

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 34/2010 OF 15TH JUNE, 2010

BETWEEN

ALLIANCE TECHNOLOGIES SOLUTIONS LTD.....APPLICANT

AND

**PUBLIC PROCUREMENT OVERSIGHT AUTHORITY.....PROCURING
ENTITY**

Review against the decision of the Tender Committee of the Public Procurement Oversight Authority, dated 3rd June, 2010 in the matter of Tender No.IFB No. PPOA/ICB/05/2009-2010 for Supply of E-Procurement Software

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Amb. C. M. Amira	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Joshua W. Wambua	-	Member

IN ATTENDANCE

Ms. Kerina A. Rota - Secretariat
Ms. Juliet Wambulwa - Secretariat

PRESENT BY INVITATION

Applicant, Alliance Technologies Ltd

Mr. Murete Kithigi - Lawyer
Mr. Waithaka Ngigi - Managing Director
Mr. Andrew Kamau - General Manager
Mr. Kamau Tirus - PM

Procuring Entity, Public Procurement Oversight Authority

Mrs. Jane Njoroge - Ag. Director, Technical Services
Mr. H. K. Kirungu - Manager, Policy & Research
Mr. Jerome Ochieng' - ICT Manager
Mr. Peter K. Ndung'u - Ag. Deputy Manager Compliance
Mr. Martin Okwatta - Head, Procurement
Mr. Lawrence Kanyinyi - ICT Officer
Mrs. Jane W. Macharia - Human Resource Officer
Ms. Caroline Warothe - Compliance Officer
Mr. James Kilaka - Procurement
Ms. Melody Karani - Procurement

Interested Candidates

Mr. Mohammed Nyaoga - Advocate, C1 India
Mr. Muthomi Thiankolu - Advocate, C1 India
Mr. Bochere Omariba - Lawyer, C1 India

Mr. Akshaya K. Rath - AVP- Sales, C1 India
Mr. Sabu Joseph - BOM, C1 India
Ms. Laura Kisirio - Software Consultant, Openview
Business System

BOARD'S DECISION

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

BACKGROUND

An Expression of Interest (hereinafter "EOI") was advertised in the Daily Nation and The Standard Newspapers of Wednesday 13th May, 2009, and The East African Newspaper of May, 18th 2009. The Notice was also posted in the United States Government Advertisement portal fedbizopps, UN DG Business, tenders.go.ke and the Procuring Entity's website.

The deadline for submission for the EOI was Friday May 29th 2009 and thirty six (36) firms submitted their bids. The EOI was evaluated and the following fifteen (15) firms shortlisted and issued with the Request for Proposal document on 29th December 2009:-

M/s Alfa Web software Company

M/s Combinenet

M/s SRA International

M/s Development Gateway

M/s Deloitte Consultant Limited

M/s Winpro Technologies
M/s TATA Consultancy Services
M/s VESL Limited
M/s Open View Business Systems Limited
M/s Pegrume Ltd
M/s Computech Ltd
M/s Standard IT Solutions Ltd
M/s CI India PVT Ltd
M/s Procservice
M/s Alliance Technologies

A pre-bid conference was held on 15th January, 2010.

Closing/Opening:

The tender was closed/opened on Friday, 29th January, 2010. Eight (8) firms of the 15 responded and the following were their tender prices:

Table I

No.	Tenderer	Read Out Amount (USD)
1	Delloite Consulting Company	1,939,329.60
2	Openview Business Systems	612,627.00
3	C1 India	1,254,000.00
4	Alfa Web Software	500,000.00
5	Wipro Technologies	1,548,100.00
6	Computech Kenya Limited	1,907,762.33
7	Alliance Technologies Solutions Limited	1,994,267.00
8	VESL Technologies Limited	2,107,398.00

Evaluation

The evaluation was carried out in the following stages:

- i) Preliminary Evaluation

ii) Technical Evaluation

iii) Financial Evaluation

iv) Combined Technical and Financial Evaluation

Preliminary Evaluation

The bidders were evaluated on completeness and compliance to the tender submission requirements and the results were as tabulated below:

Table II

No.	Name of Document	Delloite Consulting Company	Openview Business systems	C1 India	Alfa Web Software	Wipro Technologies	Computech Technologies Limited	Alliance Technologies Solutions Limited	VESL Technologies Limited
1	Bid submission form (completed and signed)	Yes	No	Yes	Yes	Yes	Yes	Yes	No
2	Price schedule duly completed	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
3	Valid Bid Security (\$15,000)	No	Yes	Yes	No	Yes	Yes	Yes	Yes
4	Financial Capability (BDS - ITB 6.1a)	Yes	Yes	Yes	No	Yes	Yes	Yes	No
5	Written confirmation authorizing the signatory of the bid (ITB sec. 13.1d)	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
6	Eligible countries for the provision of goods, works and services(ITB sec III)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
7	Manufacturer Authorization (BDS - ITB 6.1b)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Responsiveness	No	No	Yes	No	Yes	Yes	Yes	No

The following bidders M/s Delloite Consulting Company; Open View Business Systems; Alfa Web Software and VESL Technologies Ltd were declared non-responsive at this stage.

Technical Evaluation

The technical evaluation was undertaken in two stages as follows:

i) Desktop technical evaluation

The evaluation criterion was developed from the functional and Technical requirements as stated in the statement of works. The results were as tabulated below:

Table III

No.	Specification	Marks (200)	C1 India	Wipro Technologies	Computech Technologies	Alliance Technologies Solution Ltd
1	Technical Capability	15	14.00	14.33	10.67	12.00
	Technical Staff	15	14.33	13.67	11.00	12.00
2	Implementation	25	22.33	20.00	5.00	21.00
3	Reference	5	5.00	4.67	4.67	3.00
4	Procurement planning;	15	12.67	14.00	12.33	13.00
5	Supplier registration and management;	15	14.67	15.00	12.33	14.00
6	Requisition and Purchase order management;	15	9.33	14.00	10.67	14.00
7	Catalogue management;	10	8.67	7.67	8.33	8.67
	e-Tendering;	30	29.67	29.67	20.00	29.00
Phase II						
1	Contract management;	10	9.67	10.00	7.00	9.67
Phase III						
1.	e-Payments; and	5	5.00	5.00	4.00	0.00
2.	e-Auction;	10	10.00	10.00	7.67	9.33

9	Technical Specification	30	28.33	29.33	20.00	29.33
Total		200	183.67	187.33	133.67	175.00
Out of 45		45	41.33	42.15	30.08	39.38
%		100	91.84	93.67	66.84	87.51

M/s Computech Technologies scored less than 70% and was declared non-responsive. Only bidders who scored 70% and above of the desktop technical evaluation were to be subjected to the technical and functional demonstration evaluation.

ii) Technical and Functional Demonstration of the Solution

The short listed bidders from the desktop technical evaluation presented their e-procurement solution to the evaluators. The demonstrations were evaluated based on the following criteria:

- a. Demonstration of the functional and technical capabilities of the system and how it meets the requirements of the Government of Kenya;
- b. Clear understanding of the public procurement process and a demonstration of how the proposed solution delivers this;
- c. The level of vendor understanding of e-procurement and a demonstration of how all stakeholders needs are catered for by the proposed system;
- d. User friendliness of the system;
- e. Knowledge of the bidders in explaining how the system works; and

f.Reporting capability of the system.

The results were as tabulated below.

Table IV

No.	Specification	Marks (200)	C1 India	Wipro Technologies	Alliance Technologies Solution
1.	Procurement planning;	10	6.00	7.17	7.33
2.	Supplier registration and management;	10	6.83	9.17	8.00
3.	Requisition and Purchase order management;	10	5.50	8.50	7.67
4.	Catalogue management;	10	5.17	8.33	8.33
5.	e-Tendering;	20	12.50	18.17	13.83
Phase II					
1	Contract management;	10	4.67	8.83	6.67
Phase III					
1.	e-Payments; and	5	3.50	4.00	3.50
2.	e-Auction;	5	3.50	4.50	3.50
9	Technical Specification	20	10.83	17.50	16.17
Total		100	58.50	86.17	75.00
Out of 35		35	20.48	30.16	26.25

iii) Financial Evaluation

As per the statement of works, the financial evaluation was done as follows:-

Table V

Cost Item		C1 India	Wipro Technologies	Alliance Technologies
Initial License cost	Purchase Order Management	950,000.00	380,000.00	0
	e-tendering		352,000.00	0
	Catalogue management		0	0
	License for the suppliers(if any)		110,000.00	0
Annual Technical Support	Purchase Order Management	209,000.00	86,500.00	38,798.00
	e-tendering		63,600.00	31,523.36
	Catalogue management		0	23,036.32
	Licenses(if any)		24,200.00	0
Implementation Cost	Purchase Management	194,000.00	40,000.00	484,975.00
	Supplier Management		20,000.00	394,042.00
	e-tendering		48,000.00	348,576.00
	catalogue management		20,000.00	287,954.00
	Overall Project Management		0	30,000.00
TOTAL		1,487,200.00	1,040,100.00	2,087,624.68
FINANCIAL SCORE		13.99	20.00	9.96

iv) Combined Technical and Financial Scores

Table VI

Evaluation Area	Evaluation Sub-area	Assigned % Weight	C1 India	Wipro Technologies	Alliance Technologies Solutions Limited
Technical Evaluation (80%)	Desktop Technical Evaluation	45	41.33	42.15	39.38
	Technical and functional Demonstration of the Solution	35	20.48	30.16	26.25
Technical Evaluation Totals		80	61.81	72.31	65.63
Financial Evaluation (20%)		20	13.99	20	9.96
Total		100	75.8	92.31	75.59

RECOMMENDATIONS

The Evaluation Committee then recommended M/s Wipro Technologies who had the highest evaluated score for award after negotiations. The Bidder's evaluated Bid Price was USD 1,040,100.00

THE TENDER COMMITTEE DECISION

The PPOA Tender Committee in its meeting held on 26th April, 2010 deliberated on the recommendations of the Evaluation Committee and recommended a post-qualification be done on the recommended bidder M/s Wipro Technologies pursuant to Clause 31 of the Instruction to Bidders and Regulation 52 of the Public Procurement Disposal Regulations, 2006. In addition, the Tender Committee recommended that the Evaluation Committee reconsider the comparison of prices using the quoted prices for the implementation of phase 1 as per the Statement of Works.

POST QUALIFICATION

During the post qualification process, the Evaluation Committee received information from the World Bank that the recommended bidder M/s Wipro Technologies had been debarred from participating in World Bank Procurements for four years, a period that would conclude in mid-2011. This was communicated to USAID, the financiers of the project, who indicated that they were of the opinion that it would be inappropriate for the Procuring Entity to enter into a contract with United States Government funds with a firm that had been debarred by the World Bank. As a result, the Evaluation Committee pursuant to Section 7 of the Public

Procurement and Disposal Act, 2005 re-evaluated the financial proposals excluding the bid from Wipro Technologies.

The financial evaluation was re-done using the initial license cost and implementation cost of phase 1. The financial proposal had a weight of 20% and therefore the lowest financial proposal was allocated 20 points and the other calculated on a prorata basis as below:-

Table VII

Cost Item		C1 India	Alliance Technologies
Initial License cost	Purchase Order Management		0
	e-tendering		0
	Catalogue management	950,000.00	0
	License for the suppliers(if any)	110,000.00	0
Implementation Cost	Purchase Management		484,975.00
	Supplier Management		394,042.00
	e-tendering		348,576.00
	catalogue management	194,000.00	287,954.00
	Overall Project Management	0	478,720.00
TOTAL		1,254,000.00	1,994,267.00
FINANCIAL SCORE		20.00	12.58

Combined Technical and Financial Scores

Table VIII

Evaluation Area	Evaluation Sub-area	Assigned % Weight	C1 India	Alliance Technologies Solutions Limited
Technical Evaluation (80%)	Desktop Technical Evaluation	45	41.33	39.38
	Technical and functional Demonstration of the Solution	35	20.48	26.25
Technical Evaluation Totals		80	61.81	65.63
Financial Evaluation (20%)	-	20	20	12.58
Total		100	81.81	78.21

Annual Technical Support

The Costs of annual maintenance as indicated by the bidders for phase one was as below:-

Table IX

Cost Item		C1 India	Alliance Technologies
Annual Technical Support	Purchase Order Management		38,798.00
	e-tendering		31,523.36
	Catalogue management	209,000.00	23,036.32
	Licenses(if any)	24,200.00	0
TOTAL		233,200.00	93,357.68

The Evaluation Committee noted that M/s Alliance Technologies financial proposal did not give a cost for annual technical support of catalogue management. The bidder had however stated that the total annual maintenance was charged at 8% of the total cost of implementation, less project management services. The Evaluation Committee therefore calculated 8% of the cost of implementing catalogue management (i.e. USD. 287,954.00) and arrived at USD 23,036.32. This was communicated to the bidder who accepted the error and the cost added to his annual technical support.

The cost of annual technical support did not form part of the implementation costs of phase one but was to form part of the contract as USAID had given an undertaking that they will pay the annual technical support for the first year.

RECOMMENDATIONS

M/s C1 India had the highest evaluated bid score and was therefore recommended for award at their quoted price of **USD 1,254,000.00**. The

contract was however to include an Annual Technical support of **USD 233,200** to cater for the first year annual technical support.

TENDER COMMITTEE DECISION

The Procuring Entity's Tender Committee in its meeting held on 2nd June, 2010 awarded the tender to the recommended bidder M/s C1 India at their quoted price of USD 1,254,000. Notification of tender award was done simultaneously to both successful and unsuccessful tenderers on 3rd June 2010.

THE REVIEW

This Request for Review was lodged by M/S. Alliance Technologies Solutions Ltd on 15th June, 2010 against the decision of the Tender committee of PPOA in the matter of Tender Number IFB No. PPOA/ICB/05/2009-2010 for Supply of e- Procurement Software.

The Applicant was represented by Mr. Marete Githinji Advocate, while the Procuring Entity was represented by Mr. H. K. Kirungu, Manager. The Successful Bidder, C1 India, was represented by Mr. Mohammed Nyaoga, Advocate. The Applicant has raised eleven grounds of Appeal and urged the Board to make the following orders:

- 1. "That the Procurement Proceedings be annulled in their entirety.***
- 2. That in the alternative to (1) above the Board be pleased to give directions to the procuring entity with respect to anything to be done***

or redone to ensure that the procurement proceedings are fair and unbiased.

3. *That the Applicant be awarded the costs of and incidental to these proceedings.*
4. *Such other or further orders and/or directions the Honourable Board"*

PREAMBLE

This case presents a unique situation on how the Public Procurement and Disposal Act, 2005 is structured. The Public Procurement Act 2005 came into operation on 1st January, 2007 through operationalization by the Minister for Finance by Kenya Gazette No.77 of 9th December, 2006.

Prior to the enactment of this Act, Public Procurement in Kenya was regulated by the Exchequer and Audit (Public Procurement) Regulations, 2001 made by the Minister for Finance under the Exchequer and Audit Act Chapter 455 of the Laws of Kenya.

Upon enactment of the Public Procurement and Disposal Act, 2005, the Review Board was continued under Section 25 of the Act which provides as follows:-

- "25. (1) The Public Procurement Complaints, Review and Appeal Board established under the Exchequer and Audit (Public Procurement) Regulations, 2001 is continued under this Act as the Public Procurement Administrative Review Board.*
- (2) The composition and membership of the Review Board shall be in accordance with the regulations.*

- (3) *The Authority shall provide administrative services to the Review Board.*

The Act also created an Authority known as the Public Procurement Oversight Authority (PPOA). The functions of the Authority are set on at Section 9 which provide as follows:-

"9. The Authority shall have the following functions –

- (a) *to ensure that the procurement procedures established under this Act are complied with;*
- (b) *to monitor the public procurement system and report on the overall functioning of it in accordance with section 20(3)(b) and present to the Minister such other reports and recommendations for improvements as the Director-General considers advisable;*
- (c) *to assist in the implementation and operation of the public procurement system and in doing so –*
 - (i) *to prepare and distribute manuals and standard documents to be used in connection with procurement by public entities;*
 - (ii) *to provide advice and assistance to procuring entities;*
 - (iii) *to develop, promote and support the training and professional development of persons involved in procurement; and*

- (iv) to issue written directions to public entities with respect to procurement including the conduct of procurement proceedings and the dissemination of information on procurements; and*
 - v) to ensure that procuring entities engage procurement professionals in their procurement units.*
-
- (d) to initiate public procurement policy and propose amendments to this Act or to the regulations; and*
 - (e) to perform such other functions and duties as are provided for under this Act.*

The PPOA is headed by a Director-General who is to be appointed under Section 10 of the Act. The Act also provides for the Public Procurement Oversight Advisory Board whose functions are set out under 23 of the Act which provides as follows:-

"23. The functions of the Advisory Board are –

- (a) to advise the Authority generally on the exercise of its powers and the performance of its functions;*
- (b) to approve the estimates of the revenue and expenditures of the Authority;*
- (c) to recommend the appointment or termination of the Director-General in accordance with this Act;*
- (d) to perform such other functions and duties as are provided for under this Act.*

Part VIII of the Act gives the Authority Powers to enforce compliance with the Act through the office of Director - General. Sections 106 and 117 of the Act gives the Public Procurement Administrative Review Board the power to review decisions of the Director- General which he may make in the course of ensuring there is compliance with the Act.

In the course of performing its functions the Authority, as a matter of necessity is required to carry out procurement functions like any other Procuring Entity. To do so, it is required to follow the Act and the Regulations as it is a State Corporation within the meaning of Section 3(1) of the Public Procurement and Disposal Act, 2005 (herein after "the Act").

The situation that faced the Board in this case arises from Section 25(3) of the Act, which requires the Authority to provide Administrative Services to the Review Board. In doing so, the Authority provides the secretarial and administrative duties to the Board through its staff.

Upon filing of this Request for Review, the Public Procurement Administrative Review Board noted that unique situation posed by this case in view of the perceived conflict, where the Authority whose decision is being challenged is required to provide administrative services.

To address this situation, the Public Procurement Administrative Review Board excluded the staff of the Public Procurement Oversight Authority from processing any aspect of this Request for Review. The Request for Review was heard and determined by the Board members without any

input from the staff of the Public Procurement Oversight Authority. At the commencement of the hearing this unique situation which the Board found itself in was explained to the parties. After highlighting this unique situation the Public Procurement Administrative Review Board proceeded to hear the matter.

The Applicant raises eleven (11) grounds of Review which the Board deals with as follows:

Grounds 1, 9, and 11

These grounds have been consolidated as they are general statements relating to the Tender Process.

Under these grounds, the Applicant stated that the decision of the Procuring Entity under review resulted from a procurement process that was flawed as a result of duties and obligations conferred upon the Procuring Entity by the Act and Regulations.

It further argued that the process gravely offends the fundamental overriding objectives of the Kenya Public Procurement System as set out in Section 2 of the Act. It added that the Procuring Entity contravened the Provisions of the Act and the Regulations by failing to comply with the specific requirements of the Tender documents.

In response, the Procuring Entity submitted that that grounds 1, 9 and 11 of the Request for Review breached Regulation 73(2) (a) which requires an

Applicant to state the reasons for the complaint including any alleged breach of the Act and the Regulations.

The Board has considered the submissions of the parties and the documents that were presented before it.

The Board has noted that Regulation 73 (2) (a) of the Act provides as follows:-

"73(1)....."

73(2) The request referred to in Paragraph (1) shall:-

(a) State the reasons for the complaint including any alleged breach of the Act or these regulations."

Arising from the foregoing requirement, the Board notes that grounds 1, 9 and 11 of the Request for Review do not expressly set out the particular Sections of the Act that have been breached by the Procuring Entity.

Consequently, the Board considers these grounds to be general statements which are not backed by any alleged breach of the Act and or the regulations. These grounds therefore fail.

Ground 2: Breach of Section 2 of the Act

The Applicant submitted that the procurement process did not comply with the principles of economy, efficiency, equal opportunity, transparency, integrity, fairness and value for money, as contemplated under Section 2 of the Act.

In response, the Procuring Entity stated that it had carried out the procurement process in the manner required by the Act. It submitted that it had advertised the tender, evaluated the bids according to the requirements set out in the Instructions to Tenderers and subsequently awarded the tender to the Successful Bidder. It added that the tender was donor funded and that the Procuring Entity sought approval from the donor at every stage of the process which was done efficiently and in a transparent manner. It argued that the entire tender process was conducted above board and it saved the Kenyan tax payer the sum of Kshs. 48 Million.

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

The Board notes that the Procuring Entity advertised the subject tender for the supply of e-Procurement Software in the Daily Nation and the Standard newspapers on 13th May 2009 and in the East African Newspaper on 18th May 2009. The Board further notes that a pre-bid meeting was held on 15th January, 2010 where the bidders sought clarifications. The Board also notes that eight bidders, including the Applicant responded by submitting their bids by 29th January, 2010 when the tender closed/opened. The Board further notes that after the tender opening, bidders were invited to carry out demonstrations on their proposed software's in line with Clause 3.2.2 of the Statement of Works.

Arising from the above observations, the Board finds that the tender process was conducted within the broad provisions of Section 2 of the Act. Further, the Board notes that Section 2 of the Act sets out the purpose of the Act and cannot be breached in isolation.

Consequently, this ground fails.

Ground 3 – Breach of Sections 34(3) and 52(2)

The Applicant submitted that the technical requirements prepared by the Procuring Entity did not relate to performance but rather were manifestly a replica of an already existing design. It stated that this was a breach of Sections 34(3) and 52(2) of the Act and therefore rendered the procurement process biased and unfair. It argued that the technical requirements in the Instructions to Tenderers were the exact replica of existing designs available in India, contrary to the stipulations of the Act.

It stated that the Statement of Works, as set out in the Instructions to Tenderers was a replica of similar products from the Indian States of Chattisgarh and Maharashtra. The Applicant submitted that it had carried out a comparison of the technical requirements as set out in the Instructions to Tenderers which showed that the comparisons were identical word for word. It referred the Board to a brochure by P. J. Software Ltd to demonstrate the similarities of the technical specifications of the software. It added that all the technical requirements as designed by PWC Kenya, the Consultant, were copied from existing designs in India and argued that this was in breach of Sections 34(3) and 52 (2) of the Act.

In response, the Procuring Entity denied that the technical requirements were an exact replica of what was obtained in Maharashtra and Chhattisgarh States of India. It referred the Board to the blank spaces in the comparison table showing that not all the specifications were similar.

It explained that the technical specifications as set out in the tender documents were to capture key features for each and every schedule such as the starting time, closing time, opening time and system support which were not found in the comparison tables provided by the Applicant. The Procuring Entity further explained that the technical requirements for the tender were set by a local Taskforce on Implementation of E-procurement based on the Kenyan law and procurement environment considering the existing infrastructure prevailing in the country.

On its part, the Successful Bidder associated itself with the submissions of the Procuring Entity and submitted to the Board written skeleton arguments which it adopted. In addition, it stated that the Applicant had failed to prove that the technical requirements relate to an existing design as alleged. It further stated that the tender documents had no reference to any design. Instead, the tender documents referred to universal features of any e-procurement system and had a provision for alternatives pursuant to Clause 6.1 of the Statements of Works. Indeed the technical requirements accommodated competitors with heterogeneous or differentiated though functionally acceptable products.

In conclusion, the Successful Bidder urged the Board to find that the technical requirements were neither skewed to favour of any design, brand name, trade mark nor a replica of an existing e-procurement system.

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

The Board notes the provisions of Sections 34(3) and 52 (2) provides as follows:-

Section 34(3), the technical requirements shall, where appropriate:-

(a) relate to performance rather than to design or descriptive characteristics ; and

(b) be based on national or international standards

Section 52 (2) - The tender documents shall contain enough information to allow fair competition among those who may wish to submit tenders

The Board notes the specifications as set out by the Procuring Entity in the Instructions to Tenderers contained information related to performance even though they may look similar to the ones in the two cited states of India.

Further, the Board finds that the specifications as set out by the Procuring Entity in the subject tender are performance based and neither relate to