

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 65/2012

BETWEEN

HORSEBRIDGE NETWORK SYSTEMS (E.A) LTD.....APPLICANT

AND

CENTRAL BANK OF KENYA.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Central Bank of Kenya dated 29th November, 2012 in the matter of Tender No. CBK/46/2011-2012 for Supply, delivery, installation & commissioning of an integrated security management system for the Central Bank of Kenya.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	- Chairman
Eng Christine Ogut	- Member
Ms. Judith Guserwa	- Member
Mr. Joshua Willy Wambua	- Member
Mrs. Loise Ruhiu	- Member

IN ATTENDANCE

Nathan Soita	- Secretariat
Shelmith Miano	- Secretariat

PRESENT BY INVITATION

Applicant- Horsebridge Network Systems (E.A) Ltd

Mr. C.M. Njuguna - Advocate, Njuguna & Partners Advocates
Mr. Phineas Mwenda - Project Manager

Procuring Entity -Central Bank of Kenya

Mr. Ng'ang'a Mbugua - Advocate, Ngatia & Associates Advocates
Mr. C.J. Nyanjwa - Director
Mr. P.K. Kariuki - Manager, Procurement
Ms. N.K. Wanjala - Manager

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

1. That the Procuring Entity advertised the tender in dispute on 14th May, 2012 and closed/opened on 3rd July, 2012.
2. Six bidders namely; AUA Indusrtia, Orad Limited, Indra Limited, Azicon Kenya Ltd, HorseBridge Network Systems E.A. Ltd and Engineered Systems Solutions responded by submitting their tenders.
3. Only three bidders namely Orad Limited, Azicon Kenya Limited and Horsebridge Network Systems E.A. Limited were determined to be responsive.
4. On completion of technical evaluation, only two bidders, namely, Orad Ltd and the Applicant were invited to make presentation of

their submissions. Both firms then proceeded to the Financial Evaluation stage.

5. Upon evaluation of the Financial submissions and combining them with Technical Proposals, the Applicant emerged the overall winner with the combined total score of 93.5 marks against Orad Ltd's 84.5.
6. The Evaluation Committee recommended that the Applicant be awarded the contract having submitted the most technically responsive bid and with the lowest evaluated price.
7. The Tender Committee at its Meeting No. 140 held on 23rd August, 2012 deliberated on the Evaluation Committee's report and declined to award the tender as recommended and directed that:
 - a) The tenders of Indra Limited and Engineered Systems Solution be allowed to participate in the Technical Evaluation and be evaluated with the other two that were already evaluated on technical specifications.
 - b) That if the two firms attain a score above the pass mark, they be invited to demonstrate their products and services and the same be evaluated as well.
 - c) That if the two firms also pass the criteria set in (b) above, they be progressed to Financial Evaluation after which a final ranking would be reached and a recommendation made to the Tender Committee.
 - d) That the Evaluation Committee to commence the evaluation process as guided and prepare a report to be considered by the Tender Committee before 7th September, 2012.
8. A re-evaluation was carried out but still only two firms namely, Orad Limited and the Applicant qualified to the Financial evaluation stage.

The Evaluation Committee still found the Applicant's bid to be the most technically responsive and thus recommended it for the award.

9. The Tender Committee in its 143rd Meeting held on 26th September, 2012 deliberated on the re-evaluation report and made the following observations:

- a) That attribute 2 of the technical evaluation criteria requiring bidders to demonstrate technical capability to install & maintain the Integrated Security Management System as quoted was not very well crafted and therefore the scores allocated by the evaluation team were subjective and inconsistent.
- b) That attribute 4 which required local presence of the bidders was not a fair criteria of evaluation since what would be required of a bidder was technical support rather than local presence.
- c) The Tender Committee as a way forward recommended that the Bank conducts more consultations with Government organizations that had installed similar security systems so as to identify the most appropriate method of procurement due to the sensitivity of security issues considering the significance of the Bank to the country and conduct a due diligence as an evaluation criterion and not after award.
- d) In view of the foregoing, the Tender Committee concluded that the tendering process be terminated. The Minutes for that meeting were signed on 12th October, 2012.

10. The Applicant filed the Request for Review No. 51/2012 on 8th October, 2012 and the Board's decision issued on 6th November, 2012.

The Board in its decision directed that the Procuring Entity through its Tender Committee considers the recommendation of the Evaluation Committee and proceed to finalize the award in accordance with the Act and the Regulations within the next thirty (30) days from the date of the decision.

11. At the time the first Request for Review was filed, the Procuring Entity had not notified bidders of the outcome of the tender award or any other decision as made by the Procuring Entity's Tender Committee.
12. Upon receiving the Board's decision, the Procuring Entity's Tender Committee met in its 148th Meeting held on 29th November, 2012 where it recalled having considered the recommendations of the Evaluation Committee at length on 26th September, 2012 but declined to award the tender on grounds already noted herein above. Having concluded the discussions and made a decision on the matter on 26th September, 2012, the Members were guided that what was pending was communication of the decision by the Secretariat to the interested parties within the extended tender validity period as required under the procurement laws.

THE REVIEW

The Request for Review was lodged by Horsebridge Network Systems (E.A) Ltd on 6th December, 2012 in the matter of Tender No: CBK/46/2011-2012 for Supply, delivery, installation & commissioning of an integrated security management system for the Central Bank of Kenya.

The Applicant was represented by Mr. C.M. Njuguna, Advocate, while the Procuring Entity was represented by Mr. Ng'ang'a Mbugua, Advocate.

The Applicant requested the Board for the following orders:

- a. The decision of the Procuring Entity be declared illegal, unlawful and a nullity in law and be set aside.*
- b. The Procuring Entity be directed to award the contract to the applicant.*
- c. Any further orders as the Board may find appropriate.*

The Applicant raised three grounds of review which the Board deals with follows:

At the commencement of the hearing, the Board noted that the Procuring Entity had filed a notice of Preliminary Objection simultaneously with its Response to the Request for Review. It was noted that the grounds raised in the notice of Preliminary Objection were the same ones raised in the response.

In view of the foregoing and by consent of the parties, it was agreed that the grounds in the Preliminary Objection and the Response would be argued together.

The Applicant has raised three grounds which can be summarized as follows:

1. The Procuring Entity has breached Sections 98, 100 and 136 of the Public Procurement and Disposal Act (hereinafter the "Act") in that it has blatantly disregarded the decision of the Board in Review No. 51 of 2012 by purporting to terminate the tender instead of awarding the tender as per the recommendations of the Evaluation Committee and the directives issued by the Board.
2. The decision by the Tender Committee is ultra vires as the Tender Committee has exceeded its powers as set out in Regulations 10 and 11 of the Public Procurement and Disposal Regulations 2006 (hereinafter the Regulations")
3. The decision by the Procuring Entity contravenes the objectives of the Act as set out in Sections 2 and 28 of the Act.

In support of its grounds the Applicant made the following submissions:

1. The tender was the subject in Request for Review No. 51/2012. Upon hearing the parties the Board observed that the Evaluation Committee had evaluated the tender properly and recommended the Applicant. The Tender Committee ordered that a re-evaluation

be done and the Applicant emerged the lowest evaluated even after the re-evaluation.

In view of the foregoing, the Board directed that the Procuring Entity's Tender Committee should consider the recommendations of the Evaluation Committee and proceed to finalize the award in accordance with the Act and the Regulations.

2. That by a letter dated 30th November 2012, the Procuring Entity purported to terminate the Tender pursuant to Section 36 of the Act. The Applicant argued that this was a blatant disregard of the decision and directives issued by the Board in Request for Review No. 51/2012.
3. That the Procuring Entity did not challenge the decision of the Board by a way of Appeal or Judicial Review. Accordingly, in line with Section 100 of the Act, the decision of the Board on the issue was final and binding. Therefore, the Procuring Entity had no discretion at all to terminate the tender as it purported to do. It argued that the actions of the Procuring Entity contravenes clear directives of the Board issued pursuant to Section 98 of the Act and that such action was punishable under Section 136 of the Act.

4. That the powers of a Procuring Entity given by Section 36 of the Act are not absolute and that once an award has been made a Procuring Entity cannot subsequently terminate the award. It cited a decision of the Board in **Request for Review No. 39/2012 Anhui Construction Engineering Limited vs Kenya Airports Authority**. It submitted that the Procuring Entity has not cited any intervening reasons or grounds for terminating the tender after the ruling of the Board on 6th November 2012.
5. That the Procuring Entity's delay in making a decision until 29th November 2012 was suspicious and a clear indication that the Tender Committee is not ready to implement the decision of the Board. It alleged that this was an indication that the Tender Committee had a preferred bidder in mind.
6. It stated that upon filing of the Request for Review on 8th October 2012, the Board issued a stay pursuant to Section 95 of the Act. This meant that time stopped running as no action could be taken in the tender process and therefore the Tender Validity Period had not expired as argued by the Procuring Entity.

7. The Applicant urged the Board to ignore the legal technicalities raised by the Procuring Entity and instead to deliver substantial justice as envisaged in Article 159 of the Constitution.

In Response the Procuring Entity submitted as follows:

1. That the directions issued by the Board in Request for Review No. 51 of 2012 was that the Procuring Entity was to finalize the award in accordance with the Act and the Regulations. It argued that the Order by the Board did not take away the power to terminate the tender that is donated to it by Section 36 of the Act.
2. It stated that the decision to terminate the tender was made by the Tender Committee on 26th September, 2012 but the decision had not been communicated to the bidders by the time the Request for Review No. 51 of 2012 was filed on 8th October, 2012.

It presented minutes of 143rd Tender Committee meeting held on 26th September 2012 which were signed on 12th October, 2012. Upon questioning by the Board, it conceded that those minutes were not produced before the Board on 2nd November 2012 during the hearing of the Request for Review No. 51 of 2012. It stated that the reason why the said minutes were not produced before the

Board was that no communication had been made to the Bidders on the termination of the tender at the time of hearing.

Mr. Nyanjwa, the Secretary to the Tender Committee conceded that in retrospect the said minutes of 26th September 2012 ought to have been presented to the Board. On his part, the Advocate Mr. Ng'ang'a indicated that he was not aware about those minutes. However, he submitted that the Procuring Entity had an unfettered discretion to terminate a tender at any time before the signing of the contract. He stated that a decision to terminate the tender was made by the Tender Committee on 29th November 2012 and the Bidders were notified on 30th November 2012. He argued that, accordingly, the Board had no jurisdiction in view of the provisions of Section 36 of the Act.

3. It stated that the tender validity period expired on 3rd December 2012 and since it had not extended the validity period the procurement proceedings herein terminated by effluxion of time. It argued that in view of this fact there subsists no tender capable of being awarded under Section 67 of the Act.

4. The Procuring Entity submitted that it did not disobey the directives that the Board issued under Request for Review No. 51 of 2012. It stated that it did not appeal or file Judicial Review Application as it was not aggrieved by the decision.

According to it, the Order issued by the Board did not take away the Procuring Entity's power to terminate the tender and in doing so it had considered the recommendation of the Evaluation Committee and decided that the tender was of a sensitive nature and it was not proper to make an award until further consultations were made with relevant government agencies.

In conclusion, the Procuring Entity stated that the Request for Review was a nonstarter, lacks merit and ought to be dismissed.

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

It is clear from the submissions of the parties that this Request for Review is intrinsically joined with the decision of the Board in Request

for Review No. 51 of 2012. The issues that arise for determination are as follows:

1. What directives were issued by the Board in Request for Review No. 51 of 2012?,
2. Could the directives of the Board in Application No. 51 of 2012 take away the powers of Procuring Entity to terminate the tender at any time before entering into a contract?,
3. Has this tender been terminated pursuant to Section 36 of the Act and if so does the Board have jurisdiction to hear and determine this matter?
4. Has the tender process expired by effluxion of time? and
5. Do the actions of the Procuring Entity amount to an attempt to circumvent the Orders of the Board issued in Request for Review No. 51 of 2012?,

To answer the above questions it is necessary to set out the background to this Request for Review which is as follows:

1. On 8th October 2012, the Applicant filed Request for Review No. 51 of 2012 in respect of this tender.
2. The Procuring Entity filed its Response on 26th October 2012 and by a letter of even date submitted all the documents in respect of

this tender which included original tender documents, minutes of the Tender Opening Committee and the minutes on the evaluation, amongst other documents

3. Upon hearing the parties the Board made a number of observations and findings. Highlighting the salient ones the board noted as follows:

- I. Although fifty eight Bidders had bought the tender documents only six of them submitted the bid documents.
- II. After preliminary evaluation only two bidders, the Applicant and another one known as Orad Limited qualified to proceed to the Financial Evaluation stage.
- III. After Technical Evaluation, the two bidders were subjected to the Financial Evaluation. The Evaluation Committee recommended the Applicant for award of the tender.

Upon presentation of the Evaluation Committee's recommendations the Tender Committee rejected the report/recommendations and ordered a re-evaluation on the grounds that;

- (a) Two tenderers namely Indra Ltd and Engineering Solutions Systems (ESS) be allowed to participate in

Technical Evaluation and be ranked with the other two that had already been evaluated on technical specifications.

(b) That if the two Bidders attained scores above the pass mark they be allowed to make presentations of their products and services and that the presentations be evaluated.

(c) That if the two Bidders also passed technical evaluation their tender price be evaluated and ranked alongside the others

IV. A re-evaluation was done and the two Bidders namely Indra Ltd and Engineering Solution Systems (ESS) were readmitted into the technical evaluation stage. After the evaluation was done both of them failed to attain the set pass mark and therefore were disqualified at that stage.

In the ruling, the Board held that indeed the directive of the Tender Committee to re-admit those two bids was wrong and baseless as the Evaluation Committee had rightly observed that the two Bidders failed to submit mandatory

documents and they were therefore properly disqualified at the preliminary evaluation stage.

- V. The Evaluation Committee after the re-evaluation found that only the two Bidders who had initially attained the pass mark, that is the Applicant and Orad Ltd, had attained the pass mark. Accordingly, it made a recommendation once again that the tender be awarded to the Applicant.
- VI. In its decision, the Board observed that although the Evaluation Committee report had been forwarded to the Tender Committee, the Tender Committee deliberately and without any explanations or justifiable grounds failed to adjudicate on the tender which necessitated the filing of Request for Review No. 51 of 2012. The Board in its ruling stated as follows.

"Regarding the question as to whether the application is premature, the Board finds as a matter of fact that the award for this tender has not been made by the body empowered by statute, namely, the Tender Committee, to make an award. The circumstances surrounding the delay in making the award is the subject of observations by the Board in the concluding paragraphs of this decision.

The Board observes that whereas the Evaluation Committee completed the re-evaluation of the tenders on 7th September 2012, as directed by the

Tender Committee, the Tender Committee had taken no action to adjudicate the tender. Indeed, when the Board sought information from the representatives of the Procuring Entity present during the hearing of this Request for Review as to whether or not any decision had been made, it drew a blank from them. This question became even more imperative when the Board realised that the tender validity period for this tender was due to expire on 3rd November, 2012, which would be before the Board would be in a position to determine the Application. In order to forestall this untenable situation, the Board ordered the Procuring Entity to take immediate steps to seek extension of the validity period of the tenders by communicating with all the bidders.

The delay by the Tender Committee to adjudicate this tender without any explanation whatsoever raises fundamental questions as to the efficiency in the institution in the processing of tenders, and indeed, harmony among the bodies responsible for the procurement function in the organisation. This is so, especially in light of the push and pull that is evident in the relationship between the Evaluation Committee and the Tender Committee in the subject tender. The Procuring Entity is well advised to observe timeliness in decision making in all stages in the tendering process in order to avoid unnecessary delays in the implementation of projects. As the Board has already noted, the Evaluation Committee evaluated and re-evaluated the tender and the same bidder was successful. There are no reasons which have been given as to why the Tender Committee has not awarded the Tender.

VII. The Board specifically held that there were no reasons which had been given as to why the Tender Committee had not awarded the tender after the re-evaluation. The Board directed the Procuring Entity to consider the recommendations of the Evaluation Committee and proceed to finalize the award in accordance with Act and the Regulations within 30 days. The interpretation of that Order is in dispute and the Board will revisit the issue later in this decision.

VIII. On 29th November 2012, the Tender Committee in its "148th" meeting considered the decision of the Board made on 6th November 2012 and stated as follows:

"Having concluded the discussions and made a decision on the matter on 26th September 2012 as aforesaid, members guided that what was then pending was the communication of the decision by the secretariat to the interested parties within the extended tender validity period as required by procurement laws"

Accordingly, a notification was done to the bidders on 30th November 2012 that the tender had been terminated. At this stage, it is necessary to set out in full the minutes of the Tender Committee of 29th November 2012 minute No TC 1767 which states as follows:

"The Chairman called the meeting to order at 5.05 pm and noted that the agenda of the day was only one item. The members considered and adopted the agenda.

MINUTE NO TC 1767: SUPPLY, DELIVERY, INSTALLATION, TESTING AND COMMISSIONING OF AN INTEGRATED SECURITY MANAGEMENT SYSTEM (ISMS) FOR THE CENTRAL BANK OF KENYA – TENDER REF. NO. CBK/46/2011-2012

Members were taken through the details and the background of the tendering process covering:

- *The tender publications in the media and opening of the same;*
- *Tender evaluation report;*
- *Tabling of the report and Tender Committee decision for a reevaluation on 23rd August, 2012;*

- *Tabling of the re-evaluation report and subsequent Tender committee's decision to terminate the tender on 26th September 2012;*
- *Receipt of Administrative Review notice on 8th October 2012*

Members were briefed on the Ruling made by the Public Procurement Administrative Review Board on 6th November 2012 regarding a review filed by one of the bidders in Tender No. CBK/46/2011-2012 FOR SUPPLY, DELIVERY, INSTALLATION, TESTING AND COMMISSIONING OF AN ITEGRATED SECURITY MANAGEMENT SYSTEM (ISMS).

Earlier on, the Board had vide letter dated 8th October 2012 directed the bank not to proceed with the procurement process until Review No. 51 of 8th October 2012 was heard and determined.

The Tender Committee noted the ruling made by Public Procurement Administrative Review Board to that effect;

- *The Tender Committee considers the recommendation of the Evaluation Committee and proceeds to finalize the award in accordance with the Public Procurement Disposal Act and Regulations within 30 days from the date of the decision.*
- *That there be no orders to costs.*

In this regard, members recalled that they had considered the recommendations of the Evaluation Committee at length on

26th September 2012 declined to award the tender due to the following grounds;

- (a) That attribute 2 of the technical evaluation criteria requiring the bidders to demonstrate technical capability to install and maintain the Integrated Security Management System as quoted was very well crafted and therefore the scores allocated by evaluation team were subjective and inconsistent. The committee noted that the inconsistencies in the evaluation criteria would jeopardize the outcome of the tender.*
- (b) That attribute 4 on requiring local presence of the bidders was not a fair criteria of evaluation since what would be required of a bidder was to provide technical support rather than a local presence.*
- (c) The bank should conduct more consultations with Government Organizations that had installed similar security systems so as to identify the most appropriate method of procurement due to the sensitivity of security issues especially considering the significance of the Bank to the country.*
- (d) The bank to conduct a due diligence as an evaluation criterion and not after award.*

Having concluded the discussions and made a decision on the matter on 26th September 2012, as aforesaid, members guided that what was then pending was communication of the decision by the secretariat to the interested parties, within the extended tender validity period, as required under procurement laws”.

What is intriguing and very shocking is the introduction of the minutes of the 143rd meeting of the Tender Committee at the hearing of this Request for Review. It should be noted as follows:

- (i) The said minutes of the meeting of 26th September 2012 were signed by the Chairman and the Secretary on 12th October 2012
- (ii) The Procuring Entity upon notification of the Request for Review No. 51 of 2012 upon request by the Secretary to the Board, submitted its Response and all the minutes and documents on the said tender to the Board by a covering letter dated 26th October 2012. The said letter stated as follows:

**“RE: APPLICATION NO 51 OF 8TH OCTOBER 2012
HORSEBRIDGE NETWORKS SYSTEMS (EA) LTD VS
CENTRAL BANK OF KENYA ON SUPPLY, DELIVERY,
INSTALLATION , TESTING AND COMMISSIONING OF
AN ITERGRATED SECURITY MANAGEMENT SYSTEM”**

(ISMIS) FOR THE CENTRAL BANK OF KENYA - TENDER
REF. NO. CBK/46/2011-2012.

We refer to the above captioned matter and your letter Ref: ARB 3/08/Vov 1 (70) dated 16th October 2012 and as requested forward the following documents in accordance with your Schedule 1 Form 5 in response to the Request for Review:

- 1. Duly completed Schedule 1, form 5.*
- 2. List of six Tenderers who participated in the tender and their respective details (Part B of Form 5)*
- 3. Documents Required under Part D of Form 5*
 - (i) Tender Advert Notice;*
 - (ii) All original tender documents from the 6 bidders;*
 - (iii) Minutes of the Tender Opening Committee*
 - (iv) Blank copy of Tender Documents (Technical and Financial) as issued to the bidders*
 - (v) Original Tender Opening Register;*
 - (vi) Original Technical Evaluation Report and recommendations;*
 - (vii) Original Financial Evaluation Report (combined with Technical Evaluation Report above);*

(viii) Minutes of the 140th Tender Committee meeting;

(ix) Procuring Entity's Response to the grounds of Appeal

(x) Addendum to the original tender documents.

As this was an International Open Tender, only relevant documents mainly Part D of Form 5 are attached. However, no information is available with respect to items D9, 10 and 11 since notification of award /termination has not been issued and there were no samples required".

(iii) On 26th October 2012 the Procuring Entity also submitted the mandatory Form 5 issued by the Board that stipulates the documents and the information required to be submitted by a Procuring Entity. Upon filing of a Request for Review, the Board notes that PART A 1(a) of the said declaration states as follows:

("All the tenders which are the subject matter of the appeal have been rejected pursuant to Section 36 of the Act).

In response, to that declaration, the Procuring Entity indicated that no tenders had been rejected pursuant to Section 36. It also indicated that there were no documents to be submitted in respect of Section 36 as there was no termination”.

Further, at Part D of the said Form 5 requires that Procuring Entity to forward the minutes of the tender opening committee, Blank Tender Document, Original Tender Register, Original Technical and Financial Evaluation minutes. In Response to those requirements the Procuring Entity submitted the minutes and indicated so in the said Form. However, the minutes of the said Tender Committee of 26th September 2012 were not part of the documents submitted. The Board notes that requirement No. 8 in PART D required the Procuring Entity to submit signed minutes of the Tender Committee approving the award of tender. The Procuring Entity indicated in the form there was no award.

It is noteworthy that Form 5 has a declaration part to be signed by the Authorized Officer of the Procuring Entity stating the declarations in Part A are true to the best of his knowledge. This part is signed by the Director of the Procuring Entity Mr. Cassian Juma Nyanjwa.

(iv) We have set out the detailed back ground in respect of this matter as it is clear that the minutes of the Tender Committee Meeting of 26th September 2012 purported to rely on in the meeting of 29th November 2012 are suspicious and could indeed be fake or an instrument made to subvert the course of justice. We say so because the following questions come to mind:

(i) The said minutes of 26th September 2012 were signed on 12th October 2012. The Procuring Entity forwarded its Response and documents to the Board on 26th October 2012. The hearing of the Request for Review was on 2nd November 2012 . Why were the minutes not submitted to the Board then?

- (ii) The Procuring Entity submitted Form 5 that has several parts to be filled. The Procuring Entity categorically stated that no tenders had been rejected pursuant to Section 36. Further, it indicated no award had been made. If a decision to terminate the tender had been made, why was that information not disclosed?
- (iii) At the hearing on 2nd November 2012, the Procuring Entity through its Advocate and the Officers present never mentioned that the tender had been terminated or that a termination was being considered.
- (iv) The reasons given in the said impugned minutes for the termination are that the technical specifications are not clear and that there was need for further consultations with the other Government Agencies. As earlier observed, the Tender Committee had earlier ordered a re-evaluation and directed that two bidders who had not submitted mandatory documents be re-admitted into the tender process. At that time the

issues of the technical specifications or the evaluation criteria were not raised.

Clearly one does not need to be a rocket scientist to see that the Tender Committee of the Procuring Entity has a clear agenda. That although the Technical Evaluation Committee has done a re-evaluation and recommended the Applicant, the Tender Committee for reasons known to itself is not ready to approve that recommendation. It is clear to the Board that the Tender Committee of the Procuring Entity has misunderstood the powers conferred on it by Regulation 10 and 11 which provide as follows:

"10 A Procuring Entity shall establish Tender Committee in the manner set out in the Second Schedule

11 In Considering submissions made by procurement unit or evaluation committees, the Tender Committee may-

(a) Approve a submission or

(b) Reject a submission with reasons or

(c) Approve submissions, subject to minor clarifications by the procurement unit or Evaluation Committee"

It appears that the Tender Committee has interpreted that Section to mean that it has absolute powers over all the other bodies set up under the Act.

Turning to the orders that the Board issued, it is clear that the Procuring Entity totally ignored the decision of the Board and interpreting in a manner that will achieve its intentions not to award the tender. The Board had carefully considered the manner the evaluation process was done and held that the evaluation process was conducted properly. It directed the Tender Committee to consider the recommendations of the Evaluation Committee and finalize the award within thirty days. The only way it could finalize the award is as set out in Regulations 10 and 11. Since the Board had held that the Evaluation Committee acted properly, it was not open to the Tender Committee on its own motion to search for alternative reasons to reject the recommendations of the Evaluation Committee. It is trite law that once a body is conferred with discretion by the law, such discretion is not absolute as the Tender Committee in this case assumes. It has to be exercised judiciously.

It is clear to the Board that the minutes of 26th September 2012 are being introduced as a sword, in order to oust the jurisdiction of the Board. As already held, those minutes are fake to say the least, and as such cannot be a basis for ousting the jurisdiction of the Board.

Further, the Board was properly seized of the matter on 2nd November 2012 when it heard the case and delivered the decision on 6th November 2012. Upon rendering the decision the said decision became binding on the Procuring Entity and the only option open to it was to seek a Judicial Review if it was dissatisfied. It did not do so and therefore the decision is binding as provided in Section 100 (1) and (3) of the Act which states as follows:

(1) "A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision... .."

(3) " A party to the review which disobeys the decision of the Review Board or High Court shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court shall be null and void"

The Procuring Entity can not purport to seek refuge in Section 36 at this stage. In doing so, it is trying to close the stable after the horse has bolted. The act of trying to rely on minutes which are suspicious is highly regrettable when one considers that the Procuring Entity is a Regulator and is expected and required to set good standards in terms of compliance with the law and be a good example to other players in the economy in general.

The Board further notes that indeed no report has been filed with the Director General of the Public Procurement Oversight Authority (PPOA) on the purported termination as required by Section 36(8) of the Act which again is a demonstration that no termination was done as alleged by the Procuring Entity. Further the Board observes that the jurisdiction of the Board is set out in Section 93 which states as follows:

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 as may be prescribed”.

Section 36 has to be read together with Sections 93 and 100. As clearly noted the Procuring Entity admitted in Form 5 that it had not rejected tenders pursuant to section 36 of the Act. The Tender Committee in its meeting of 29th November 2012 attempted to rely on the minutes of 26th September 2012 which as already observed are being introduced in an attempt to oust the jurisdiction of the Board.

The Board is the body created by statute to ensure that the objectives of the Act as set out in Section 2 are observed. The said Section states that:

“The purpose of this Act is to establish procedures for procurement and disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives:

(a) Maximum economy and efficiency

(b) To promote competition and ensure that the competitors are treated fairly;

(c) To promote the integrity and fairness of those procedures:

(d) To increase transparency and accountability in those procedures and

(e) To increase confidence in those procedures"

The Board has also been clothed with powers as set out in Section 98 to ensure that Procuring Entities adhere to the requirements of the Act.

The upshot of the foregoing is that the Board has jurisdiction to hear and determine this matter and the attempt to create a technical defence by the Procuring Entity must fail.

The other line of defence taken by the Procuring Entity was that this tender has lapsed by effluxion of time in view of the provisions of Section 67 (1) and (2) which states as follows:

(1) Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the persons submitting the successful tender that his tender has been accepted...."

(2) "At the same time as the person submitting the successful tender is notified, the Procuring Entity shall notify all other persons submitting tenders that their tenders were not successful"

As can be noted, the said Section requires Procuring Entities to notify bidders the outcome of a tender within the validity period. As already noted the Procuring Entity ignored the clear directives of the Board and purported to terminate the tender.

Nevertheless, the communication was done within the tender validity period. In any event the Procuring Entity has been given powers to extend the tender validity period under Section 61 of the Act. The Procuring Entity cannot fail to discharge a duty imposed on it by the Act and thereafter attempt to use that fact as a sword and more so to oust the jurisdiction of the Board.

As the Board has already held the decision delivered on 6th November 2012 was binding on the Procuring Entity in line with Section 100 (1) of the Act. The Board notes that the Procuring Entity's Tender Committee did not sit until 29th November 2012. The Act and the Regulations give aggrieved bidders a fourteen days appeal window and that cannot be taken away by a Procuring Entity.

The decision of the Board was binding and had to be implemented by the Tender Committee. The said decision cannot be said to have lapsed by effluxion of time as alleged by the Procuring Entity. The Board holds that the tender validity period in this case did not lapse before the award of the tender. On the contrary the Procuring Entity's Tender Committee wrongly assumed that it could ignore the clear directions of the Board and later set up technical legal defence. As already stated such a defences fly in the face of the clear provisions of the law.

The Board notes that Article 159 (2) (d) of the Constitution imposes on Courts and Tribunals a duty to dispense substantial justice

without regard to undue technicalities. The Article states as follows:

159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-....

(d) "Justice shall be administered without undue regard to procedural technicalities".

The Procuring Entity has attempted to fabricate technicalities to oust the jurisdiction of the Board which cannot withstand legal scrutiny. The Board has held in the past that a tender should be awarded before the expiry of the validity date. That remains the position. What cannot be allowed is a situation where a Procuring Entity deliberately fails to comply with the decision of the Board that was made when the tender validity was alive. If this was allowed it would render the procurement law to be useless as all the Procuring Entities would do is to invoke Section 36 or Section 67 of the Act. This kind of action would be contrary to the provisions of Article 227 of the Constitution which provides as follows"

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective"

In view of the foregoing, the Board holds that the Procuring Entity and specifically the Tender Committee is behaving like an unruly horse and it has to be tamed and calmed. In the premises, the Board holds as follows:

1. The decision in Request for Review No. 51 of 2012 was delivered when the tender was still valid and there was no termination or rejection of all the tenders as at that time.
2. That the minutes of the Procuring Entity as produced for a meeting purportedly held on 26th September 2012 have been manufactured in an attempt to oust the jurisdiction of the Board. As the Board issued a decision on 6th November 2012 giving directions pursuant to Section 98 (b) of the Act, Section 36 was not available to the Procuring Entity as it has to be read together with Sections 93 and 100 of the Act.

Accordingly, the Board has jurisdiction to hear and determine this matter.

The Board holds that the decision in the Selex Siestemi case does not support the position taken by the Procuring Entity. On the contrary it clearly demonstrates that the Courts will intervene where a Procuring Entity abuses the discretion conferred on it by the Act.

3. The Procuring Entity's Tender Committee has acted in excess of its powers in disregarding the recommendations of the Evaluation Committee and the orders issued by the Board.
4. The entire tender process was carried out in accordance with the Act and the Applicant emerged as the lowest evaluated Bidder on two occasions but the Tender Committee has refused to award the tender citing different reasons on two occasions. There is no complaint from the user department or any of the Bidders on the technical specifications or the evaluation criteria. This issue has been raised by the Tender Committee on its own motion and is clearly an afterthought and amounts to a red-herring.

5. The Procuring Entity has breached the provisions of Section 2, 98 and 100 of the Act and Regulations 10 and 11.
6. If the blatant acts of the Procuring Entity are allowed to stand, this will promote impunity in the procurement sector and reverse all the gains made since the enactment of the Act. A Procuring Entity that attempts to run away from the parameters set by the Act and the Regulations must be contained and forced to comply with the Act and the Regulations.

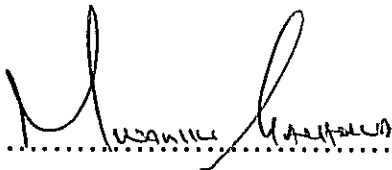
Accordingly, the Board holds that to bring this matter to finality, this is a proper case where the Board should invoke the powers donated by Section 98 (c) of the Act. Consequently the Board holds and directs as follows:

1. That the Request for Review succeeds
2. The decision of the Procuring Entity made on 29th November 2012 and communicated under the letter dated 30th November 2012 is hereby set aside and in lieu thereof the Board substitutes the same with an Order that this tender be and is hereby awarded to the lowest evaluated bidder

Horsebridge Networks Systems (EA) Ltd, the Applicant
herein.

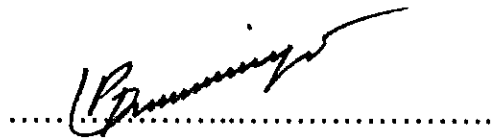
3. Each party shall bear their own costs.

Dated at Nairobi on this 4th day of January, 2013



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**CHAIRMAN
PPARB**



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**ALG. SECRETARY
PPARB**

