

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. NO. 52/2013 OF 17TH DECEMBER, 2013

BETWEEN

HORSEBRIDGE NETWORK SYSTEMS (EA) LIMITED...APPLICANT

AND

KENYA AIRPORTS AUTHORITYPROCURING
ENTITY

Review against the decision of the Tender Committee of the Kenya Airports Authority dated 6th December, 2013 in the matter of Tender No. KAA/ES/JKIA/476B/ISMS for Procurement of Plant, Design, Supply and Installation of Integrated Security Management System at JKIA, Nairobi

BOARD MEMBERS PRESENT

Mrs. Josephine Mong'are	- Member (in the chair)
Mr. Hussein Were	- Member
Mr. Peter Bitia Ondieki	- Member
Mr. Paul Ngotho	- Member
Mr. Nelson Orgut	- Member

IN ATTENDANCE

Mr. Philip Okumu	- Secretariat
Ms Judy Maina	- Secretariat

PRESENT BY INVITATION

Applicant, Horsebridge Network Systems (EA) Limited

Njuguna Charles - Advocate, Njuguna & Partners
Maureen Kiiru - Legal Assistant, Njuguna & Partners

Procuring Entity, Kenya Airports Authority

Victor Arika - Corporation Secretary
George K. Kamau - Legal Officer
Evans Gitonga - Procurement Officer
Abraham Ng'etich - Procurement Officer
Orora Hobadiah - Ag General Manager, Procurement
Sammy Kemboi - Procurement Officer
Jonah Biwott - Para-Legal Clerk

Interested Candidates

Orad Limited

John Ohaga - Advocate, TripleOKLaw
Boaz Peled - Representative
Avinoam Asarov - Manager

Magal Security Systems Limited

Stephen Kipkenda - Advocate, Kipkenda & Co.
Isaac Kalua - Partner

Indra Limited

S. Njinu - Chief Accountant

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. In order to improve capacity to allow for natural growth of traffic and to improve operations at Jomo Kenyatta International Airport (JKIA), the Procuring Entity received funding from the World Bank ("the Bank") under the Northern Corridor Transport Improvement Project for Expansion of Passenger Terminal Facilities at JKIA (IDA Credit 3930 KE).
2. This funding was a result of a loan negotiated between the World Bank and the Government of Kenya as part of the Northern Corridor Transport Improvement Project (NCTIP) of 16th December, 2004 under IDA Credit Number 3930 KE.
3. Part of the proceeds of this loan was to be applied to eligible payments under the contract for supply and installation of integrated security management system for the new international passenger terminal building at JKIA, known as T4.
4. The procurement process followed was guided by World Bank guidelines as provided under the Public Procurement and Disposal Act, 2005 ("the Act") and the Regulations there under being a process financed through a loan negotiated between the World Bank and the Government of Kenya as part of the Northern Corridor Transport Improvement Project (NCTIP) of 16th December, 2004 under IDA Credit Number 3930 KE.

THE BIDDING PROCESS

Advertisement

1. The tender for Procurement of Plant, Design, Supply and Installation of Integrated Security Management System Works ("the works) Tender No. KAA/ES/JKIA/476b/ISMS ("the tender") was advertised in the print media on from 28th December 2012 and closing on 22nd February 2013. The closing date was extended to 6th March 2013.

Closing/Opening:

Out of 40 bid documents purchased the following nine (9) firms submitted bids before expiry of the bid submission deadline at 11.00am on 6th March, 2013:-

1. *Horse Bridge Network System (EA) Limited*
2. *Indra Limited*
3. *Mehta Electricals Limited*
4. *Optilan (UK) Limited*
5. *Securex Agencies Limited*
6. *Magal Security Systems Limited*
7. *Motorola Solutions Israel Limited*
8. *Casria / Avic - Intl JV*
9. *Orad Control Solutions Limited*

2. The Procuring Entity thereafter undertook the bid evaluation process where the bids were subjected to *preliminary, technical and financial*

evaluation to determine compliance with the bid requirements. The evaluation was concluded on 17th April, 2013 whereupon the bid evaluation report was submitted to the World Bank for review of the bid evaluation process and award recommendation in accordance with the guidelines where the Procuring Entity recommended the award of the tender to Orad Control Solutions Limited.

3. After analysis of the bid evaluation report the Bank made observations and advised the Procuring Entity to undertake a review of the bid evaluation while taking into consideration the total life cycle cost of the responsive bids by Magal Security Systems and Orad Control Solutions Limited.
4. The responsive bids were subjected to economic evaluation and the report was submitted to the World Bank for a second review and obtaining of the Bank's No Objection for the Procuring Entity to award the tender, by a letter dated 8th October, 2013.
5. By a letter dated 4th December 2013, the Bank indicated that upon review of the revised Bid Evaluation Report as submitted by the Procuring Entity on 8th October 2013, it had no objection for the award of the tender to Magal Security Systems Limited of Israel as requested by the Procuring Entity.
6. The Procuring Entity notified the bidders on the outcome of the tender by letters dated 9th December, 2013.
7. The Applicant was notified that its bid was rejected at the *Preliminary evaluation stage* for the reason that it submitted a bid security with validity period less than the required days (expiry date was 10th July 2013 against required date of 31st July 2013).

EVALUATION

The nine (9) bids received were evaluated in accordance with the criteria set out in the Bid Document and in line with the standard evaluation forms as below.

Table 1. Identification

1.1	Name of Borrower	<i>Government of Kenya</i>
1.2	IDA Credit number	<i>3930 KE</i>
1.3	Date of effectiveness	<i>16th September, 2004</i>
1.4	Closing date	
	(a) original	<i>31st December 2009</i>
	(b) revised	<i>31st December 2015</i>
1.5	Name of project	<i>Northern Corridor Transport Improvement Project (NCTIP)</i>
1.6	Purchaser (or Employer)	
	(a) name	<i>Kenya Airports Authority</i>
	(b) address	<i>P. O. Box 19001- 00501, Nairobi, Kenya</i>
1.7	Contract number (identification)	<i>KAA/ES/KSM/476/B/ISMS</i>
1.8	Contract description	<p><i>The works to be executed under this contract comprises of the Integrated Security Management Systems (ISMS) as part of the Renovation and Expansion of the existing terminal building at JKIA, Nairobi. The works shall be executed as a supply and install contract. The works comprise the following:</i></p> <ul style="list-style-type: none"> <i>i. Central computer system with the management software</i> <i>ii. Passenger Screening systems</i> <i>iii. Access control systems</i> <i>iv. Intruder/Motion detection systems</i> <i>v. IP CCTV.</i> <i>vi. Access card printing and issuing station.</i>
1.9	Cost estimate	<p><i>Kshs. 428,000,000</i></p> <p><i>Exclusive of VAT, inclusive of Contingencies and Provisional Sums.</i></p>
1.10	Method of procurement (check one)	<i>ICB</i>

Table 4. Bid Prices (as Read Out)

Bidder Identification						Read-out Bid Price(s)		Modifications or Comments
Name	City/State or Province	Country	Currency(ies)	Amount(s) or %				
(a)	(b)	(c)	(d)	(e)	(f)			
<p>1. HORSE BRIDGE NETWORK SYSTEM E.A LIMITED. Address: P.O.BOX 46631-00100, Nairobi, Kenya. Authorized Representative: Michael Murithi Tel; +254 0733 331061, Fax: +254 3742187 Email: pkago@horsebridgeea.com</p>	Nairobi	Kenya	GPB	3,365,695.85				No modifications or comments
<p>2. INDRA LIMITED Address: P.O BOX 32443-00600, Nairobi, Kenya. Authorized Representative: Luiz Galliana Gomez Tel No: +254 733 607 009, Fax: +254 020 346355120 Email: lgalliana@indra.es</p>	Nairobi	Kenya	Euro	3,741,443.41				No modifications or comments

Bidder Identification				Read-out Bid Price(s)		Modifications or Comments
Name	City/State or Province	Country	Currency(ies)	Amount(s) or %		
(a)	(b)	(c)	(d)	(e)	(f)	
3. MEHTA ELECTRICALS LIMITED M/S Address: 39977- 00100 Nairobi, Kenya Authorized Representative: Mr. B. D. Mehta Tel; +254 020 3750519/20, Fax: +254 020 3748634 Email: pitu@mehta.co.ke	Nairobi	Kenya	US Dollars	4,340,994.71	No modifications or comments	
4. OPTILAN (UK) LIMITED M/S Address: PO Box 32242- 00600 Nairobi, Kenya. Stone Bridge Trading Estate, Sibree Road, Coventry. CV3 4FD. United Kingdom Authorized Representative: Hawkseye Limited Tel; +254 702 566 533, Fax: +254 702 566 533 Email: hawkseyeltd@gmail.com	Coventry	U.K	Kenya Shillings	584,435,929	No modifications or comments	

Bidder Identification				Read-out Bid Price(s)		Modifications or Comments
Name	City/State or Province	Country	Currency(ies)	Amount(s) or %		
(a)	(b)	(c)	(d)	(e)	(f)	
5. SECUREX AGENCIES LIMITED M/S Address: PO Box 48399 – 00100 Nairobi, Kenya. Authorized Representative: Nitin Wadhwa Tel; +254 722 343 434, Fax: +254 733 343 434 Email: projects@securex.co.ke ; sales@securex.co.ke	Nairobi	Kenya				Did not fill Form of Bid
6. MAGAL SECURITY SYSTEMS LIMITED M/S Address: 7 Kisufim St., Tel Aviv 6935510, Israel Authorized Representative: Raphael (Rafi) Nezer Tel; +972 – 3 – 5391444, Fax: Email: rafin@magal-s3.com	Tel Aviv	Israel	USD	6,462,299.00		No modifications or comments

Bidder Identification						Read-out Bid Price(s)		Modifications or Comments
Name	City/State or Province	Country	Currency(ies)	Amount(s) or %				
(a)	(b)	(c)	(d)	(e)	(f)			
7. MOTOROLA SOLUTIONS ISRAEL LIMITED M/S Address: 2 Negev St. Airport City 70199 Israel Authorized Representative: Ronney Preger Tel: +972 (3) 5658269, +972 (3) 3031111 Fax: +972 (3) 6252611 Email: R.Preger@motorolasolutions.com	Negev	Israel	USD	7,973,770.00				No modifications or comments
8. CASRI/AVIC-INTL JV M/S Address: C6 Maki Department Ngong Road, Nairobi, Kenya No. 17, Second Section, Second Ring Road South, Chengdu, Sichuan, P.R.C (610041) 5/F AVIC INTERNATIONAL PLAZA No. 18Beichen East Rd, Chaoyang District Beijing 100101, China Authorized Representative: Stanley Gitau Tel: +254 722511522, Fax: +254 722511522 Email: sivanxuan@avic-intl.cn	Sichuan	China	USD	6,158,000.00				No modifications or comments

Bidder Identification						Read-out Bid Price(s)		Modifications or Comments
Name	City/State or Province	Country	Currency(ies)	Amount(s) or %				
(a)	(b)	(c)	(d)	(e)	(f)			
9. ORAD LIMITED Address: 4 Hamashbirst. Holon. 58855 Israel. Authorized Representative: Yehuda Ankonina Tel; +972 - 3 - 5576660, Fax: +972 - 3 - 55765535 Email: Yehuda.ankonina@orad.cc	Holon	Israel	USD	5,204,960.00				No modifications or comments

Evaluation Criteria

Bids were evaluated against the criteria set out in the bidding documents. The criteria covered the following:

Preliminary evaluation requirements

The bid was checked for responsiveness to the Bid requirements to verify that:-

- i) Legal Registration of the Bidder
- ii) The bid was accompanied with the proper bid security.
- iii) The bid was properly signed.
- iv) The bid was valid for at least 120 days in accordance with the bid requirements.
- v) There were no deviations or reservations that would affect in any substantive way the
 - The scope, quality or performance of the works,
 - Employer's rights or the bidder's obligations under the contract.

Qualification requirements

- a) **Eligibility to bid** – to be eligible to bid the contractor must be from an eligible country as listed and regularly updated by the World Bank at the Bank's website:
<http://www.worldbank.org/html/opr/procure/contents.html>
- b) **Have no conflict of interest** - the contractor has not participated as consultants in preparation of design among others as per the instructions to bidders sub-clause 4.3

c) **Historical Contract non performance**- The bidder should not have failed to perform contracts satisfactorily within the past five years and where they occurred the dispute should have been fully settled. Further, pending litigation should not represent more than 30% of the applicant's net worth.

d) **Financial performance** - The bidder must submit Audited Accounts or if not required in bidder's country, other financial statements acceptable to employer for the last five years to demonstrate:

1. The current soundness of the firm's financial position and its prospective long-term profitability with net worth higher than zero and a current ratio of two or higher.
2. Average Annual Turnover of US\$ 3,000,000 calculated as total certified payments received for contracts in progress or completed, within the last five years.
3. Capacity to have cash-flow amount of US\$ 500,000 or its equivalent (evidence to be provided in form of letters of credit or other evidence for liquid assets).

e) **Experience**

1. **General Experience** - The bidder must have been active as the main contractor, subcontractor, or management contractor for at least the last five years with activity for at least nine (9) months in each year.
2. **Specific Construction Experience** - The bidder must have participated as contractor, management contractor or as subcontractor in at least three (3) contracts within the last Five (5)

years each with a value of at least US\$ 2.0 million. The projects should have been successfully completed and are similar to the proposed works in physical size, complexity, method/technology etc.

3. *Specific Construction Experience (Key Activities)* - The bidder must also have minimum construction experience capability in the key activities as follows:

- a. Participation as contractor, management contractor, or subcontractor, in at least Three (3) contracts within the last five (5) years, each with a value of at least US Dollar 2.0 million, that have been successfully and substantially completed and that are similar to the proposed Works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section VI, Employer's Requirements.
- b. For the above or other contracts executed during the period stipulated in 2.1.2(a) above, a minimum experience in the following key activities:
 - i. Central computer system with the management software
 - ii. Passenger screening systems
 - iii. Access control systems
 - iv. Intruder/Motion detection systems
 - v. IP CCTV.
 - vi. Access card printing and issuing station.

vii. Integrated commissioning with other building systems.

4. Minimum Availability of Personnel and Equipment as listed below:

Personnel – Availability of Technical personnel, organization structure and CVs:-

- a. Project manager – 10 years' experience
- b. Electronics Engineer – 5 years' experience
- c. CCTV and Access control specialist – 5 years' experience
- d. X-Ray screening specialist- 5 years' experience
- e. Commissioning Engineer- 5 years' experience
- f. Installation Engineer- 5 years' experience

Equipment – Mobilization of minimum construction equipment.

- a. Video Analyser – 1 No.
- b. Network Analyser – 1No.
- c. Fibre Optic fusion splicer – 1 No.
- d. Transporter 2,5t capacity – 2 No
- e. Hoisting equipment 2,5t capacity – 2 No

5. Submission of mobilization plan and work methodology - The bidders were required to submit proposals of work methods and schedules in sufficient detail to demonstrate the adequacy of the bidders' proposals to meet the technical specifications and the project completion time of 12 months.

6. Submission of detailed technical brochures - The bidders were required to submit detailed technical brochures of proposed equipment.

Evaluation against Preliminary

The Bids were evaluated against preliminary evaluation requirements listed above.

Summary of observations on preliminary evaluation.

From Table 5 (a) - *Preliminary Examination*, three (3 No) bidders out of the nine (9 No.) bidders were disqualified from further evaluation. The reasons for disqualification are as below;

a) M/s Mehta Electrical Limited

Submitted a bid security with expiry date of 3rd July, 2013 against expected date of 31st July, 2013. Their bid security was therefore 28 days less than the required 148 days as per requirements of ITB 20. The bidder did not meet the preliminary requirements and was therefore disqualified from further evaluation.

b) M/s Horsebridge Network Systems (E.A)

Submitted a bid security with expiry date of 10th July, 2013 against expected date of 31st July, 2013. Their bid security was therefore 21 days less than the required 148 days as per requirements of ITB 20. The bidder did not meet the preliminary requirements and was therefore disqualified from further evaluation.

c) M/s Securex Agencies Limited

Submitted a bid security with expiry date of 4th July 2013 against expected date of 31st July, 2013. Their bid security was therefore 27 days less than the required 148 days as per requirements of ITB 20. They also did not submit Form of Bid. The bidder did not meet the preliminary requirements and was therefore disqualified from further evaluation.

Conclusion on Preliminary Evaluation

Following the preliminary evaluation, six (6 No) firms were determined to have satisfied the preliminary qualification requirements and were accepted for detailed evaluation

1. M/s Indra Limited.
2. M/s Optilan (UK) Limited
3. M/s Magal Security Systems Limited,
4. M/s Motorola Solutions Israel Limited,
5. M/s Casri/ Avic-Intl JV,
6. M/s Orad Limited

Examination against Qualification Requirements

The detailed examination of the six (6) bids was conducted using the criteria as detailed above.

Summary of observations following evaluation of bids against qualification requirements

Four (4) bidders, M/s Indra Limited, M/s Optilan UK Limited, M/s Motorola Solutions Israel Limited and M/s Avic International (J.V) Casri

were disqualified from further evaluation due to the reasons summarized below:-

A) M/s Indra Limited

The bidder submitted power of Attorney Under Soluziona Kenya Limited, not under Indra Limited because they had changed their name twice. The power of attorney was certified by commissioner of oaths as authentic. However, in the evaluation committee's opinion, the power of attorney was unacceptable as it was not binding on the name under which the bid was submitted.

The bidder was therefore disqualified from further evaluation.

B) M/s Optilan UK Limited

- i) The construction schedule submitted lacked details on installation, testing and commissioning.
- ii) The proposed Dome Camera had Integrated lenses as opposed to CS mount lenses as specified in the specifications. This limitation on the cameras was not acceptable.
- iii) The bidder was offering Screening system with two views instead of the specified four views (Section 28 50 00 clause 2.3). The screening system was therefore technically non-compliant.

The bidder did not meet technical requirements and was therefore disqualified from further evaluation.

C) M/s Motorola Solutions Israel Limited

- i) Did not submit technical information on electromagnetic locks, card readers, access cards, exit buttons and door contacts. The evaluation committee was therefore not able to establish whether the proposed equipment met the minimum technical requirements or not.
- ii) The technical brochure provided for pay stations for the parking management system did not have information on automatic voice messages for pay stations.

The bidder was found technically non-responsive

D) M/s Avic International (J.V) Casri

- i) The bidder did not submit the required technical brochures as instructed in the bid document. The committee was therefore not able to establish whether their offer was technically responsive or not.

The bidder did not qualify for further evaluation.

Financial and Economic Evaluation

The Financial Evaluation was carried out on the two (2) bids from M/s Magal Ltd and M/s Orad Limited and the observations were as below:

Table 12. Currency Conversion (Multiple Currencies) Specify Evaluation Currency: Kenya Shillings

Bidder	Currency(ies) of Bid	Corrected/ Discounted Bid Price(s)	Applicable Exchange Rate(s)	Evaluation Currency	
				Bid Price(s)	Total Bid Price
(a)	(b)	(c)	(d)	(e) = (c) x (d)	(f)
M/s Magal Security Systems	USD	6,411,411.60	87.5775		561,495,399.40
M/S Orad Limited	USD	5,205,610.00	87.5775		455,894,309.78

Economic Evaluation

The typical life cycle is indicated as 8 years in the BD and this was used for the overall service life of the entire ISMS. The LIBOR 12-month rate used for discounting purposes was based on the date 28 days before bid submission deadline, i.e. February 5th, 2013, plus 5%.

The discounting formula used to determine the present total operational and maintenance cost is $FV = PV(1+i)^n$, where:-

- FV = future value
- PV = present value
- i = interest rate at 5%
- n = the years of discounting

The total life cycle cost was calculated as a sum of the initial asset acquisition and the discounted operational and maintenance costs. For the two bidders, the total life cycle cost was therefore calculated as below:

i) M/s Magal offered an SLA charge including spares and consumables of US\$ 8,000 per month (Schedule 4, Item 4.10). This was applied in computation of the life cycle costs for the equipment as follows in accordance with the evaluation criteria.

ii) M/s Orad offered an SLA charge including spares and consumables of US\$ 40,000 per month (Schedule 4, Item 4.10). This was applied in computation of the life cycle costs for the equipment as follows.

Summary of observations on financial and economic evaluation

Net Correction of Errors.

After adjusting the bid prices for corrections noted, the ranking of the bidders did not change:

a) Correction of Errors for Magal Security Systems Limited (Submitted bid sum excluding VAT -Foreign USD 6,462,299)

There were several extension errors contained in Bill No.1 and multiplication and rounding errors in Bill No.4 totaling negative USD 887.40. These errors were mainly due to summation of the totals and rounding in unit prices.

From the foregoing, the corrected bid sum is: USD 6,461,411.60 including provisional sums and contingencies.

b) Correction of Errors for Orad Control Solutions Limited (Submitted bid sum excluding VAT -Foreign USD 5,204,960.00)

There were several extension errors contained in Bill No.1 of USD 50,650.00

This error was due to the failure to transfer the total cost for schedule number 6 to item no. 1.8 of schedule 1 (mandatory spare parts)

From the foregoing, the corrected bid sum is: USD 5,255,610.00 including provisional sums and contingencies.

Life Cycle Cost

The life cycle cost was calculated as a total of the discounted amount of the offered SLA for a period of 8 years in accordance with the criteria in the bidding document and the bid value excluding provisional sums and contingencies. The resulting life cycle cost for both bidders shows that M/s Magal has a lower life cycle cost than M/s Orad by US\$ 1,276,072.11 as follows:

	Life Cycle Cost
M/s Magal	US\$ 7,031,880.02
M/s Orad	US\$ 8,307,952.13

Extension of bid validity and bid security validity

The original validity period of the bid was 120 days to expire on July 4, 2013. On the Procuring Entity's request the following bidders extended the bid validity to August 1, 2013 as required:

1. M/s Horse Bridge Network System (EA) Limited (Copy of Bid Security not submitted)
2. M/s Indra Limited
3. M/s Mehta Electricals Limited
4. M/s Optilan (UK) Limited (Copy of Bid Security not submitted)
5. M/s Securex Agencies Limited
6. M/s Magal Security Systems Limited (Copy of Bid Security not submitted)
7. M/s Motorola Solutions Israel Limited
8. M/s Orad Limited

Bidders were requested to further extend the bid validity to September 19, 2013 and again to October 25, 2013.

OBSERVATIONS AND RECOMMENDATION

Observations

- i) From the nine (9 No) bids received for evaluation, three (3 No) bidders were disqualified for failing to meet the minimum requirements. Their bid securities did not meet the required 148 days (28 days after the bid validity period of 120 days)
- ii) Of the six bidders who qualified for technical evaluation, only two bidders M/s Orad Control Solutions Limited and M/S

Magal Security Systems Limited met the minimum technical requirements and qualified for financial and economic evaluation.

- iii) M/s Magal Security Systems Ltd was the lowest responsive evaluated bidder after combining the bid price and the total life cycle costs for a period of 8 years in accordance with the requirements of the bidding document. M/s Orad Control Solutions Ltd was the second lowest responsive bidder. Both bidders met the financial requirements.

Recommendation

The Evaluation Committee recommended that:-

The contract for Integrated Security Management System Works for Expansion of Passenger Terminal Facilities - Construction of Terminal (4) Terminal Building, Parking Garage and Other Associated Services - Contract No: KAA/ES/KSM/476/B/ISMS be awarded to M/S MAGAL SECURITY SYSTEMS LIMITED, of Address: 7 Kisufim St., Tel Aviv 6935510, Israel, Tel; +972 - 3 - 5391444 for the corrected bid price of USD Six million, four hundred and sixty one thousand four hundred and eleven Cents sixty (US\$ 6,461,411.60) for being the lowest evaluated bidder

This amount includes:

Contingency Sum of USD 20,000.00

Provisional Sums of USD 30,000.00

But exclusive of: VAT

THE TENDER COMMITTEE DECISION

The Evaluation Committee had recommended award to M/S Magal Security Systems Limited at USD 6,461,411.60 (inclusive of provisional and contingency sum of USD 50,000 but exclusive of VAT).

The meeting was informed that World Bank had given their "No Objection" to the award as per their letter dated 4th December, 2013.

The Tender Committee adjudicated and approved the award on 6th December, 2013.

THE REVIEW

The Request for Review was lodged by M/S Horsebrige Network Systems (EA) Ltd, hereinafter referred to as "the Applicant". The Applicant was at the hearing represented by Mr. C N Njuguna, Advocate. M/S Orad Limited, hereinafter referred to as "the Interested Party" sought to be enjoined in the proceedings by filing written submissions raising pertinent issues for determination by the Board. The interested party was represented at the Hearing by Mr. John Ohaga Advocate. The Respondent, M/S Kenya Airports Authority, hereinafter referred to as "the Procuring Entity" was represented By Messrs Arika and Kamau, Advocates and Mr. Hobadiah Orora, the General Manager, Procurement and Logistics. M/S Magal Security Systems Limited, hereinafter referred to as "the Successful bidder" also appeared represented by Mr. Stephen Kipkenda, Advocate. The Successful bidder sought to support the submission by the Procuring Entity in their entirety and did not introduce any new issues at the Hearing.

The Applicant has filed the request for Review seeking the following prayers;

- A. The decision of the Procuring Entity be set aside,
- B. The Procuring Entity be directed to evaluate in substance the Applicant's tender among others and proceed to award the same on merit,
- C. In the alternative
 - a. A declaration that the tender has lapsed and further processing thereof will be in breach of the Act and Regulations.
 - b. The entire tender be annulled and the Procuring Entity be ordered to retender afresh.
- D. Any further orders as the Board may find appropriate to issue.

The Interested Party on its party requests the Board for the following orders;

- i. A declaration that the Procuring Entity breached the provisions of the Act;
- ii. The Procuring Entity be precluded from awarding the tender to any other bidder other than the interested party;
- iii. The interested party be declared the most responsive bidder and the Tender No. KAA/ES/JKIA/476B/ISMS be awarded to the Interested Party

- iv. In the Alternative, the Procuring Entity be directed to carry out a re-evaluation of the tenders in accordance with the Act and the instructions to Bidders;
- v. The costs of the Application be provided for.

PRELIMINARY OBJECTION

The Procuring Entity filed a Preliminary Objection to the Request for Review on 24th December, 2013 on the following grounds:

1. That the subject tender (No. KAA/ES/JKIA/476b/ISMS) was undertaken under the international competitive bidding procedures as specified in the World Bank Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits and Grants.
2. That as such, the procurement process does not fall within the provisions of the Public Procurement & Disposal Act Chapter 412 C of the laws of Kenya ("the Act") and the regulations there under being a process financed through a loan negotiated between the World Bank and the Government of Kenya as part of the Northern Corridor Transport Improvement Project (NCTIP) of 16th December, 2004 under IDA Credit Number 3930 KE.
3. That the procurement process prescribed under the tender is expressly excluded from the provisions of the Act under Sections 6 and 7 there under.

4. That the procedures for Request for Review as outlined under Part VII of the Act is therefore not applicable to the procurement in question.

The Procuring Entity prayed that:

- a. The Applicant's Request for Review as filed should be dismissed and to allow continuation of the procurement process.
- b. The Applicant to be condemned to pay the costs of the proceedings.

Decision on the Preliminary Objection

RULING

The Procuring Entity has raised a Preliminary Objection alleging that the Board lacks Jurisdiction to hear the Request for Review as filed by the Applicant. The Procuring Entity alleges that the application of the IBRD & IDA World Bank Guidelines to borrowers apply to the procurement process, the subject matter of the Review. It further states that at Page 46 of the said Guidelines the role of the Bank is defined and one such function is to hear any complaints arising from the procurement process. The Procuring Entity goes ahead to state that under sections 5, 6 and 7 of the Public Procurement and Disposal Act, 2005, the matter cannot be handled by the Board as it relates to a donor funded contract and as such these provisions exclude such matters from the ambit of the

operation of the Kenyan Procurement Laws. It therefore submits that the said sections make it clear that the Board has no jurisdiction.

In response the Applicant states that Section 6 of the Act deals with conflict of a condition in the donor contract and any obligations of the Republic of Kenya. The Applicant goes on to state that the Procuring Entity has therefore not demonstrated that this procurement process has conflicted with the obligations of the Republic of Kenya. The obligations of the donor/grant that are placed upon the Procuring Entity, which cannot equate itself to the Republic of Kenya, cannot be said to oust the jurisdiction of the Board as such an ouster is not automatic but premised upon certain conditions which must be demonstrated as being conflict with obligations of the Republic of Kenya. Section 7 therefore deals with donor funding and not loans or grants. The funds being advanced by World Bank towards this procurement are not donated but are a loan that shall be paid by the people of Kenya. The World Bank's role is limited to among other things, signing a letter of No Objection to the awarding of the Contract.

The Board has heard the submissions by counsel for the Procuring Entity on the Preliminary Objection and the responses from counsels for the Applicant and Interested Parties and has also looked at the grounds as contained in the Preliminary Objection filed on 24th December, 2013.

The Board has looked at the tender document and the advertisement inviting the tender and finds no specific requirement indicating the mandatory application of the IBRD Loans and IDA Credits and Grants Guidelines by World Bank Borrowers in the said documents.

The Board notes that from the evaluation reports submitted to it by the Procuring Entity the World Bank is co-financing the procurement under consideration at only 19.3% while the Government of Kenya and other partners will meet 80.7% of the costs.

Section 6 (3)(b) of the Act states that:

"Where the Republic of Kenya is required under the terms of any treaty or grant to which she is a party, to contribute from her resources, in any form, to any procurement activities within Kenya, either in part of wholly, jointly or separately, procurement through such contributions shall be-

(a)

(b) subject to the applicable provisions of this Act".

Guided by the said provisions of the Act, the Board finds that the Preliminary Objection has no merit and dismisses it forthwith. The review shall proceed to be heard on merit.

THE APPEAL

The Board having heard the submissions of all the parties to the Request for Review has identified three key issues for determination. The Applicant in its request has filed six grounds.

1. **Grounds 1, 2 and 3** have been consolidated as they raise similar issues. The issue for determination raised by the said grounds is *"Whether the Applicant's bid having been adjudged as being non-*

responsive for failure to meet mandatory requirements of the tender conditions could be cured by the actions of the Procuring Entity requiring the Applicant to extend its bid security on several occasions."

During the hearing the Applicant admitted that it submitted a bid security as part of its bid that did not meet a key condition of the requirement of the tender. Under clause 31 of the Instructions to Bidders (ITB) all bidders were required to submit bid security document that would lapse 28 days after the expiry of the tender validity period of 120 days. The Applicant states that its bid security was indeed in tandem with all the material requirements of the tender in everything else save that as an oversight the bid was to expire on 10th of July 2013 instead of 31st July, 2013. The Applicant goes on to argue that failure on its part to meet that mandatory requirement of the tender was a minor deviation that could have been cured by the Procuring Entity had it sought for clarification from it as envisioned by Section 61 of the Act. The Applicant further submitted that such a clarification would not have materially affected the substance of the tender or at all. In the alternative the Applicant goes on to state that even if its bid security did not meet the mandatory requirements of the tender requirements, the Procuring Entity having on several occasions required the Applicant together with the other bidders to extend their bid security in the course of the procurement process has through its actions cured the material defects occasioned by the improper computation of time in the Applicant's initial bid security document. The Applicant therefore submits that the Procuring Entity is therefore estopped by its own actions from disqualifying the Applicant's bid on that ground alone and cannot therefore be heard to state that the Applicant's bid was non-responsive

or at all. This is reinforced by the Applicant's assertion that although the Procuring Entity sought various extensions of all the bidders' bid securities and they obliged, under clause 3.61 of the Instructions to Tenderers, they were not duty bound to oblige. They could indeed opt not to comply with the request with the resultant consequence of forfeiture of their bid security.

The Procuring Entity in its response contested these grounds and went on to state that after the bids were opened they were immediately and in accordance with the Act and the conditions of the Tender evaluated. The evaluation process was completed on the 17th of April, 2013 and a decision to award the tender was made by its tender committee. The evaluation process was carried out within the 120 days within which the tenders were all valid. The Procuring Entity states that the Applicant's bid was found to be non-responsive at the preliminary evaluation stage and was not evaluated further in that it failed to conform with material requirement of the tender document. The Procuring Entity further contends that the requirement that all bid securities of all tenderers be valid for 28 days after the 120 day period within which the tender itself was valid was clearly communicated to all the bidders in the tender document. The Procuring Entity could have sought a clarification if it had difficulties understanding this requirement as provided by Section 31 of the Act but chose not to do so. This in effect meant that the Applicant understood its obligations clearly under the tender document and cannot be now seen to insist that the Procuring Entity was under the provisions of the law obligated to seek clarification of its bid documents. The Procuring Entity went further to state that the act of requesting all participants to keep their bid securities valid could not in any way have

assisted to cure a tender that had already been found non responsive *ab initio*. The tender subject matter of the Review is co funded by the World Bank and the Government of Kenya and that it at the outset communicated this fact to all the participants. A key requirement of the entire procurement process was that the World Bank would have to give a letter of No Objection to the Procuring Entity in order for it to continue to issue an award. The fact that this took time to come through necessitated that the Procuring Entity require the bidders to this tender to keep their bids valid until such a time it was in a position to award the tender. The Procuring Entity therefore cannot be said to have waived a mandatory requirement by such request for extension as to do so would accord the Applicant undue advantage against all the other bidders.

The Board having heard both parties on this point/issue and read all the written submissions of the parties in respect thereof must therefore determine whether a bid that at inception was materially non responsive could be cured by the action of the Procuring Entity's request to all participants for extension of their bid security in order to keep the procurement process alive. It is not in dispute that this tender was subject to the World Bank guidelines on procurement. It therefore follows that the participation of the World Bank was a key requirement to the outcome of the tender. The Board notes that at the outset the Procuring Entity through the advert calling for the bids communicated this fact to all the participants. It was therefore necessary that the Procuring Entity do allow the World Bank to participate in the process by requiring it to give a letter of No Objection prior to its issuing an award. The Board notes that this process took a rather long period of

time which meant that the Procuring Entity had on various occasions to request the participants to keep their bids valid by seeking the necessary extensions therein. The Board therefore agrees that this exercise could not be used by any party including the Applicant to cure a material defect of its tender. The fact that the Applicant's bid was found non responsive *ab initio* meant that no action of the Procuring Entity could be seen to cure that as to do so was to accord undue advantage to the Applicant against the other participants. The Board notes that under Section 2 of the Act the purpose of the procurement process in an open and competitive process is to accord all bidders fair treatment in order to *promote the integrity and fairness of all the procedures*. The Board is therefore persuaded that the Procuring Entity was right in finding the Applicant's bid as non-responsive by failure to meet a mandatory condition.

The result therefore is that these grounds of Appeal fail.

2. Grounds 4 & 5 related the issue of validity of the extension of the bid security by the Procuring Entity. The issues raised are similar hence these grounds have been consolidated. The Applicant has sought in the alternative that the Board finds that the tender validity having expired the tender process must be stopped as to continue the same violates the Act and the Regulations. In canvassing this ground the Applicant states that the Procuring Entity requested bidders to extend the bid security when the same had lapsed contrary to section 61 of the Act. Section 61 of the Act states;

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

It is the Applicant's contention that these requirements of the law have been replicated under clause 2.57 and 2.58 of the World Bank guidelines and also clause 40.1 of the tender document.

The Procuring Entity submitted that over the period from the tender opening it took all necessary steps to keep the procurement process alive by seeking extensions of the bid securities of all bidders. It further submitted that it met no opposition to its requests and that all bid securities including that of the Applicant are valid until February 2014. The Procuring Entity went further to state that the Applicant is only raising these grounds to declare the procurement process invalid now at this point because its bid has now been determined to be unsuccessful. The Procuring Entity therefore argues that this ground lacks merit and cannot be sustained. The Applicant has all along been a willing participant of the process and has recently extended its bid security to February 2014. The Applicant has never raised a query either to the Procuring Entity or the World Bank on the validity of the extensions and has been a willing participant of the procurement process. To do so now that its bid has been rejected for being non responsive raises questions as to the Applicant's motive.

The Board having heard the arguments of all the parties and perused all the documents submitted to it notes that the issue of validity of extensions of bids has been raised as an alternative prayer to the main application in that should the Board have found in favour of the prayers sought under prayers A & B by the Applicant, then the Board should have proceeded to disregard these alternative prayers as sought. However should the Board find the said prayers in A & B unsustainable, it should anyway proceed to cancel the procurement process on account

of questionability of the timeliness of the extensions by the Procuring Entity, which in itself is being canvassed as a technicality. The Board notes that although the interested party associated itself with the submissions of the Applicant it did not support or canvass the issue of validity as a key issue to this matter and has instead sought to be awarded the tender as the lowest bidder. The Board, having perused all the documents submitted by the Procuring Entity to it in respect of the tender subject matter of this review, notes that indeed the evaluation process was carried out and completed within the tender validity period. The Board notes that the Procuring Entity was obligated from the onset to seek the participation of the World Bank on the outcome of the procurement process, a process that was outside its control and hence necessitating the Procuring Entity to from time to time seek to have the bidders to extend their bid securities. The Board also notes that all bidders willingly and voluntarily acceded to the various requests and none of them including the Applicant raised a query or an issue as to whether the process was valid. The Board is therefore persuaded and holds that the Applicant is only raising this issue at this point in time because its bid has been declared unsuccessful. The Board therefore finds that this ground lacks merit and cannot be sustained.

The totality of the Board's finding is that this ground of Appeal fails.

3. The Interested Party, M/S Orad Limited, filed written submissions seeking to be declared the lowest bidder and therefore requesting the Board to award it the tender in place of the successful bidder M/S Magal Security Systems Limited. The Interested Party went further to state that its bid was found responsive in all material aspects and that the Tender

Committee of the Procuring Entity recommended that it be awarded the tender. The Issue therefore for determination as canvassed by the Interested Party was *whether the Interested Party was indeed the lowest evaluated bidder.*

From the onset the Interested Party and the Applicant acknowledge that under the conditions of the tender there was an evaluation criteria for an economic evaluation of the tenders. This clause is to be found under Part 3 of the tender document. The Interested Party however contends that no explanation has been offered to it regarding the application of this evaluation criteria and could only be left to conjure up what may have transpired. The Interested Party submitted therefore in the absence of a clear explanation then the award of the tender should be overturned and awarded to it.

The Procuring Entity in its response submitted that although the Interested Party had offered the lowest priced bid for the tender, it was not the lowest evaluated bidder to the tender. This was because after all the bids were subjected to the three stages of evaluation, that is Preliminary, Technical and Financial evaluation, the two responsive bids being that of the Interested Party and the Successful Bidder were then put through an economic evaluation process to determine the Life Cycle Costs.. This criteria was clearly spelt out in the tender document and all parties to the tender were aware of it hence it was not new or introduced later to the evaluation process. It was only after this economic evaluation process was conducted that it became possible to determine the lowest evaluated bidder to the tender. The application of this criteria was necessary in order to determine the most economic bid

of the two responsive bids and hence the successful bidder was the one whose bid was found lowest after the process was concluded.

The Board having listened to the submission of all the parties on this ground and having looked at all the documents submitted before it in respect of the same must then determine whether the Interested Party was the lowest evaluated bidder to this tender. The Board notes that the Interested Party has admitted indeed once the bids were found responsive they were to undergo an economic evaluation and that criteria is to be found in the tender document. The Board further notes that this criteria to conduct an economic evaluation was all along part of the financial evaluation of the bids and although the Procuring Entity admits not to have applied it in the first evaluation stage, it did so upon request by the World Bank, a key partner in the procurement process and hence the tables were turned in favour of the successful bidder, instead of the Interested Party. The Board having examined all the documents to this tender including the advertisement calling for the bids to the tender is persuaded that the World Bank is a key partner in the procurement process and was therefore within its rights to request the Procuring Entity to carry out a further financial evaluation to determine the Life Cycle Costs of the bids before issuing a letter of No Objection to the tender. The Board therefore holds that application of this criteria by the Procuring Entity at the behest of the World Bank was proper and not outside the conditions set out in the Tender document. The Board in arriving at this conclusion is guided by its previous decisions in the matter of *Danca Traders Limited VS. Ministry of State for Defence, Application No.25 of 2008* where the Board previously held that the "Lowest priced bidder is not necessarily the Lowest Evaluated Bidder".

Also in the matter of *Metro Consultants & Guardian Limited Vs: Chemelil Sugar Company, Application No.8 of 2008*, the Board held that the *"Evaluation criteria to be used by a Procuring Entity is the one that is contained in the tender document and no other criteria can be introduced"*. The Board therefore finds that the request by the Interested Party to be declared the lowest bidder and to be awarded the tender lacks merit and dismisses it accordingly.

4. COSTS

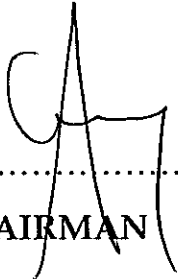
Both the Applicant and the Interested Party have sought for costs from the board. The Applicant has argued that the act of continuously extending its bid validity for a period of almost twelve months is a costly one and wishes to be granted costs towards this. The Interested Party has also sought for costs of the application. The Board has previously held that when parties submit themselves to a procurement process they do so as a commercial risk and are aware and alive to the resultant costs therein and cannot be heard to argue that they were unprepared for such eventualities. The Board therefore dismisses the request for cost in this matter accordingly.

Arising from the foregoing the Board therefore makes the following orders;

1. The Request for Review by the Applicant is hereby dismissed.
2. The Request by the Interested Party to be awarded the tender as the lowest bidder is hereby dismissed

3. The Board directs the Procuring Entity to proceed and conclude the procurement process and issue an award to the successful bidder.
4. There are no orders as to costs.

Dated at Nairobi on this th 14. day of January, 2014.



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CHAIRMAN
PPARB



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SECRETARY
PPARB

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