,682,361.64</b>	<b>347,063,481.12</b>	<b>294,550,059.26</b>
3	Post warranty period service and maintenance charges for Eight Years	149,035,218.50	157,799,967.20	121,933,726.57
	<b>Total (Values Inclusive of VAT)</b>	<b>550,717,580.14</b>	<b>504,863,448.32</b>	<b>416,483,785.83</b>

### Recommendation of award

The tender evaluation committee recommended the award of the tender for Supply, Delivery, Installation, Testing and Commissioning of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine as tabulated below and a Comprehensive Service Agreement to remain as quoted by the Bidder.

No	Item Description	Quantity	Cost Kshs.	Remarks
1	Supply, Delivery, Installation, Testing and Commissioning Of 3 Testa MRI Machine And MRI Compatible Anaesthetic Machine	1	293,447,784.26	Ms. Philips East Africa Limited. 1 <sup>st</sup> Lowest evaluated bidder.
2	Pre-shipment Cost		1,102,275.00	
	<b>Total</b>		<b>294,550,059.26</b>	

### Professional Opinion

The Deputy Director, Supply Chain Management in her professional opinion dated 12<sup>th</sup> March, 2018 considered the evaluation process and opined that the subject procurement satisfied the Constitutional requirements of Article 227 (1) and the statutory requirements of the Public Procurement and Asset Disposal Act, 2015 and the Public Procurement (Preference & Reservations) Regulations, 2011 and other related legislations and recommended that the tender be awarded to M/s Philips East Africa Limited a recommendation which the Ag. Chief Executive Officer of the Procuring Entity accepted.

## THE REQUEST FOR REVIEW

The Request for Review was lodged by Messrs Meditec Systems Limited (hereinafter referred to as “the Applicant”) on 26<sup>th</sup> March, 2018 in the Matter of Tender No. KNH/T/94/2017-2018 for the supply, delivery, installation, testing and commissioning of 3 Tesla MRI machines and MRI compatible anaesthetic machine Kenyatta National Hospital (hereinafter referred to as the “Procuring Entity”).

The Applicant sought for the following orders:-

- a) *The decision of the Respondent be stayed until the hearing and determination of this reference.*
- b) *The Respondent’s decision be reversed and quashed and further that the tender be secured.*
- c) *The Respondent’s decision be declared irregular, procedurally unfair, unreasonable and therefore illegal.*

The Applicant sought and was granted leave to amend the prayers set out in the Request for Review on 4<sup>th</sup> April 2018 to include the following two additional prayers:-

- a) *The nullification of the award to the successful bidder with one to the Applicant and/or*
- b) *Any other relief that the Review Board may be pleased to grant in accordance with section 173 of the Act.*

The Board considered the submissions made by all the parties on the application for amendment and allowed the same paving the way for the full hearing of the Request for Review.

During the hearing of the Request for Review, the Applicant was represented by M/s Kananu Mutea Advocate from the firm of Daly & Inamdar Advocates while the Procuring Entity was represented by Mr. Wilfred Mutubwa Advocate from the firm of Lubulellah & Associates Advocates. The Interested Party was represented by Mr. Anthony Njogu Advocate from the firm of Coulson Harney LLP Advocates.

### **The Applicant's Submissions**

The Applicant averred in support of the Request for Review that the Procuring Entity awarded the tender in question to a bidder who did not meet the technical specifications set out in the tender document contrary to the procurement rules as set out in the Public Procurement and Asset Disposal Act (2015). In an affidavit sworn by one Mr. Priten Patel a director of the Applicant and which was relied upon by Counsel for the Applicant, the Applicant contended that the Special Conditions of Contract at Section IV Clause 3.4.1 required that the equipment to be procured must comply with the technical specifications set out in the tender document and further that Section VI Clause 6.1.2 of the Technical Specifications provided that tenderers must indicate on the specifications sheets whether the equipment offered complied with each specific requirement adding that under Clause 6.1.3 of the tender document, all dimensions and capacities of the equipment to be supplied should not have been less than those required in the specifications and also that deviations from the basic requirements, if any, shall be explained in detail in writing with the offer with supporting data.

The Applicant further contended that the tender Technical Evaluation criteria under step 1 headed “**Technical Mandatory Requirements**” the Procuring Entity demanded that the model offered ought to be a high end model under current production. It further contended that the substantive technical specifications strictly required by the Procuring Entity included among others:-

1. 45 MT/200 Gradient - which should be simultaneously achieved;
2. Multinuclear Spectroscopy;
3. B1 Homogeneity & Parallel transmission;
4. Moving table Angiography;
5. Free Breathing Imaging Scan;
6. Dedicated peripheral Angio Coils;
7. Flex coil, 16 Chanel

Counsel for the Applicant submitted that on 14<sup>th</sup> March, 2018 the Applicant received a letter of regret which also informed it that M/s Philips East Africa Limited was the successful bidder. The Applicant however stated that from the technical advice it received from its sources, it strongly believed that the successful bidder could not and did not quote for a high end model under current production as was required under the strict terms of the tender document considering among other factors, the low price at which it had been awarded the tender. The Applicant requested that the technical specifications provided by the successful bidder be investigated by the Board. Counsel for the Applicant further submitted that it had reason to believe that the total price costs quoted by the successful bidder were solely for the equipment and did not include the post warranty period service and maintenance charges for the prerequisite period of eight (8) years as required.

It was the Applicant's further contention that on 14<sup>th</sup> March, 2018, it sought for information from the Procuring Entity on the technical quotations by the successful bidder and further that on 15<sup>th</sup> March, 2018, the Procuring Entity declined to furnish it with the information requested for without justifiable cause.

The Applicant additionally contended that it was prejudiced by the Procuring Entity's action of not considering the fact that the Applicant's total cost as quoted included the cost of the equipment and the post warranty period service and maintenance costs for the prerequisite period of eight (8) years.

In conclusion, the Applicant argued that the evaluation process followed in awarding the tender to the successful bidder was irregular, procedurally unfair, unreasonable and prejudicial and urged the Board to allow the Request for Review.

### **The Procuring Entity's Response**

In response to the submissions made by Counsel for the Applicant, Counsel for the Procuring Entity started off his submissions by contending that the Applicant's Request for Review was incompetent for the reason that the last two prayers sought by the Applicant and which were a result of the amendment granted on 4<sup>th</sup> April, 2018 took the Request for Review outside the period of fourteen (14) days required for an aggrieved bidder to file a Request for Review with the Board. He therefore urged the Board to strike out the Request for Review for being incompetent.

On the substantive merits of the Request for Review, the Procuring Entity contended that all the three bidders passed the preliminary evaluation stage and proceeded to the technical evaluation stage.

The Procuring Entity further averred that step 1 of the technical evaluation required that bids would be evaluated as per the brochures submitted, and that the model offered should have been a high-end model under current production which should meet the specifications set out in the tender document. It averred further that the substantive technical specifications listed in paragraph 9 of the Applicant's Affidavit were just seven of the more than two hundred and forty six specifications for the MRI machine required, which were complied with by all the bidders. The Procuring Entity further contended that all the three bidders passed the technical evaluation stage on both product evaluation (Step 1) and firm evaluation (Step 2) and proceeded to the financial evaluation stage where the financial bids for the three (3) bidders were evaluated as follows:-

Item Description	Bidder No.1	Bidder No.2	Bidder No.3
Supply, Delivery, Installation, Testing and Commissioning of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine	401,682,361.64	347,063,481.12	293,447,784.26
Pre-shipment Cost	-	-	1,102,275.00
<b>Sub-total</b>	<b>401,682,361.64</b>	<b>347,063,481.12</b>	<b>294,550,059.26</b>
Post warranty period service and maintenance charges for 8 years	149,035,218.50	157,799,967.20	121,933,726.57
<b>Total (inclusive of VAT)</b>	<b>550,717,580.14</b>	<b>504,863,448.32</b>	<b>416,483,785.83</b>

It was the Procuring Entity's further contention that all the three bidders quoted for the two years warranty and eight years post-warranty service and

maintenance charges and stated further that the tender was awarded to the successful bidder who had the lowest evaluated price.

During the course of the hearing however and upon inquiry from the Board the Procuring Entity clarified that the price quoted by the interested party in its form of tender was for the equipment only and that the two parties would enter into a separate maintenance and warranty contract in future.

It was the Procuring Entity's further contention that it sent out an email to the Applicant on 13<sup>th</sup> March 2018 advising it to collect the letter of notification of the outcome of its tender and that the Applicant wrote back to the Procuring Entity on 14<sup>th</sup> March 2018 requesting it for information regarding the evaluation of the successful bidder. The Procuring Entity however advised the Applicant vide a letter dated 15<sup>th</sup> March, 2018 that Section 67 of the Act prohibited disclosure of procurement proceedings which were confidential in nature.

In conclusion Counsel for the Procuring Entity argued that the Procuring Entity evaluated the tender in question in line with the Act and the Regulations of 2006 and that based on the ground upon which the Applicant was eliminated, the only motivation for the Applicant in bringing the Request for Review was to delay and prejudice the Procuring Entity's procurement plan which according to the Procuring Entity would not be in the public interest.

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

## Interested Party's Response

In response to the Applicant's Request for Review, Mr. Anthony Njogu Advocate for the interested party contended that the Applicant did not set out, with any specificity, the alleged basis of the breaches that would necessitate the reversal or annulment of the award of the tender to the Successful Bidder. He further contended that the submissions made by the Applicant and which were dated 6<sup>th</sup> April 2018 were clearly divergent from the grounds that were set out in the application itself. He stated that the Applicant had made general complaints, which it did not elaborate but later turned around and made substantive accusations under the guise of submissions.

Counsel for the Interested Party further contended that the alleged breaches in the tender process were set out in the Applicant's submissions but the facts were neither stated nor deponed to in the supporting Affidavit sworn by Mr. Priten Patel. He termed this as irregular and un-procedural.

Counsel for the interested party stated that the equipment the interested party offered in its bid not only met but exceeded all the requirements set out in the tender document issued by the Procuring Entity and that the allegation by the Applicant that the successful bidder did not submit a high end model under current production with similar specifications was false and baseless. He added that the total prices read out at the tender opening for the Successful Bidder were fully consistent with the prices it had set out in its form of tender which was contained in the tender document.

Counsel for the Interested Party further submitted that following the notification of the award of the tender to it, the interested party had already made arrangements to procure a performance bond in favour of the procuring

entity adding that the delay caused by the Applicant through the filing of the Request for Review had serious detrimental effect on the public given that the MRI machine that was being procured was for Kenya's largest referral hospital which was operating without any MRI machine at present. He submitted further that the Applicant was causing the Kenyan public to suffer on the basis of complaints for which it had no credible basis and on the strength of information it allegedly received from unnamed and undisclosed sources.

In conclusion, Counsel for the Applicant submitted that the entire Application was incompetent and had failed to meet the legal threshold for the grant of the orders sought and prayed for its dismissal with costs.

### **The Applicant's Reply**

In response to the submissions made by Counsel for the Procuring Entity and Counsel for the interested party, Counsel for the Applicant submitted that the complaint by Counsel for the Procuring Entity that the amendment of the prayers sought in the Request for Review made the entire Request for Review incompetent was baseless. She contended that the application for amendment was only in relation to the prayers sought and that no new grounds of Review were added.

She further contended that the oral application for amendment was made in the presence of all parties who made their representations and that the Procuring Entity did not challenge the leave to amend granted on 4<sup>th</sup> April, 2018.

In further response to the said submissions, Counsel for the Applicant stated that the tender document required the bidders to not only set out the price of the machine itself but to also set out the amount of taxes, maintenance and the warranty for the equipment.

She finally submitted that based on the admission by the Procuring Entity during the hearing, it was clear that the price at which the interested party had been awarded the tender and which was set out in the interested party's form of tender was only for the equipment but omitted all the other requirements set out in the tender document.

### **THE BOARD'S FINDINGS**

The Board has considered the submissions made by parties and has further examined all the documents placed before it and finds it necessary to first deal with the objection raised by Counsel for the Procuring Entity that the Applicant's Request for Review was incompetent because the leave to amend the prayers which was granted on 4<sup>th</sup> April, 2018 took it outside the period of 14 days for the filing of a Request for Review under the Act.

The Board has considered the rival submissions on this issue and is of the view that the objection lacks merit for the following reasons:-

- a) The oral application for amendment made on 4<sup>th</sup> April, 2018 was made in the presence of all the parties who were allowed to address the Board on the proposed amendment and upon a consideration of the arguments, the Board allowed the same on the grounds that the same had been made before the hearing and that no party would suffer any prejudice.

- b) The Procuring Entity which participated in the said proceedings did not challenge the grant of the leave to amend in any other forum.
- c) The amendment only related to the prayers sought in the Request for Review and no new ground was introduced through the amendment.

Turning to the substantive Request for Review, it is evident from all the submissions made by the parties that the Applicant's Request for Review turned on only one issue namely:-

- (i) Whether the Procuring Entity failed to evaluate the subject interested party's tender with regard to the cost of supply and maintenance of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine in accordance with the evaluation criteria set out in the tender document thereby contravening the provisions of Section 80 (2) of the Act.**

The Board finds as follows on the said issue:-

- (i) Whether the Procuring Entity failed to evaluate the subject interested party's tender with regard to the cost of supply and maintenance of 3 Tesla MRI Machine and MRI Compatible Anesthetic Machine in accordance with the evaluation criteria set out in the tender document thereby contravening the provisions of Section 80 (2) of the Act.**

The Board has perused the documents placed before it and has considered the submissions made by the parties and notes that Tender No. KNH/T/94/2017-2018 for the supply, delivery, installation, testing and the commissioning of 3 Tesla MRI machine and MRI compatible anaesthetic machine for Kenyatta National Hospital was advertised in The *East African* newspaper on 13<sup>th</sup> to 16<sup>th</sup>

January, 2018 and in *myGov*, the dedicated Government portal for prospective bidders to bid. Three tenders were received and opened on 28<sup>th</sup> February, 2018. The Procuring Entity's tender evaluation committee evaluated the tender in three stages of preliminary, technical and financial evaluation and recommended the award of the tender on 9<sup>th</sup> March 2018 based on the following prices:-

No	Item Description	Bidder No. 1	Bidder No. 2	Bidder No. 3
1	Supply, Delivery, Installation, Testing And Commissioning of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine	401,682,361.64	347,063,481.12	293,447,784.26
2	Pre-shipment Cost	-	-	1,102,275.00
	<b>Sub Total</b>	<b>401,682,361.64</b>	<b>347,063,481.12</b>	<b>294,550,059.26</b>
3	Post warranty period service and maintenance charges for Eight Years	149,035,218.50	157,799,967.20	121,933,726.57
	<b>Total (Values Inclusive of VAT)</b>	<b>550,717,580.14</b>	<b>504,863,448.32</b>	<b>416,483,785.83</b>
		<b>3<sup>rd</sup> Lowest bidder</b>	<b>2<sup>nd</sup> Lowest bidder</b>	<b>1<sup>st</sup> Lowest bidder</b>

The evaluation committee awarded as follows;

No	Item Description	Quantity	Cost Kshs.	Remarks
1	Supply, Delivery, Installation, Testing And Commissioning Of 3 Tesla MRI Machine And MRI Compatible Anaesthetic Machine	1	293,447,784.26	Ms. Philips East Africa Limited. 1 <sup>st</sup> Lowest evaluated bidder.
2	Pre-shipment Cost		1,102,275.00	
	<b>Total</b>		<b>294,550,059.26</b>	

The successful and unsuccessful bidders were notified of the outcome of the evaluation process by the Procuring Entity *vide* letters dated 13<sup>th</sup> March, 2018. Upon receipt of the letter of notification, the Board notes that the Applicant wrote to the Procuring Entity on 14<sup>th</sup> March, 2018 stating thus,

*“During the meeting at KNH, dated 8 February 2018, it was clearly understood that a high end MRI must be offered and no exceptions would be made on the technical compliance. Therefore we would like to request for the following information to be availed to Meditec: -*

- *The model and technical specifications of the model offered by M/s Philips East Africa Limited*
- *Copy of the compliance sheet submitted by M/s Philips East Africa Limited*

*“...kindly confirm if the successful bidder offered all of the following items as per the tender requirement: -*

- *45 MT/200 Gradient- which should be simultaneously achieved*
- *Multinuclear Spectroscopy*
- *B1 Homogeneity & Parallel transmission*
- *Movable table Angiography*
- *Free Breathing Imaging Scan*
- *Dedicated peripheral Angio coils*
- *Flex coil, 16 channel”*

In response to the above letter, the Procuring Entity *vide* a letter dated 15<sup>th</sup> March, 2018 declined the Applicant’s request citing the confidentiality clause under section 67 of the Act.

On the main issue in contention, the Board has considered the rival submissions made by the parties and finds that this dispute turns on the issue of whether the financial proposal set out by the interested party in its form of tender forming part of the tender document was responsive to the criteria and the requirements set out in the tender document.

To determine this issue, the Board has looked at the following applicable clauses in the tender document and in the Public Procurement and Asset Disposal Act (2015).

Section VI headed – Technical Specifications Compliance Sheet under Step 1 – Technical Mandatory, the tender document provided that the model offered should be a high end model under current production, the detailed specifications of which were laid out under 37 headings in the tender document. The requirement on warranty specifically stated as follows:

**Clause 26 – Warranty** *“Price At least 2 year warranty. All parts and all labour costs to be included during the warranty period.*

*- Comprehensive service contract to be given for at least 5 years negotiable including labour, Helium refills, spare parts and third party items which include air conditioning, UPS plus batteries, pump injector, workstations and printer. TO BE QUOTED SEPARATELY.”*

The Procuring Entity issued Addendum number 1 dated 13<sup>th</sup> February 2018 which stated as follows:

“WARRANTY on page 61 of the tender document expunged”:

*“At least 2 year warranty. All parts and all labour costs to be included during the warranty period. - Comprehensive service contract to be given for at least 5 years negotiable”*

And replacing with;

*“At least 2 year warranty. All parts and all labour costs to be included during the warranty period. - Comprehensive service contract to be given for 8 years negotiable”*

Section II – Appendix to Instructions to Tenderers at Clause 2.10.1 of the tender document, provided as follows:

**Clause 2.10.1** *“Price quoted shall include the total cost of acquisition. This shall take into account the cost up to commissioning together with maintenance and service for two years post warranty period. Bidders MUST attach proof/evidence of availability of spare parts in the market.”*

The Board wishes to observe that the reason stated for the disqualification of the Applicant’s tender was because it was not the lowest evaluated bidder. The Board further finds that the Applicant’s contestation was that the interested party/the successful bidder could not and did not quote for a high-end model under current production as was required under the terms of the tender and further that it had reason to believe that the total cost quoted by the successful bidder was solely that of the equipment and did not include the post warranty period service and maintenance charges for the prerequisite period of eight (8) years.

The question that therefore arises is whether the Procuring Entity evaluated the successful and unsuccessful bidders’ tenders in accordance with the

evaluation criteria set out in the tender document. To answer this question, the Board has perused the requisite documents and has taken cognisance of the provisions of Section 80 (2) of the Act which stipulates as follows:

**Section 80 (2)**     *“The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.”*

The Board has looked at the original tender documents for all bidders submitted to it by the Procuring Entity during the hearing, the addenda to the original tender document and the evaluation report and notes that it was a requirement in the tender document for bidders to quote for the Supply, Delivery, Installation, Testing and Commissioning of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine. It was a further requirement in the tender document that the equipment to be procured be a high-end model under current production. It was also a requirement of this tender that the price quoted shall include a two year parts and service warranty and an eight-year post-warranty service and maintenance.

From the documentation provided, the Board observes that the evaluation criteria was set out in Clause 2.24 of the Appendix to Instructions to Tenderers at pages 30-77 of the tender document. It is further observed that the three bidders were evaluated through the preliminary, technical and the financial evaluation stages. The bidders were found to have passed the first two stages of evaluation and the successful bidder emerged the winner, having attained

the lowest evaluated price. The Applicant's bid was evaluated up to the financial stage but was found not to be the lowest.

The successful bidder, Messrs Philips East Africa Ltd was eventually awarded the tender at a price of Kshs 294,550,059.26 for Supply, Delivery, Installation, Testing and Commissioning of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine. The separate price quoted by the successful bidder for warranty service and maintenance was Kshs. 121,933,726.57, which brought the total evaluated cost to Kshs 416,483,785.83 although the sum set out in the form of tender was Kshs. 293,447,784.26.

It is clear from the form of tender and the schedule attached to the form of tender that the price quoted by the Applicant and that which was stated in the form of tender and which was tabulated in the price schedule attached thereto was only for the equipment but not for maintenance and the warranty.

While carrying out the evaluation of the tenders however, the Procuring Entity considered the sum of Kshs. 121,933,726.57 allegedly for maintenance and warranty then added it to the sum of Kshs. 294,550,059.26 to come up with the total price of Kshs. 416,483,785.83. The interested party was thereafter declared as the lowest evaluated bidder and was awarded the tender at the sum of Kshs. 294,550,059.26.

The sum of Kshs. 121,933,726.57 allegedly for maintenance and warranty was not however part of the successful bidder's form of tender and in terms of compliance with the tender requirements, the interested party did not therefore submit a price on account of the cost of maintenance and warranty.

This fact was admitted by the Procuring Entity which sought to justify the omission by stating that the cost of maintenance and the warranty would have formed the basis of a future separate contract.

The Board however finds the said justification untenable firstly because the tender itself required that a price cost be submitted for maintenance and warranty. A financial proposal that omitted these components was therefore non-responsive. Secondly, where a price component required in a tender is omitted, the same cannot be the subject of a separate contract unless a fresh tender is floated since the second exercise would amount to a distinct procurement as defined by the Act.

The Procuring Entity therefore took a risk both to itself and the public by purporting to acquire an equipment without ensuring and putting in place mechanisms to ensure the future continued efficient use of the machine in case of a future breakdown or if it was supplied with a defective machine.

The Board further finds that it was legally untenable for the Procuring Entity to award the tender to a bidder who had omitted to include such valuable component in its form of tender and the Board is not therefore entirely surprised that the prices quoted by the third party/successful bidder and those quoted by the remaining two bidders in their forms of tender were so distinctly different in figures that left the Board wondering whether they were all participating in the same tender.

The Board has severally held that a tender cannot be awarded outside the confines of the requirements set out in the tender document and outside the prices set out in the form of tender which must reflect the components enumerated in the tender document. Some of the decisions on the issue are

the cases of **Alfatech Contractors Limited vs Kenya National Highways Authority** (PPARB No. 38 of 2009) and the more recent one **Surestep Systems and Solution Limited vs Industrial & Commercial Development Corporation** (PPARB No. 42 of 2017) where the Board stated as follows:-

**“The Board holds that the form of tender is the document in which the offer is communicated to specified employer. It is the offer that the procuring entity would consider and either accept or reject. The Board finds that the form of tender is a very vital document which communicates every essential information based on which a contract is created.”**

The Form of Tender is therefore the document that communicates the offer of a bidder to the Procuring Entity and it is only that which is in the Form of Tender that is capable of being accepted or rejected by the Procuring Entity. An offer that is placed outside the Form of Tender in a tender process is not an offer in law. Such an offer, in the Board’s view, is not capable of being acted upon by a Procuring Entity.

In the tender the subject matter of this Request for Review, the Board wishes to once again observe that the successful bidder’s offer as communicated in the Form of Tender was Kshs 293,477,784.26. By the Procuring Entity’s own admission at the hearing, the amount quoted by the interested party was for the Supply, Delivery, Installation, Testing and Commissioning of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine. The Procuring Entity stated that the amount did not cover the cost of the post-warranty service and maintenance, which it had indicated separately outside the Form of Tender as Kshs 121,933,726.57.

In view of all of the foregoing, the Board finds that the Procuring Entity deviated from the evaluation criteria set out in the tender document in the evaluation of the interested party/the successful bidder's tender. The Board therefore holds that the Procuring Entity acted contrary to the provisions of Section 80 (2) of the Act by awarding the tender to a bidder who did not comply with the requirements set out in the tender document with regard to the total cost of equipment supply, installation, commissioning, testing, training and eight-year post warranty service and maintenance contract.

The Board therefore holds that the interested party's financial proposal was non-responsive to the requirements of the tender document.

The ground of review as set out in this issue therefore succeeds and is allowed.

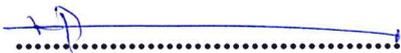
### **FINAL ORDERS**

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

- 1. The Request for Review dated 26<sup>th</sup> March 2018 and filed by the Applicant, M/s Meditec Systems Ltd on the same date in respect of Tender No. KNH/T/94/2017-2018 for Supply, Delivery, Installation, Testing and Commissioning of 3 Tesla MRI Machine and MRI Compatible Anaesthetic Machine, be and is hereby allowed.**
- 2. The award of the subject tender to the Successful bidder, M/s Philips East Africa Limited, be and is hereby annulled and set aside.**

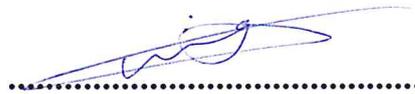
3. The Procuring Entity is directed to re-evaluate afresh the financial bids for the financially responsive bidders taking into account the findings of the Board herein and complete the procurement process including the making of an award within fourteen days of the date of this decision.
4. For the reason that the procurement process herein is not complete, each party shall bear its own costs of the Request for Review.

Dated at Nairobi on this 16<sup>th</sup> day of April, 2018.



**CHAIRMAN**

**PPARB**



**SECRETARY**

**PPARB**