

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 42/2013 OF 29TH OCTOBER, 2013

BETWEEN

ZTE CORPORATION.....APPLICANT

AND

**MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT.....PROCURING ENTITY**

Review against the decision of the Tender Committee of the Ministry of State for Provincial Administration & Internal Security dated 7th October, 2013 in the matter of Tender No. OOP/NSCCC/2011-2012 for Supply, Installation, Testing and Commissioning of the National Surveillance, Communication, Command and Control Systems in the National Police Service.

BOARD MEMBERS PRESENT

- | | |
|-------------------------------|---------------|
| 1. Mrs. Josephine W. Mong'are | - Ag.Chairman |
| 2. Mr. Hussein Were | - Member |
| 3. Mr. Paul Gicheru | -Member |
| 4. Mr. Nelson Orgut | -Member |

IN ATTENDANCE

- | | |
|----------------------|-----------------|
| 1. Ms. Pauline Opiyo | - The Secretary |
| 2. Ms Shelmith Miano | - Secretariat |

PRESENT BY INVITATION

Applicant ZTE Corporation

- | | |
|----------------------|-------------------|
| 1. Charles N. Kihara | Advocate |
| 2. Kenneth Wilson | Advocates |
| 3. Leo Tu | Technical Manager |
| 4. Scan Han | Technical officer |
| 5. Arthur Sagara | Senior. |
| 6. Sean Han | |

Procuring Entity Ministry of Interior Coordination of National Government

- | | |
|-----------------|---------------------|
| 1. Mohammed | State Counsel |
| 2. Judy Mwihaki | Legal Officer |
| 3. C. K. Nimrod | Legal Officer |
| 4. Peter Mwangi | Procurement officer |

Interested Parties

- | | |
|-----------------------|------------------------------|
| 1. Richard Gowi | Legal Officer ,Huawei Co.Ltd |
| 2. Mr. Joseph Kariuki | Engineer, Huawei Co. Ltd |
| 3. Mr. Kamau | Engineer,Huawei Co.Ltd |

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

Invitation to tender

The Procuring Entity advertised for expression of interest for the project in the print media on 3rd February, 2012 where the following six firms showed interest by submitting their documents;

1. China Electronics Engineering
2. AVIC International Holding
3. ALIT
4. China Xinshidai Company
5. ZTE Kenya Limited
6. Huawei Technologies Africa Limited

After checking the bids on their responsiveness to conditions set in the request for expression of interest the following bidders qualified and were shortlisted by Ministerial Tender committee to participate in the tender for design and build of the project in the National Police Service, namely:

1. AVIC International Holding
2. ALIT
3. ZTE Kenya Limited
4. Huawei Technologies Africa Limited

The Requests for Proposal documents were issued to the shortlisted prequalified bidders on 23rd May 2012 and closed on 27th July 2012.

Closing/Opening:

At the time of tender closing, the following three firms had submitted their bids:

1. ZTE Kenya Limited
2. Huawei Technologies Africa Limited
3. AVIC International Holding

EVALUATION

Evaluation of the received bids was carried out by an Evaluation Committee of ten members and one secretariat under the chairmanship of Mr. Jonam Kinama, Deputy Secretary. The evaluation was undertaken in four stages namely; Preliminary, Technical Mandatory requirements, Detailed Technical Evaluation and Financial evaluation.

PRELIMINARY EVALUATION

Tenderers were examined for responsiveness on six mandatory parameters and the results summarized in table 1 below;

Table 1: Results of the Preliminary evaluation

	REQUIREMENTS	BIDDER 1	BIDDER 2	BIDDER 3
1	Bid bond amounting to USD 500,000	Yes-Kenya Commercial Bank	Yes-CFC Stanbic Bank	Yes-Chase Bank
2	Bid bond validity period 180 days	245 days	185 days	189 days
3	Written proof from country of origin that they do not have restrictions regarding the export of product offered(The proof should be from regulatory authority in the country of manufacture)-Bidders attached a letter from the manufacturing company	Yes	Yes	Yes

	instead of the country of origin			
4	In English format	Yes	Yes	Yes
5	Both original and 5 copies	Yes	Yes	Yes
6	Site survey report	Yes	Yes	Yes
		Responsive	Responsive	Responsive

The committee noted that bidders attached letters from the manufacturing companies other than providing a written proof from the country of origin that had no restrictions regarding the export of products. It was agreed that if need be, proof may be obtained through Ministry of Foreign Affairs from The People Republic of China Embassy.

All the bidders passed the preliminary evaluation and were subjected to technical mandatory requirements.

TECHNICAL MANDATORY REQUIREMENTS

At this stage, the bid documents were checked to verify compliance with the technical mandatory requirements contained in the appendix to instruction to tenders (special conditions). The results of which were as summarized in table 2 below:

Table 2: Results of the Mandatory requirements

	REQUIREMENTS	BIDDER 1	BIDDER 2	BIDDER 3
1	Delivery period/schedule	Yes	Yes	Yes
2	Brochures/catalogues of the equipment	Yes	Yes	Yes
3	Company profile and brief history in the undertaking of similar projects	Yes	Yes	No
4	Manufacturer's authorization(core component of the proposed system)	Yes	Yes	No
5	Details of the recommended spare parts with their costing	Yes	Yes	No

6	Mandatory pre-site survey report and detailed project plan and design			
	Design documents	Yes	Yes	Yes
	Connectivity diagram	Yes	Yes	Yes
	Detailed work breakdown structure and project plan	Yes	Yes	Yes
	Manufacturing process and delivery schedule	Yes	Yes	Yes
	Training program and modules	Yes	Yes	No
	Installation, testing and commissioning	Yes	Yes	Yes
	List of technical staff to implement the project	Yes	Yes	Yes
7	Confirm the respective compliance to the requirements	Yes	Yes	No

Observations

After the Preliminary evaluation and confirmation of Technical Mandatory requirements, the Evaluation Committee made the following observations:

The core components of the proposed system that required manufacturers' authorisation are:-

1. Radio Trunking system
2. Surveillance system
3. Command and control system

Bidder 1

- a) The bidder provided list of spare parts in their technical proposal while the costing was in financial proposal part.
- b) Bidders provided manufacturer brochures in hard and soft copy.
- c) The bidder satisfied all the mandatory technical requirements and proceeded to technical evaluation.

Bidder 2

- a) The bidder provided list of spare parts in their technical proposal while the costing was in financial proposal part.
- b) Bidders provided manufacturer brochures in hard and soft copy.
- c) The bidder satisfied all the mandatory technical requirements and proceeded to technical evaluation.

Bidder 3

- a) The bidder did not attach manufacturer's authorization from Alcatel and other equipments proposed to install.
- b) There was no list detailing the recommended spare parts.
- c) The members noted that training will be conducted by Alcatel instead of Avic International Holding.
- d) The bidder submitted company profile of Alcatel instead of the Avic International Holding.
- e) In the statement of compliance on price been net inclusive of all government taxes the bidder indicates that he does not comply with it and their prices are exclusive of taxes while it was a mandatory requirement.
- f) The bidder did not satisfy the mandatory technical requirement thus disqualified from further evaluation.

Bidder Nos.1 and 2 qualified through the Preliminary and Technical Mandatory requirements and were subjected to detailed evaluation.

TECHNICAL EVALUATION

Bidders were subjected to detailed technical evaluation based on the criteria tabulated in table 3 below.

The evaluation criterion used to evaluate the technical proposal was set out in the tender document on page 82 through to 85.

The Evaluation Committee discussed, agreed and came up with the following sub-criteria and the evaluation matrix below:-

Table 3: Technical evaluation criteria

TECHNICAL EVALUATION CRETERIA		PNTS	
1	TENDERER'S CORPORATE CAPACITY	10	
1.1	Company's background and years of experience in providing similar services mentioned in the statement of requirements	4	
	a) Company's Background		
	Telecommunications	0.5	
	Trunking Systems	0.5	
	Surveillance	0.5	
	Manufacturer	0.5	
	b) Years of Experience in Similar Services (Providing Security Services - Page 128, 1.1.4)		
	5 Years and Above	2.0	
	4 Years and Below 5 Years	1.5	
	3 Years and Below 4 Years	1.0	
	2 Years and Below 3 Years	0.5	
	Less than 2 Years	0.0	

1.2	Provision of three customer references of similar magnitude and complexity where the bidder has carried out successful survey, design, installation, commissioning and post implementation technical support of the proposed systems. The bidder should confirm the availability of these customer references for a site visit by the employer's representative prior to contract signature.	6	
	a) Three Customer References	1.0	
	b) Magnitude of Project (Amount)	0.5	
	c) Complexity of Project	1.0	
	Trunking Systems		
	Command and Control		
	Data and Video Streaming		
	Network Topology		
	Integration of all systems		
	d) Implementation		
	Survey	0.5	
	Design	0.5	
	Installation	0.5	
	Commissioning	0.5	
	Post Implementation	1.0	
	e) Confirm Availability of Customer References for a Visit	0.5	
2.0	TENDERER'S UNDERSTANDING OF REQUIREMENTS	40	
2.1	Overall clarity of the technical proposal document in response to the requirements.	1	
	a) Submission of technical proposal		
	b) Completeness of Technical Proposal		
	Overall coverage of scope of the works		
	Layout of proposal:		
	Conditions of contract		
	Appendix to conditions of Contract		
	Specifications		
	Drawings		

2.2	Detailed mapping of technical solution proposed to the site survey report and system design documentation. The detailed mapping should clearly demonstrate how the proposed technical solution addresses the system requirements.		28	
	Technical solution components			
	a) Detailed Site Survey Report		1	
	Inclusion in the site report of old Sites and new sites			
	New Sites			
	Technical Solution mapped to survey assessment and system design documentation			
	b) System Architecture	60	6	
	Topology - Links	12		
	Meshed			
	Hybrid (Star, Ring, Mesh)			
	Ring			
	Star			
	Speed of the system(Minimum 2Mbps at County)	8		
	Redundancy	9		
	Business continuity/Disaster Recovery (backup of data/ power)	6		
	<i>Expandability / scalability</i>			
	Evolution support from 3G to Long Term Evolution (LTE)			
	Just 3G Network	3		
	Strategy for evolution	6		
	Upgrades (Software / Hardware) without overhaul	3		
	Modernization (Hardware)	2		
	Shared Services	6		
	<i>Interoperability (Standards)</i>			
	Internal & external systems	3		
	Compatibility	2		
	c) Network Capacity	40	4	
	i) Base Station Design	1		
	ii) Roaming and Resilience (Radio System Features)	1		
	iii) Voice Services (Radio System Features)			
	Group calls	1		

	Dynamic Group Numbering Assignment	1		
	Individual Calls	1		
	Telephone Interconnect Calls	1		
	Emergency Mode Operations	1		
	Essential Supplementary Services	1		
	iv) Data Services			
	Status Messages	1		
	Short Data Transport Service	1		
	Packet Data Services	1		
	v) Dispatch Console Features			
	General Management Communication, Users and Fleet of Subscribers	1		
	Group calls	1		
	Individual Calls	1		
	Telephone Interconnect Calls	1		
	Console Configuration (Administration)	1		
	vi) Network Management			
	Configuration Management	2		
	Faults / Maintenance Management	2		
	Accounting/Subscriber/User Management	2		
	Performance / Events Management	2		
	Security Management	2		
	vii) Radio Network Planning			
	UHF Radio Coverage	2		
	Air to Ground Communication (Min 6000ft)	1		
	Traffic Planning	1		
	Frequency Planning	1		
	viii) Digital PABX (Gateway / Exchange)	1		
	ix) Microwave Communication Network			
	Coverage on full redundancy	5		
	Internet Protocol Virtual Private Network (VPN) Configuration	1		
	Mobile Terminals / Fixed Radio Terminals	1		
	Handheld Radio Terminals	1		
	d) Support Systems	20	2	
	i) Geographical Information System			
	Location of installations (vehicles, base stations)	2		

	Alerts and event locations	2		
	Map of Data and Geo-analysis features	2		
	GIS Software proposed	2		
	Control Room Monitoring of GIS Platforms	6		
	ii) Automatic Vehicle Location System	3		
	iii) Computer Aided Dispatch System	3		
	e) Video Surveillance System	40	4	
	Capability of Cameras/High Definition Cameras	3		
	Storage	6		
	Redundancy (Alternative route, storage, coverage)	6		
	Network Video Recorder	3		
	High Speed Number Plate Video Sub-System	4		
	Open Standard System	2		
	Power provision	1		
	Surveillance Management System	9		
	Graphical User Interface			
	Web-Based Access			
	User Management, Device Management			
	Fallback on Disaster Recovery on Surveillance	3		
	Security of Cameras	3		
	f) Command and Control Centre		3	
	Application, Dispatcher and Control System		1.5	
	Video Whole Solution		0.5	
	Physical Access Control Systems		1.0	
	g) Server Room and Equipment		3	
	Proposed Design	0.5		
	Servers	1.0		
	Capacity of Servers			
	Interconnection with facilities or equipments			
	Storage Area Network	1.5		
	h) Security		5	

	Encryption: all terminals		1	
	Encryption: Non-degradation on quality		1	
	Two layers / End to End Encryption		2	
	User capacity to encrypt (change code)		1	
	CIA			
2.3	Provision of detailed technical specifications for all the equipment and products proposed by the bidder in response to the system features required by the employer.		4	
	Manufacturers Manuals	2		
	Brochure Items meet the specifications	2		
2.4	Provision of a manpower plan detailing the tenderer's proposed project personnel (technical and supervisory) specific to this project, their resumes and the manpower organization structure.		3	
	Organizational structure (Lead PM, Supervisory and Personnel)	1		
	Categories of cadre and evidence on certificates	2		
2.5	Particulars of bidder's tools, equipment and any special facilities that they would need to deploy in Kenya to successfully carry out the works.		2	
	Evidence on tools and capacity to deliver the solution proposed - schedule of tools	1		
	Service Level Agreement	1		
2.6	The tenderer to demonstrate the technical compliance of all materials and products offered to internationally recognized specifications and standards by providing certification details.		1	
	ANSI, ITU, IEEE and Equivalent Standards			
2.7	Performance guarantees and warranties provided by the equipment manufacturers.		1	
	Promise or statement: including			
3	PROJECT MOBILIZATION AND IMPLEMENTATION PLAN		20	

3.1	Tenderers project plan execution strategy in relation to the local environment and challenges identified in the site survey	2	2	
	Execution Strategy for all parts / all phases / Project Execution Plan			
	Clear activities to be done and clear deliverables	0.5		
	Time sequencing (linked to flow of events)	0.5		
	Logistics management	0.5		
	Progress reporting	0.5		
3.2	Provision of detailed project and implementation plan (Gaant Chart)		5	
	Implementation Plan (Activities, inputs, outputs, outcomes, milestones, resources)	3		
	Gantt Chart	2		
3.3	Provision of detailed mobilization and pre-project preparation activities		3	
	Preparation for site take over			
	Mobilize resources (Machinery, man-power, capital, Power, local support)			
3.4	The detailed plan to highlight the logical progression of the implementation phases and activities geographically in the various system installation locations		3	
3.5	Provision on documentation on systems testing and acceptance parameters prior to project completion and handover		2	
	Acceptance parameters: Commitment from the providers	1		
	Issues to be checked are system parameters as per device deployed as part of solution: input and output comparison for verification	1		
3.6	Adequacy of the proposed technical systems and end-user training program		4	
	Curriculum of the training			
	Technical systems training	1		

	End-User (Operators) Training	1		
	Methodology for delivery (Master Trainers, ToTs and Trainers)	1		
	Setting up of a training laboratory locally	1		
3.7	Adequacy of the proposed system hand-over documentation and operational manuals		1	
	Commitment of system hand-over documentation and operational manuals - Majorly to be included in detailed in contract preparation.	1		
4	TECHNICAL SUPPORT AND SERVICE		30	
4.1	Provision of detailed technical support program for use during and after system implementation.		2	
	Maintenance		0.5	
	Sustainability of spares		0.5	
	Adaptability		0.5	
	R&D		0.5	
4.2	24x7x365 Network Operation Centre capability to monitor overall system performance and service levels		10	
	Service Level Agreement (SLA) -Support Helpdesk		2	
	SLA -Real-Time Tec support		1	
	SLA -RMON Performing remote monitoring		2	
	SLA -Timely on-site service		1	
	Providing 24/7 support -Network discovery, Topology mapping of network elements		2	
	Providing 24/7 support -Event handler-Alarms		2	
4.3	Problem escalation procedures and resolution process		6	
	Quality of Service (QoS) -Existence		1	
	QoS -Monitoring		1	
	QoS -Reporting		1	
	Service Level Agreement (SLA) -Existence		1	
	SLA -Monitoring		1	

	SLA -Reporting		1	
4.4	Local spares holding capacity of critical system components		5	
	% of spares in Police Custody		2	
	Availability at Local Reps		2	
	Availability at other agencies		1	
4.5	Adequacy of proposed local systems support structure		3	
	Existence of Support Structure		1	
	Distribution/Spread of support structure		1	
	Response Mechanism		1	
4.6	Adequacy of proposed technical laboratory		4	
	Link simulator		1	
	Testing equipment		1	
	System Simulator		1	
	Tool kits		1	
	TOTAL		100	

The pass mark for technical evaluation was at 70/80 in the tender document. Each member of technical evaluation committee independently evaluated and rated the bidders and an average score was obtained.

The results of the Technical evaluation are summarized in table 4 below

Table 4: Results of the Technical evaluation

TECHNICAL CRITERIA DETAILS		SCORES		
			BIDDER 1	BIDDER 2
1	TENDERER'S CORPORATE CAPACITY	10		
1.1	Company's background and years of experience in providing similar services mentioned in the statement of requirements	4		

	a) Company's Background			
	Telecommunications		0.5	
			0.5	0.5
	Trunking Systems		0.5	
			0.5	0.2
	Surveillance		0.5	
			0.5	0.4
	Manufacturer		0.5	
			0.5	0.2
	b) Years of Experience in Similar Services (Providing Security Services - Page 128, 1.1.4)			
	5 Years and Above		2.0	
			2.0	1.6
	4 Years and Below 5 Years		1.5	
	3 Years and Below 4 Years		1.0	
	2 Years and Below 3 Years		0.5	
	Less than 2 Years		0.0	
1.2	Provision of three customer references of similar magnitude and complexity where the tenderer has carried out successful survey, design, installation, commissioning and post implementation technical support of the proposed systems. The tenderer should confirm the availability of these customer references for a site visit by the employer's representative prior to contract signature.		6	
	a) Three Customer References		1.0	
			1.0	1.0
	b) Magnitude of Project (Amount)		0.5	
			0.5	0.3
	c) Complexity of Project		1.0	
			1.0	0.5
	Trunking Systems			
	Command and Control			
	Data and Video Streaming			
	Network Topology			
	Integration of all systems			
	d) Implementation			
	Survey		0.5	
			0.5	0.5
	Design		0.5	
			0.5	0.4

	Installation		0.5	0.5	0.5
	Commissioning		0.5	0.5	0.5
	Post Implementation		1.0	1.0	0.6
	e) Confirm Availability of Customer References for a Visit		0.5	0.5	0.5
2.0	TENDERER'S UNDERSTANDING OF REQUIREMENTS		40		
2.1	Overall clarity of the technical proposal document in response to the requirements.		1	1.0	1.0
	a) Submission of technical proposal				
	b) Completeness of Technical Proposal				
	Overall coverage of scope of the works				
	Layout of proposal:				
	Conditions of contract				
	Appendix to conditions of Contract				
	Specifications				
	Drawings				
2.2	Detailed mapping of technical solution proposed to the site survey report and system design documentation. The detailed mapping should clearly demonstrate how the proposed technical solution addresses the system requirements.		28		
	Solution Components				
	a) Detailed Site Survey Report		1	1.0	1
	Old Sites				
	New Sites				
	Technical Solution mapped to survey assessment and system design documentation				
	b) System Architecture	60	6		
	Topology - Links	12		1.2	0.6
	Meshed				
	Hybrid (Star, Ring, Mesh)				
	Ring				

Star				
Speed of the system(Minimum 2Mbps at County)	8		0.8	0.2
Redundancy	9		0.9	0.5
Business continuity/Disaster Recovery (backup of data/ power)	6		0.6	0.4
<i>Expandability / scalability</i>				
Evolution support from 3G to Long Term Evolution (LTE)				
Just 3G Network	3		0.3	0.1
Strategy for evolution	6		0.6	0.2
Upgrades (Software / Hardware) without overhaul	3		0.3	0.1
Modernization (Hardware)	2		0.2	0.1
Shared Services	6		0.6	0.4
<i>Interoperability (Standards)</i>				
Internal & external systems	3		0.3	0.2
Compatibility	2		0.2	0.2
c) Network Capacity	40	4		
i) Base Station Design	1		0.1	0.1
ii) Roaming and Resilience (Radio System Features)	1		0.1	0.2
iii) Voice Services (Radio System Features)				
Group calls	1		0.1	0.1
Dynamic Group Numbering Assignment	1		0.1	0.1
Individual Calls	1		0.1	0.1
Telephone Interconnect Calls	1		0.1	0.1
Emergency Mode Operations	1		0.1	0.1
Essential Supplementary Services	1		0.1	0.1
iv) Data Services				
Status Messages	1		0.1	0.1

	Short Data Transport Service	1		0.1	0.1
	Packet Data Services	1		0.1	0.1
	v) Dispatch Console Features				
	General Management Communication, Users and Fleet of Subscribers	1		0.1	0.1
	Group calls	1		0.1	0.1
	Individual Calls	1		0.1	0.1
	Telephone Interconnect Calls	1		0.1	0.1
	Console Configuration (Administration)	1		0.1	0.1
	vi) Network Management				
	Configuration Management	2		0.2	0.2
	Faults / Maintenance Management	2		0.2	0.2
	Accounting/Subscriber/User Management	2		0.2	0.2
	Performance / Events Management	2		0.2	0.2
	Security Management	2		0.2	0.2
	vii) Radio Network Planning				
	UHF Radio Coverage	2		0.2	0.2
	Air to Ground Communication (Min 6000ft)	1		0.1	0.1
	Traffic Planning	1		0.1	0.1
	Frequency Planning	1		0.1	0.1
	viii) Digital PABX (Gateway / Exchange)	1		0.1	0.1
	ix) Microwave Communication Network				
	Coverage on full redundancy	5		0.5	0.2
	Internet Protocol Virtual Private Network (VPN) Configuration	1		0.1	0.1
	Mobile Terminals / Fixed Radio Terminals	1		0.1	0.1
	Handheld Radio Terminals	1		0.1	0.1

d) Support Systems	20	2		
i) Geographical Information System				
Location of installations (vehicles, base stations)	2		0.2	0.2
Alerts and event locations	2		0.2	0.2
Map of Data and Geo-analysis features	2		0.2	0.2
GIS Software proposed	2		0.2	0.2
Control Room Monitoring of GIS Platforms	6		0.6	0.6
ii) Automatic Vehicle Location System	3		0.3	0.3
iii) Computer Aided Dispatch System	3		0.3	0.3
e) Video Surveillance System	40	4		
Capability of Cameras/High Definition Cameras	3		0.3	0.2
Storage	6		0.6	0.3
Redundancy (Alternative route, storage, coverage)	6		0.6	0.4
Network Video Recorder	3		0.3	0.3
High Speed Number Plate Video Sub-System	4		0.4	0.3
Open Standard System	2		0.2	0.1
Power provision	1		0.1	0.1
Surveillance Management System	9		0.8	0.8
Graphical User Interface				
Web-Based Access				
User Management, Device Management				
Fallback on Disaster Recovery on Surveillance	3		0.3	0.2
Security of Cameras	3		0.3	0.1

	f) Command and Control Centre		3		
	Application, Dispatcher and Control System		1.5	1.5	1.4
	Video Whole Solution		0.5	0.5	0.5
	Physical Access Control Systems		1.0	1.0	0.7
	g) Server Room and Equipment		3		
	Proposed Design	0.5		0.5	0.4
	Servers	1.0		1.0	0.9
	Capacity of Servers				
	Interconnection with facilities or equipments				
	Storage Area Network	1.5		1.5	1.1
	h) Security		5		
	Encryption: all terminals		1	1.0	0.9
	Encryption: Non-degradation on quality		1	1.0	0.8
	Two layers / End to End Encryption		2	2.0	1.0
	User capacity to encrypt (change code)		1	0.9	0.4
	CIA				
2.3	Provision of detailed technical specifications for all the equipment and products proposed by the tenderer in response to the system features required by the employer.		4		
	Manufacturers Manuals	2		1.9	1.9
	Brochure Items meet the specifications	2		2.0	2.0
2.4	Provision of a manpower plan detailing the Tenderers proposed project personnel (technical and supervisory) specific to this project, their resumes and the manpower organization structure.		3		
	Organizational structure (Lead PM,	1			

	Supervisory and Personnel)			1.0	0.9
	Categories of cadre and evidence on certificates	2		1.7	1.3
2.5	Particulars of Tenderers tools, equipment and any special facilities that they would need to deploy in Kenya to successfully carry out the works.		2		
	Evidence on tools and capacity to deliver the solution proposed - schedule of tools	1		1.0	0.8
	Service Level Agreement	1		1.0	0.9
2.6	The tenderer to demonstrate the technical compliance of all materials and products offered to internationally recognized specifications and standards by providing certification details.		1	1.0	1.0
	ANSI, ITU, IEEE and Equivalent Standards				
2.7	Performance guarantees and warranties provided by the equipment manufacturers.		1		0.9
	Promise or statement: including				
3	PROJECT MOBILIZATION AND IMPLEMENTATION PLAN		20		
3.1	Tenderers project plan execution strategy in relation to the local environment and challenges identified in the site survey	2	2		
	Execution Strategy for all parts / all phases / Project Execution Plan				
	Clear activities to be done and clear deliverables	0.5		0.4	0.4
	Time sequencing (linked to flow of events)	0.5		0.5	0.4
	Logistics management	0.5		0.3	0.3
	Progress reporting	0.5		0.5	0.3
3.2	Provision of detailed project and implementation plan (Gaant Chart)		5		
	Implementation Plan (Activities, inputs, outputs, outcomes, milestones,	3		2.6	2.3

	resources)				
	Gantt Chart	2		2.0	2.0
3.3	Provision of detailed mobilization and pre-project preparation activities		3	2.8	2.2
	Preparation for site take over				
	Mobilize resources (Machinery, man-power, capital, Power, local support)				
3.4	The detailed plan to highlight the logical progression of the implementation phases and activities geographically in the various system installation locations		3	2.6	2.4
3.5	Provision on documentation on systems testing and acceptance parameters prior to project completion and handover		2		
	Acceptance parameters: Commitment from the providers	1		0.9	0.9
	Issues to be checked are system parameters as per device deployed as part of solution: input and output comparison for verification	1		0.9	0.6
3.6	Adequacy of the proposed technical systems and end-user training program		4		
	Curriculum of the training				
	Technical systems training	1		1.0	0.9
	End-User (Operators) Training	1		1.0	1.0
	Methodology for delivery (Master Trainers, ToTs and Trainers)	1		1.0	0.5
	Setting up of a training laboratory locally	1		1.0	0.9
3.7	Adequacy of the proposed system hand-over documentation and operational manuals		1		-
	Commitment of system hand-over documentation and operational manuals - Majorly to be included in detailed in contract preparation.	1		1.0	0.9

4	TECHNICAL SUPPORT AND SERVICE		30		
4.1	Provision of detailed technical support program for use during and after system implementation.		2		
	Maintanance		0.5	0.5	0.5
	Sustainability of spares		0.5	0.5	0.3
	Adaptability		0.5	0.5	0.3
	R&D		0.5	0.5	0.1
4.2	24x7x365 Network Operation Centre capability to monitor overall system performance and service levels		10		
	Service Level Agreement (SLA) - Support Helpdesk		2	1.9	1.6
	SLA -Real-Time Tec support		1	1.0	0.6
	SLA -RMON Performing remote monitoring		2	2.0	1.3
	SLA -Timely on-site service		1	1.0	0.6
	Providing 24/7 support -Network discovery,Topology mapping of network elements		2	1.9	1.2
	Providing 24/7 support -Event handler-Alarms		2	1.9	1.4
4.3	Problem escalation procedures and resolution process		6		
	Quality of Service (QoS) - Existence		1	1.0	0.8
	QoS -Monitoring		1	1.0	0.7
	QoS -Reporting		1	1.0	0.7
	Service Level Agreement (SLA) - Existence		1	1.0	0.9
	SLA -Monitoring		1	0.9	0.8
	SLA -Reporting		1	0.9	0.8
4.4	Local spares holding capacity of critical system components		5		

	% of spares in Police Custody		2	1.7	1.8
	Availability at Local Reps		2	2.0	1.0
	Availability at other agencies		1	0.9	0.7
4.5	Adequacy of proposed local systems support structure		3		
	Existance of Suport Structure		1	1.0	0.8
	Distribution/Spread of support structure		1	1.0	0.6
	Response Mechanism		1	1.0	0.5
4.6	Adequacy of proposed technical laboratory		4		0.3
	Link simulator		1	1.0	0.7
	Testing equipment		1	0.9	1.0
	System Simulator		1	1.0	0.9
	Tool kits		1	1.0	0.9
	TOTAL		100	95.9	77.2

Bidder 1 scored $95.9/100 \times 80 = 76.7/80$

Bidder 2 scored $77.2 / 100 \times 80 = 61.76 / 80$

Only bidder 1 passed the technical evaluation and qualifies for next stage of verification of previous completed projects to ascertain its capability.

General observation

- The two bidders 1 and 2 in their submitted bids, included manufacturer's authorization letters for the core components of their proposed systems.

Bidder 1

- Bidder 1 provided a good background on the manufacture of critical items for Trunked Radio Systems and provided for works done in various countries such as Nigeria, Equitorial Guinea and Southern Sudan amongst other major projects.
- It is observed that project implementation schedule seems ambitious with a timeline of One (1) year indicated by the bidder.
- They provided critical items for the requirements of a modern telecommunication system in Third Generation (3G) Network and provided a plan for long term evolution (LTE).
- Being manufacturer of modern CDMA systems, the bidder was able to clearly indicate how they would build envisaged system.
- They offer guarantee of spares since they are original manufacturers of critical component for the Trunked Radio System.
- They provided end-to-end encryption systems, with clear way of how the police can encrypt by use of their own algorithm. They also demonstrated how the quality of communication network cannot be degraded through encryption.
- Bidder provided a hybrid of mesh and ring topology covering the entire proposed set of sites (Vol. 2 Executive Summary Pg 4 - 6), a requirement for redundancy or backup for the microwave networks and other satellite systems to provide last mile solution.
- Bidder proposed a good training programme and also proposed to setup a state-of-art training laboratory locally for the National Police Service (Vol 8 Part 24).

- In the provision of supplementary services, the bidder stated that its technology CDMA 2000 does not support roaming.
- Interoperability - the bidder did not specify how the communication system will integrate with the existing police GSM Trunked Radio System. In real practice, the two systems are compatible.

Bidder 2

- Bidder 2 indicated that their quotation will be exclusive of any tax, levies, duties and VAT with only withholding tax included. The committee noted that this was contrary to the requirement in the special conditions No. 5 page 80 of the tender document that required that all prices MUST be net inclusive of all government taxes.
- Bidder No. 2 has indicated that they will only partially comply with the requirements for playing "live and recorded video through the video guided tour".
- Bidder 2 has indicated that they would only comply with the requirement for the operator to view video feeds from the video management system if a third party provides International Standards. The committee observed that the requirement of the tender was to provide a complete solution without reference to third parties.
- The bidder did not indicate clearly what generation the system proposed i.e. whether 2G or 3G. The bidder only talked about interoperability with other systems.
- The bidder did not indicate how the system will evolve in future i.e. from Second Generation (2G), Third Generation (3G) and Long Term

Evolution (LTE) in future. In the bidder's document (Volume 2 of 5, Part 3 Pg 4/24), it proposes a system based on IP Protocols with future support for 3G features as part of the system.

- They do not manufacture the main Trunked Radio System Components but have proposed M/s Motorola Solutions Israel for their solution.
- Their project implementation programme is not clear since they mention that upon Receipt of Order, they will complete their project first phase in 2013 but what is reflected in the Gantt Chart goes up to 2014.
- The issue of network capacity and redundancy is not adequately addressed by the bidder. They have proposed a two-ring topology and a star topology for wider part of their network, with no adequate backup indicated or assured. The Bidder (Document 1 of 5, Executive Summary, Pg 31 of 53) further banks on the Ministry of Information and Communication National Optic Fibre Backbone Infrastructure (NOFBI) as main redundancy link for Microwave hence not providing "fully redundant microwave topology" expected in their design as solution for National Police Service.
- The bidder did not indicate how resource sharing will be achieved in the proposed system.

RECOMMENDATION

The Evaluation Committee recommended that only one bidder M/s ZTE Corporation Limited passed the technical evaluation. The verification of the projects completed by the bidder has not yet been done as per

special condition number 8 in the tender documents. The following are projects undertaken by ZTE Corporation Limited as per their technical proposal document:-

- a. Ethiopia National Security System
- b. Equatorial Guinea Public Security System-50 Million USD-July 2011
- c. Ghana Public Security System-30 Million USD-March 6, 2009
- d. Mauritius National Security System-5 Million USD-May 2011
- e. Uruguay National Security System
- f. Senegal National Security System-March 12, 2008
- g. Shanghai City National Security System
- h. Myanmar National Security System
- i. Beijing Olympics Security System
- j. Shenzhen City Security System
- k. Marseille City security System
- l. Tanzania National Security System
- m. Sudan National Security System
- n. Zambia National Security System
- o. Zimbabwe National Security System
- p. Sierra Leone National Security System
- q. Algeria National Security System
- r. Angola National Security System
- s. Benin National Security System
- t. Chad National Security System
- u. Nigeria Public Security System-475 Million USD-May 29, 2011
- v. Liberia National Security System

- w. Morocco National Security System
- x. Mozambique National Security System
- y. Niger National Security System
- z. Egypt National Security System
- aa. China National Security System
- bb. Malaysia National Security System
- cc. Mongolia National Security System
- dd. Thailand National Security System
- ee. Vietnam National Security System
- ff. Chile National Security System
- gg. Czech National Security System
- hh. Estonia National Security System
- ii. Iraq National Security System
- jj. Jamaica National Security System
- kk. Kyrgyzstan National Security System
- ll. Norway National Security System
- mm. Poland National Security System
- nn. Romania National Security System
- oo. Russia National Security System
- pp. Haiti National Security System
- qq. Venezuela National Security System

2. That only financial proposal of bidder number 1 be opened while others be returned unopened.

FINANCIAL EVALUATION

The Financial proposal for the only technically qualified bidder, M/s ZTE Kenya Limited was opened on Monday 10th December, 2012 and concluded in 13th January, 2013 and made the following.

FINDINGS

1. The financial proposal surpasses the estimated project cost of US dollars 100 Million by US dollar 99 million (99%).
2. The committee found that bidder prices for certain items as listed in this report are too high compared with the prevailing market prices. Quotations from different company's locally and internationally are hereby attached for ease of reference and price comparisons for different item prices They are as follows :-
Ebrahim Electronics Kenya, Samsung Company ltd website, LG company ltd website, Aeroflex test equipment website, Ministry previous contracts ,Electric link (EA)ltd, Smoothtel company ltd Kenya, Data and logics co.ltd, Motorola Germany Solargent Power systems Kenya, Nakumatt Supermarket ltd,Network-4 Office solutions Co ltd, MFI office solutions ltd, Sollatek Electronics Kenya ltd and AN wireless RF communication tower company.
3. The bidder's proposed terms of payment are skewed in favour of the bidder in that 90% of the project cost will be paid when the project equipment land in Mombasa. This is extremely dangerous as the equipments will not have been installed, tested and commissioned.
4. The bidder proposes that after one year of the warranty period, the Government to pay an average of Kshs one billion per year for repairs and maintenance service for a period of five years.

Item description	Market price per unit in USD	Bidders price per unit in USD	Item on the bidder document

IFR3901 Radio test set Marconi type	45,000.00	148,818.90	1.34
IFR3920 Radio test set Marconi type	39,446.00	170,866.14	1.35
IFR2928 Radio test set Marconi type	30,000.00	137,795.28	1.36
Oscilloscope Rohde Schwarz CMD55 type	1,800.00	132,283.46	1.37

5. The committee noted discrepancies in pricing of similar items in the bidders' financial document for Radio Test equipment (IFR3901, IFR3920, IFR2928 and Oscilloscope). See tables below:-

See page 13/21 items 1.34 to 1.37 of the bidder's financial proposal.

Item description	Market price per unit in USD	Bidders price per unit in USD	Item on the bidder document
IFR3901 Radio test set Marconi type	45,000.00	16,331.65	6.1
IFR3920 Radio test set Marconi type	39,446.00	18,751.15	6.2
IFR2928 Radio test set Marconi type	30,000.00	15,121.89	6.3
Oscilloscope Rohde Schwarz CMD55 type	1,800.00	14,517.02	6.4

TENDER COMMITTEE DECISION

the Ministerial Tender Committee in its meeting of 7th October 2013 deliberated on the same tender and noted that the tender was deferred for Technical and Financial evaluation Committee to resolve issues. The Committee further noted as follows:-

- i) That after deliberation it become clear that the Technical Evaluation could not agree on the above contentious issues that had caused deferment of the previous meeting.
- ii) That during the meeting ,representatives of the National police service (user) in the technical Evaluation committee submitted to the Tender committee a signed statement indicating that the proposed technology was not suitable for their use.

After noting the departmental, secretariat and above points the committee rejected and terminated the process of the tender under review.

THE REVIEW

This request, as has already been stated above, was lodged by ZTE Corporation on 29th October, 2013 in the matter of Tender No: OOP/NSCCC/2011 -2012 for the supply, installation, testing and commissioning of the National Surveillance, communication, command and control systems in the National Police Service.

The Applicant was represented in the application for Review by Mr. Charles N. Kihara, advocate while the Procuring Entity was represented by Mr. Mohammed Adu, State Counsel, Ms Judy Mwihaki, Mr. C. K. Nimrod and Peter Mwangi, and Huawei Technologies Co. Limited was represented by Mr. Richard Gowi, a Legal Officer in the said Company.

The Applicant set out a total of 11 grounds of Review which the Board shall revert to later in this decision. The Applicant consequently prayed:-

- (i) That the Board annuls and revokes the Procuring Entity's decision to reject the Applicant's proposal.**
- (ii) That the Board substitutes the decision of the Procuring Entity hereof and direct the Procuring Entity to award the tender to the Applicant.**
- (iii) That the Procuring Entity be prohibited from attempting to and/or re-advertising Tender No. OOP/NSCC/2011-2012.**
- (iv) That the Board grants it any other remedy that the Board may deem fit to grant under Section 98 of the Act.**
- (v) That the Board awards it the costs of these proceedings.**

The Applicant in addition to filing the Request for Review dated 29th October, 2013 also filed a Response to the Reply to the Request for Review and a further Response to the Reply to the Request for Review dated 18th November, 2013 and 20th November, 2013 respectively.

The Procuring Entity on its part filed a reply to the Request for Review accompanied by a letter dated 1st November 2013 signed by Mr. P. N. Mwangi on behalf of the Principal Secretary in the Ministry of Interior and Co-ordination of National Government.

The Interested Party, Huawei Technologies Co. Limited, did not file any documents in support or in opposition to the Request for Review. Mr. Richard Gowi who appeared before the Board on behalf of the Interested Party informed the Board that it appeared before the Board just to inform it that his client no longer had interest in the tendering process

since they had withdrawn from the process voluntarily and that his appearance before the Board is only to counter any adverse comments that had or would be made against his client by any Party to the Review. It stated that his client felt that it was likely to be adversely mentioned in the tendering process and cited an instance where it had been alleged that his client had invited an Israeli Company to participate in a Chinese tendering process which accusation he termed as erroneous.

The substantive contest before the Board was therefore one between the Applicant and the Procuring Entity.

The history, the background and all the processes through which this tender had gone through have been set out in the Background contained at pages 1 to 34 of this decision headed "**the background**" and also in the decision of the Board Review number 68 of 2012 given on 14th January, 2013 and which the Applicant has reproduced at pages 9 to 66 of the Request for Review bundle of documents.

The Board finds that it will be a repetition and will amount to belabouring the facts of this dispute if the Board was to re-examine the facts set out in the background and the Board's decision given on 14th January, 2013 in Review No. 68 of 2012. The Board will therefore deal with such facts that are direct issues in the dispute now before the Board.

The Applicant's case before the Board was argued by Applicant advocate and its first argument was that the Procuring Entity had advertised for Expression of Interest in the tender, the subject matter of this dispute, on 3rd February 2012. The tender was, according to Counsel, restricted and only open to Chinese firms.

Six (6) firms applied for prequalification but only four (4) firms were shortlisted and requested to make proposals on 23rd May, 2012. Out of the four (4) firms, only three (3) firms had submitted tenders by the time the tender closed/opened on 27th July, 2012.

It is not disputed that preliminary and technical evaluation was conducted and Huawei Technologies Co. Ltd's and Avic International Holdings' bids were found not to be technically responsive.

Huawei Technologies Co. Ltd was dissatisfied with the result of the Technical Evaluation and filed the Request for Review No. 68 of 2012 with this Board on 14th December, 2012. The Board heard the Request for Review which the Board dismissed in a ruling given on 14th January, 2013. Huawei Technologies Co. Limited being dissatisfied with the Board's ruling filed an application for Judicial Review No. 16 of 2013 at the High Court of Kenya at Nairobi but later withdrew the application on 27th February, 2013.

Based on the above state of affairs, the advocate for the Applicant, argued that upon the withdrawal of the Judicial Review application the decision of the Board became final and binding and has remained so to date.

Mr. Kihara further submitted before the Board on the basis of the letter dated 6th December 2012 appearing at page 70 of the Request for Review that the Procuring Entity invited the Applicant to attend the financial opening of its bid on Monday 10th December, 2012 but that there was a delay in informing the Applicant of the outcome of the financial evaluation until it received a letter dated 18th October, 2013 appearing at page 88 of the Request for Review informing the Applicant that its bid was unsuccessful.

This letter, which the Applicant informed the Board is what triggered this Request for Review, reads as follows:-

"The above tender was discussed and adjudicated by the ministerial tender committee on 7th October 2013.

The purpose of this letter is therefore to inform you that your proposal for undertaking the above project was not successful.

We register our appreciation to your organization for having participated in the tender."

The Applicant was dissatisfied with the decision of the Procuring Entity as contained in the letter dated 18th October, 2013 and wrote a letter dated 24th October, 2013 complaining that though the issue that their proposal was not successful was discussed and adjudicated upon on 7th October 2013, they had only received the letter dated 18th October, 2013 on 23rd October, 2013. The Applicant requested for some documents to enable it take legal steps but since time was running out the Applicant decided to file this Request for Review on 29th October, 2013.

The Applicant however confirmed to the Board that it had subsequently received a letter dated 30th October, 2013 and another letter dated 1st November 2013 which had been filed by the Procuring Entity with their reply to the Request for Review.

The Applicant faulted both letters and the reasons set out therein and more particularly because both letters indicated that the Applicant had been faulted by the Procuring Entity on both the technical and the financial evaluation. The Applicant contended that the term **"terminated"** was also being used for the first time in the letter dated 30th October, 2013.

On the issue of financial evaluation, Mr. Kihara took the Board through several parts of the Response to the Reply to the Request for Review and the Further Response to the Reply to the Request for Review in a bid to persuade the Board that the Procuring Entity was wrong in either declaring its proposal unsuccessful and or terminating it. The Board will look at the items in the latter parts of this decision.

The Procuring Entity on its part was represented by a State Counsel, two Legal Officers and Mr. Peter Mwangi, Procurement Officer at the Procuring Entity.

The Procuring Entity's substantive Response to the Applicant's Request for Review was however presented by Mr. Mwangi while the legal arguments were also canvassed by Mr. Mohamed Adu, State Counsel.

The Procuring Entity's position was that it had not breached any of the provisions of the Public Procurement & Disposal Act nor the Regulations made thereunder. On the issue of the alleged delay to inform the Applicant that its financial proposal did not succeed, Mr. Mwangi stated that this was due to the fact that upon technical evaluation, the firm which had lost in the technical evaluation applied for Review before this Board and thereafter filed an application for Judicial Review in the High Court which was later withdrawn in the month of February, 2013. The Director General - PPOA then requested for all the documentation regarding this tender for his own investigation, a process that took three (3) months till the end of July, 2013 and all these factors either viewed singularly or as a whole accounted for the delay.

Mr. Mwangi disputed that the Procuring Entity had muddled up the technical and commercial/financial evaluation. He stated that though

the Technical team had made a recommendation that the Applicant's technical proposal was successful, the Technical team had also noted that there were two areas that the bidder had not met the requirements, namely; the roaming services and the interoperability of the system.

On the Financial evaluation, Mr. Mwangi informed the Board that the Government of Kenya had negotiated with the Government of China for a concessionary loan of **USD 100 Million** but when the project was tendered it came to the realization of the Procuring Entity that the Applicant had returned a bid of **USD 206 Million**. The Procuring Entity stated that if it was to proceed with the bid this would force the Government to finance the difference .

The Procuring Entity through Mr. Mwangi further informed the Board that the Procuring Entity carried out a market survey while evaluating the Applicant's financial bid as required by Regulation 10 (e) of the Regulations and it is upon doing the survey that the Procuring Entity realized that quite a number of the prices quoted by the Applicant were quite high.

The Procuring Entity gave a few examples of what it considered as instances of such high prices at page 4 of the letter dated 1st November, 2013 which it presented to the Board.

In the Procuring Entity's view the prices of certain items were higher than the prevailing market prices as follows:-

ITEM DESCRIPTION	REF NO.	ITEM	UNIT COST COMPARISON	
			IN USD	

Well Mount for 55 Full HD Display	4.4	5,193	350
Desktop computers hp	1.22.1	3,772	1,200
Routers	1.1.7	1,959	600
Printers hp	1.1.11	9,673	500
UPS system for one hour	1.1.10	11,486	1,000

The Procuring Entity's decision to declare the Applicant's bid unsuccessful according to Mr. Mwangi was also inter-alia based on the following reasons:-

- (i) It would cost the Government an average of 1 Billion Kenya Shillings per year to repair and maintain the system after the warranty period of one year lapsed.
- (ii) That the bidder had given different prices for similar items in its bid documents and gave as illustrations the items appearing at page 13/21 item 1.34 - 1.37 of the bid document.
- (iii) The bidder had also proposed 90% payment of the price when shipment lands in Mombasa, contrary to the phased schedule of project implementation.

Mr. Mohammed Adu , the State Counsel who represented the Procuring Entity, in addition to Mr. Mwangi's arguments submitted that the Board did not have jurisdiction to **award the contract** to the Applicant and that tenders were floated on the basis of budgets which had limits and that the Government could not award a tender where there was clearly no financial ability to complete the contract.

Counsel argued that awarding the tender to the Applicant would amount to what he termed as **"fleecing"** the Government and the tax payer.

Mr. Kihara while largely relying on the Response to the Reply for Request for Review dated 18th November, 2013 and the Further Response to the Reply to the Request for Review sought to explain the basis and or demonstrate that the prices tendered by his client were not exaggerated.

While the Applicant in paragraph 1 of the Further Response to the Reply to the Request for Review averred in paragraph 1 that the Applicant had come across an alleged Financial evaluation Report prepared by the Procuring Entity but that it had come across the Report from the proposed Interested Parties documents filed with the High Court in Nairobi Milimani Commercial Court Constitutional in Petition No. 446 of 2013. The Applicant however stated that the production of the report in Court was in breach of the law on confidentiality of commercial interest but the Applicant nonetheless elected to make comments on the report. The Applicant then proceeded to dedicate paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of its Further Response to the Reply to the Request for Review in justifying the allegations made by the Procuring Entity on price exaggeration among the other issues raised in opposition to the Request for Review.

Mr. Kihara finally urged the Board to grant the Applicant the reliefs sought in the Request for Review and sought to rely on various decisions of the Board in support of the prayer.

THE DECISION OF THE BOARD

The Board has considered all the documents lodged before it by all the parties to this dispute, the submissions made by the parties, the authorities cited by the parties and particularly the Applicant and has identified the following as the issues for determination in the Request for Review:-

- (i) Whether or not the Board has jurisdiction to hear and determine the Request for Review now pending before it.**
- (ii) Whether or not the decision in Review No. 68 of 2012 was final and binding on the Procuring Entity on the issue of Technical Evaluation.**
- (iii) Whether or not the Procuring Entity breached the Provisions of Section 2, 27(1) and (2), 66(4) and 67 of The Public Procurement and Disposal Act and Regulations 10(1) and 10(2)(a) and (c) and 11(1)(a) and (b), and 11(2)(b) of the Public Procurement and Disposal Regulation, 2006.**
- (iv) Whether the issue of alleged breach of the provisions of Section 36 of the Act was properly before the Board and whether the Procuring Entity breached the said provision if applicable.**
- (v) Whether the Applicant is therefore entitled to the reliefs sought.**

The Board shall now proceed to determine each of the issues set out above.

- (i) Whether or not the Board has jurisdiction to hear and determine the Request for Review now pending before it.**

This issue largely arose from the Procuring Entity's submissions and was put forward by Mr. Mohammed Adu during his oral submissions. According to Mr. Adu, the Board did not have jurisdiction to hear and determine the dispute before it in view of the provisions of Section 36 of the Act. The Board however wishes to note that the Request for Review was triggered by the Procuring Entity's letter dated 18th October, 2013 informing the Applicant that its financial proposal was unsuccessful and it is on the basis of this letter that the Applicant sought to impeach the decision of the Procuring Entity for the reasons and on the grounds set out in the Request for Review.

The Applicant at paragraph 7 of the Request for Review states that without prejudice to what it had in paragraphs 1 to 6 of the Request for Review it was seeking to impeach the said decision by virtue of the alleged breach of the Provisions of Section 36 (2) of Act by the Procuring Entity.

The Board notes that the assertion by the Applicant that it received the letter dated 18th October, 2013 annexed on page 88 of the Request for Review on 23rd October, 2013 was not disputed by the Procuring Entity. The Request for Review which was filed on 29th October 2013 was therefore filed within time and the Board has jurisdiction to hear and determine it.

The Board is also empowered in Law to determine whether any Provisions the Act or the Regulations made thereunder have been complied with or breached. The Board therefore has the jurisdiction to determine the dispute before it. The Procuring Entity has in fact acknowledged the Boards jurisdiction in paragraph 11 of its Reply to the

Request for Review and cannot now dispute that which it has already conceded to.

- (ii) **Whether or not the decision of the Review Board in Review No. 68 of 2012 was final and binding on the Procuring Entity on the issue of technical evaluation.**

The Procuring Entity argued that upon the withdrawal of the judicial Review filed in the High Court by the Interested Party, the decision of the Board in Review No. 68 of 2012 became final and binding and that it remains so to date. A decision of the Board is indeed final and binding where the Board determines all the issues in controversy between the parties on their merits.

The next issue that would then follow is whether or not the Procuring Entity could revisit any of the technical issues of the Applicant's tender or was the Board's decision final in all respects as relates to the issue of technical tender evaluation.

The Board in its decision given on 14th January, 2013 made the following useful observations at page 57 of its decision which is marked at page 65 of the Request for Review.

"In this regard, the Board finds that ZTE Corporation had indicated that it had deployed its system in more than 40 Countries including China, Senegal, Equatorial Guinea, Mauritius, Ghana, Sudan, Romania, Poland, Czech, Chile, Haiti, Mongolia, Malaysia and Myanmar, and established professional customer service centres in more than 100 Countries.

The Board notes that the Procuring Entity was yet to verify the Interested Candidate's reference projects pursuant to the Tender Document's Special conditions in the Appendix to instructions

to Tenderers at clause 8, and that as per the tender document. Evaluation matrix item 1.2 at pages 82-83 was to be done prior to contract signature.

The Board therefore finds that on the face of it, the Interested Candidate, ZTE Corporation, met the mandatory System requirements, and further, that it would be premature for the Board to find in the alternative given that the Procuring Entity is yet to verify the reference projects where the System has been successfully implemented.”

The Board’s finding on technical evaluation was therefore what amounts to a *prima facie* finding on some of the issues and thus the use of the words “**on the face of it**”. It did not preclude the Procuring Entity in exercising some of the powers conferred upon it by law and more particularly under the Act.

(iii) Whether or not the Procuring Entity acted in breach of the Provision of Sections 2, 27(1) and (2), 66(4) and 67 of The Public Procurement and Disposal Act Regulations 10(1) and 10(2)(a) and (c) and 11(1)(a) & (b) and 11(2)(b) of The Public Procurement and Disposal Regulations, 2006.

The Applicant alleges that the Procuring Entity including its employees failed to comply with the Provision of Sections 2, 27 (1) & (2) and 66(4) of The Public Procurement and Disposal Act, 2005 and Regulations 10(2)(a) and (c) and 11(1)(a) & (b) and 11 (2) (b) of The Public Procurement and Disposal Regulations, 2006. It further alleges that the Procuring Entity failed to award the Applicant the tender, yet the Applicant’s proposal

was the lowest evaluated financial proposal and that it therefore acted contrary to the provisions of Section 66(4) of the Act.

The Procuring Entity however submitted that it acted in accordance with the Provisions of the Act and the Regulations and that it did not breach the Provisions of Regulation 10, 11 or Section 66 of the Act.

The Board has scrutinized all the documents placed before it by the parties and by the Procuring Entity under Regulation 74 (3) of the Regulations and notes that the main reasons why the Procuring Entity declared the Applicant's financial bid as unsuccessful was that whereas the Government of Kenya had negotiated with the Government of China for a concessionary loan of **100 Million US Dollars** the Applicant returned a tender quotation of **206 Million US Dollars** which was 106% over and above the amount the loan that the Kenyan Government had negotiated with the Chinese Government. This bid would then not be able to proceed without the Government of Kenya being forced to finance the difference.

The Procuring Entity attributes this difference in the amount of the concessionary loan to the exaggeration of the prices of certain items as demonstrated in Mr. P. N. Mwangi's letter dated 1st November, 2013.

The Applicant who was granted leave to file a further Response to the Reply to the Request for Review made no specific challenge to the items set out on page 4 of the Procuring Entity's letter and which have been reproduced at page 8 of this decision. The Applicant's reference to the Financial Evaluation which it says it has in its possession and in its Further Response to the Reply to the Request for Review was also quite unhelpful to the Applicant's case. The Financial Evaluation which the Board has had the occasion to look at confirms the contention by the

Procuring Entity that there was a gross exaggeration of price of items. This is the only logical way that a 106% excess in the cost of the project can be explained. It does not require rocket science in view of the evidence before the Board to establish that the Interested Party's financial proposal was way above the intended contract value.

The Procuring Entity also raised a number of very pertinent issues which formed part of its answer dated 1st November 2013 that justified the Procuring Entity's decision to declare the Applicant's financial proposal unsuccessful. These include the fact that:-

1. That it would cost an average of Kshs. 1 Billion per year to repair and maintain the system after the warranty period of 1 year.
2. That the bidder had proposed a 90% payment when shipment lands in Mombasa contrary to the phased schedule of the project implementation.

The Applicant has alleged that the Procuring Entity and its employees breached the Provisions of Section 27 (1), (2) and (3) of the Act as read together with Regulations 10(2)(a) and (c) of the Regulations by failing to approve the selection of the Applicant's successful proposal and awarding the Applicant a contract in accordance with that prescribed in the first schedule to the Regulations.

The Applicant also alleged that the Procuring Entity breached the law when it termed the Applicants proposal as unsuccessful contrary to Regulation 11 (1) (a) & (b) by failing to approve the submission of the evaluation committee or rejecting the said submissions with reasons and or failing to give justifiable reasons contrary to Regulations 11 (2) (b) of the Regulations. The Applicant further contended that in failing to

determine that the Applicant's bid was the lowest evaluated price in terms of the financial proposal acted contrary to the Provisions of Section 66(4) of the Act and thereby failed to uphold the objective of the Act and the Regulations by inter-alia failing to promote fair and open competition maximize economy, efficiency and promote competition as required by Section 2 of the Act

The Applicant also alleged that the Procuring Entity failed to notify the Applicant who alleged to be the lowest bidder of the award of the contract to it contrary to Section 67 of the Act thereby depriving the Applicant of the benefits of submitting a successful tender.

The Board has read the Provisions of Sections 2, 27, 66(4) and 67 of the Act and finds that the Procuring Entity did not breach any of the Provisions of the said Act.

The Board has already stated why the Applicant's bid was not successful and adds that it was against the promotion of the principles of integrity, fairness, transparency and accountability to award a tender where the tender price was above the budget by 106% due to the overpricing of items.

The Board also finds that the Procuring Entity acted responsibly in the public interest in arriving at its decision as required by the Provisions of Section 27 of the Act.

The Board particularly notes that by refusing to accept the Applicant's financial proposal, the Procuring Entity took full cognizance of the Provisions of Regulation 10 (2) (e) of the Regulations which requires the Procuring Entity to ensure that the Procuring Entity does not pay in excess of prevailing market prices.

Under the Provisions of Regulation 10 (2) the duties of the Procuring Entity are to, inter-alia:-

- a) **Review, verify and ascertain that all Procurement and Disposal has been undertaken in accordance with the Act, the Regulations and the terms set out in the tender documents.**
- b) **Award Procurement contracts in accordance with the thresholds prescribe in the first schedule.**

The Board finds that the Procuring Entity acted properly by reviewing, verifying and ascertaining the prices quoted by the Applicant for various items and the effect of an excess of 106% above the budget. The Procuring Entity was also entitled to consider all the other factors which the Board has already alluded to in arriving at the decision to declare the Applicant's bid as unsuccessful.

The Board rejects the Applicant's contention that it ought to have been awarded the tender under the Provisions of Section 66(4) or Section 67 of the Act. The Applicant contended that it had the lowest evaluated price in terms of the financial proposal and therefore ought to have been awarded the contract under Section 67 of the Act.

This is not and cannot be the true position since the Procuring Entity declared the Applicant's financial proposal unsuccessful for the reasons the Board has already set out in this decision. The Applicant was not therefore the lowest evaluated bidder in terms of the Act and was not therefore entitled to be awarded the contract under section 67 of the Act.

The Applicant was notified that its proposal was not successful by a letter dated 18th October, 2013 which it admittedly received on 23rd

October, 2013. The Applicant was thereafter able to lodge its Request for Review within time and was not therefore prejudiced in anyway.

The Board also finds that the Applicant's complaint that the Procuring Entity did not give justifiable reasons as to why the Applicant's bid was not successful lacks merit.

Under the Provisions of Regulation 66 (2) of the Act, the Applicant was under an obligation to seek for reasons from the Procuring Entity why its bid was unsuccessful. The Applicant sought for the reasons which were given to it in the letter dated 1st November, 2013.

The law on this subject has been enumerated by the Board in several decisions.

It was held in the case **Nyoro Construction Co. Ltd =VS= Kenya Roads Authority** (Application No. 32 of 2010) that Section 67 of the Act provides for the simultaneous notification of the award of a tender to a successful and unsuccessful bidders but does not require the notification to unsuccessful bidders to contain reasons why their bids failed. The Board also noted that unsuccessful bidders can request for the reasons for disqualification of their bids under Regulation 66 (2) of the Regulations.

The Board was of a similar holding in the case of **Enterprises Limited =vs = Kenya National Highways Authority** (Application No. 64 of 2010).

The Board therefore finds and holds that there was no breach of any of the Provisions of Sections 2, 27(1) & (2), 64 and 66(4) of the Act and or of Regulations 10 and 11 of the Regulations.

(iv) Whether or not the issue of breach of the Provisions of Section 36 of the Act was properly before the Board and whether the Procuring Entity breached the said Provisions if applicable.

Both parties addressed the Board at length on this subject but the Board notes that this Request for Review was triggered by the Procuring Entity's letter dated 18th October, 2013 appearing at page 88 of the Request for Review informing the Applicant that its bid was unsuccessful. That was the decision that was before the Board and the Board could not overstep its mandate by considering a decision which was not contained in the Request for Review. The heading of the Request for Review in fact identifies the decision being challenged as that dated 18th October, 2013.

Mr. Kihara, learned Counsel for the Applicant, sought to introduce a letter dated 30th October 2013 addressed to the Applicant by the Permanent Secretary, Office of the President, Ministry of Interior and Coordination of National Government and argued that the issue of termination of the contract was being captured for the first time in the said letter. He then faulted the letter on the grounds that it combined both aspects of technical evaluation and the financial proposal. The Applicant also stated that the reasons in the letter were not sufficient enough to warrant a termination.

The Procuring Entity on the other had defended its decision to terminate and set out a number of grounds why it felt that it was right in terminating the tender process.

The Board however finds and holds that the only decision that had properly been brought before it within time in the Request for Review

was the decision contained in the letter dated 18th October, 2013 declaring the Applicant's proposal as unsuccessful. No Request for Review was brought before the Board as respects the letter dated 30th October, 2013 no wonder therefore that there is no mention of that letter in the heading of the Request for Review.

(v) Whether or not the Procuring Entity breached the Provisions of Section 44 of the Act on confidentiality.

The Applicant alleged that the Procurement Entity disclosed the confidential proceedings of The Public Procurement Administrative Review Board in application No. 68 of 2012 which was prejudicial to the legitimate commercial interest of the Applicant contrary to the Provisions of Section 44 of the Act.

The Procurement Entity denied that it made any such disclosure and did not therefore breach the provisions of Section 44 of the Act.

The Board has examined all the evidence tendered before it and it has been unable to find any evidence to support the allegation that the Procuring Entity disclosed the proceedings of the Public Procurement Administration Review Board in Application No. 68 of 2012 as alleged. The Board further takes judicial notice that decisions of the Board are posted in the official PPOA website and once posted they become public documents.

The Board therefore finds no merit in this ground of the Request for Review and this ground therefore fails.

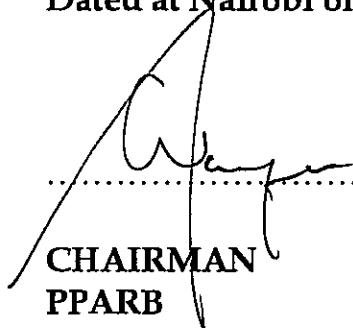
The Board has finally considered the Authorities supplied to the Board and which are contained in the Applicant's list of Authorities and particularly the cases of China Tianxi International Kenya Limited =vs = The Parliamentary Service Commission (PPARB No. 71 of 2012, Horsebridge Network Systems (E.A) Ltd =vs = Central Bank of Kenya PPARB Review No. 65 of 2012), Hospital in Genieure = vs = Stadt Wien (2002) ECR 1 -15553 ECJ, and Bev AJ Furniture Limited = vs = Kenya School of Monetary Studies (PPARB Review No. 35 of 2013).


The Board finds that the facts and the circumstances obtaining in the above decision are clearly distinguishable from the facts of this case. The first two decisions relate to situations where the Procuring Entity had evaluated and notified the successful bidders that their tenders were successful but later purported to terminate the tender proceedings while a dispute was pending before the Board resulting in a direct award of the tenders to the successful tenderers by the Board. This is not the case in the review before us. The circumstances in the last two cited reviews were also not similar to the facts and the circumstances before us.

The upshot of all our findings therefore is that the Request for Review lodged before this Board by the Applicant on 29th October, 2013 seeking the Review of the decision of the Ministry of Interior and Coordination of National Government as contained in the letter dated 18th October, 2013 is hereby dismissed but with no order as to costs.

Secondly the Board at the request of the Applicant extends the tender validity for a period of fifteen (15) days to allow the Applicant exercise its rights under the Act if it so wishes to file a Judicial Review.

Dated at Nairobi on this 27th day of November, 2013


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**CHAIRMAN
PPARB**


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**SECRETARY
PPARB**

1/10/11