

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION No.04/2018& 05/2018 OF 4thJANUARY, 2018

BETWEEN

**CENTRAL ELECTRICAL
INTERNATIONAL LIMITED.....1STAPPLICANT**

AMIRAN COMMUNICATION LTD.....2NDAPPLICANT

AND

KENYA MEDICAL SUPPLIES AUTHORITY.....PROCURING ENTITY

Review against the decision of the Kenya Medical Supplies Authority in the Matter of Tender Number.GF-KEMSA-CONST-3/OIT6/2017-2018 for the Provision of Structured Cabling PABX & Security Installations on a Modern Warehouse and Office Block on LR NO. 9042/176 at Embakasi, Nairobi Kenya.

BOARD MEMBERS PRESENT

- | | |
|--------------------------------|------------|
| 1. Mr. Paul Gicheru | - Chairman |
| 2. Mr. Hussein Were | - Member |
| 3. Mrs. Josephine W. Mong'are | - Member |
| 4. Mr. Peter Bitu Ondieki, MBS | - Member |
| 5. Mr. Nelson Orgut | - Member |
| 6. Mrs. Rosemary Gituma | - Member |

IN ATTENDANCE

1. Stanley C. Miheso - Holding Brief for Secretary
2. Ms. Maryanne Karanja - Secretariat

PRESENT BY INVITATION

1st Applicant – Central Electrical International Ltd

1. Jackson MuemaKisinga - Advocate, Mohamed Madhani& Co Adv
2. Mbugua Anthony - Advocate, Mohamed Madhani& Co Adv
3. Mohammed Taki Rashid - Estimates Manager

2nd Applicant – Amiran Communication Ltd

1. Wamuyu Mwangi - Advocate, Ngulli& Company Advocates
2. Martin Mutua - Head of Department

Procuring Entity–Kenya Medical Supplies Authority

1. Kenneth Akide SC - Advocate, Akide& Company Advocates
2. Charles Juma -Director Procurement
3. David Muttu -Procurement Manager
4. Edward Buluma -Procurement Manager
5. Albert Kangere -Procurement Officer
6. Anthony Chege -Procurement Officer
7. Susan Onyango -Procurement Officer
8. Caroline W.Mugo - Procurement Officer
9. Duncan Sitati - Procurement Officer
- 10.Purity Kanini -Procurement Assistant
- 11.NariboGuyo -Procurement Assistant
- 12.R.Murithi -Director

- | | |
|-----------------------|-----------------------------------|
| 13. James Kamau | - Quantity Surveyor, Public Works |
| 14. Khadija Ramadhani | - Senior Procurement officer |
| 15. Marylyn Kioko | - Pupil |

INTERESTED PARTIES

- | | |
|---------------------|--------------------------|
| 1. Oscar Litoro | - Advocate, Master Power |
| 2. Caroline Kaganzi | - Advocate, Master Power |

MEDIA

- | | |
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| 1. Aluy Jamah | - Journalist, Standard |
| 2. Anthony Mwangi | - Reporter, Media Max |

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information and all the documents before it, the Board decides as follows:

BACKGROUND OF DECISION

The Government of the Republic of Kenya (GoK) and The Global Fund (GF) through The Kenya Medical Supplies Authority (KEMSA) has set aside funds for construction of a Modern Warehouse and Office Block on LR No. 9042/176 at Embakasi, Nairobi Kenya.

A consultant was recruited for the design and supervision of construction of the modern Warehouse and office block through a competitive request for proposal process. The consultant undertook the design work and Bills of Quantities developed.

Tender Invitation

Subsequent Open International Tenders Ref: GF-KEMSA-CONST -1-7/OIT 6/2017-2018 for Proposed Construction of Modern Warehouse and Office Block were advertised in *My Government* newspaper published in two dailies; *The Daily Nation* and *The Star Newspaper* on 17th November, 2017. The tenders closed on 11th December, 2017. The Procurement of electrical installation works was conducted through the Open International Tender (OIT) process.

Tender Opening

The public tender opening was carried out on the 11th December, 2017 at the Tender Opening Hall. The bids opening was done in the presence of bidders' representatives and the bid sums read out are as follows:

Bidder No.	Tenderer's Name	Tender Received on time	Tender Price/ Currency
1	Contemporary Electrical Enterprises Limited	Y	282,769,291.61
2	Central Electricals International Limited	Y	175,000,000.00
3	Icom Engineering Company Limited	Y	229,857,480.00
4	Master Power System Limited	Y	189,976,976.00
5	Top Choice Surveillance Limited	Y	202,507,438.00
6	Prowatt Enterprises Limited	Y	229,600,000.00
7	Amiran Communication Limited	Y	246,930,553.87
8	Micronet Power System	Y	93,088,762.00
9	Kinde Engineering Works Limited	Y	307,781,760.64
10	Njuca Consolidated Co. Limited	Y	172,910,273.90

Tender Evaluation

The tender evaluation committee consisted of representatives from the Ministry of Transport, Infrastructure, Housing and Urban Development-State Department of Public Works and KEMSA. It conducted the evaluation process from 12th to 22nd December, 2017 in three stages of preliminary examination, technical evaluation and financial evaluation.

Preliminary Examination Stage

Tenders were examined for completeness and compliance with the following mandatory requirements:

- a. Certificate of Registration/Incorporation
- b. Valid Registration with National Construction Authority (NCA 1)
- c. Valid & Current Registration with Energy Regulatory Commission – Criteria not applicable.
- d. Valid & Current County Government Plumbers Licence – Criteria not applicable.
- e. Valid & Current Registration with The Communication Authority
- f. Manuals and Materials Certificates as described in the Tables attached and Bills of Quantities
- g. Valid Tax Compliance Certificate
- h. Tender Security
- i. Duly Signed Anti-Corruption declaration form
- j. Duly signed non -Debarment declaration form
- k. Pagination/Serialization of Tender Document
- l. Duly signed Form of Tender

- m. Certificate of Site visit duly signed and stamped by the procuring entity's representatives.

These were mandatory requirements and therefore bidders who failed to meet any of the criteria above were disqualified.

Six tenderers complied fully with the mandatory requirements and therefore qualified for technical evaluation. Four tenderers were declared non-responsive and disqualified from further evaluation for failure to comply fully with the mandatory requirements for the reasons given below:

Bidder No.	Reason for non-responsiveness
02	Did not provide a valid & current registration with The Communication Authority thus disqualified from further evaluation.
03	<ul style="list-style-type: none"> ❖ This a joint venture between China Gansu International Corp. for Economic and Technical Cooperation Kenya Company Ltd (<i>Lead partner</i>) and Icom Engineering Co. Ltd. However, the Lead partner did not submit their registration with the Communication Authority ❖ Certificate of Site visit was not filled and not signed or stamped by KEMSA representative.
06	Did not provide a valid & current registration with The Communication Authority thus disqualified from further evaluation
10	<ul style="list-style-type: none"> ❖ Did not provide a valid & current registration with The Communication Authority. ❖ Did not provide Manuals and Materials Certificates. ❖ Tender security not as per prescribed format. The wordings were altered to read " <i>with the procuring entity having to substantiate his demand...</i>" instead of " <i>without the procuring entity having to substantiate his demand...</i>"

Six bidders - Nos. 01, 04, 05, 07, 08 and 09 were found responsive and recommended to proceed to technical evaluation.

Technical Evaluation Stage

This stage involved examining the technical proposals of the tenderers based on the requirements at clause 2.2 of the Instruction to Tenderers in the tender document.

The award of points considered in this section were as shown below:

No	Description	Max. Point
1	<p>Compliance with Technical Specifications</p> <ul style="list-style-type: none"> • Full Compliant----- 40 • Non-compliant ----- 0 <p><i>(Note: Tender Evaluation Committee to carry out analysis showing how decision on this requirement has been arrived at. (Detailed analysis as indicated from page 20 – 47)</i></p>	40
2	Presentation and response (This includes binding the documents, neat presentation, separation and arrangement of requested information and general response to all requirements)	2
3	Key Personnel (Attach evidence)	
	<p>Director of the firm</p> <ul style="list-style-type: none"> • Holder of degree in relevant field ----- 4 • Holder of diploma in relevant field -----3 • Holder of certificate in relevant field -----2 • Holder of trade test certificate in relevant field (At least three personnel) 1 	4
	<p>2 No. degree/diploma holders of key personnel in relevant field</p> <ul style="list-style-type: none"> • With over 10 years relevant experience ----- 8 • With over 5 years relevant experience ----- 4 • With under 5 years relevant experience -----2 	8
	<p>4 No certificate holder of key personnel in relevant field</p> <ul style="list-style-type: none"> • With over 10 years relevant experience -----4 • With over 5 years relevant experience -----3 • With under 5 years relevant experience -----1 	4
	Remarks	
	<p>8 No artisan (trade test certificate in relevant field)</p> <ul style="list-style-type: none"> • Artisan with over 10 years relevant experience --4 • Artisan with under 10 years relevant experience --2 	4

No	Description	Max.P oint
iii	Contract completed in the last Ten(10)years <u>Provide Evidence</u> Warehouses-2projectsofsimilarnature/complexity and magnitude Warehouses-Maximum-12marks (a) Above Kshs.20. Million (6 marks for each project) (b) Kshs15Million-19.9Million (4marksforeachproject) (c) Below Kshs15 Million – (2 mark for each project) Office Block/officefacilities-8marks (d) Above Kshs100 Million (4 marks for each project) (e) Kshs75 Million – 99Million – (2 mark for each project) (f) Below Kshs74.9 Million (1 mark for each project)	20
iv	On-going projects and their values <u>Provide Evidence</u>	3
v	Schedule of contractors equipment and transport (proof or evidence of ownership/Lease) a) Relevant Transport • Vans 2No. (4Mks) • Pickups 2No. (2mks) b) Equipment's/tools • Copper Cable tester 2No. (2mks) • Fiber splicing tool 2No. (2Mks) • Fiber Cable tester 1No. (2Mks) • Patching 3No. (2Mks) • Cable roller 4No. (4mks) • Drilling tools 2 No. (2Mks) • PPE Equipment's (2mks)	38
vi	Financial report	
	a) Audited financial report (last three (3) years) • Provide Audited Accounts for 2016, 2015, 2014 (3 Mks) • Average Annual Turn-over equal to or greater than the annual Expected Turnover of the project ----- (12mks) • Average Annual Turn-over above 50% but below 100% of the cost of the project -- ----- (2Mks) • Average Annual Turn-over below 50% of the cost of the project ----- 1Mks	15
	b) Evidence of Financial Resources (cash in hand, lines of credit, over draft facility, etc) • Has financial resources to finance the projected monthly cash flow* for three months ----- 15 • Has financial resources equal to the projected monthly cash flow* 10 • Has financial resources less the projected monthly cash flow* 5 • Has not indicated sources of financial resources 0	15
	Name, Address and Telephone of Banks	2
vii	Litigation History • Duly Filled 1 • Not filled 0	1
xi	Prepared for Compliance to warehouse Main contractor (to be appointed) completion time	4
Points Obtained		160

The pass mark for technical evaluation was 75%. A bidder scoring less than 75% was not considered technically responsive and therefore not eligible for financial evaluation.

The results at this stage of the evaluation were summarized as below:

	Max.Point	Bidder No.					
		01	04	05	07	08	09
Points Obtained	160	115.00	101.75	152.5	134.25	89.25	48.25
Score%		71.88%	63.59375%	95.3125%	83.90625%	55.78125%	30.15625%
Verdict		Fail	Fail	Pass	Pass	Fail	Fail

Bidders 01, 04, 08, and 09 were disqualified for not attaining the required pass mark. Bidders 05 and 07 were found responsive having attained marks above 75% and therefore recommended to proceed to financial evaluation.

Financial Evaluation Stage

Determination of Technical Score and Financial Score was done as per the table below:

Bidder No.	Bidder's Score	Technical Score (Bidder's score /Maximum Score(160) x 70)	Financial Score (Lowest Bid/Bid value under consideration x 30)	Total Combined Score	Rank
05	152.5 ≈ 95.3125%	66.72	30.00	96.72	1
07	134.25 ≈ 83.90625%	58.73	24.60	83.33	2

The responsive bid was subjected to arithmetic check in accordance with clause 5.7 of the "Instructions to Tenderers" in order to establish the error adjustment factor. Error adjustment factor is the factor by which the tender rates would be adjusted if the respective tender is successful.

The bids comparison to the official estimates as well as the arithmetic errors upon corrections vis-à-vis the tender sum are tabulated as indicated below;

Comparisons of the Responsive Bids with the Engineers Estimates and Corrected Tender Sum

Bidder No./Name		Tendered Amount (Kshs)	Variance from Estimate %	Corrected Tender Amount (Kshs)	% Error
5	Top Choice Surveillance Limited	202,507,438.380	5.09 (below)	202,456,306.53	0%
7	Amiran Communications	246,930,553.870	15.73 (above)	259,392,786,81	5.12% (To contractors Disadvantage)
Estimate		213,376,739.00	0.00		

From the above table it was noted that Bidder No. 7 had an arithmetic error of 5.12% to their disadvantage

Comparison of unit rates on major BQ items

The rates of the major items in the bills of quantities for the two (2 No.) bidders were compared as shown in below

Serial No.	BQ Item	Qualification Parameter	Bidder No. 7	Bidder No. 5
1	A1.01	42U Distribution Cabinet	• 149,000/=	• 178,171/=
2	A3.01	Floor Network Switch	• 435,985/=	• 355,631/=
3	A3.03	Core Switch	• 784,990/=	• 138,083/=
4	E1.01	Full IP-PABX Unit capable of supporting 750 Users	• 3,318,000/=	• 292,558/=
5	G1.01	15KVA True online double conversion UPS	• 1,251,833/=	• 668,857/=
6	J2.01	Cameras • Model 2 • Model 3 • Model 4 • Model 6	• 113,297/= • 116,630/= • 117,463/= • 148,493/=	• 60,400/= • 60,400/= • 63,963/= • 63,963/=
7	J1.10	Network Video Recorder	• 1,000,812/=	• 407,122/=
8	J1.20	Network Switch	• 136,790/=	• 355,631/=
9	L1.01	Half Height Glass Flap Turnstile	• 1,311,951/=	• 4,409,932/=
10	L1.03	Walk Through Metal Detector	• 911,750/=	• 178,171/=
12	M1.10	Hand Held Explosives Detector	• 4,375,000/=	• 3,207,093/=
	M1.01	Under Vehicle Surveillance System	• 6,743,151/=	• 3,652,523/=

Serial No.	BQ Item	Qualification Parameter	Bidder No. 7	Bidder No. 5
	M1.02	Bollards (Retracting)	• 1,115,473/=	• 5,514,968/=
13	N1.01	Security Platform Integration Software	• 6,500,230/=	• 356,343/=
14	N1.02	Integration Server	• 529,041/=	• 442,429/=
15	N1.03	Card Production Unit	• 548,738/=	• 712,687/=
		Remarks	Rates too high on items 4 & 13	Rates too low on item 4 & 6

In view of the above the rates were found to be fair and competitive.

Recommendation

The committee hereby recommends for consideration of award for Structured Cabling, PABX & Security Installations Works to Bidder No. 5, M/s Top Choice Surveillance Limited of P.O Box 1218 – 00618 NAIROBI, in the amount of Kshs 202,507,438.00 (Kenya Shillings Two Hundred and Two Million, Five Hundred and Seven Thousand, Four Hundred and Thirty Eight only) having attained the highest combined score of 96.72.

PROFESSIONAL OPINION

The Director of Procurement was of the opinion that the Structured Cabling, PABX & Security Installations Works tender be awarded to M/s Top Choice Surveillance Limited, in the amount of Kshs. 202,507,438.00 (Kenya Shillings Two Hundred and Two Million, Five Hundred and Seven Thousand, Four Hundred and Thirty-Eight) only inclusive of all government taxes.

REVIEW NO.4/2018

The Request for Review was lodged by M/s Central Electrical International Limited, on 4th January, 2018 in the matter of Tender No. GF-KEMSA-CONST-3/OIT6/2017-2018 for Structured Cabling PABX & Security Installations on a Modern Warehouse and Office Block on LR No. 9042/176 at Embakasi, Nairobi Kenya.

The Applicant sought the following orders of the Board:

- 1. The decision of the Procuring entity awarding Tender No. GF-KEMSA-CONST-3/OIT6/2017-2018 for Structured Cabling PABX & Security Installations on a Modern Warehouse and Office Block on LR No. 9042/176 at Embakasi, Nairobi Kenya to Messrs. Top Choice Surveillance Limited be annulled.*
- 2. The decision in respect of the award of Tender No. GF-KEMSA-CONST-3/OIT6/2017-2018 for Structured Cabling PABX & Security Installations on a Modern Warehouse and Office Block on LR No. 9042/176 at Embakasi, Nairobi Kenya be substituted by the Review Board's decision that the Applicant's bid for Structured Cabling PABX & Security Installations is successful.*
- 3. In the alternative, the decision by the procuring entity to reject the Applicant's tender as unsuccessful on the basis that it didn't provide a valid and current registration with the communication authority be nullified and the procuring entity be directed to evaluate the Applicant's technical and financial bids.*
- 4. The procuring entity be ordered to retender for the Structured Cabling PABX & Security Installations on a Modern Warehouse and Office Block on LR No. 9042/176 at Embakasi, Nairobi Kenya.*

5. *The costs of this Review be awarded to the Applicant.*

THE REQUEST FOR REVIEW N0.5/2018

M/s Amiran Communication Ltd lodged the Request for Review on 4th January 2018 in the matter of Tender No. GF-KEMSA-CONST-3/OIT6/2017-2018 for Structured Cabling PABX & Security Installations on a Modern Warehouse and Office Block on LR No. 9042/176 at Embakasi, Nairobi Kenya.

The Applicant sought the following orders of the Board:

1. *The winning bid/candidate's bid was non-responsive and ineligible.*
2. *The Procuring Entity was in breach of the Public Procurement and Disposal Act, the Public Procurement and Disposal Regulation 2015, Section 65 (1) and (2) Section 66 (2) (3) (a) and (b), Section 67 (1)(c), Section 78(5), Section 80(1) and (2), Regulation 25, Regulation 48 therein and the criteria as stipulated in the tender documents particularly page 25 Stage 1 (k) while conducting the bid evaluation.*
3. *Annul the decision of the Procuring Entity to award tender number GF-KEMSA-CONST-3/OIT/6/2017-2018 TENDER FOR PROVISION OF STRUCTURED CABLING, PABX & SECURITY INSTALLATIONS TO KENYA MEDICAL SUPPLIES AUTHORITY to the alleged winning bidder/candidate.*
4. *Direct and compel the Procuring Entity to revoke the alleged winning candidate's award as the winning bid and declare the Applicant's bid as the winning bid.*

5. *Require and compel the Procuring Entity to apply the evaluation criteria as stipulated in the Tender Document and thereafter annul the part of the evaluation and award of the tender determined irregularly and unlawfully in breach of the provisions of Public Procurement and Disposal Act and the Public Procurement and Disposal Regulations 2006 and thereafter award the tender to the applicant or as found appropriate.*
6. *Review the Procuring Entity's decision and nullify the unlawful decision made irregularly and unlawfully in breach of the tender criteria and instructions and the applicable law and Regulations cited herein above and thereafter award the tender to the applicant.*
7. *Make any other incidental orders, directions or findings as may be found fair and just.*
8. *Award costs of this review to the Applicant.*

In its Response to the Request for Review, the Procuring Entity prayed that the Application for review dated 5th January 2018 be dismissed with costs.

During the hearing of the Request for Review, the First Applicant was represented by Mr. Jackson Kisinga, Advocate from the firm of Mohamed Madhani & Company Advocates, the Second Applicant was represented by Ms Wamuyu Mwangi, Advocate from the firm of Ngulli & Co. Advocates, the Procuring Entity was represented by Senior Counsel Mr. Kenneth Akide, Advocate from the firm of Akide & Co. Advocates, while Master Power, the Interested Party, was represented by Mr. Oscar Litoro, Advocate.

The two Applicants raised twenty-six grounds of review between them, which are consolidated and argued as hereunder. The First and Second

Applicant's arguments are consolidated and jointly referred to as "the Applicant" unless the contrary reference is inferred.

Consolidated of Case No. 4 and Case No.5/2018

When the Requests for review first came up for hearing on 16th January, 2018, the board gave directions for consolidation of the requests pursuant to the provisions of regulation 82 of the Public Procurement and Disposal Regulations, 2006. The Board noted that since the two requests were related to the same tender it ordered that the requests for review be consolidated and heard together. Parties were also ordered to file and serve written submissions before 10am on 18th January 2018 and appear for hearing on the same day at 12 noon.

First Applicant's Case

The Applicant averred that *vide* a letter dated 22nd December 2017 it was notified that its bid was unsuccessful due to failure to provide a valid and current registration with the communications authority and was further informed that the tender had been awarded to M/s. Top Choice Surveillance Limited despite the glaring non-responsiveness of their bid. It averred further that it attended the public tender opening on 11th December, 2017 where it was noted that M/s. Top Choice Surveillance Limited's Tender was not paginated as mandatorily required. It also averred that it sought clarification on the issues raised in the notification letter dated 22nd December, 2017 *vide* its own letter dated 26th December, 2017, specifically asking why the Procuring Entity appeared to unilaterally waive certain

parameters or requirements in respect to the successful bidder. The Applicant added that the Procuring Entity responded *vide* letter dated 29th December, 2017 stating that despite the finding during the tender opening, the document submitted to the Tender Evaluation Committee was properly paginated, which, to the Applicant, implied improper changes and/or manipulation were made to the successful bid after the tender opening.

The Applicant submitted that the Procuring Entity erred in awarding the tender to a non-responsive tender within the meaning of Section 79 of the Act as the successful tender had failed to paginate their tender documents as found in the tender opening. It further submitted that the Procuring Entity erred in finding that it failed to provide a valid and current registration with the Communication Authority and hence declaring its bid unsuccessful even though it had provided the said document. It also submitted that the Procuring Entity erred by considering minor deviations that did not warrant the outright disqualification of its bid that had materially complied with the requirements within the meaning of Section 79 of the Act.

The Applicant contended that the Procuring Entity failed to adhere to the provisions of Section 3 of the Act by unilaterally and improperly engaging the successful bidder and allowing alteration of documents without the knowledge or participation of the Applicant, which constituted collusive or fraudulent practice within the meaning of Section 66 of the Act. It also contended that the Procuring Entity failed to adhere to the provisions of Section 86 of the Act by awarding the tender to M/s. Top Choice Surveillance Limited whose bid was not the lowest evaluated price or the responsive proposal with the highest score in the technical and financial proposals.

In conclusion, the Applicant alleged that as a result of the improper award it would be exposed to loss of a potentially gainful opportunity and professional reputation hence the Board ought to intervene and review.

Second Applicant's Case

The Second Applicant, in addition to the First Applicant's submissions averred that the Procuring Entity irregularly, unfairly, discriminately and without any plausible basis failed to award its bid which was substantially, fully compliant and responsive in its entirety in accordance with Article 227 of the Constitution and Section 86(1) of the Act.

Procuring Entity's Response

The Procuring Entity opposed the request for review in its response, stating that it evaluated and awarded the tender in accordance with provisions of the Act, and the regulations thereunder and in conformity with the evaluation criteria set out in the tender document. It submitted that the tender opening was carried out on 11th December, 2017 and witnessed by bidder's representatives who opted to attend. The Procuring Entity submitted further that, in the evaluation of the tender document it followed the requisite criteria set out in the tender document that included mandatory pagination of the document. It also submitted that the evaluation committee, which is the one mandated to verify compliance by bidders with the tender requirements established that the winning bidder's document was paginated contrary to comments made by the Tender opening of tenders.

The Procuring Entity averred that it awarded the tender to the tenderer with the highest combined technical and financial score of 96.72 and who also

conformed to all the eligibility and mandatory requirements in the tender document in accordance with Section 86 of the Act. It averred further that the second Applicant's combined technical and financial score was not the highest and could therefore not have been awarded the tender. It contended that submission of registration certificate by the Communication Authority was a mandatory requirement, which the Applicant failed to comply with leading to disqualification of its tender. The Procuring Entity added that, contrary to the First Applicant's averment, failure to comply with a mandatory requirement could not be termed as a minor deviation and therefore that the Applicant's bid was unsuccessful.

The procuring Entity denied the Applicant's allegation that it altered the tender document stating that it handed over the tender documents to the evaluation committee as received from the tender opening committee. It denied further that the winning bidder engaged it in unsolicited communication stating that the winning bidder, when writing to the Procuring Entity, was reacting to an anomaly it had noticed in the tender opening register, a matter which was already in the public domain and that no breach of Section 65(1) and (2) and 67(1)(c) of the Act had been occasioned.

The Interested Party's Response

Mr. Nguringa, Advocate, submitting on behalf of the Interested Party and who was also the successful bidder, opposed the Request for Review. He stated that there was a representative of Top Choice who is the interested party herein but that the interested party's representative was not privy to the report as made by the opening committee. He stated further that Section 64 of the Act limits all communication and enquires between parties in a

procurement process to be in writing and that Section 65 of the Act talks of communication must not be unsolicited. He also stated that when the interested party discovered that there the report itself of the tender opening committee was a means of communication, which solicited a response.

The Interested Party averred that the tender opening committee is a ceremonial committee whose mandate expires on the day the tenders are opened and therefore the recourse an aggrieved party has is to communicate with the Procuring Entity, which, in this case, Top Choice did through an open letter. It averred further that the letter did not wish to canvass the award of the tender but was simply telling the Procuring Entity that the Interested Party's tender was paginated. It also averred that the evaluation committee's role as per the Act was not just confirmed to digits but to the suitability of the tender. The Interested Party emphasized that the tender was paginated and that the mode of the pagination adopted was detailed and customized to the tender. The serialization pagination of the tender was KSL/0001/GF-KEMSA-CONST-3/OIT6/2017/2017 as a footnote.

Turning to whether the thoughts of an opening committee are incurable, the Interested Party's submission was that they are curable. In its view, as per Section 78(5) of the act, "the tender opening committee shall assign an identification number to each tender and record the number of pages received", and maintained that pagination was not a number.

Moving on to the issue of whether its tender was responsive or not, the Interested Party submitted that its tender was responsive within the meaning of Section 79(2)(b) of the act and that errors and oversight could be

corrected corrected without affecting the substance of the tender. Pagination, in the Interested Party's view would not affect the substance of the tender.

APPLICANT'S REPLY

In reply, on behalf of the First applicant, Kisinga, Advocate submitted the function of the tender opening committee had been trivialized before this Board. It stated that the tender opening committee was a body that was instituted pursuant to the Act and that its mandate under Section 78(5) was couched in mandatory terms in that the tender opening committee shall assign an identification number to each tender and record the number of pages received. To the Applicant, the mischief sought to be curtailed by the tender opening committee in its minutes was that parties may add documents or remove or alter the tender after the opening.

On whether or not the communication were solicited, Mr. Kisinga submitted that for a Procuring Entity to solicit it must have issued a letter asking for clarification but that was not the case in this instance contrary to the meaning of Section 65 of the Act. Further, observed the advocate, members of the opening committee made observations and signed them pursuant to the provisions of the section 78(10) of the Act and that, those observations were that it was not paginated. He also observed that the Interested Party in a tacit agreement stated that even if its documents were not paginated, that was something that could be overlooked under Section 79 of the Act. He urged the Board to allow the request for Review.

Ms. Wamuyu, for the Second Applicant aligned herself to Mr. Kisinga's submissions and prayed that the request for review be allowed,

THE BOARD'S FINDINGS

The Board has considered the submissions made by parties and has further examined all the documents submitted to it and has identified the following issues for determination in this Request for Review:

- (i) Whether the Procuring Entity breached the provisions of Sections 79 (1) and 80 (2) of the Act by failing to observe the mandatory requirements of the tender document with regard to pagination while evaluating the successful bidder's tender.
- (ii) Whether the First Applicant's bid was wrongly disqualified for alleged failure to provide a valid registration with the Communication Authority thereby breaching the provisions of Section 80 (2) of the Act.
- (iii) Whether the Procuring Entity awarded the tender to a bidder other than the bidder with the lowest evaluated price contrary to the provisions of Section 86 (1) of the Act.

The Board will now proceed to determine the issues framed for determination as follows:

1. **As to whether the Procuring Entity breached the provisions of Section 80 (2) of the Act by failing to observe the mandatory requirements of the tender document with regard to pagination while evaluating the successful bidder's tender.**

The Board observes that Tender Number GF-KEMSA-CONST-3/OIT6/2017-2018 for the Provision of Structured Cabling PABX & Security Installations on a Modern Warehouse and Office Block on LR NO. 9042/176 at Embakasi, Nairobi for the Kenya Medical Supplies Authority was opened on 11th December, 2017 and minutes for tender opening prepared by the tender

opening committee. The Board further observes that the Procuring Entity's tender evaluation committee evaluated the tenders through three stages of preliminary examination, technical evaluation and financial evaluation and recommended award of the tender to the Interested Party, Messrs Top Choice Surveillance Limited at a sum of Kshs 202,507,438.00, having attained the highest combined score of 96.72 in its report dated 22nd December, 2017. The successful and unsuccessful bidders were all notified by the Procuring Entity of the outcome of the evaluation process *vide* letters dated 22nd December, 2017. The letter to the Applicant stated thus:

"We make reference to the above tender and advise that your bid was unsuccessful due to the following reason;

❖ Did not provide a valid & current registration with The Communication Authority

"Further, kindly be advised that the above tender was awarded to M/s Top Choice Surveillance Limited."

The Board also observes that the Applicant protested the award of the tender to the successful bidder in a letter to the Procuring Entity dated 26th December 2018. The said letter stated as follows:

"We seek clarification as to why the proposed bidder that's being recommended for award has been waived of certain requirements whilst the others did not get the same benefits. During the tender opening, it was clear that the recommended bidder had not fully paginated his document. Based on this we wish to challenge this award."

The Procuring Entity, *vide* letter dated 29thDecember 2017, refuted the Applicant's assertion and stated that the Evaluation Committee on scrutiny of the tender established that it had been paginated.

The matter for the Board to establish is whether the Procuring Entity acted properly in failing to disqualify the successful bidder after its bid was found by the tender opening committee not to have been paginated.

The Board has heard arguments by the First and Second Applicants that the successful bidder was awarded the tender despite the glaring non-responsiveness of its tender. The Applicants argued that the tender opening committee found that the tender submitted by the successful bidder was not paginated and contended that, pagination being a mandatory requirement, the successful tender ought to have been disqualified at the preliminary evaluation stage. The Board has further heard opposing arguments by the Procuring Entity that the evaluation committee, which is the organ mandated to verify compliance by bidders with the tender requirements, established that the successful bidder's document was indeed paginated contrary to comments made by the Tender Opening Committee and asserted that no tenderer was disqualified during the opening of tenders.

The Board has looked at relevant documents to assist in the determination of this issue. The tender evaluation criteria found at Section III of the tender document, and specifically Clause 1.1 provides mandatory requirements of evaluation as follows:

- "a)
- b)

e)Valid & Current Registration with The Communication Authority – (Applicable to ICT & Security Bidders)

k) Pagination/Serialization of Tender Document (Applicable to all)”

The minutes of the tender opening titled, **PUBLIC TENDER OPENING FOR TENDER NO. GF-KEMSA-CONST-3/OIT6/2017-2018 ON 11TH DECEMBER 2017**,at page 1 of 2 provides ten columns containing the following information for each bidder:

- i. Firm Name
- ii. Original Tender
- iii. Copy of Tender
- iv. Assigned Number
- v. Receipt Number
- vi. Financial Institution providing security
- vii. Bid Value
- viii. Bid Bond Value
- ix. Bid Bond Validity
- x. Comments

The Board notes that under the item of Comments, entries for each bidder was either *partially paginated*, *not paginated* or the actual number of pages shown. It is noted that the tender for the successful bidder was shown as *not paginated* while the tenders for the First and Second Applicants were shown as *703 pages* and *partially paginated*, respectively.

The Board observes that during evaluation, the evaluation committee of the Procuring Entity found that the tender for the winning bidder was paginated and hence responsive to the mandatory requirements.

The Board has established that pagination/serialisation was part of the mandatory evaluation criteria set out at the preliminary evaluation stage of the tender. The Board has further established that the successful tender was marked as not paginated in the tender opening committee minutes. It is also not lost on the Board that the Procuring Entity's evaluation committee found that the successful bidder's tender was paginated, contrary to the findings of the tender opening committee.

A question then arises, which one, between the tender opening committee and the tender evaluation committee, has the mandate of determining pagination of the tender document. The Board's attention is drawn to the roles of the tender opening committee spelt out at Section 78 of the Act as follows:

Section 78 (5) *"The tender opening committee shall assign an identification number to each tender and record the number of pages received. "*

Section 78 (6) *"As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—*

(a) the name of the person submitting the tender;

(b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and

(c) if applicable, what has been given as tender security.

Section 78 (7) *"No tenderer shall be disqualified by the procuring entity during opening of tenders. "*

Section 78 (10) *“The tender opening committee shall prepare tender opening minutes which shall set out-*

- (a) a record of the procedure followed in opening the tenders; and*
- (b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders. “*

From the plain reading of Section 78 of the Act, the tender opening committee's role in determining the issue that has arisen - whether the tender was paginated or not - rests with the recording of the number of pages received in a tender. It is the respectful view of the Board that the role of the opening committee does not extend to establishing whether a tender has been paginated/serialised, which role, the Board believes, is firmly the province of the tender evaluation committee. In the instant case, the tender evaluation committee found that the successful tender was paginated. The Board's own perusal of the successful tender confirmed that it had indeed been paginated.

The Board however importantly notes that before the date of submission of the tenders the parties were invited for a pre-bid meeting between bidders and the Procuring Entity on 29th November, 2017.

According to the minutes of the pre-bid meeting held on 29th November, 2017 various bidders raised several issues and sought several clarifications on various aspects of the criteria set out in the tender document. One of enquiries dealt with the criteria for the determination of the successful bidder under this tender.

Pursuant to the said inquiry, the Procuring Entity issued Addendum No. 1 dated 29th November, 2017 where it clarified that for the purposes of the

main contract and the sub-contracts failing under this procurement, an award would be made to the bidder who had attained the highest total combined technical and financial weighted score.

The said addendum reads as follows in part:-

“RECOMMENDATION FOR AWARD

The bidder with the highest total combined weighted score shall be recommended for award”.

It is the Board’s view based on the provisions of Section 75 of the Public Procurement and Asset Disposal Act 2015 that a Procuring Entity may amend a tender document at any time before the deadline for the submission of tenders by issuing an addendum and that such an addendum may be issued by the Procuring Entity on its own initiative or in response to an inquiry by a candidate or a tenderer.

Under the provisions of Section 75(4) of the said Act, where an addendum is issued as was done in this case, the addendum shall be deemed to be part of the tender document.

The said Section 75(4) of the Act reads as follows:-

75(4): The addendum shall be deemed to be part of the tender documents.

It is the Board’s further view that based on Addendum 1 dated 29th November, 2017, the Procuring Entity effectively amended the award criteria set out under clause 6.1 of the tender document and thereby aligned it with the financial evaluation and award criteria set out at page 25 of the tender document and which the Board has already reproduced above.

Based on all the above findings, the Board therefore holds that the tender in issue was to be awarded to the tenderer with the highest combined technical and financial score but not to the tenderer with the lowest evaluated price as contended by Counsel for the Applicant and Counsel for the 2nd interested party.

Before concluding its determination of this issue, the Board wishes to comment on the arguments by the Applicants that the successful bidder engaged in unsolicited correspondence with the Procuring Entity after the tender opening. It is not in dispute that the successful bidder wrote to the Procuring Entity on vide letter dated 13th December, 2017 seeking to clarify that the tender it submitted on 11th December, 2017 was fully serialized and paginated. This was after the tender opening minutes had shown otherwise. The Procuring Entity responded to the inquiry *vide* its letter dated 15th December, 2017, affirming that it had checked and established that indeed the tender documents had been serialized.

The issue that arises here is whether there was unsolicited communication between the successful bidder and the Procuring Entity after the deadline for submission of tenders in contravention of Section 65 (1) of the Act. The Board notes that the Applicant's letter of 13th December 2017 arose from the record of the tender opening minutes dated 11th December 2017. The tender opening was a public event attended by bidders or their representatives. The bidders were therefore entitled to a record of the tender opening at a meeting they participated by attending and were at liberty to query the record as appropriate. The action of a bidder raising a query on the content of the tender opening minutes does not, in the Board's view, amount to

unsolicited communication and the Board finds no breach of the provisions of Section 65 (1) in the instant case.

Putting aside for a moment the finding of the evaluation committee on pagination of the subject tender, it is the further view of the Board that the tender opening committee is not an evaluation committee bestowed with powers to disqualify a non-responsive tender even if the tender appeared non-responsive on the face of it at the tender opening stage. The tender opening committee is only limited by law to reading out and recording the number of pages comprised in each tender and pass over the process of evaluation to the tender evaluation committee.

During the hearing of the request for review, counsel for the two applicants urged the Board to find that the procuring entity and the successful bidder altered the tender document by causing it to be paginated after the tender opening meeting contrary to the observation by the tender opening committee in the tender opening minutes.

The Board has considered the said submissions and has perused the successful bidder's original tender document and finds that the same was fully paginated.

The Board further notes that the matters complained against squarely fall under the provisions Part XVI of the Act dealing with offences. Section 176 (1), (d), (g) and (i) in particular criminalizes such conduct if proved.

The High Court held in the case of Republic -vs- The Public Procurement Administrative Review Board, Kenya Electricity Generating Co. Ltd (Exparte

the Consortium of H. Young & Co. (E.A) Limited and Yantai Jereth Petroleum Equipment and Technologies Company Ltd) [Nai HC JR Appl. No. 551 of 2017] that a Procuring Entity cannot disqualify a bidder based on an allegation of the commission of an offence under the provisions of Section 176 of the Act. The court stated as follows at holding No. 70 in the said decision:-

“(70) Whereas reliance was placed on Section 176 of the Act as supporting the action that was taken by the interested party herein, suffice it to say that was not the provisions that the interested party relied on in not awarding the tender to the 2nd Respondent. The reliance on that provision can only be an afterthought. In any case that Section falls within the part dealing with offences. It is doubtful whether the Procuring Entity has the power to find a person guilty of offences in order to justify the cancellation of an award”.

The Board has adopted the same approach while dealing with cases where allegations of the commission of offences have been raised against a bidder in Request for Review in the case of *Baraki International Limited =Versus=Kenya Urban Roads PPARB Application Number 8 Of 2017* which was also adopted by the Board in the case of *Joint Venture of Baran International and Integrated Solutions Africa International Entrepreneurship versus The National Irrigation Board (PPARB Application Number 101 of 2017)* that the Board cannot sit as a criminal trial court or debar a bidder from participating in a procurement process in Kenya pursuant to allegations of criminal conduct under the provisions of Section 176 of the Act.

The Board wishes to adopt the reasoning in the above two decisions in the particular circumstances of this case.

In view of all the foregoing findings, the Board finds that the tender opening committee of the Procuring Entity overreached its mandate in declaring the successful tender as *not paginated*. The Board further finds that the Procuring Entity observed the mandatory requirements of the tender document with regard to pagination while evaluating the successful bidder's tender. This ground of review therefore fails and is disallowed.

2. As to whether the First Applicant's bid was wrongly disqualified for alleged failure to provide a valid registration with the Communication Authority thereby breaching the provisions of Section 80 (2) of the Act.

The Board has observed elsewhere in this decision that the tender of the First Applicant was disqualified for failure to provide a valid and current registration with the Communication Authority. The decision of the Procuring Entity was conveyed to the First Applicant *vide* letter dated 22nd December, 2017 which read, in part, as follows:

"We make reference to the above tender and advise that your bid was unsuccessful due to the following reason;

❖ Did not provide a valid & current registration with The Communication Authority."

In its submission before the Board, the First Applicant protested the finding of the Procuring Entity that the First Applicant failed to provide a valid and current registration with the Communication Authority in its tender leading to its tender being declared unsuccessful and went on to argue that it had,

on the contrary, provided the said document. The Board also heard the First Applicant's averment that the Procuring Entity erred by considering minor deviations which did not warrant the outright disqualification of its bid which had materially complied with the requirements within the meaning of Section 79 of the Act.

The Board heard the counter submissions of the Procuring Entity that the registration certificate by the Communication Authority was a mandatory requirement, which the Applicant failed to comply with leading to disqualification of its bid.

To determine this issue, the Board has perused the tender document and established that the requirement that a bidder provides Valid and Current Registration with The Communication Authority (CA) was a mandatory requirement of the tender, which would result in disqualification for a non-conforming tender. The Board has further perused the Applicant's original tender document and did not find the Applicant's registration certificate with CA. It is also not lost on the Board that the Applicant did not provide any proof of registration with CA in its bundle of documents filed with the Board for this Request for Review.

The Board's attention is drawn to Section 79 (1) of the Act, which states as follows:

Section 79 (1) *"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."*

As already observed, the Applicant did not provide proof that it provided a valid and current certificate of registration with the Communication

Authority in its tender. The Board holds the view that a valid certificate of registration with Communication Authority is a fundamental mandatory requirement and the lack of the certificate denies the Procuring Entity the opportunity to determine the qualifications and capability of the bidder to perform the service for which it was bidding. The Board therefore finds that the disqualified of the Applicant's tender from the evaluation process was proper and proceeds to disallow this ground of review.

3. As to whether the Procuring Entity awarded the tender to a bidder other than the bidder with the lowest evaluated price contrary to the provisions of Section 86 (1) of the Act.

The Board has heard arguments of the Applicants that the Procuring Entity failed to adhere to the provisions of Section 86 of the Act by awarding the Tender to M/s. Top Choice Surveillance Limited whose bid was not the lowest evaluated price or the responsive proposal with the highest score in the technical and financial proposals. The said Section 86 (1) (a) of the Act states that:

Section 86 (1) *"The successful tender shall be the one who meets any one of the following as specified in the tender document—*
(a) the tender with the lowest evaluated price."

The matter for the Board to determine is whether the winning bidder was correctly awarded the tender. As already observed elsewhere in this decision, the tender subject of this request for review was opened on 11th December 2017 with ten bidders submitting tenders. The tender results were as shown in the table below:-

Bidder No.	Tenderer's Name	Tender Received on time	Tender Price/ Currency
1	Contemporary Electrical Enterprises Limited	Y	282,769,291.61
2	Central Electricals International Limited	Y	175,000,000.00
3	Icom Engineering Company Limited	Y	229,857,480.00
4	Master Power System Limited	Y	189,976,976.00
5	Top Choice Surveillance Limited	Y	202,507,438.00
6	Prowatt Enterprises Limited	Y	229,600,000.00
7	Amiran Communication Limited	Y	246,930,553.87
8	Micronet Power System	Y	93,088,762.00
9	Kinde Engineering Works Limited	Y	307,781,760.64
10	Njuca Consolidated Co. Limited	Y	172,910,273.90

The tender was evaluated through three stages of preliminary, technical and financial evaluation. Six bidders were found to be responsive and recommended to proceed for technical evaluation. The First Applicant was declared non-responsive while the Second Applicant was found to be responsive at the preliminary evaluation stage. The six responsive bidders were evaluated for technical responsiveness to determine if they met the pass mark of 75%. Two bidders made the score while four did not. The four who included the Second Applicant were disqualified at this stage from further evaluation. The successful bidders at the technical evaluation stage were subjected to financial evaluation and Bidder 05, Top Choice Surveillance Limited emerged the winning bidder.

The Board has perused the tender evaluation report and observes that the winning bidder was awarded the tender after having scored the highest combined score of 96.72. The Board notes that the successful bidder scored 66.72 at technical evaluation and 30.00 at financial evaluation. The combined score was 96.72, which was the highest for any bidder.

In addition to attaining the highest combined score in the subject matter of this Request for Review the bidders who made it past the technical evaluation stage were two - Bidders 05 and 07 - whose tender amounts were as shown in the table below.

Bidder No. /Name		Tendered Amount (Kshs)	Variance from Estimate %	Corrected Tender Amount (Kshs)	% Error
5	Top Choice Surveillance Limited	202,507,438.380	5.09 (below)	202,456,306.53	0%
7	Amiran Communications	246,930,553.870	15.73 (above)	259,392,786,81	5.12% (To contractors Disadvantage)
	Estimate	213,376,739.00	0.00		

Based on the above further evidence the Board further finds that upon the carrying out of the financial evaluation the Successful bidder's price was also the lowest bid price-wise. The successful bidder would therefore have still emerged successful whether the criteria was the one based on the highest combined technical and financial score or if the determination was based on the lowest evaluated price.

The sum total of the foregoing findings is that the Procuring Entity properly awarded the subject tender to the successful bidder under the provisions of Section 86(1) of the Act. Consequently, this ground of review also fails and is disallowed.

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review.

1. The Request for Review dated 4th January, 2018 and filed with the Board on the same date by the First Applicant, M/s Central Electrical International Limited, in the Matter of Tender Number GF-KEMSA-CONST-3/OIT6/2017-2018 for the Provision of Structured Cabling PABX & Security Installations on a Modern Warehouse and Office Block on LR NO. 9042/176 at Embakasi, Nairobi Kenya for the Kenya Medical Supplies Authority and is hereby dismissed.
2. The Request for Review dated 4th January, 2018 and filed with the Board on 5th January, 2018 by the Second Applicant, M/s Amiran Communication Limited, in the Matter of Tender Number GF-KEMSA-CONST-3/OIT6/2017-2018 for the Provision of Structured Cabling PABX & Security Installations on a Modern Warehouse and Office Block on LR NO. 9042/176 at Embakasi, Nairobi Kenya for the Kenya Medical Supplies Authority and is hereby dismissed.
3. The Procuring Entity is at liberty to proceed with the procurement process to its logical conclusion.
4. Each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 23rd day of January 2018.


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CHAIRMAN
PPARB


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SECRETARY
PPARB