

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 30/2011 OF 6<sup>TH</sup> JULY, 2011**

**BETWEEN**

**DELOITTE CONSULTING LTD.....APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY**

Review against the decision of the Tender Committee of the Kenya Airports Authority dated 23<sup>rd</sup> June, 2011 in the matter of Tender No. KAA/65/2010-2011 for Supply, Implementation and Commissioning of Airport Systems.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Amb. C. M. Amira	-	Member
Mr. Sospeter Kioko	-	Member

**IN ATTENDANCE**

Mr. N. Soita - Secretary  
Ms. S. Miano - Secretariat

**PRESENT BY INVITATION**

**Applicant, Deloitte Consulting Company Ltd**

Mr. Andrew Wandabwa - Advocate, Wandabwa Advocates  
Ms. Victoria Kariithi - Advocate, Wandabwa Advocates  
Ms. Rose Kariuki - Pupil, Wandabwa Advocates  
Mr. Charles Oduor - Director

**Procuring Entity, Kenya Airports Authority**

Mr. Victor Arika - Legal Officer  
Mr. Allan Muturi - General Manager, Procurement  
Mr. Hobadiah Orora - Manager, Projects  
Ms. Lilian Okidi - Manager, Logistics  
Mr. Alloys Siaya - ICT Manager  
Ms. Judy Kerich - Manager HR  
Mr. George Kamau - Legal Officer  
Mr. David Ochieng - Business Analyst  
Mr. Peter Njaga - Audit  
Ms. Hannah Njuguna - Audit  
Mr. C. N. Warutere - Mechanical Engineer  
Ms. Carol Mwangi - MGA  
Mr. David Tomno - Procurement Officer  
Ms. Judy Chepkor - Procurement Officer  
Mr. Owen Waithaka - Engineer

Mr. Charles Cheboi	-	ILC
Mr. Sammy Kemboi	-	PA

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**Interested Candidates**

Mr. George Ng'ang'a	-	Advocate, Indra Sistemas S. A.
Ms. Rosana Rubianes	-	Manager, Indra Sistemas S. A.
Mr. Francis Kinyua	-	Advocate, Alliance Technologies
Mr. Anthony Mungai	-	C.C. O, Alliance Technologies
Mr. Henry Mkuli	-	BDM , Alliance Technologies
Mr. Robert Mutua	-	B. Manager, Alttab Africa
Ms. Rose Kwamboka	-	A. Executive, Alttab Africa
Mr. Nelson Kinoji	-	Presales, Dhanush Infotech Ltd
Mr. Vinod Bang	-	Manager, Mahindra Satyam System
Mr. Umesh Khot	-	Manager, Mannai Trading Company Ltd
Mr. Robert Gitau	-	Sales Manager, Seal Kenya

**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 for Supply, Implementation and Commissioning of Airports System was advertised in the daily press on 29<sup>th</sup> March, 2011. The tender was divided into two lots as follows:

Lot 1: Integrated Enterprise Resource Planning (ERP)

## Lot 2: Airport Operational Database (AODB)

Forty seven potential bidders bought the tender documents and a pre-bid meeting was held on 15<sup>th</sup> April, 2011.

### **Closing/Opening:**

The tender closing date was extended from 29<sup>th</sup> April, 2011 to 20<sup>th</sup> May, 2011 following requests by bidders for extension of time. At the tender closing/opening twenty three(23) bids were submitted. Fifteen (15) firms submitted bids for lot 1 while eight (8) for Lot 2.

The following bidders submitted bids in regard to Lot 1:

- i) Alttab Africa
- ii) Dhanush Infotech
- iii) Computech Limited
- iv) John Keels Computer Services
- v) Navayuga Infotech & Simba Tech Limited
- vi) PriceWaterhouseCoopers
- vii) Deloitte Consulting Limited
- viii) Mahindra Satyam and Next Tech Limited
- ix) Seven Seas Technologies
- x) Techno Brain
- xi) Indra Sistemas SA
- xii) Infogain EA Limited
- xiii) Mannai Trading Company
- xiv) Alliance Technologie (s) Limited
- xv) MFI Enterprise Solutions

## **EVALUATION**

The evaluation was carried out in three stages namely Preliminary Evaluation, Technical Evaluation and Financial Evaluation.

### **i) Preliminary Evaluation**

The tenders were evaluated against the criteria set out in the tender document. The bidders were required to submit the following documents, failure to which they were not to be considered for further evaluation:

- i) Certificate of Registration/Incorporation (all parties of a joint venture must submit)
- ii) Power of Attorney
- iii) Confidential Business Questionnaire (all parties of a joint venture must submit)
- iv) Litigation History (all parties of a joint venture must submit)
- v) Declaration Form (all parties of a joint venture must submit)
- vi) Audited Accounts for the years 2009, 2008, 2007. (all parties of a joint venture must submit).
- vii) List of at least three (3) ERP implementations done in the last five (5) years.
- viii) List and CV's of key personnel to be involved in the project
- ix) Manufacturers Authorization letter for the product (s) being tendered for
- x) Name of the proposed Local Agent (in case of international Tenderers)

Following the Preliminary Evaluation of the bids, the following eight (8) bidders were found to be responsive for having fulfilled the tender requirements:-

1. Dhanush Infotech

2. Computech
3. Navayuga Infotech and Simba Technologies
4. PriceWaterhouseCoopers
5. Techno Brain
6. Deloitte Consulting Ltd
7. Alliance Technologies Ltd
8. Indra Sistemas S.A.

Seven bidders namely Altab (JV with Brighthouse and Computech); John Keels (JV with MicroImage, Billeeta and Trade Winds); Infogain (JV with Gentrack); Mahindra Satyam (Satyam Computer Services); Seven Seas (JV with Twenty Third Century Systems); Mannai Trading Company WLL; and MFI (JV with Epicor) were declared non-responsive and were disqualified from further evaluation.

## **ii) Technical Evaluation**

The eight bidders who passed the Preliminary Evaluation stage were then subjected to a technical evaluation based on the criteria indicated in Clause 2.12 of the Instructions to Bidder. It included :-

- Technical Experience
- Key Personnel to include:- The Project Manager; the Finance System Expert; the Procurement and Logistics System Expert; the IT Expert; the Property Management System Expert; and Airport Systems Expert
- Other Personnel
- Financial Capability
- compliance with technical specifications as stipulated in Section V (Technical Specifications) and Section VI (Schedule of Requirements)

Six (6) bidders were disqualified at this stage for not fully meeting the requirements of the technical criteria. They were:-

- a) Dhanush Infotech (JV with SPA);
- b) Computech;
- c) Navayuga (JV with Simba Technologies);
- d) PriceWaterhouseCoopers (JV with Coretec);
- e) Technobrain (JV with Fujitsu); and
- f) Alliance Technologies Ltd (JV with Adaxa)

Two tenderers namely; M/s Deloitte Consulting Ltd in partnership with EIM and M/s Indra Sistemas were found to be responsive to the requirements of the technical evaluation. The two bidders offered to supply and install SAP application.

**Recommendation:**

The Evaluation Committee then recommended that the financial proposal for the responsive two firms be opened.

**Financial Evaluation**

The Financial bids were opened on 13<sup>th</sup> June, 2011 and the quoted prices of the two bids read out as follows:

- Deloitte Consulting Ltd - Euro 3,940,872.02
- Indra Sistemas S. A - Kshs. 539,353,783.00

Deloitte Consulting Ltd's bid was then converted from Euros to Kenya Shillings at the selling rate for Euros dated 20<sup>th</sup> May, 2011 from the Central Bank of Kenya. The total cost of the bidder was converted to Kshs. 486,513,408.84

The evaluation committee noted the following regarding Schedule 8 on Grand Total of M/s Deloitte's Bid.

- Price Schedule 1 had indicated a Total Price with DPP of Euro 572,418.00 equivalent to Kshs. 70,666,891.08 while on the Grand Total Price Schedule 8 it had indicated that the amount for Price Schedule 1 was included in Price Schedule 5.
- The bidder had also indicated that the amount for Price Schedule 6, is included in Price Schedule 5. the Committee noted that under the Grand Total Price Schedule 8, the tenderer had stated an amount of Euro 10,714.29 (equivalent to Kshs. 1,322,714.46)) indicated on the line item
- the amount for Price Schedule 7 is included in Price Schedule 5
- it stated zero sum on the required provision of 10% on subtotal for contingency, line item 8 under the Grand Total Price Schedule 8, contrary to paragraph (e) of the preamble to the price schedule in the bid document that :-

***(e) A price or rate shall be entered in ink or printed against every item in the Price Schedule with the exception items, which already have provisional sums, affixed thereto. The Tenderers are reminded that no "nil" or "included" rates or "lumpsum" discounts are accepted. the rates for various items should include discounts in any. Tenderers who fail to comply will be disqualified***

- The bidder has not stated the applicable taxes on recurrent costs as required.



- Did not include for Schedule 6 (training) and Schedule 7 (Documentation, Testing and Commissioning) unit and total prices. it however indicated that the costs for these two schedules are included in Schedule 5 (Key Personnel) contrary to paragraph (e). due to the inclusion of Schedule 1, 6 and 7 into Schedule 5 it was not possible to determine the actual unit prices for the affected respective schedules.

With regard to the bid submitted by Indra Sistemas, the Evaluation Committee noted that the bidder had indicated that it had converted the prices from Euros as at 19<sup>th</sup> May, 2011 at a rate of Kshs. 124.28 to the Euro. The prices were then normalized using the Central Bank of Kenya selling rate of 20<sup>th</sup> May, 2011 which was 123.4533. Its Grand total was 535,773,744.34.

The summary of a comparison of the revised bid prices was as tabulated:

PRICE SCHEDULE 8: GRAND TOTAL (ONE TIME COST)		DELOITTE	INDRA SISTEMAS
NO.	ITEM	Corrected Total Price DDP in Kshs	Corrected Total Price DDP in Kshs.
1.	Total of Price Schedule 1 (Needs Assessment)		9,891,100.65
2.	Total of Price Schedule 2 (Application Software - Licences)	58,713,093.22	57,726,452.16
3.	Total of Price Schedule 3 (Server Operating System Licenses)	7,514,902.36	8,153,929.54
4.	Total of Price Schedule 4 (Hardware)	33,112,594.74	23,813,157.16
5.	Total of Price Schedule 5 (Key Personnel)	244,129,888.38	233,458,015.10
6.	Total of Price Schedule 6 (Training)	1,322,714.46	11,154,510.28
7.	Total of Price Schedule 7 (Documents)	0.00	6,180,223.39

	<b>SUBTOTAL</b>	<b>344,793,193.16</b>	<b>350,377,388.28</b>
8.	Add 10% of Sub Total for Contingency	34,479,319.32	35,037,738.83
9.	Add All Applicable Taxes	42,966,860.60	57,284,669.54
<b>GRAND TOTAL ONE-TIME COST</b>		<b>422,239,373.08</b>	<b>442,699,796.65</b>
<b>PRICE SCHEDULE 9: RECURRENT COSTS</b>			
	Recurrent Costs on Applications Licenses, Server Software, Hardware Maintenance, Support, Upgrades etc for five (5) years	102,699,689.19	80,236,161.81
	Add all Applicable Taxes	16,431,950.27	12,837,785.89
<b>TOTAL RECURRENT COST</b>		<b>119,131,639.46</b>	<b>93,073,947.70</b>
<b>GRAND TOTAL TO FORM OF TENDER</b>		<b>541,371,012.54</b>	<b>535,773,744.35</b>

The Evaluation Committee noted that both the bidders had errors in their schedule of prices. The bidders were asked to accept the errors in accordance to the tender documents. Deloitte in partnership with EIM made an error of Euros 311, 362.19 hence a revised total sum of Euros 4,252,232.21. Indra Sistemas S. A. made an error of Kshs. 7,748.42 hence a revised total sum of Kshs. 539,361,531.42 as per their bid documents before normalization.

For purposes of equitable evaluation applicable taxes on recurrent costs were applied on Schedule 9 of M/s Deloitte bid at the rate of 16%. It was noted that the bidder did not apply applicable taxes on recurrent costs as per Schedule 9 whereas M/s Indra Sistemas applied 16% VAT on the sub total of the same schedule as required.

The breakdown of the Annual Recurrent Costs for both tenderers is as indicated in the table below:

<b>PRICE SCHEDULE 9: RECURRENT COSTS</b>		<b>DELOITTE</b>	<b>INDRA</b>
1.	Application Licences as per Price Schedule 2 ( inclusive of upgrades, patches and after sales support)	12,935,461.46	13,515,692.00
2.	Licenses as per Price Schedule 3 (Inclusive of upgrades, patches and after sales support)	2,543,508.34	1,587,453.00
3.	Hardware Maintenance and support as per Price Schedule 4	5,060,968.03	1,051,547.00
<b>TOTAL ANNUAL RECURRENT COST</b>		<b>20,539,937.84</b>	<b>16,154,692.00</b>
<b>TOTAL RECURRENT COST-FIVE (5) YEAR PERIOD</b>		<b>102,699,689.19</b>	<b>80,773,460.00</b>

The Evaluation Committee recommended that M/s Indra Sistemas S. A be awarded the tender for Supply, Implementation and Commissioning of Airport Systems Lot 1: Integrated Enterprise Resource Planning at their corrected tender sum of Kshs. 535, 773, 744.35 for being the lowest evaluated tenderer.

## **EVALUATION LOT 2**

### **Preliminary Evaluation**

The ten bidders who submitted bids for Lot 2 – Airport Operational Database (AODB) were subjected to a preliminary evaluation on responsiveness to the tender. The following Six bidders were declared non-responsive for not meeting the requirements of the tender:-

- i) Dhanush Infotech (JV with SPA)
- ii) Symphony Harmony
- iii) Impax Business Solutions (JV with IBS)
- iv) Top System
- v) Infogain (JV with Gentrack)
- vi) SITA Information Networking

Two bidders namely Deloitte Consulting Ltd and Indra Sistemas S. A were found to be responsive to the preliminary requirements.

### Technical Evaluation:

The two bids were found to have been responsive to the technical requirements and the two were recommended for the financial opening of their bids.

### Financial Evaluation:

The financial bid of the two responsive bidders were opened 13<sup>th</sup> June 2011.

The prices read out at the tender opening were as follows:

	Bidder	Amount	
i)	Deloitte Consulting Ltd	One Time Cost	Euro 583,059.00
		Recurrent Cost (for Five Years)	Euro 311,960.00
ii)	Indra Sistemas S. A.	One Time Cost	Kshs. 25,224,689.00
		Recurrent Cost (for Five Years)	Kshs. 18,444,170.00

After evaluation M/s Deloitte Consulting Ltd was found to have error in their schedule of prices. The bidder was requested to accept the errors which it did. It had made an error of Euros 56,866.94 hence a revised total sum for price schedule 1 of Euros 639,925.94.

The Summary of the comparison of the prices was as tabulated:-

	PRICE SCHEDULE 1- ONE TIME COSTS	DELOITTE	INDRA
1.	Supply and install airport operational database (AODB) server application at JKIA including licence	29,011,525.50	11,627,466.48
2.	Supply and install airport operational database (AODB) client application software including licences for :		
	a) Jomo Kenyatta Airport		586,303.72
	b) Moi Airport , Mombasa	617,266.50	271,375.15
3.	Supply and install Workstations for AODB client application at a) Jomo Kenyatta Airport	632,698.16	1,126,294.78

	b) Moi Airport, Mombasa	379,618.90	595,369.79
4.	Allow for initial integration with airport systems including:		
	a) CUTE		589,658.54
	b) AFTN	641,957.16	589,658.54
	c) Type B – Messaging		589,658.54
	d) FIDS		589,658.54
5.	Allow for on-site training prior to system acceptance testing for system administrators	Included in 9 (a and b) below	675,423.48
6.	Allow for on-site training prior to system acceptance testing end users at JKIA and MIA	Included in 9 (a and b) below	675,423.48
7.	Allow for technical and user manuals	Included in 9 (a and b) below	117,931.71
8.	Allow for testing and commissioning	Included in 9 (a and b) below	670,065.63
9.	Allow for any other items and implementation costs not included above required for complete AODB system (if applicable):		
	a) Implementation Costs (on site services) Weeks	25,746,805.45	841,951.51
	b) Implementation Costs (off site services) – Hours	10,089,048.11	337,711.73
	c) Oracle standard Edition Per processor @ USD 17,500 per processor	3,086,332.50	1,074,422.04
10.	SUBTOTAL	70,205,252.28	20,958,373.66
11.	Add 10% of sub-total (item 10 above) contingency	7,020,525.23	2,095,837.37
12.	Add all applicable taxes	1,775,191.79	2,095,570.78
13.	TOTAL COST ONE TIME COST	79,000,969.30	25,149,781.81
<b>PRICE SCHEDULE 2 – RECURRENT COSTS</b>		<b>DELOITTE</b>	<b>INDRA</b>
	<b>ITEM</b>	<b>Corrected Total Price DDP in Kshs</b>	<b>Corrected Total Price DDP in Kshs</b>
1.	Annual support starting from the 2 <sup>nd</sup> year after warranty, inclusive of software upgrades, patches, and after sales support	38,512,491.47	10,501,761.00
2.	Other recurrent items		4,209,758.00
3.	SUBTOTAL	38,512,491.47	14,711,519.00
4.	Add all Applicable Taxes		3,677,880.00

5.	TOTAL RECURRENT COST	38,512,491.47	18,389,399.00
GRAND TOTAL TO FORM OF TENDER		117,513,460.76	43,539,180.81

Deloitte Consulting Ltd had not included unit and total prices. They had indicated that the costs for these line items were included in line item 9 (a and b), contrary to paragraph (e) of the preamble to the price schedule.

The Evaluation Committee then recommended that M/s Indra Sistemas S. A. be awarded the contract for Supply, Implementation and Commissioning of Airport Systems; Lot 2 - Airport Operational Database (AODB) at their corrected Tender Sum of Kshs. 43,539, 180.81 for being the lowest evaluated bidder.

### **THE TENDER COMMITTEE DECISION**

The Tender Committee in its meeting held on 23<sup>rd</sup> June, 2011 deliberated on the recommendations of the Evaluation Committee on the two lots and recommended that M/s Indra Sistemas S. A. of P. O. Box 28108, Madrid, Spain be awarded the contract for Tender No. KAA 65/2010-2011 For Supply, Implementation and Commissioning of Airport Systems - Lot 1 at their corrected tender sums of Kshs. 535,773,744.35 and Lot 2 at Kshs. 43, 539,180.81.

The bidders were notified the outcome of the tender vide letters dated 23<sup>rd</sup> June, 2011.

## **THE REVIEW**

The Request for Review was lodged by M/s Deloitte Consulting Limited on 6<sup>th</sup> July, 2011 against the decision of the Procuring Entity in the matter of Tender No. KAA/65/2010-2011 for the Supply, Implementation and Commissioning of Airport Systems. The Applicant was represented by Mr. Andrew Wandabwa, Advocate while the Procuring Entity was represented by Mr. Victor Arika, its legal officer. Interested Candidates included: Indra Sistemas S. A. Represented by Mr. Georger Ng'anga, Advocate; Alliance Technologies represented by Mr. Francis Kinyua, Advocate; Mahindra Satyam System; and Mannai Trading Company Ltd represented by Mr. Umesh Khot.

The Applicant requests the Board for the following orders:-

1. ***"The Procuring Entities decision awarding the tender to Indra Sistemas S.A. be annulled.***
2. ***The Procuring Entities decision awarding the tender to Indra Sistemas S. A. be substituted with one awarding the subject tender to the Applicant herein.***
3. ***The costs of this Review in any event."***

The Applicant raises seventeen (17) grounds of review which the Board deals with as follows:-

### **Ground 1 - Breach of Regulations 47 and 48**

The Applicant withdrew this ground at the hearing having taken cognisance of the fact that its tender was not disqualified at the preliminary evaluation stage but at financial evaluation stage.

The Board need not make a findings on this ground.

### **Grounds 2, 3, 4, 5, 6, 7 and 17 - Breach of Sections 2, 64, and Regulations 50**

These grounds have been combined because they relate to the same issues regarding the evaluation of the financial bids.

The Applicant alleged that the Procuring Entity erred in rejecting its financial bid on account of Schedules 1, 6 and 7 in respect of Lot 1 of its financial bid not having the actual unit prices for the said items. It further alleged that it was exempted from doing so as per Clause (e) of the Preamble to the Price Schedule at Section VII of the Tender Document. It averred that it had complied with the said Clause because Schedules 1, 6 and 7 in respect of Lot 1 already had provisional sums affixed thereto which was permissible by the said Clause.

The Applicant further averred that its pricing of schedules 1, 6 and 7 was in conformity with Section IV (Project Governance) item 4 because the items under these Schedules were to be implemented by the personnel it had already priced for in Schedule 5. It argued that in any event its purported deviation from the tender requirements was minor and ought to have been overlooked by the Procuring Entity in keeping with the provisions of Section 64 of the Public Procurement and Disposal Act, 2005 (herein after "the Act").



The Applicant submitted that the manner in which the evaluation was conducted was not done in accordance with the objectives of the Act as set out in Section 2. In Conclusion, it submitted that the Procuring Entity having fully evaluated its financial bid, contrary to Regulation 50, was in law estopped from alleging that its financial bid was disqualified on account of an alleged technicality.

In response, the Procuring Entity stated that the Applicant's financial bid was duly subjected to financial evaluation in accordance with the Tender Document and Price Schedule, Section 8 as required under Regulation 50. It submitted that Section VII of the tender document Clause (e) of the Preamble to the Price Schedule did not exempt the Applicant from indicating the unit prices for items in the price schedules. It further stated that the Clause reminded tenderers that no 'nil' or 'included' rates or 'lump sum' discounts would be accepted. It submitted that the said Clause only allowed for exemption of unit pricing in situations where the items already had provisional sums affixed thereto, and that in these price schedules, there were no such provisional sums affixed.

The Procuring Entity submitted that Section IV Clause 3.12 stated that ***"all payments shall be made for the portion of the contract price corresponding to the goods or services actually delivered, installed or operationally accepted, per the contract implementation schedule, at unit prices specified in the Price Schedules."*** It averred that in regard to the Applicants financial bid, it would be unable to make payments for items under price schedules 1, 6 and 7 as envisaged by the tender document since the Applicant did not indicate the unit prices as per the tender requirements.

In Conclusion, the Procuring Entity submitted that the omission was not a minor deviation as claimed by the Applicant.

On their part, some Interested Candidates namely Alliance Technologies and Mahindra Satyam expressed dissatisfaction with the way the tender evaluation and subsequent award was conducted. M/s Alliance Technologies submitted that they did not receive notification of the outcome of the tender in time to lodge a Request for Review. It added that the Procuring Entity, by not sending the notifications breached the provisions of Section 67 (2).

M/s Mahindra Satyam, submitted that its bid was wrongly disqualified on account of the requirements of signed audited accounts. It submitted that under the tender document item 1.6 the Procuring entity required audited accounts for year 2007, 2008 and 2009 without any express requirements for the signing of the accounts. It averred that it had provided in its bid, Audited accounts for the years 2008, 2009, 2010 which were more recent than the years the Procuring Entity required.

The Successful bidder, M/s Indra Sistemas S.A. aligned and associated itself with the submissions of the Procuring Entity. It submitted that the Procuring Entity evaluated the tender in compliance with the tender document, the Act and the Regulations thereto.

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

The Board has noted the requirements of Section VII Clause (e) of the Preamble to the Price Schedule which stated as follows:-

*"A Price or rate shall be entered in ink or printed against every item in the price schedule with the exception of items, which already have provisional sums, affixed thereto. The tenderers are reminded that no "nil" or "included" rates or "lump-sum" discounts will be accepted. The rates for various items should include discounts if any. Tenderers who fail to comply will be disqualified".*

The Board further notes that the evaluation criteria did not exempt any bidder from ensuring that all the rates were entered in the Price Schedule and any tenderer who failed to comply would be disqualified. The Board Further notes that the financial evaluation was to be done in accordance with Section II -Instructions to Tenderers: Evaluation Criteria Clause 3 which stated as follows:

**Clause 3**

*"Comparison of prices shall be done in accordance with the provisions of the Instructions to Tenderers Clause 2.22 - 2.24"*

The Board notes Clauses 2.22 - 2.24 deal with Responsiveness of the tender; General Completion of the Tender; and Arithmetical Errors. The Board finds that, substantive responsiveness considers conformity by the bidders to all the terms and conditions of the tender document. Any bidder who materially deviates from the tender requirements is disqualified. As already noted and admitted by the Applicant, it did not include the unit prices in Schedules 1, 6

and 7 as required by the tender document and this was not a minor deviation as alleged by the Applicant.

The Board further notes that Section VII Preamble to the Price Schedule Clause (e) stated that no "nil" or "included" rates or "lump-sum" discounts would be accepted. That Clause only allowed for exemption for unit pricing in situations where the items had provisional sum affixed thereto and the Board notes that Schedules 1, 6 and 7 did not have provisional sums.

In view of the above, the Applicant did not comply with the requirements of the tender documents and on this ground alone, ought to have been disqualified.

Accordingly, these grounds of appeal fail.

With regard to the issues raised by the interested parties , the Board holds as follows:-

- i) In the case of Alliance Technologies, nothing could have stopped them from lodging a formal request for Review within 14 days with effect from 7<sup>th</sup> July, 2011 when they became aware that their bid was unsuccessful.
- ii) With regard to M/s Mahindra Satyam, the Board observes that it did not provide the Audited accounts for year 2007 as required by the tender document neither did it lodge a Request for Review.

## **Grounds 8 and 9 - Breach of Sections 63 of the Act and Regulation 50**

These grounds have been consolidated because they raise similar issues regarding the requirements for provision of 10% contingency.

The Applicant alleged that the Procuring Entity purported to seek clarification from it relating to a 10% contingency provision required in the Price Schedule, whereas in its bid, it had indicated that there was no need for a contingency and had quoted as such having indicated a figure of zero against the contingency provision. It further alleged that it had agreed to the Procuring Entity's clarification to add an additional 10% to its bid amount to cover the contingency, because failure to do so would have meant disqualification and forfeiture of its bid bond. It claimed that even though it had agreed to the addition of the 10% contingency amount to its bid, this was not a correction of an arithmetical error as allowed by Section 63 of the Act, but a forced amendment of its bid.

In response, the Procuring Entity stated that the Applicant had made an arithmetic error on item (a) of price schedule 5, and item 8 of price schedule 8 (Grand Total - One Time Cost) where the Applicant made an entry of zero instead of adding to the sub-total of schedules 1 to 7, the figure resulting from the multiplication of 10% with the sub-total of Price Schedules 1 to 7. It submitted that the correction of errors was a requirement provided for in Section 63 of the Act, Regulation 50 and Clause 2.22.2 of the Instructions to Tenderers.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board has noted that item (a) of price Schedule 5, and item 8 of Price Schedule 8 provided as follows:

***Item (a)***

***"Project manager"***

***Item 8***

***"Add 10% of Sub Total for Contingency"***

The Board notes that it was a requirement of the tender that bidders had to add a contingency of 10 % sum to their totals in Price Schedules 1 to 7. The Board notes that the Applicant included a nil figure in its tender document in respect of the said items this was not in line with the express requirement of the Instructions to tenderers Clause 2.22 .2. which provides as follows:-

***"Arithmetical errors will be rectified on the following basis. If there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantifying, the unit price shall prevail, and the total price shall be corrected. If the candidate does not accept the correction of the errors, its tender will be rejected and its tender security forfeited. If there is a discrepancy between words and figures the amount in words will prevail.***

It is clear that this was an error on the part of the Applicant and therefore the Procuring Entity acted properly in disqualifying its bid. Provision of a contingency sum is crucial where the Procuring Entity has expressly instructed bidders to provide for it and such bidders cannot on their own volition ignore or misinterpret such instructions.

Accordingly, these grounds of appeal fail.

**Grounds 10, 11, 12, 13, 14, 15 and 16 - Breach of Sections 31 and 66 of the Act**

These grounds have been consolidated because they raise similar issues regarding financial evaluation on 16% VAT.

The Applicant alleged that the Procuring Entity unilaterally and without any notice to it, loaded a 16% tax element to its bid, thus making its bid higher than that of the Successful Bidder's. It further alleged that by doing so the Procuring Entity breached Sections 31 and 66 of the Act by introducing an evaluation criterion not set in the tender documents. It stated that the Procuring Entity failed to appreciate that it had already factored all applicable taxes within its bid rates in conformity with Section VII Price Schedule, Preamble to the Price Schedule, Clause (g).

The Applicant further claimed that the Procuring Entity further breached Section 66 of the Act by adjudging the Successful Bidder's financial bid based on a price that the Successful Bidder did not quote. In conclusion, it stated that the Procuring Entity applied the evaluation criteria in a discriminatory manner and failed to award the tender to the lowest evaluated bidder.

In response, the Procuring Entity stated that under Price Schedule 9, all applicable taxes were a line asset which all bidders were required to add. It stated that the Applicant failed to include the taxes in its financial bid. With respect to the Successful Bidder's financial proposal, the Procuring Entity submitted that the said bid had arithmetical errors and that it evaluated the bid in accordance with Regulation 50 which provided that the evaluated bid price would be determined by taking into account any arithmetic corrections.

In conclusion it stated that it evaluated the financial bids in accordance with the evaluation criteria stated in the tender documents, Regulation 50 and Section 66 of the Act.

The Board has carefully considered the documents presented before it and the parties' submissions.

The Board has noted that Clause 2.10.2 of the Instructions to Tenderers and Section VII Price Schedule, Preamble to the Price Schedule, Clause (g) and provided as follows:

**Clause 2.10.2**

*"Prices indicated on the Price Schedule shall include all costs including taxes, insurances and delivery to the premises of the entity."*

**Clause (g)**

*"The price rates entered in the Price Schedule shall, except insofar as it is otherwise provided under the Contract, include all materials to be*



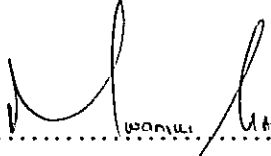
*used, labour, insurance, supplier's supervision, compliance, testing, materials, maintenance or works, overheads and profits, taxes and duties together with all general risks, liabilities and obligations set out or implied in the Contract, transport, electricity and telephones, water, use and replenishment of all consumables, including those required under the Contract by the procuring entity and his staff."*

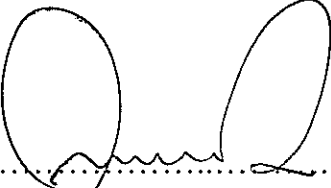
The Board notes that a bidder could include the taxes in their unit prices and therefore there was no need for the Procuring Entity to add the 16% to the quoted sum of the Applicant. However, as the Board has already noted, the Applicant's financial bid had material deviations and was not responsive. Accordingly, the Applicant's bid could not have been the lowest evaluated.

Accordingly, although the Board has noted that it was wrong for the Procuring Entity to include the 16% VAT on the Applicant's bid this does not cure the defect in the Applicant's financial bid as already highlighted.

Taking into account the foregoing, the Request for Review fails and the Board orders, pursuant to Section 98 of the Act, that the Procurement process may proceed.

**Dated at Nairobi on this 3<sup>rd</sup> day of August, 2011**

  
.....  
**CHAIRMAN**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**

