

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 22/2009 OF 2009**

**BETWEEN**

**TECHNO BRAIN (K) LTD .....APPLICANT**

**AND**

**HORTICULTURAL CROP  
DEVELOPMENT AUTHORITY.....PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Horticultural Crop Development Authority (HCDA) dated the 14<sup>th</sup> day of May, 2009 in the matter of Tender No. HCDA/37/08-09 for the Supply, Implementation and Commissioning of Integrated Enterprise Resource Planning system (ERP).

**BOARD MEMBERS PRESENT**

Mr. Joshua Wambua	-	Member (in the chair)
Mr. Sospeter Kioko	-	Member
Eng. C. A. Ogut	-	Member
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Board Secretary
Ms. Kerina A. Rota	-	Secretariat
Mr. Gilbert Kimaiyo	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Techno Brain (K) Ltd**

Mr. Alfred Mugo - Country Manager

### **Procuring Entity, Horticultural Crop Development Authority**

Mr. Andrew Wandabwa - Advocate, Wadambwa Advocates  
Mr. Munyasa Khasiani - Advocate, Wadambwa Advocates  
Mr. James Kilazi - Ag. GM, Finance & Administration  
Mr. Richard Okite - Systems Analyst  
Mr. Nahashon Muse - Procurement Manager  
Ms. Caroline Weloba - Administrative Assistant

### **Interested Candidates**

Mr. Gatheru Gathemia - Advocate for Coretec Systems and Solutions  
Mr. Tobias Otieno - Chief Executive Officer, Coretec Systems and Solutions  
Mr. Wison O. Awili - Customer Relations Manager, Coretec Systems and Solutions  
Ms. Tracy Amuhoyi - Administrator, Attain Enterprise  
Mr. Francis Muli - Office Assistant, Attain Enterprise  
Ms. Lillian Ambaka - Managing Director, ICE Training & Consultancy Ltd

## **BOARD'S DECISION**

Upon hearing the representations of the parties and upon reading the documents before it, the Board decides as follows: -

## **BACKGROUND OF AWARD**

This tender No. HCDA/37/08-09 was advertised by the Procuring Entity on 19<sup>th</sup> November, 2008. It was for the Supply, Implementation and Commissioning of Integrated Enterprise Resource Planning System (ERP). On 19<sup>th</sup> December, 2009, the Procuring Entity put up an advertisement in Daily Nation informing bidders that clarifications had been deemed necessary, therefore calling for an Addendum to the tender documents. It further informed the bidders that the closing date had been extended from 6<sup>th</sup> January 2009 to 30<sup>th</sup> January 2009 at noon and bidders were advised to collect the Addendum to the tender from the Procuring Entity.

The tender was closed/closed on 30<sup>th</sup> January 2009, the following bidders submitted their bids:-

1. M/s Standard Solutions Ltd
2. M/s Techbiz Software Solutions
3. M/s Ecletics
4. M/s Vision/R4 Corporation and Footprint Comp.
5. M/s Open World Ltd
6. M/s Professional Digital Systems Ltd
7. M/s Micro House Technologies Ltd

8. M/s Open View Business System
9. M/s Coretec Systems and Solutions
10. M/s Attain Enterprise Solutions
11. M/s Techno Brain Ltd
12. M/s MFI Solutions
13. M/s Simba Technology Ltd
14. M/s Compulynx links Ltd

## **EVALUATION**

The Evaluation was based on only two assessment areas and was carried out in all three phases, with the financial suitability being carried forward until the completion of the site visit phase. The scoring per area was as follows:

- Technical Evaluation            50%
- Vendor suitability                30%
- Financial Suitability            20%

The Evaluation Committee used Evaluation templates based on the Request for Proposal to score first two assessment areas. The financial evaluation was based on the lowest bid.

The technical evaluation was carried out in all the three phases. The results were treated autonomously for each phase with the latter independent of the former. The results for each phase were ranked and tabulated. The tenderers were ranked as follows based on the technical results obtained from the Desk Evaluation.

### **Desk Evaluation Phase**

Ranking	Tenderer
1.	M/s Coretec Systems and Solutions
2.	M/s Attain Enterprise Solutions
3.	M/s Techbiz Software Solutions
4.	M/s Techno Brain Ltd
5.	M/s Simba Technology Ltd
6.	M/s MFI Solutions
7.	M/s Vision/R4 Corporation and Footprint Comp.
8.	M/s Ecletics
9.	M/s Open View Business System
10.	M/s Compulynx links Ltd
11.	M/s Open World Ltd
12.	M/s Micro House Technologies Ltd

### **Demonstration Phase**

The Enterprise Resource Planning System demonstration phase took place from 1<sup>st</sup> April 2009 to 9<sup>th</sup> April 2009. Seven tenderers proceeded to the demonstration phase. Based on the results obtained during this phase, tenderers were ranked as follows:-

Ranking	Tenderer
1.	M/s Coretec Systems and Solutions
2.	M/s Techno Brain Ltd
3.	M/s Attain Enterprise Solutions
4.	M/s Techbiz Software Solutions

5.	M/s MFI Solutions
6.	M/s Vision/R4 Corporation and Footprint Comp.
7.	M/s Simba Technology Ltd

### Site Visit Phase

The top three tenderers proceeded to this phase which commenced on the 22<sup>nd</sup> of April 2009 and concluded on 5<sup>th</sup> may 2009. The results obtained after the site visit were ranked as follows:

Ranking	Tenderer	Score
1.	M/s Coretec Systems and Solutions	90.67%
2.	M/s Techno Brain Ltd	84%
3.	M/s Attain Enterprise Solutions	59.17%

**Financial Evaluation:** The Evaluation Committee noted that it was very difficult to rate this area due to inconsistency of the format supplied by the vendors in their tender documents. However, it agreed that the financial evaluation be carried out on the vendors who were successful after the Site Visit Phase.

The top two vendors who qualified after the Site Visit Phase were:

- 1<sup>st</sup> - Coretec Systems and Solutions
- 2<sup>nd</sup> - Techno Brain(K) Ltd

The Evaluation Committee sought clarifications from each of the two vendors as to whether the costs quoted were inclusive of :

- 1. 16% VAT

2. 50 User Licences
3. Annual recurrent costs.

M/s Coretec Systems and Solutions had already quoted for the 50 User licence while Techno Brain (K) Ltd had quoted for 20 and hence Techno Brain (K) Ltd were asked to quote for the additional 30 user licences.

**Recommendations:** The Evaluation Committee recommended M/s Coretec Systems and Solutions for award of the tender because it had the technical and professional capacity and was financially sound to undertake the project. It further noted that M/s Coretec Systems and Solutions was the lowest evaluated bidder.

The Tender Committee in its meeting held on 14<sup>th</sup> May, 2009, under Minute No. TC/04/05/08-09 awarded the contract for the Supply and Implementation of the Enterprise Resource Planning (ERP) System to M/s Coretec System Solutions, the lowest evaluated tender in price.

On 22<sup>nd</sup> May, 2009, the Procuring Entity notified both the successful and unsuccessful bidders.

### **THE REVIEW**

This Request for Review was lodged by M/s Techno Brain (K) Ltd on 5<sup>th</sup> June, 2009 against the decision of the Tender Committee of Horticultural Crop Development Authority (HCDA) in the matter of tender No. HCDA/37/08-09 for Supply, Implementation and Commissioning of Integrated Enterprise Resource Planning System (ERP). The Applicant

was represented by Mr. Alfred Mugo, Country Manager while the Procuring Entity was represented by Mr. Andrew Wadambwa, Advocate of Wadambwa Advocates. The interested candidate M/s Coretec Systems and Solutions was represented by Mr. Gatheru Gathemia, Advocate of Gatheru Gathemia & Co. Advocates.

The Applicant has raised seven grounds of appeal and urged the Board to make the following orders:-

1. The tender referred to above be nullified and subsequently re-advertised and evaluated according to the procurement Act and Regulations.
2. All procurement proceedings arising from the above mentioned tender be stopped immediately.
3. The award of the contract be retraced and subsequently no contract should be signed between the respondent and the successful bidder.
4. The respondent reimburses the Applicant, within a period not exceeding 14 days, such costs including the fees for lodging of this review and the actual costs borne by the Applicant towards preparations of material for this review.

At the commencement of the hearing, the Procuring Entity made an application to the Board to amend its Replying Affidavit by introduction of two (2) emails and a copy of the consultancy Agreement between the



Procuring Entity and ICE Training & Consultancy to specifically address some allegations raised by the Applicant in its ground of appeal.

The Applicant objected to the admission of the replying affidavit on the grounds that it should have been filed in good time.

After consideration of the parties arguments, the Board accepted the amended replying Affidavit and the Applicant was given time to go through the amendment.

**GROUND 1: Breach of Section 66(6) of the Act and Regulation 46**

The Applicant informed the Board that it had participated in tender No. HCDA/37/08-09 for Supply, Implementation and Commissioning of Integrated Enterprise Resource Planning System (ERP). It submitted that the Procuring Entity was in breach of Section 66(6) of the Act and Regulation 46 by not evaluating the tender within 30 days. It pointed out that the bids were opened on 30<sup>th</sup> January, 2009, and the evaluation was still ongoing by 1<sup>st</sup> April, 2009 when it was invited by the Procuring Entity to do demonstration vide letter dated 19<sup>th</sup> March, 2009 and e-mail dated 6<sup>th</sup> May, 2009. It averred that, the communications clearly indicated that the evaluation period had exceeded the period provided for by Section 66(6) of the Act and Regulation 46.

In response, the Procuring Entity submitted that it had conducted the evaluation within the stipulated time from 23<sup>rd</sup> February, 2009 to 27<sup>th</sup> February, 2009. It further submitted that after the Desk evaluation, it

became necessary to verify the data that had been submitted by the bidders. It argued that the verification exercise was not an evaluation process, but only served to verify that what was specified by the bidders in the technical documents existed and met its specifications. It further stated that the Applicant participated in the demonstration and did not raise any questions about the peculiarity of the demonstrations. In addition, the Procuring Entity stated that the site visits and demonstrations did not prejudice the Applicant since both the site visits and demonstrations were done within the Bid validity period and that the evaluation process was not tainted. In conclusion, the Procuring Entity argued that the Applicant should be estopped from castigating an exercise which it fully participated in.

The Board has carefully scrutinized the documents and considered the parties submissions and noted that Section 66(6) and Regulation 46, respectively provide as follows:

**Section 66(4)**

*“The Evaluation shall be carried out within such period as may be prescribed.”*

**Regulation 46**

*“A Procuring Entity shall, for purposes of section 66(6) of the Act, evaluate the tenders within a period of thirty days after the opening of the Tender.”*

The Board has noted that the tenders were opened on 30<sup>th</sup> January, 2009 and therefore the 30 days evaluation period lapsed on 2<sup>nd</sup> March, 2009. Further, the Board has noted the contents of the Procuring Entity's e-mail dated 6<sup>th</sup> May, 2009 to the bidders. In the third line of this e-mail, it states as follows:

***"Please note that this still part of the evaluation, and as such you will meet the same Evaluation team you met in KIE."***

It is therefore clear from the e-mail, the demonstrations were part of the evaluation process. Indeed, the evaluation report was signed on 12<sup>th</sup> May, 2009.

In the past, this Board has dealt with similar cases and ruled that evaluation beyond 30 days did not prejudice bidders. However, in his ruling on High Court case No. 540 of 2008 between Kenya Revenue Authority and Delarue, Justice Nyamu held that:-

***"The provisions of Section 66(6) of the Public Procurement and Disposal Act and Regulation 46 are couched in mandatory terms, and hence the Procuring Entity's must comply."***

Accordingly this ground of Appeal succeeds.

## **GROUND 2- Breach of Regulations 8(3) and 16**

The Applicant submitted that the Tender Committee Secretary (i.e. Procurement Manager) was a member of both the Tender Committee and the Evaluation Committee contrary to Regulations 8(3), 16(3) and (4). It further submitted that the said officer in-charge of the Procurement Unit was physically present during the demonstrations and therefore in their view he was a member of the Evaluation Committee.

The Procuring Entity in its response stated that the appointment letters of the members of the evaluation committee dated 29<sup>th</sup> January, 2009 did not include the name of the Procurement Manager, Mr. Nahashon Muse, as a listed member. It further submitted that it was aware of the provisions of the Act and the Regulations that the Head of the Procurement Unit should not be a member of the Evaluation Committee. It stated that, at no time was the Procurement Manager involved in the tender evaluation process.

The Board has considered the submissions of the parties and examined the documents before it.

It is not disputed that Nahashon Muse was present during the demonstrations conducted by the bidders. The issue to be determined in this ground is whether the physical presence of the officer in-charge of the Procurement Unit during the demonstrations amounted to a breach of Regulations 8(3), 16(3) and (4).

The Board has examined the Accounting Officer's appointment letter Ref: HCDA/A7/3/VOL (120) of 29<sup>th</sup> January, 2009 informing the persons listed therein that they had been appointed by the Accounting Officer to the tender evaluation committee. This was done in accordance with Regulation 16(3). The Board notes that the name of Mr. Nahashon Muse was not among the nine persons appointed by the Accounting Officer to evaluate the tender. Indeed he did not sign the evaluation report and therefore his presence in the Evaluation Committee meeting could not be construed to be a breach of Regulation 16(4) as he attended the Evaluation Committee by virtue of being the head of the Procurement Unit.

The Board holds that the mere physical appearance of an individual during demonstrations by the bidder is not of necessity enough to conclude that such a person is a member of the Evaluation Committee.

Accordingly this ground of Appeal fails.

**GROUND 3 and 5, Breach of Sections 66(2), (3), (4) and Regulations 38(a), 50 (1) and (3)**

These grounds have been consolidated as they raise similar issues.

The Applicant argued that the Procuring Entity breached Sections 66(2) and 66(3) of the Act, by failing to specify the evaluation criteria in the tender document. It submitted that it was necessary to have a criteria with a format of evaluating the bids with weights apportioned, say for technical 70% and financial 30%. The Applicant argued that it was not

clear to bidders whether the tender would be decided based on quality or finance. It further queried how the Procuring Entity determined the lowest evaluated tender because there was no basis for arriving at the lowest evaluated tender as envisaged by Section 66(4) of the Act.

The Applicant submitted that the Procuring Entity did not follow evaluation procedures and was in breach of Regulations 38(a), 50(1) and (3). It stated that the Procuring Entity did not include a statement in the Tender Document whether tenders which did not conform precisely to the description of requirements but which met the objectives of the procurement in an alternative manner, could be permitted; and the manner in which such tenders would be evaluated. It further stated that Regulations 50(1) and 50(3) were breached in that since there was no evaluation criteria, it would not be possible to do and complete the Technical Evaluation. Further, it argued that it would not also be possible for the Procuring Entity to rank the tenders.

In its response, the Procuring Entity stated that it had clearly specified the evaluation criteria in the tender documents, with different aspects of the system having been assigned weights, as per the tender documents. It further stated that a Desk evaluation was carried out on the 23<sup>rd</sup> to 27<sup>th</sup> February, 2009 solely based on the criteria set out in the tender document. The Procuring Entity argued that due to constraints of time, it only invited seven bidders for the demonstration phase. It submitted that the three top vendors proceeded to the site visit phase. Further, it sought clarifications from the top two vendors as to whether the costs

quoted were inclusive of 16% VAT, 50 User Licence and Annual recurrent costs. It admitted that reports of demonstration and site visit were submitted to the Tender Committee as part of the Evaluation Report.

With regard to breach of Regulations 38(a), 50(1) and (3), the Procuring Entity reiterated in its submissions that it had clearly stated in Clause 3.13 of the tender documents a statement that it would not accept alternatives and that it had done the evaluation using the criteria set in the tender document pursuant to the said Regulations.

An Interested Candidate, M/s Open World Limited, represented by Ms. Dorcas Muthoni, informed the Board that although it had not filed its submission, it wanted to make a clarification regarding the evaluation process. It submitted that during the opening of Bids, the Procuring Entity informed the bidders that demonstrations and site visits would be part of the evaluation process for the short listed bidders.

M/s Coretec Systems & Solutions, the successful bidder in their submissions concurred with the Procuring Entity. It submitted that it had adopted the arguments made by the Procuring Entity in their entirety.

The Board has scrutinised the tender documents and noted that Desk evaluation and the weighted scoring for technical evaluation was provided for in the Tender Document. At the Desk evaluation stage, the

Procuring Entity scored the bidders according to the weighted scores. Thereafter, the Procuring Entity shortlisted 7 bidders and subjected them to Demonstrations. The shortlisting and Demonstrations are not stated in the tender document as procedures and criteria to be used in the evaluation. The Board further noted from the Procuring Entity's submissions at the hearing that the shortlisting of 7 bidders was done in the interest of time. The application of cut off formula and shortlisting a certain number of bidders in the interest of time was not part of the evaluation criteria stated in the Tender Documents.

The Board further notes that during the Demonstration phase, the Procuring Entity awarded marks to the tenderers. Further, the Board notes that the Procuring Entity conducted site visits and awarded marks. Both the Procedure of awarding marks at the Demonstration phase and the criteria of conducting Site Visits and awarding marks were also not set out in the Tender Document. After the technical evaluation which comprised Desk evaluation, Demonstration and Site visits, the Evaluation Committee proceeded to recommend the award to the successful bidder on the basis that it scored the highest in the technical evaluation. The award of the contract to a bidder with the highest technical score was not a criteria in the Tender Document.

Taking the above matters into account, the Procuring Entity breached Section 66(2) of the Act by evaluating and comparing the tenders using procedures and criteria not set out in the Tender Documents.



Indeed, there was no procedure or criteria stated in the Tender Document as to how the lowest evaluated tenderer would be determined after application of the weighted scoring of parameters in the Tender Document. This was in breach of Section 66(3) of the Act.

Consequently, the successful tenderer could not have been the tenderer with the lowest evaluated price; thus a breach of Section 66(4) of the Act.

Accordingly these grounds of Appeal succeed.

#### **GROUND 4, Breach of Regulation 16(8)**

The Applicant alleged that the Procuring Consultant and Evaluation Committee had direct contact with bidders through the use of Telephone - Mobile communication which prompted its response by e-mail. It submitted that, the communication with regard to selection of site visits, submission of draft contract and clarification of price quotation and adjustment of price quotation, was contrary to Regulation 16(8).

The Procuring Entity in response submitted that there was no direct communication within the meaning of the Act. It argued that the communication to all the bidders by e-mail was a formal communication. Further, it argued that it was the Applicant who called to make an inquiry and the Procuring Entity followed it with an e-mail confirming the conversation. It submitted that no prejudice is alleged to have been caused by reason of this purported direct communication.

In conclusion, it further submitted that the Applicant be estopped from further raising issues in this respect.

The Board has considered the submissions made by the parties and documents submitted.

The issue that arises for determination is whether the Procuring Entity was in breach of Regulation 16(8) which states as follows:-

***“Under no circumstances may any member of an evaluation committee enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering”***

The Board notes that the Chairman of the Evaluation Committee, Mr. Richard Okite, communicated with bidders directly through e-mails dated 6<sup>th</sup> May, 2009. The e-mail informed them that the Demonstration was still part of the evaluation, and as such bidders would be required to meet the same Evaluation team they met at Kenya Institute of Education.

The Board holds that a member of the Evaluation Committee should not have directly communicated with the tenderers pursuant to Regulation 16(8).

In the circumstances, this ground of Appeal succeeds.

## **GROUND 6, Breach of Regulation 19**

The Applicant alleged that the Procuring Entity contracted a consultant which in its view was to have been registered by the Public Procurement Oversight Authority as a Procuring Agent, pursuant to Regulation 19. It argued that the appointment of the consultant was not in accordance with Regulation 19.

In its response, the Procuring Entity stated that it engaged the consultant to determine the ICT requirements through an open tender and due process was followed including the approval of the Tender Committee. Further, it stated that it did not contract its procurement function to a third party during the tender process. The tender evaluation was carried out by the Tender Evaluation Committee.

The Board notes that a Procuring Entity is not barred from hiring a consultant in accordance with the Act and the Regulations as long as the Procurement procedures are adhered to when selecting such a Consultant. The Board further notes that the consultant was involved in the preparation of the tender document and evaluation of the bids.

The Board takes note of Regulation 19 which deals with the appointment of a Procurement Agent. In this case, the consultant was not a Procuring Agent as envisaged under Section 28 of the Act read together with Regulation 19, in that the Consultant was not appointed to carry out procurement process on behalf of Procuring Entity. It is apparent that the Consultant was offering technical support to the procurement

process undertaken by the Procuring Entity and therefore could not be a Procurement Agent.

Accordingly this ground of Appeal fails.

**GROUND 7 - Breach of Section 64 of the Act**

The Applicant alleged that the evaluation of the tender was not done in accordance with the Tender Document instructions on responsiveness, which eventually affected the level of competition. It cited Hardware pricing as an example where, despite pricing for it, no evaluation on it was carried out by the Procuring Entity.

In its response, the Procuring Entity reiterated that the impression that the Hardware was to be evaluated was unfounded. It further noted that the provisions of the tender documents in relation to equipment was basically to determine whether the vendors proposed system would be compatible with the Procuring Entity's hardware or whether it would be required to acquire an additional hardware. It finally stated that there was no provision to quote for the Hardware as alleged and therefore it was not subject to evaluation. After reviewing the tender documents, the Board find that the Procuring Entity had sought for pricing on both the Software and Hardware, but that the pricing for the Hardware was for purposes of ascertaining cost of such hardware in the market. This was useful to the Procuring Entity if it was to purchase compatible Software to such hardware.

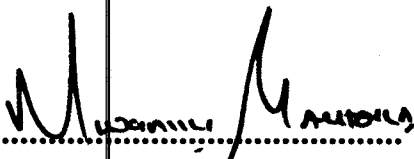
In this regard, the Board holds that the evaluation of the tender was to be based on the pricing of software only as provided in the tender documents.

Accordingly this ground of Appeal fails.

The Board has considered arguments on all the grounds as detailed herein and finds that grounds 1, 3, 4 and 5 which are very key have succeeded.

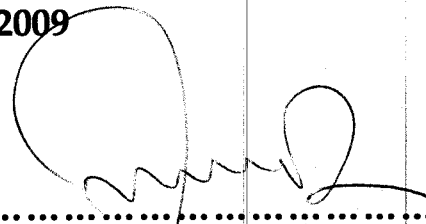
Taking into consideration all the above matters, this Request for Review succeeds. The award of the tender to the successful bidder is hereby annulled and the Procuring Entity may re-tender.

Dated at Nairobi on this 3<sup>rd</sup> day of July, 2009



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**CHAIRMAN  
PPARB**



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**SECRETARY  
PPARB**

