

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

CONSOLIDATED REVIEW NO. 24/2011 OF 22ND JUNE, 2011 AND
REVIEW NO. 28/2011 OF 1ST JULY, 2011

BETWEEN

NATIONAL SIGNALS NETWORKS &
MAYFOX COMPANY LTD.....APPLICANTS

AND

COMMUNICATION COMMISSION OF KENYA...PROCURING ENTITY

Review against the decision of the Tender Committee of the Communication Commission of Kenya dated 17th and 23rd June, 2011 in the matter of Tender No. CCK/PROC/RFP/09/2011-2011 for Request for Proposal for award of a Licence to Roll -Out and Operate a National Terrestrial Broadcasting Signal Distribution Network in Kenya

BOARD MEMBERS PRESENT

Mr. Joshua W. Wambua	-	Member, in the Chair
Ms. Loise Ruhu	-	Member
Ms. Natasha Mutai	-	Member
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

- Mrs. Pamela K. Ouma - Holding brief for the Secretary
Ms. Maurine Namadi - Secretariat
Ms. Christian Wambui - Secretariat

PRESENT BY INVITATION

Applicant for Review No. 24/2011, National Signals Networks

- Mr. Kamau Karori - Partner, Iseme Kamau & Maema Advocates
Ms. Karen Mate - Associate, Iseme Kamau & Maema
Advocates
Ms. Stella Situma - Pupil, Iseme Kamau & Maema Advocates
Mr. Paayal Patel - Paralegal, Iseme Kamau & Maema
Advocates
Mr. Charles Maye - General Manager
Mr. Martin Mwaura - Technical Manager
Mr. Wainaina Mungai - Head of ICT, Royal Media Services Ltd

Applicant for Review No. 28/2011, Mayfox Company Ltd

- Ms. Nazima Malik - Partner, Kaplan and Stratton Advocates
Ms. Lynda Aluvale - Pupil, Kaplan and Stratton Advocates
Mr. Akshay Sevak - Pupil, Kaplan and Stratton Advocates
Mr. Mugwe Manga - Director

Procuring Entity, Communication Commission of Kenya (CCK)

- Mr. Walter Amoko - Advocate, Inamder & Inamder Advocates
Ms. Nelly Muathi - Assistant Legal Manager
Mr. J. Omo - Employee of CCK

Interested Candidate, Pan-Africa Network Group (Kenya) Company Ltd

Mr. Muthomi Thiankolu	-	Advocate, Mohammed Muigai Advocates
Mr. Michael Wu	-	Director
Mr. Ruosi Qi	-	Director

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

Advertisement

The tender was initiated through an Expression of Interest advertised on 16th February, 2011. The Procuring Entity shortlisted six bidders who were then issued with the Request for Proposal documents that were to be closed/opened on 25th May, 2011.

Closing/Opening:

The tender opening date was extended from 25th May, 2011 to 31st May, 2011 vide addendum No. 4 issued on 24th May, 2011. The following four bidders submitted their Request for Proposal documents.

1. National Signals Network - Consortium of Nation Media Group Ltd and Royal Media Services Ltd
2. Pan-Africa Network Group (Kenya) Co. Ltd - Consortium of Pan-Africa network Group (Kenya) Group Co. Ltd a subsidiary of StarTimes Communication Network Technology Co. Ltd.

3. African Link Agencies Ltd- a Consortium of African Link Agencies Ltd and TV Magic Inc.

4. Mayfox Company Ltd a Consortium of Mayfox Company Ltd and Screen Service Broadcasting Technologies.

EVALUATION

The evaluation was conducted by a committee chaired by Eng. Leo Boruett. The evaluation was conducted in three stages namely, Mandatory, Technical and Financial evaluation stages.

a) Mandatory Evaluation:

The Preliminary Evaluation was conducted based on the mandatory requirements as stipulated in the Request for Proposal document. The summary results were as tabulated:

No.	Bidder	Bid Security Submission of Kshs. 500,000	Bid Security Issuing Bank	Validity period	Compliance with Clauses 3.2.7 and 3.2.8 regarding eligibility and composition of a bid
B2	National Signals	√	Citibank	53	√
B3	Pan-African Network	√	Cooperative Bank	158	√
B4	African Link	√	Dubai Bank Kenya	180	√
B5	Mayfox Company Ltd	√	KCB LTD	120	√

The Evaluation Committee noted that Bidder No. B2 namely, National Signals Network had submitted a Bid bond that was valid for 53 days instead of 120 days as required by Clause 3.8, 3.9.1.

Its bid was therefore declared non responsive as stipulated in Clause 3.9.2. The other three bidders proceeded to the Technical Evaluation stage.

b) Technical Evaluation

The proposals were subjected to a technical evaluation on the basis of the following four components as stipulated in the Request for Proposal document:

- i. Experience in Managing Broadcasting/Telecommunication
- ii. Network and Services.
- iii. Financial capacity
- iv. Business strategy
- v. Technical strategy

The evaluation criteria included:

A. Experience in Managing Broadcasting/Telecommunications Networks Services

- Platforms deployed
- Years of experience in operating broadcasting/telecom networks and/or providing telecom/broadcasting services
- Experience in providing the following broadcasting infrastructure
 - DTT multiplex/headend system
 - Pay TV Platform
 - Transmitter network
- Number of countries where bidder has operations

B. Financial Capacity

- Ability to raise funds (Gearing ratio =Debt/Total assets)

- Current ratio = Total current assets/total current liabilities
- Cash flow coverage of interest expenses ratio= cash flow from operating activities + interest)/interest expense
- Profitability(net profit margin=Net income/net sales)

C. Business Strategy

- Market analysis
- Market share projections
- Tariff Plan
- Marketing Penetration Strategy
- Human resources strategy
- Revenue Forecast
- Capital Investment
- Universal Service/ Access
- Customer Care Strategy

D. Technical Strategy

- Conceptual Plans and Network Planning Principles
- Network Deployment Schedule/Rollout Plan
- Maintenance and Operations Plan
- Infrastructure Sharing and Co- location plans
- Quality of service targets
- Billing
- Provision of EPG facility and services
- Environmental Conservation
- Spectrum requirements & Plans

Each evaluator independently reviewed, evaluated and awarded scores for each item in the criteria, which were then averaged. The summary results of the technical evaluation were as summarized in the table below:

Technical criteria	Max score	Pan-Africa Network group	African Link Agencies	Mayfox Company
i) Experience in Managing Broadcasting/Telecommunication Networks and Services	15	15	7	15
ii) financial capacity	15	15	0	0
iii) Business Strategy	30	27.4	17.2	13.9
iv) technical strategy	40	37.4	24.2	15.6
Total Score	100	94.8	48.4	44.5

Clause 3.15(b) of the tender document provided that bidders scoring 75 percent and above would be considered to have qualified in Technical Evaluation stage and will be eligible for Financial Evaluation stage. Only one bidder Pan-Africa Network Group scored above 75 percent and qualified to proceed to the financial evaluation stage.

c) Financial Evaluation

The financial proposal of M/s Pan-Africa Network Group was opened on 20th June 2011 and had offered a bid of USD 450,000. In accordance to Clause 3.17 of the tender document, the bidder's technical stage was normalized at 80% while its financial score was normalized at 20%. The overall normalized score was 100%

The Evaluation Committee then recommended that the tender for the award of one licence to roll out a national broadcasting signal distribution network in Kenya be awarded to M/s Pan-Africa Network Group (Kenya) Co. Ltd at an initial licence fee of USD 450,000.00

THE TENDER COMMITTEE DECISION

The Tender Committee at its meeting held on 20/6/2011 considered and approved the award of the tender for a license for the National Broadcasting Signals Distribution Network to M/s Pan-Africa Network Group (Kenya) Company Ltd at an initial license fee of USD 450,000.

THE REVIEW

APPLICATION NO. 24/2011

The Applicant, National Signals Network, lodged the Request for Review on 22nd June, 2011 against the decision of the Communication Commission of Kenya in the matter of Request for Review for Award of a Licence to Roll -Out and Operate a National Terrestrial Broadcasting Signal Distribution Network in Kenya. The Applicant requests the Board for the following orders:

- a. "The decision of the Procuring Entity contained in the letter dated 17th June 2011 be annulled or set aside.*
- b. The Applicant's bid be declared and/or deemed to be responsive.*
- c. The Procuring Entity be directed to evaluate the Applicant's bid on both the technical and financial aspects.*

Such other/further order as this Honourable Board may deem just to make.

- d. The Procuring Entity be ordered to pay such costs as may be assessed by this Honourable Board."*

The Applicant raises nine grounds of review which the Board deals with as follows:

GROUND 1

The Applicant submitted that the Procuring Entity's decision was erroneous as it was based on documents that were contradictory and ambiguous. It argued that the form of Security Bond, which is set out in Annex 5A of the Tender Document, did not stipulate a validity period. It contended that if indeed the Procuring Entity intended that the specific period of validity of the security bond was important it could have stated so in the Bid Bond form, as it had done in respect to the performance bond, as set out in Annex 5B, wherein the period of validity of the performance bond is specified as ninety(90) days after notification of acceptance of the application for the licences.

It further argued that the Request for Proposal (RFP) was ambiguous in that under Clause 3.14 (Mandatory Evaluation) reference is made only to the type of security required and the amount. In its view a bidder was only required to provide a bid security of Kenya Shillings five hundred thousand and not to state the period of validity of the security bond. Accordingly, its bank, in providing such security chose to assign a validity period of sixty days, taking into account the fact that guarantees are negotiable instruments and as such, must have a period within which they will remain valid in accordance with standard banking practice. It stated that having provided a bid bond in the amount specified in Clause 3.14(a) of the tender document, it had complied with the mandatory evaluation Clause.

In response, the Procuring Entity submitted that there was no ambiguity and, or contradiction, in the RFP with regard to the requirement that all bidders were to produce a bid bond for a period of validity of 120 days.

It added that Clauses 3.9.1 and 3.9.2 of the Instructions to Bidders were explicit and clear as to the period of validity of the bid bond, as well as the

consequence of failure to provide the bid bond. It stated that the requirement specified in these clauses was that a bidder was required to provide a bid bond which was valid for 120 days in the format bidders understood. In this regard it pointed out that all bidders, except the Applicant, understood this requirement, and thus provided the bid bond in the correct format and with the correct validity period.

It further argued that Regulations 41(4), of the Public Procurement and Disposal Regulations, 2006 (herein after "the Regulations") provided that no tender shall be accepted under the Act unless such security is valid for a period of at least thirty days after the expiry of the tender validity period. It pointed out that in this case the tender validity period was ninety (90) days, and hence the tender security should have been valid for 120 days in order for it to comply with the provisions of Regulation 41(4).

On its part the Interested Candidate associated itself with the submissions of the Procuring Entity. It submitted that the tender documents must be read and constructed as a whole in respect of any alleged ambiguity or contradiction. It pointed out that in particular, Annex 5A of the tender document must be read together with Clause 3.0 of the tender document. It further submitted that a conjunctive reading of Clause 3.9.1 and Annex 5A leaves no ambiguity or contradiction on the issue of the duration of validity of the tender security.

It argued that a textual reading of Clause 3.9.1 of the tender document clearly indicates that Annex 5A only prescribed the format of the bid security.

The Interested Candidate further argued that in view of the provision of Regulation 41(4), where the tender validity period is prescribed, there can be

no ambiguity or contradiction in respect of the minimum validity period for a valid bid security.

~~It concluded by stating that in view of the fact that ground one of the Request~~ for Review is frivolous; it ought to be dismissed pursuant to the provisions of Sections 93(2) and 95 of the Act.

The Board notes that the Requests for Proposals submitted by five bidders which had been shortlisted, among them the Applicant, following evaluation of Expression of Interest, were opened on 31st May, 2011. The Board further notes that the Applicant was disqualified at the Preliminary Evaluation stage for having failed to provide a bid security bond that was valid for 120 days as provided for in accordance with Clauses 3.8, 3.9.1 and 3.9.2. The Board further notes that the bid bond provided by the Applicant shows that it was issued by the Citi Bank, Nairobi on May 24, 2011 and was to lapse on 23rd July, 2011 which makes it valid for only 59 days. The Board further notes that all the other bidders provided bid securities with expiry period beyond the 120 days as required in the Request for Proposals.

The Board further notes the provisions of Clause 3.14 of the RFP which state that:-

"The proposal shall be subjected to the mandatory evaluation, where the Bidder must submit the following mandatory requirements:

(a) Bid Security of Kenya Shillings five hundred thousand only (Kshs. 500,000)

(b) Compliance with clause 3.2.7 and 3.2.8 regarding eligibility and composition of a bid.

Bidders shall be required to meet all the above two mandatory requirements in order to proceed to the technical evaluation stage. Any bidder not complying with the mandatory requirements shall be disqualified at this stage."

The Board further notes the provisions of Clause 3.9.1 of the RFP which state that:

"Each bid must be accompanied by a Tender (Bid) Security of Kenya shillings five hundred thousand only (Kshs. 500,000) from a reputable bank with a validity period of 30 days beyond the tender validity period. The tender security which must be in the exact format provided in Annex A, shall be submitted in a separate envelope together with the bid."

It is the Applicant's position that insofar as Clause 3.14(a) is silent on the period of validity of the bid bond to be submitted by bidders, it was entitled to assign any period to the validity of the bid bond, which in its case was 59 days. Indeed, a plain reading of this provision supports the contention by the Applicant that a bidder was merely required to provide a bid bond for the amount stated in the Clause, so long as it was in the format set out in Annex 5A.

However the question which arises from this contention is whether or not in light of Clause 3.9.1 cited above, which required bid bonds to have "*a validity period of thirty days beyond the tender validity period,*" the Applicant met the requirements of the RFP, and should thus not have been disqualified at the Preliminary Evaluation stage.

In the view of the Board, the contention by the Applicant is not sustainable because it is founded on only one Clause of the RFP, namely Clause 3.14. A tender document cannot fully be understood unless it is read in its entirety.

In this case the Applicant has pegged its case on the reading of one provision of the RFP which, considered in isolation from the other provisions of the document, leads to the impression that it had satisfied all the requirements of the document. As the Board has stated in the case of *China Wu Yi (K) Co. Limited*, [Application No. 13 of 2011], *"A tender document..... is a complex compilation of many parts of a process whose meaning cannot be understood if read in a disjunctive manner. It is therefore not correct, as argued by the Applicant, that the conditions of contract cannot override the provisions of the tender document: the conditions of contract are part of the tender document and must be read together with the other parts."*

In this case the number of days that constitutes validity period is to be found at the Instruction to Bidders in the Tender Document Clauses 3.8, 3.9.1 and 3.9.2.

Clause 3.8 provides that:

"The tender shall remain valid and open for acceptance for a period of 90 days from the specified date of the tender opening. In exceptional circumstances, the Commission may request the Bidder for extension period...."

The tenders in this case having been opened on 31st May, 2011 were to remain valid till 31st August, 2011. In accordance with Clause 3.9.1 of the RFP, the validity of the bid bonds would thus be 30th September, 2011. The Applicant

having provided a bid bond with a validity period of 59 days, the bid bond would expire before the tender validity period.

This would be contrary to Regulation 41.4 which states that:

"No tender security shall be accepted under the Act unless such security is valid for a period of at least thirty days after the expiry of the tender validity period."

As noted by the Board hereinabove, these Clauses were clear and were understood by all the other bidders who provided tender securities in conformity with Clause 3.9.1. Failure by the Applicant to provide the required tender security in conformity with the RFP, can only be attributed to its failure to read and understand the Instructions to Bidders.

Taking the above matters into account the Board holds that the Procuring Entity was justified in rejecting the Applicant's bid at the Preliminary Evaluation stage for failure to provide a bid bond with a validity period of thirty days beyond the tender validity period.

Accordingly, this ground of the Request for Review fails.

GROUND2. BREACH OF SECTION 64 OF THE ACT

The Applicant stated that the Procuring Entity disqualified it on the basis of failing to specify a period of 120 days. It argued that this in effect elevated the issue of 120 days to mandatory status. It further stated that since the RFP document did not identify the tender validity period as a mandatory term, the issue of the period is specified to be cured by extension of the validity period.

In support of this contention it cited Clause 3.9.3 of the RFP which states that:

"Where circumstances so demand, the Commission may require the Bidders to extend the validity of the tender security."

It submitted that this provision, which is reiterated in Annex 5, makes it clear that the period for the validity of the tender security was not static but was subject to extension, and thus the Procuring Entity could not have specified a pre-determined period.

The Applicant further argued that even if the provisions of Clauses 3.8 and 3.9.1 of the Request for Proposals were to be considered, submission of a bid bond with a validity period of sixty days amounted to a minor deviation as it did not affect the substance of the tender. In its view therefore, disqualification of the Applicant on this ground was contrary to the provisions of Section 64 of the Act.

The Applicant further stated that the e-mail by the Procuring Entity dated 25th May, 2011 advising that bidders were expected to submit bid bonds that are valid for 120 days with effect from the date of bids opening of 31st May 2011 was not communicated to its contact person as set out in Clause 3.3 of the tender document.

In response, the Procuring Entity submitted that the issue of period of validity of the security bond was a mandatory requirement and a disqualifying condition in terms of Clauses 3.9.1 and 3.9.2 of the RFP and Regulation 41(4) and that it did not act outside these terms.

It further stated that the period of validity of the bid bond had to extend beyond 90 days of the tender, and therefore, failure to provide a tender with a minimum period of validity of 120 days was not a minor deviation, as claimed by the Applicant.

Regarding the notification contained in the email dated 25th May 2011, it stated that it sent the e-mail to the Applicant's representatives namely, a Mr. Wainaina, and Mr. Fernandes who were present during the pre-bid conference, and whose email addresses were recorded in the minutes of the pre-bid conference. It stated that the Applicant's bid did not provide the email addresses of the specified contact person as was required under Clause 3.3 of the bid document.

The Board notes that Clause 3.9.3 is derived from Section 61(1) of the Act which provides as follows:

"Before the expiry of the period during which tenders must remain valid the procuring entity may extend that period."

The Board further notes the provisions of Regulation 41(5) which states that:

The procuring entity shall, where it extends the tender validity period, request the tenderers to extend the period of validity of their tender securities."

The choice of extending the validity period of a tender, and the consequential need to extend the tender security period, thus lies with the Procuring Entity. It is not one that can be imposed on it by a tenderer.

The Board further notes that following a query by one bidder regarding financial projection of the Business Plan, the Procuring Entity wrote to all the Bidders on 24th May, 2011, advising them that the tender opening would be extended to 31st May, 2011.

The Board further notes that upon receipt of the letter, one bidder wrote to the Procuring Entity pointing out that the change in the tender closing date would affect the period of validity of the tender security. In reaction to this letter, the Procuring Entity informed all the bidders vide an e-mail dated 25th May, 2011, that *"....It is in the interest of the bidders to have their bid bond valid from the date of bids opening. The Commission recognizes the process and effort involved in getting the bid bond and therefore considered extending the bids opening period to 31st May 2011.*

In the circumstances therefore, bidders are expected to submit bid bonds that are valid for 120 days with effect from the date of bids opening (31st May 2011)."

In this case the Procuring Entity did find it necessary to extend the tender opening date to 31st May 2011, duly notified the bidders of the fact, and advised them to submit their respective tender securities for 120 days with effect from the new tender opening date.

As regards the argument by the Applicant that its decision to submit a tender security with a validity period of sixty days should have been regarded by the Procuring Entity as a minor deviation in terms of Section 64, it is necessary to quote the material provisions of this section.

They provide as follows:

"64.(1) A tender is responsive if it conforms to all the mandatory requirements in the tender documents.

(2) The following do not affect whether a tender is responsive -

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender."

Clause 3.9.1 cited hereinbefore is very categorical that validity period of the bid security shall be 30 days beyond the tender validity period. The bid security that was provided by the Applicant was to expire on 23rd July 2011. This was therefore shorter than the period expected by the requirements of Clause 3.9.1 which was to be 29th September 2011. The opportunity to cure this non-conformity was provided to the Applicant vide the e-mail from the Procuring Entity dated 25th May 2011. It failed to take advantage of this opportunity.

On reviewing the Applicant's tender document, the Board notes that though the name of the contact person was given in Clause 3.3, there were no details as to the e-mail address of the contact person. Further the e-mail in question was sent to the Mr. Wainaina of Royal Media, and Mr, Fernandes of the Nation Media, being the persons whose email addresses were given according to the minutes of the pre bid conference.

In the view of the Board the decision by the Applicant to submit a tender security which did not conform with the requirement set out in Clause 3.9.1

was not a minor deviation as the requirement was mandatory. Accordingly, failure to conform with this requirement rendered the Applicant's bid non-responsive in terms of Section 64(1).

Accordingly the Board finds that failure by the Applicant to provide a bid bond with the stipulated period of validity was not a minor deviation as alleged by the Applicant for the reasons that:

- i) the RFP explicitly stated at Clause 3.9.2 that failure to provide a tender security with a validity period as specified in Clause 3.9.1 shall be disqualified and;
- ii) by treating the failure as a minor deviation, the Procuring Entity would breach Regulation 41(4) cited above.

Accordingly this ground for request for review fails.

GROUND 3, 4, 5,6,7,8 & 9: Breach of Section 2 of the Act.

These grounds are treated together as they are general and do not go to the breach as provided under Section 93 of the Act.

The Applicant stated that the decision by the Procuring Entity had the effect of removing from the competition the only bidder which had the technical ability to provide the required services. It further stated that by acting this way the Procuring Entity failed to promote competition as required by section 2(e) of the Act. It further stated that it was treated unfairly by being disqualified without first being required to extend the validity of the tender security, if necessary, as provided in Annex 5A and Clause 3.9.3 of the tender document.

The Applicant further averred that by being disqualified on the grounds of not submitting a bid bond with the validity period as alleged by the Procuring Entity, the action by the Procuring Entity would erode public confidence in the procurement process in breach of Section 46 A(c) of the Kenya Communications Act No. 2 of 1998. It further averred that it was unnecessary to disqualify the Applicant on the grounds of the number of days specified on the security bond yet extension of bid security was envisaged on the tender document. It stated that this amounted to the Procuring Entity making a wrong decision that ensured that locally owned bidders were all disqualified at the technical stage thus leaving only having foreign owned bidders to compete. It further stated that this action by the Procuring Entity had the effect of the procuring decision failing to promote the local industry and economic development, contrary to the provision of Section 2(f) of the Act.

It further stated that the decision by the Procuring Entity was against the public interest in that its effect was to assign the role of allocating national transmission signals to a foreign company while there exists local talent and industry which can undertake the same role.

Finally the Applicant submitted that Article 159(2) of the Constitution had been breached in that the decision thereof deprived the Applicant the rights to acquire property, the license on a technicality.

In response, the Procuring Entity stated that the experience and superior technical ability of the Applicant was not assessed because it did not comply with Clauses 3.9.1 and 3.9.2 and Regulation 41(4). It stated that it could only be promoted by giving all the bidders equal opportunity to participate, as it

had done. On the issue of alleged unfairness and failure to promote of public confidence and being unreasonable, the Procuring Entity denied the allegations of the Applicant and stated that it had acted fairly and reasonably in evaluating the tenders.

On the issue of deliberate elimination of locally owned bids, the Procuring Entity reiterated that statutory requirements of 30 days beyond bid validity period did not favour foreign firms. Further, the openness and transparency was displayed by advertisement of the tender in two local newspapers as envisaged by the Act and that there was a further requirement that in the event of a winning bidder being wholly foreign owned, the government sector policy requirements that a minimum of 20% of its equity be offloaded to Kenyans was provided for.

Finally, on Article 159(2) (1) of the Constitution, the Procuring Entity stated that this was totally misconceived as it applied to the judiciary on how it would discharge its functions, powers and duties.

The Board notes that the tender was processed through an Expression of Interest and the shortlisted bidders invited to submit their Request for Proposal. The Board further notes that at the evaluation stage of the Request for Proposal, there was Preliminary Evaluation, Technical Evaluation and the Financial Evaluation. As stated in the earlier grounds, the Applicant did not provide a bid security that was valid for the required 120 days.

As the Board has ruled on various occasions in the past, breach of Section 2 must be supported by specific breaches of the Act and/or the Regulations in light of the fact that Section 2 merely deals with the objectives and principles

that underpin the Act. These grounds on which the Applicant seeks to rely to impugn the decision of the Procuring Entity specify no breaches of the Act and/or the Regulations to support its claim.

In any event, after a careful examination of the documents on which both parties rely, and on the evidence adduced by them, the Board is convinced that the whole process was carried out by the Procuring Entity in a transparent, competitive and fair manner. This is exemplified by the fact that on the main ground of the Application, namely compliance with the requirements of Clause 3.9.2, the Applicant was not only disqualified on a pre-disclosed mandatory requirement, but it was also, together with all other bidders, given an opportunity to rectify its mistake, but failed to do so.

As far as promotion of local industry is concerned, the Board finds that this was an open tender in which local and foreign bidders were invited to compete on equal footing using evaluation criteria which were pre-disclosed to all bidders. The Applicant has not produced any evidence to show that local bidders were put to any particular disadvantage vis-a-vis foreign bidders. Its failure to move to the Technical Evaluation stage was wholly due to the fact that it failed to provide a tender security with the required validity period, which all other bidders, including local ones, submitted. It stated that it would have been unfair to the other bidders, and indeed, a breach of the Act and the Regulations, had the Applicant's bid been allowed to proceed to the next evaluation stage, as that would have resulted in defeating the very principles and objectives of promoting confidence in the procurement process, fairness, and competition, which it claims were breached by the Procuring Entity.

Regarding breach of the Kenya Communications Act, the Board lacks jurisdiction to make any findings regarding the actions of the Procuring Entity, and to make any ruling on the actions, as the jurisdiction of the Board is limited by Section 93(1) of the Public Procurement and Disposal Act, 2005.

The Section provides that:

"Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner may be prescribed."

On the question of public interest, the Board has already noted hereinbefore, that this was an open tender in which all interested bidders, local and international, were invited to participate in pursuant to Sections 50, 51, and 52 of the Act. In such open competition there will inevitably be a winner and losers. In this particular tender the Procuring Entity had foreseen the possibility that the winner might be a foreigner, in which case Clause 3.2.4 provided a safeguard to take care of the national interest. The Clause provides that:

"In line with the Government's sector policy, if the Bidder's consortium has 100 percent foreign equity participation, the consortium shall be required to off load at least 20 percent of its equity participation to Kenyans."

The essence of open tendering is that there must be as wide a dissemination of the tender opportunity as possible in order to encourage competition, with the hope that this will result in value for money for the Government.

The requirement for such dissemination is set forth in Section 54 of the Act. Along with this is the legal requirement for the provision of tender documents to all who wish to participate in the tender opportunity, as stipulated in Section 56(1) of the Act. It is pursuant to these provisions that the Procuring Entity floated the tender in question. So long as it complied with the procedures set out in the Act and the Regulations, it cannot be faulted.

The Board finds that although there is no provision in the Act and the Regulations on the question "Public Interest" Clause 3.2.4 of the RFP made the off loading of at least 20 percent of the equity to Kenyans an eligibility requirement in the event that the winner happened to be a foreigner. In the view of the Board, this is one way of addressing the issue of public interest. The Applicant has not produced any evidence that the Procuring Entity has not complied with this provision of the RFP.

Turning to the question of Article 159(2)(d) of the Constitution, the Board finds that the Article deals with the judiciary in the discharge of its functions and not to administrative bodies, such as the Procuring Entity.

Accordingly this ground of the Request for Review fails.

Taking all the above matters into account, the Board finds that the Application has no merit. Accordingly, pursuant to section 98 of the Act the Board orders that the procurement process may continue.

APPLICATION NO. 28/2011

The Applicant, Mayfox Company Limited lodged this Request for Review on 1st July, 2011 against the decision of the Communication Commission of Kenya in the matter of Request for Review for Award of a Licence to Roll -Out and

Operate a National Terrestrial Broadcasting Signal Distribution Network in Kenya. The Applicant was represented by Ms. Nazima Malik, Advocate, while the Procuring Entity was represented by Mr. Walter Amoko, Advocate. ~~The Interested Candidate M/s Pan-Africa Network Group (Kenya) Company Ltd was represented by Mr. Muthomi Thiankolu, Advocate.~~

The Applicant requests the Board for the following orders:

1. *"The procurement proceedings and the award be annulled in their entirety.*
2. *The Respondent be directed to re-evaluate the proposals in accordance with the Law.*
3. *Alternatively the Respondent's decision be substituted by the Review Board's decision that the Applicant qualified in the technical evaluation phase and that Pan Africa Network Group Kenya was not eligible and therefore the Applicant's Proposal was successful.*
4. *The costs of this request for review be awarded to the Applicant."*

The Board has carefully listened to the submissions by the parties and considered the documents before it and makes the following findings and decision.

The Applicant raises sixteen grounds of review which the Board deals with as follows:

GROUND 1, 2, 3 & 4

These are general statements that capture the facts about the Applicant having been invited through Expression of Interest and was subsequently prequalified and was invited to tender in the Request for Proposal document

and finally that it had not attained the minimum qualifying mark and was notified of its being unsuccessful.

The Board makes no findings on these grounds as they do not disclose any breach as envisaged by Section 93 of the Act.

GROUND 5, 6, 7, 8, 9 & 10.

These grounds have been consolidated as they raise similar issues concerning the eligibility of the Successful Bidder M/s Pan African Network Group (Kenya) Company Limited.

The Applicant submitted that the Procuring Entity awarded the tender to a company that was not eligible pursuant to the requirements of Clause 3.2.4 of the Request for Proposal Document. It stated that Clause 3.2.4 of the RFP specified that in line with Government Sector Policy, if the bidders' consortium held 100% foreign equity participation the consortium shall be required to offload 20% equity participation to Kenyans. It further stated that it had carried out a search with the Registrar of Companies on 23/06/2011 and confirmed that shareholders of the successful bidder's firm were of Chinese nationality.

It argued that by accepting the bid of a company that was not eligible for the award the Procuring Entity acted in breach of Section 2(b) (c) (d) (e) & (f) of the Public Procurement and Disposal Act, which requires procuring entities to establish procurement procedures that promote competition and ensure that competitors are treated fairly, promote integrity and fairness of procedures, increase transparency and accountability of the procedures, increase public

confidence in those procedures, and facilitate the promotion of local industry and economic development.

~~The Applicant further submitted that in order for a bidder to be eligible to~~ submit a bid, it had to meet the condition set out in the last paragraph of Annex 1(a), namely, that *the level and nature of Kenyan participation must be clearly outlined in the bid*. It argued that the draft proposed agreement attached to the bid of the winning bidder did not meet this requirement because it did not set out in its bid such matters as the responsibilities, distribution of tasks, capital structure, funding, and legal establishment of the bidder, at the time of submission of its bid. It further argued that what was given by the winning bidder was merely an undertaking to off load the required equity in the future, which did not conform to Annex 1(a).

The Applicant further submitted that Clause 3.2.4 takes precedence over Annex 1(a) because it was an eligibility criteria and should be interpreted to mean that the 20 percent equity participation should be offloaded at the time of submission of a bid as opposed to the provision in Annex 1(a) where the offloading is achieved after the issuance of the licence.

In response, the Procuring Entity stated that the Government of Kenya by Gazette Notice No. 10335 of 2008 gave policy guidelines on ownership and control of Broadcasting Signals Distribution Services.

It further stated that according to the guidelines the *"The Government will engage Kenyans to participate in the sector through appropriate ownership and control mechanisms and any firm licensed to provide communication services as opening of service provider shall be required to maintain and shall ensure that at the end of the 3rd year from the date of the issue of a license or*

earlier as the case may be or thereafter for the disconnection of the license term that not less than 20% ownership and control by Kenyan persons."

It submitted that the requirement set out in Clause 3.2.4 was therefore to the effect that the Successful Bidder if foreign, would within 3 years, offload minimum 20% equity to Kenyans in compliance with these guidelines.

The Procuring Entity concluded that the Successful Bidder qualified to be awarded the tender upon which it would be required as post qualification to fulfil the obligations of the country by offloading the equity as provided in the tender documents.

The Successful Candidate on its part submitted that the tender in dispute was open to all bidders irrespective of nationality and that it was a Kenyan Citizen Company, having been incorporated in Kenya. It further submitted that it is a distinct legal entity separate from its shareholders and the Chinese nationality of the Successful Bidder shareholders cannot be attributed to it. In support of this contention, it cited the cases of *Barcelona Traction Case, [1970] ICJR*, and *Salmon v Salmon [1897] A.C. 22* as its authorities. Further on eligibility, it stated that the Procuring Entity anticipated some bidders to have 100% foreign equity participation and that 20% offloading was not a pre-bid requirement but rather, a subsequent one after the award.

It further pointed out that paragraph 1 (a) of Annex 1 of the tender document required that each bidder must ensure that a minimum of 20% Kenya equity participation is achieved 3 years after the issue of the license and to which the Successful Bidder gave an undertaking.

The Board notes the provisions of Clause 3.2.3 which state that:-

"A bidder for the BSD may be composed of either individual business entities/firms or a group of such entities or firms who may come together as a consortium for purposes of participating in the aforementioned tender provided that the shares to be held by each such member are specified. The bidding consortium shall provide the Commission with details of the name under which the consortium shall be known during the tender process."

The Board further notes the provisions of Clause 3.2.4 tender documents which state as follows:-

"In line with the Government's sector policy, if the Bidder's consortium has 100 percent foreign equity participation, the consortium shall be required to off load at least 20 percent of its equity participation to Kenyans."

The Board further notes the provisions of Annex 1(a), entitled "Information on the Bidder," which state that:

"The description of the bidder relating to responsibilities, distribution of tasks, capital structure, funding and legal establishment of the bidder. (The terms and conditions of the tender require that each bidder must ensure that a minimum of 20 percent Kenyan equity participation is achieved 3 years after the issuance of a licence). The level and nature of Kenyan participation must be clearly outlined in the bid."

It is clear from Clause 3.2.3 that consortia and joint ventures were allowed. It is further clear from Clause 3.2.4 that if a consortium was owned one hundred

percent by foreigners, it was required to off load its equity participation to the extent of at least twenty percent to Kenyans.

The issue for determination by the Board is whether or not it was a requirement that a bidder had to clearly outline in its bid the level and nature of Kenyan participation at the time of submission of its bid, as argued by the Applicant, or whether a bidder was merely required to show that a minimum of 20 percent equity participation is achieved three years after issuance of the licence, as claimed by the Procuring Entity.

However, before making a determination on this issue, it is necessary to deal with the issue raised by the Applicant regarding breach of section 2 of the Act. As already decided by the Board in Application 24/2011 of 22 June, 2011, which deals with the same tender, this was an open competitive tender in which both local and international bidders were invited to participate. The Successful Bidder, though a foreign company, was equally entitled to submit its bid upon the invitation by the Procuring Entity and to be evaluated using the criteria and parameters set out in the tender document.

The Board finds no fault with the Procuring Entity in carrying out evaluation of the foreign bidder, so long as this was done in accordance with the Act, the Regulations and the Tender Document. The Board finds that this was the case as the Applicant has adduced no evidence to show that the contrary was the case.

Indeed, as observed in Application No 24 cited above, had the Procuring Entity used evaluation criteria other than those set out in the tender document to evaluate the Successful bidder, it would have breached Section 2 of the Act

by not treating the foreign bidder fairly, and thus risk the possibility that such action might result in loss of public confidence in the procurement process.

~~Turning back to the issue of the meaning of Clause 3.2.4 and Annex 1(a), the~~ Board finds no merit in the argument by the Applicant that Clause 3.2.4 takes precedence over Annex 1(a). Both Clauses are complementing each other. In the understanding of the Board, Clause 3.2.4 states the broad policy objective of the Government of requiring equity participation by Kenyans. Annex 1(a) on the other hand amplifies how that policy objective should be realised by prescribing the timeline of three years for offloading the 20 percent equity to Kenyans, as a condition to the grant of a licence. It is in this context that the Successful Bidder gave an undertaking annexed to its bid committing itself to offloading the prescribed equity to Kenyan participants over a period of three years. The Board takes this commitment as fulfilling the requirement that the level and nature of Kenyan participation should be outlined in the bid.

On the issue of breach of Regulation 14(5) of the Kenya Information and Communication (Broadcasting) Regulation 2009, as the Board has already stated in Application No. 24 cited above, the mandate of the Board as provided in Section 93 of the Public Procurement and Disposal Act, 2005, is limited to determining disputes relating to this Act and Regulations. On this premise, it cannot determine whether there has been a breach of the Kenya Information and Communication (Broadcasting) Regulation 2009.

Suffice it to say that if the provisions of that Regulation have been imported into a tender document as a requirement in the procurement process, the Board is entitled to look at such a provision purely from a procurement

perspective, to determine whether or not in applying it from that perspective alone, the Procuring Entity has breached the Procurement Act or Regulations. This indeed is the only reason why in respect to Clause 3.2.4, which sets out policy objectives as elaborated in Kenya Information and Communications Act, the Board has given its view on the meaning of that Clause.

Taking all the above matters into account these grounds of Request for Review fail.

Ground 11, 12, & 13

The Applicant stated that the technical evaluation matrix as set out in the RFP document was comprised of four criteria namely, Experience in Managing Broadcasting/Telecommunications Networks Services, Financial Capacity, Business Strategy, and Technical Strategy. It submitted that having scored full marks in managing broadcasting/telecommunications networks, the Applicant should not have awarded it such low marks for technical and business strategy. It further submitted that the Procuring Entity did not properly compare the Applicant's proposal to the criteria set out in the technical evaluation matrix and did not properly apply such criteria. It argued that the Applicant breached Section 66(2) and Section 82(2) of the Act in failing to assign a score in accordance with the procedures set out in the RFP.

It further argued that the Applicant was not awarded any point in the financial capacity, yet the lowest point in that category was 0.5 points. It stated that it was inconceivable that it scored zero in the circumstances unless it did not submit any documents. It further stated that it submitted audited balance sheet and income statement as required by the tender documents.

In response, the Procuring Entity stated that the technical evaluation was based on a scoring matrix of four distinct components, namely experience in Managing broadcasting/telecommunications networks and service/financial capacity, business strategy and technical strategy. It stated that experience looks at past records of the bidder while the business and technical strategies assess the viability of the bid through the submitted documents. It further stated that experience in Managing Broadcasting/Telecoms Network and services did not lead to the same score in the business/technical compliments. Its high score on high experience was on the basis of the information provided which showed that its technical and financial partner SSBT had the required experience. It concluded by stating that the Applicants' complaints were based on unfounded assumptions and baseless speculations.

The Successful Bidder on its part stated that the Applicant had merely restated what was contained in the evaluation criteria.

The Board notes that the technical evaluation had the following scoring matrix:

- | | |
|---|-----------|
| a) Experience in managing broadcasting telecoms | 15 points |
| b) Financial capacity | 15 points |
| c) Business strategy | 30 points |
| d) Technical strategy | 40 points |

The Board further notes that the Applicant passed the Preliminary Evaluation stage. On moving to technical evaluation on years of experience, the Board notes that the Applicant earned a maximum of 15 points whereas on financial capacity, it earned zero points.

The Board further notes that on the issue of documents submitted the Applicant submitted 2 years balance sheet for SSBT for the years 2007, 2008 and 2009, and income statements with no evidence that they were audited. The Board further notes that as to a cash flow statement, there was no evidence that the Applicant submitted one, which was a requirement of Annex 1(i)(d). Furthermore, the income statement was given in Italian language, without any translation, whereas the official language for the tender was English.

The Board further notes that the Applicant did not submit certified audited financial statements for the last three years for Mayfox, which was a requirement under Annex 1(ii)(d).

Notwithstanding its assertion to the effect that it submitted audited accounts as required by the tender documents, the Board is not persuaded that this was indeed the case. It is noteworthy that when confronted with its own tender documents the Applicant was not able to explain why they did not contain the audited accounts. Moreover, there was no proof tendered by the Applicant to sustain the claim that it had submitted a cash flow statement. This situation is further confounded by the fact that the income statement submitted by the Applicant was in the Italian language, making it difficult to ascertain their authenticity. In these circumstances, the Board can find no fault with the decision of the Procuring Entity to award a score of zero to the Applicant for financial capacity.

Accordingly, these grounds of request for review fail.

GROUND 14

The Applicant submitted that the Procuring Entity breached Section 66(3) of the Act by failing to set out objective criteria to determine business and technological strategy.

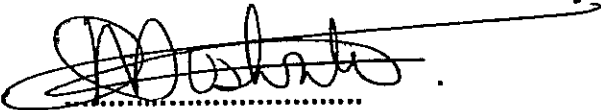
In response, the Procuring Entity stated that the Applicant failed to set out or demonstrate that the criteria set out in the tender documents at Annex 2 Sections A iii and (iv) were not objective and reiterated that all the bids submitted were fully evaluated with all the objectivity as set out in Annex 2 of the RFP.

The Board has scrutinized the tender document and notes that the Procuring Entity set out the criteria for evaluation in Annex 2 and that it carried out its evaluation in accordance with the set criteria. The claim by Applicant that the Procuring Entity breached section 66(2) of the Act is therefore not sustainable.

Accordingly this ground of request for review fails.

Taking all these matters into account, the request for review fails. Accordingly, pursuant to section 98 of the Act the Board orders that the procurement process may continue.

Dated at Nairobi on this 19th Day of July, 2011.


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for: CHAIRMAN
PPARB


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for: SECRETARY
PPARB

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