

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 48/2020 OF 6<sup>TH</sup> APRIL 2020**

**BETWEEN**

**XTRANET COMMUNICATIONS LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**AGRICULTURE AND FOOD AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**AND**

**AGRICULTURE AND FOOD AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**JENETWORKS VENTURES LIMITED.....INTERESTED PARTY**

Review against the decision of Agriculture and Food Authority dated 23<sup>rd</sup> March 2020 with respect to Tender No. AFA/T/03/2019-2020 for the Supply, Installation and Commissioning of Broadband Internet, Wide area Network, Email Services, WI-FI Network and Integration of IP based voice communication.

**BOARD MEMBERS**

- |                           |              |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa       | -Chairperson |
| 2. Ms. Phyllis Chepkemboi | -Member      |
| 3. Ms. Robi Chacha        | -Member      |

## **IN ATTENDANCE**

1. Mr. Stanley Miheso

-Holding brief for the Secretary

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Agriculture and Food Authority (hereinafter referred to as “the Procuring Entity”) invited sealed tenders from eligible candidates to bid for Tender No. AFA/T/03/2019-2020 for the Supply, Installation and Commissioning of Broadband Internet, Wide area Network, Email Services, WI-FI Network and Integration of IP based voice communication (hereinafter referred to as “the subject tender”) by publishing an advertisement dated 28<sup>th</sup> January 2020 in My Gov Publication Website, the Procuring Entity’s Website and the Public Procurement Information Portal.

### **Bid Submission Deadline and Opening of Bids**

The Procuring Entity received a total of 3 bids by the bid submission deadline of 12<sup>th</sup> February 2020. The same were opened on the same date at 11.30 a.m. at the Procuring Entity’s headquarters by a Tender Opening Committee. The bids were recorded as follows:-

<b>No Assigned</b>	<b>Bidder Name</b>	<b>No of Copies</b>	<b>Tender Sum(ksh)</b>	<b>Observations</b>
1	Xtranet Communications Limited	2	38,312,418.00 14,985,228.00	Three years. Year 1.

<b>No Assigned</b>	<b>Bidder Name</b>	<b>No of Copies</b>	<b>Tender Sum(ksh)</b>	<b>Observations</b>
2	Liquid Telecommunications Ltd	2	16,958,263.00	Per annum
3	Jenetworks Venture Ltd	2	15,892,512.00	Per annum

## **Evaluation of Bids**

The Director General of the Procuring Entity appointed a Tender Evaluation Committee who evaluated bids in the following stages:-

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation

### **1. Preliminary Evaluation**

At this stage, the Evaluation Committee applied the evaluation criteria outlined in the Appendix to Instructions to Tenderers at page 17 of the Tender Document. The results of Preliminary Evaluation were recorded as follows:-

<b>Bidder No.</b>	<b>Bidder 1</b>	<b>Bidder 2</b>	<b>Bidder 3</b>
<b>REMARKS</b>	RESPONSIVE	RESPONSIVE	RESPONSIVE

The three tenderers were responsive at the preliminary stage and thus qualified for the Technical Evaluation.

## 2. Technical Evaluation

At this stage, the Evaluation Committee applied the evaluation criteria under Clause 2.29.2 of the Appendix to Instructions to Tenderers of the Tender Document. Bidders were further required to achieve a minimum technical score of 75% to proceed to Financial Evaluation. At the end of Technical Evaluation, the Evaluation Committee observed that all the three bidders attained the minimum pass mark of 75%, thus qualified for Financial Evaluation.

## 3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria under Clause 2.29.3 of the Appendix to Instructions to Tenderers of the Tender Document which specified that award of the subject tender would be made to the lowest evaluated bidder. An analysis of the prices of the three bidders was recorded as follows:-

### Financial Analysis Table.

No	Bidder Name	Amount per year	Total cost for 3years.
1	Xtranet Communications Limited	Year 1: 14,985,228.00 Year 2: 11,663,568.00 Year 3: 11,663,568.00	38,312,418.00
2.	Liquid Telecommunications Ltd	16,958,263.00	50,874789.00
3.	Jenetworks Venture Ltd	15,892,512.00	47,677536.00

## **Recommendation**

At the end of Financial Evaluation, the Evaluation Committee recommended the lowest evaluated bidder, M/s Xtranet Communications Limited for award of the subject tender at its total cost for the three years being **Kshs. 38,312,418.00**

## **Professional Opinion**

In a professional opinion dated 28<sup>th</sup> February 2020, the Interim Manager, Procurement reviewed the procurement process and the evaluation process as contained in the Evaluation Report reiterating the observations and recommendation made by the Evaluation Committee that the subject tender be awarded to M/s Xtranet Communications Limited at its total cost for the three years being **Kshs. 38,312,418.00**. He urged the Interim Director General to approve the said recommendation.

## **Re-Evaluation**

Upon reviewing the Professional Opinion dated 28<sup>th</sup> February 2020, the Interim Director General did not approve the same, but appointed a Re-evaluation Committee vide a memo dated 16<sup>th</sup> March 2020.

The newly appointed Evaluation Committee proceeded to evaluate tenders in the Preliminary, Technical and Financial Stages. At the end of Financial Evaluation, M/s Jenetworks Ventures Ltd was found to be the lowest

evaluated bidder at an annual total cost of Kshs. 15,892,512.00 thereby recommended for award of the subject tender.

### **Professional Opinion**

In a professional opinion dated 23<sup>rd</sup> March 2020, the Interim Manager, Procurement, outlined the background to the procurement process noting the outcome of the first evaluation process and the direction by the Interim Director General for a re-evaluation. He further reviewed the Re-evaluation Report and concurred with the recommendation that the subject tender be awarded to M/s Jenetworks Ventures Ltd. He therefore urged the Interim Director General to approve the said recommendation. The Interim Director General approved the said professional opinion on 23<sup>rd</sup> March 2020.

### **Notification to Bidders**

In letters dated 23<sup>rd</sup> March 2020, the Interim Director General notified the successful and unsuccessful bidders of the outcome of their bids.

### **THE REQUEST FOR REVIEW**

M/s Xtranet Communications Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 6<sup>th</sup> April 2020 together with a Statement sworn and filed on even date and a Further Statement filed on 21<sup>st</sup> April 2020 seeking the following orders:-

- a) An order nullifying the entire procurement process in Tender No. AFA/T/03/2019-2020 including notification of award dated 23<sup>rd</sup> March 2020 addressed to Jenetworks Venture Limited and notification of unsuccessful bids dated 23<sup>rd</sup> March 2020 to unsuccessful bidders;***
- b) An order directing the Procuring Entity to tender afresh for Supply, Installation and Commissioning of Broadband Internet, Wide area Network, Email Services, WI-FI Network and Integration of IP based voice communication; and***
- c) An order condemning the Procuring Entity to pay Costs of this Request for Review to the Applicant.***

In response, the Procuring Entity lodged a Response to the Request for Review dated and filed on 14<sup>th</sup> April 2020, a Further Response dated and filed on 22<sup>nd</sup> April 2020 and a Digest and Bundle of Authorities filed on even date while the Interested Party lodged a Memorandum of Response dated 20<sup>th</sup> April 2020 and filed on 22<sup>nd</sup> April 2020 together with a Supporting Affidavit sworn and filed on even date and a List of an Authority.

On 16<sup>th</sup> March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website ([www.ppra.go.ke](http://www.ppra.go.ke)) in recognition of the challenges posed by the COVID-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before

the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

In compliance with the directions of the Board, the Applicant lodged its Written Submissions dated and filed on 21<sup>st</sup> April 2020 while the Procuring Entity lodged its Written Submissions which are dated 21<sup>st</sup> April 2020 and filed on 22<sup>nd</sup> April 2020. The Interested Party filed its Written Submissions on 22<sup>nd</sup> April 2020.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings together with the confidential documents submitted to it pursuant to Section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds that the following issues call for determination:-



- I. Whether the Procuring Entity evaluated bids received in the subject tender within the statutory period provided in section 80 (6) of the Act;**
- II. Whether the Procuring Entity took into account the stand-still period under section 135 (3) read together with section 167 (1) of the Act when notifying the Interested Party of the outcome of its bid pursuant to section 87 (1) of the Act; and**
- III. Whether the Tender Validity Period of the subject tender existed at the time the Procuring Entity issued a letter of notification of award to the Interested Party.**

The Board now proceeds to address the above issues as follows:-

On the first issue, the Board notes, the Applicant challenged the period within which the Procuring Entity conducted its first evaluation and re-evaluation of bids in the subject tender. In the Applicant's view, the Procuring Entity conducted its evaluation for a period of more than 30 days from the date of tender opening.

The Procuring Entity on the other hand, submitted in its Response to the Request for Review that bids submitted to it were opened on 12<sup>th</sup> February 2020 and that a first evaluation was done and concluded on 27<sup>th</sup> February

2020. The Interim Manager, Procurement submitted a professional opinion on 28<sup>th</sup> February 2020 for consideration by the Accounting Officer of the Procuring Entity.

Upon considering the same, the Accounting Officer, that is, the 1<sup>st</sup> Respondent herein did not approve recommendation of award to the Applicant, but re-constituted a committee to conduct a re-evaluation vide a memo dated 16<sup>th</sup> March 2020. The said re-evaluation was concluded on 20<sup>th</sup> March 2020. Thereafter, the Interim Manager, Procurement issued a professional opinion on 23<sup>rd</sup> March 2020 which was approved by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent, through a letter dated 23<sup>rd</sup> March 2020, proceeded to notify the Interested Party that it was awarded the subject tender and that the Interested Party should confirm its acceptance of the award within 7 days from the date thereof following which a formal contract would be entered. It was the Procuring Entity's contention that the 1<sup>st</sup> Respondent is not bound by an evaluation report and professional opinion when making a decision whether or not to award a tender and that this can be inferred from the provisions of section 80 (5) and 84 (3) of the Act.

The Interested Party in its Written Submissions took the view that the Procuring Entity ought to conduct evaluation within a maximum period of 30 days but within the tender validity period. Further to this, the Interested Party contended that the decision for re-evaluation was a fresh decision conducted in 4 days after the 1<sup>st</sup> Respondent ordered the same.

Having considered parties' submissions, the Board deems it necessary to establish the meaning of evaluation and at what point evaluation ends.

The Black's Law Dictionary, 6<sup>th</sup> Edition defines "Bid Evaluation" as follows:-

***"After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award."***

Section 85 of the Act further states that:-

***"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers"***

From the above provisions and having noted the ordinary meaning of bid evaluation, it is the Board's considered view that evaluation is conducted with a view of recommending a bidder for award of a tender. Section 80 (4) of the Act is further instructive on the document that marks the end of evaluation. It states as follows:-

***"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation"***

An Evaluation Committee having conducted an evaluation of tenders is able to recommend a bidder for award of a tender. The recommendation envisioned by the Head of Procurement function is only in respect of his professional opinion given pursuant to section 84 of the Act advising the Accounting Officer on the appropriate action to take.

The Board further notes that if a procuring entity wishes to conduct a due diligence exercise, section 83 of the Act is instructive that such a process is conducted after tender evaluation but prior to award of a tender. The said provision states as follows:-

***"An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act"***

This provision supports the view that once evaluation has been concluded, one of the processes that may follow includes a due diligence exercise prior to award of a tender. If such a due diligence exercise is conducted, then the Head of Procurement function's advice to the Accounting Officer will follow and subsequently, the Accounting Officer will make a decision whether or not to award the tender. In essence, evaluation of bids ends once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation and comparison of tenders.

The Interested Party contended that the evaluation conducted by the Procuring Entity is valid in law since it was conducted within the tender validity period. This Board observes that the period within which evaluation must be conducted is specified under section 80 (6) of the Act to be 30 days. This does not mean that, a procuring entity may evaluate tenders beyond 30 days and thereafter plead that evaluation was within the tender validity period.

The Act is specific on the actions by a procuring entity that have no express timeline but must be made within the tender validity period. These include the following:-

Section 87 (1) of the Act states that:-

***"Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted"***

This means, even though a specific timeline for award of a tender is not provided in the 2015 Act, award of a tender must be made within the tender validity period. A due diligence exercise is an example of a process that may take some time especially in instances where a procuring entity writes to third parties enquiring about the experience of the lowest evaluated responsive tenderer. These third parties may delay in responding to queries raised by a procuring entity during a due diligence process. However, the Act is instructive that a procuring entity should take careful consideration to award a tender within the tender validity period.

It is also important to note that section 135 (3) of the Act states that:-

***"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period"***

Section 135 (3) of the Act is another example of a provision that requires a procuring entity to execute a contract with the successful bidder within the

tender validity period but not before fourteen days have elapsed following the giving of that notification. In the Board's view, the legislature took into account the possibility that aggrieved candidates or tenderers may lodge request for review applications before this Board therefore no express timeline could have been given within which a procurement contract is formed. However, the legislature took cognizance that no award of a tender or contract can be made outside the tender validity period.

Accordingly, the Board finds that evaluation of bids does not include all other processes after the conclusion of an evaluation process as contained in the Evaluation Report that is prepared and signed by the Evaluation Committee. However, in so far as evaluation is concerned, the same must be conducted within a period of 30 days.

Having noted that the period of evaluation (which does not include a professional opinion, a due diligence exercise and award of tenders), is a maximum of 30 days pursuant to section 80 (6) of the Act, the Board now turns to determine whether the Procuring Entity complied with the timelines provided for in the Act.

The Board studied the Procuring Entity's confidential file and notes that an Evaluation Committee was first appointed by the 1<sup>st</sup> Respondent vide a memo dated 12<sup>th</sup> February 2020, which is the date when tenders received in the subject tender were opened.

Having noted that evaluation of bids is the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award, then the first evaluation ended with the recommendation for award of the subject tender to the Applicant. Section 80 (6) of the Act does not expressly state that evaluation of bids be commenced immediately after the tender opening date. It is however good practice for the accounting officer to take reasonable steps and appoint an evaluation committee by the tender opening date to avoid unnecessary delay of evaluation.

Notably, section 176 (1) (c) of the Act states as follows:-

***"176 (1) A person shall not—***

***(a) .....***

***(b) .....***

***(c) delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations***

The Board has already noted that an evaluation committee was appointed on 12<sup>th</sup> February 2020. Even though the first evaluation report does not indicate the date when evaluation commenced, the said report is dated 27<sup>th</sup>



February 2020, meaning that the first evaluation of bids took 15 days from the date of tender opening.

Thereafter, a professional opinion was issued on 28<sup>th</sup> February 2020 by the Interim Manager, Procurement but the 1<sup>st</sup> Respondent failed to approve the recommendation for award of the subject tender to the Applicant.

This therefore leads the Board to address the question whether an accounting officer of a procuring entity is bound by the recommendation for award made by an evaluation committee and the professional opinion by the head of procurement function.

Section 80 (5) of the Act provides that:-

***"The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations"***

Further, section 84 of the Act states as follows:-

***"(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation***

***report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings***

***(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations***

***(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).***

From the above provisions, the Board observes that the head of procurement function's professional opinion is a central aspect between tender evaluation and award of a tender. In the Board's view, the accounting officer is not bound by a recommendation by an evaluation committee neither is he bound by the professional opinion of the head of procurement function. He however is required to consider or regard the contents of the professional opinion (which is a review of the tender evaluation report) in making a decision whether or not to award a tender.

**In PPARB Application No. 16 of 2020, Papaton Security Services Limited v. The Accounting Officer, Kakamega County Water and**

**Sanitation Company & Another**, which was cited by the Procuring Entity herein, the Board held as follows:-

***"In the Board's view, the only stage where a procuring entity can exercise its discretion twice is where an accounting officer, upon receiving an evaluation report and the professional opinion forwarded to him/her, may order a re-evaluation and such order is done before he/she awards a tender to a bidder and not after an award."***

The Board agrees with the observation made in the above case and reiterates that nothing under the Act stops an accounting officer from ordering a re-evaluation. In this instance, the 1<sup>st</sup> Respondent opted to re-constitute the evaluation committee to conduct a re-evaluation.

The Board makes an observation that section 44 (2) (j) of the Act provides that:-

***"(1) An accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.***

***(2) In the performance of the responsibility under subsection (1), an accounting officer shall—***

.....

***(j) ensure compliance with any other responsibilities assigned by this Act or any other Act of Parliament or as may be prescribed in Regulations.”***

Further, section 44 of the Act provides that:-

***(1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise***

***(2) .....***;

***(3) .....***;

***(4) An evaluation committee established under subsection (1), shall—***

***(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;***

***(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall***

***advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;***

***(c) have as its secretary, the person in charge of the procurement function;***

***(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;***

***(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201 (d) and 227(1) of the Constitution***

The above provisions support the Board's view that the 1<sup>st</sup> Respondent herein has the responsibility to ensure an evaluation committee he has established under section 46 (1) of the Act, performs its functions under section 46 (4) and 80 (2) of the Act. According to section 46 (4) (d) of the Act, such an evaluation committee must complete the procurement process for which it was appointed, and no new committee is appointed on the same issue unless the one handling the issue has been procedurally disbanded.

At this juncture it is worth noting that, the Board having studied the Procuring Entity's confidential file notes that the 1<sup>st</sup> Respondent did not give any written reasons why he did not approve award of the subject tender to the Applicant neither did he give written reasons why he re-constituted the evaluation committee to conduct a re-evaluation. The Procuring Entity when making reference to section 46 (4) (d) of the Act, stated that there is no procedure under the Act for disbanding an evaluation committee.

It is true that the Act does not specify the procedure that an accounting officer should adopt when disbanding a previously constituted evaluation committee before appointing a new one to re-evaluate tenders received in the same procurement process.

In addressing this question, the Board notes that section 45 (1) of the Act states as follows:-

**"For the purpose of ensuring that the accounting officer's decisions are made in a systematic and structured way, an accounting officer shall establish systems and procedures to facilitate decision making for procurement and asset disposal"**

Article 10 (1) and (2) (c) of the Constitution further provides that:-

**"10 (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons...**

**(2) The national values and principles of governance include**

**(a) .....**

**(b) .....**

**(c) good governance, integrity, transparency and accountability"**

From the foregoing provisions, an accounting officer has the obligation to establish systems and procedures to ensure decision making is done in a systematic and structured way. This means that in the absence of a procedure for disbanding an evaluation committee, he ought to apply the internal working modalities within the procuring entity in disbanding an evaluation committee.

The Procuring Entity referred the Board to **Republic v. Public Procurement Administrative Review Board ex parte Nairobi City & Sewerage Company and Another (2019) eKLR** where it was held as follows:-

***"What must be borne in mind is that public procurement has a constitutional underpinning as clearly stated in Article 227.***

***In addition, the scheme of the Act is such that procurement process including cancellation of the tender process must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally, the rule of law and such rights cannot be narrowly construed..."***

Further, in **PPARB Application No. 5 of 2009, Ongata Works Limited v. Kenyatta University**, that was cited by the Interested Party herein, it was held as follows:-

***"The main purpose of the Public Procurement and Disposal Act, 2005, as stated in section 2 is among others, to ensure fairness, integrity, transparency and accountability in public procurement. To achieve this, both the Procuring Entity and candidates in a tender must observe all the provisions of the Act"***

As noted in the above cases, the principles of transparency and accountability under Article 10 (2) (c) of the Constitution dictate that the accounting officer applies such principles in the entire procurement process. A decision directing a re-evaluation ought to have been followed by written reasons for such action, especially in this instance where the Applicant could have been awarded the tender, but for the order for a re-evaluation. In this instance, the 1<sup>st</sup> Respondent did not provide any written reasons for his



action neither did the Procuring Entity give an explanation in its responses to the Request for Review and Written Submissions.

Accordingly, the Board finds that the 1<sup>st</sup> Respondent breached the provisions of section 45 (1) of the Act read together with Article 10 (1) and 2 (c) of the Constitution in his failure to provide written reasons for ordering a re-evaluation upon re-constituting the evaluation committee.

Upon re-constituting the evaluation committee, the Board observes that in its Response to the Request for Review, the Procuring Entity avers as follows:-

***"The Applicant's bid was found non-responsive during preliminary re-evaluation and disqualified for failing to comply with the mandatory requirements for the following reasons:-***

***(a) The re-evaluation committee had conducted a due diligence and made inquiries from the Communications Authority of Kenya in accordance with the tender document in order to ascertain the validity and compliance of the license submitted in satisfaction of mandatory requirement number 4. The due diligence revealed that the Applicant did not have a valid licence in line with the said mandatory requirement..."***

The foregoing paragraph is evidence of the Procuring Entity's admission that the Applicant was disqualified at the Preliminary Evaluation Stage, during the re-evaluation process following a due diligence exercise by the re-evaluation committee. This prompted the Board to study the Procuring Entity's confidential file to determine the stage at which the said due diligence was conducted and we proceed to observe the following:-

Clauses 2.2 and 2.3. at page 7 of the Re-evaluation Report dated 20<sup>th</sup> March 2020, states as follows:-

***"2.2. The committee conducted a due diligence from Communication Authority of Kenya (CA) which is in accordance with section 83 (1) of the Public Procurement and Asset Disposal Act, 2015 to ascertain the validity and compliance of the Licenses submitted and the response was as follows:-***

- Jenetworks Ventures Limited had a licence with Communication Authority of Kenya (CA) for Telecommunication Contractor Licence but not Application Service Provider Licence***
- Xtranet Communications Limited -the entity is licensed with Communication Authority of Kenya (CA) but not compliant***
- Liquid Telecom Limited-the entity is licenced with the Authority and is compliant***

***The committee was in agreement that the Telecommunication Contractor Licence for Jenetworks and Liquid Telecommunication Limited were acceptable***

### ***2.3 Observations from Preliminary Evaluation***

- The four evaluators were in agreement as indicated in their evaluation forms that Bidder No. 2, Telecommunications Kenya and Bidder No. 3, Jenetworks Ventures Ltd were responsive as they complied to all mandatory requirements as stipulated in the tender document***
- Xtranet Communications Ltd failed to provide a fully signed site visit form for Tea Directorate and the Telecommunication Licence issued by Communication Authority of Kenya (CA) was invalid and thus non compliant...”***

From the foregoing, the Board observes that the Procuring Entity conducted a due diligence exercise on all the three bidders at the Preliminary Evaluation Stage thereby concluded that the Applicant’s bid was non-responsive. Section 83 of the Act however provides that a due diligence is conducted using the following procedure:-

- "(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***
- (a) initial each page of the report; and***
- (b) append his or her signature as well as their full name and designation."***

Section 83 (1) of the Act provides that the purpose of due diligence is to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender. In conducting a due diligence exercise, the following procedure must be adhered to:-

Due diligence should be conducted by the Evaluation Committee after tender evaluation but prior to award of the tender to confirm and verify the

qualifications of the bidder determined by the Procuring Entity to have submitted the lowest evaluated responsive tender.

Further, an Evaluation Committee is the one that conducts a due diligence exercise. Pursuant to section 46 (4) (b) of the Act cited herein before, the minimum number required to constitute an Evaluation Committee is 3. On the other hand, section 83 (3) of the Act directs that it is only the Evaluation Committee members who took part in the due diligence that sign and initial the due diligence report. Even though it is not mandatory that all Evaluation Committee members participate in a due diligence exercise, the minimum number of three stipulated under section 46 (4) (b) of the Act must be maintained noting that it is an Evaluation Committee that conducts a due diligence exercise.

Prior to commencing the due diligence exercise, the Evaluation Committee must first conclude evaluation of tenders at the Preliminary, Technical and Financial Evaluation Stages and recommend the lowest evaluated responsive tenderer for award of the tender. At this stage, due diligence has not been conducted yet, hence the date appearing at the end of the Evaluation Report should be a true reflection of when evaluation at the Preliminary, Technical and Financial stages were concluded.

Due diligence is conducted on the lowest evaluated responsive tenderer. This is used to verify and confirm the qualification of the lowest evaluated

tenderer after preliminary, technical and financial evaluation with respect to what such tenderer provided in its bid, in response to the minimum eligibility and mandatory requirements in the Tender Document and which documents ought to have been considered during evaluation.

After concluding the exercise, a due diligence report must be prepared outlining how due diligence was conducted together with the findings of the process. The said report is separate from an Evaluation Report and is only signed by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialed on each page.

If the qualifications of the lowest evaluated tenderer are satisfactory, the report is submitted to the Head of Procurement function for his professional opinion and onward transmission to the Accounting Officer who will consider the professional opinion in making a decision to award the tender.

Assuming the lowest evaluated tenderer is disqualified after the first due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends award to the next lowest evaluated tenderer. Thereafter, a similar due diligence process is conducted on such tenderer.

This procedure is applied until the successful tenderer for award of the tender is determined.

The Procuring Entity herein conducted a due diligence at the Preliminary Evaluation Stage contrary to section 83 of the Act which recognizes that due diligence is a post-qualification exercise conducted only on the lowest evaluated responsive tenderer. The Board notes that at the preliminary evaluation stage, the evaluation committee only evaluates documents and information on the face value, which documents were submitted by bidders in response to the Preliminary Evaluation criteria outlined in the Tender Document in determining their responsiveness.

The Procuring Entity will only have the option to verify such documents in a due diligence exercise conducted after Financial Evaluation has been concluded and recommendation of award made to the lowest evaluated responsive tenderer.

Having noted the Procuring Entity's own admission that it found the Applicant's bid non-responsive following a due diligence exercise conducted at the Preliminary Evaluation Stage, the Board finds that the Procuring Entity, though entitled to conduct a due diligence exercise, it conducted such exercise prematurely, hence did not rightfully find the Applicant's bid non-

responsive based on a due diligence exercise conducted at the Preliminary Evaluation Stage.

The Board notes that the re-evaluation process was conducted and concluded on 20<sup>th</sup> March 2020. Whereas the Re-evaluation Report does not specify the date when the said re-evaluation commenced, the same took 5 days from 16<sup>th</sup> March 2020 when the 1<sup>st</sup> Respondent re-constituted the Evaluation Committee. Having noted that issuance of the professional opinion, the conduct of due diligence and award of a tender do not form part of evaluation, the Board finds that evaluation of bids in the subject tender took a cumulative period of 20 days (i.e. 15 days for the first evaluation and 5 days for the re-evaluation). This period was within the maximum period of 30 days specified under section 80 (6) of the Act.

Accordingly, the Board finds that the Procuring Entity evaluated bids in the subject tender within the maximum period specified under section 80 (6) of the Act, having completed the said evaluation within a cumulative period of 20 days, save that the 1<sup>st</sup> Respondent failed to provide written reasons why he re-constituted the evaluation committee to conduct a re-evaluation and the re-constituted Evaluation Committee proceeded to conduct a due diligence exercise on the Applicant and other bidders prematurely at the Preliminary Evaluation, contrary to the provisions of section 83 (1) of the Act.



On the second issue for determination, the Applicant in its Request for Review averred that on 23<sup>rd</sup> March 2020, the Procuring Entity issued a letter of notification of award to the Interested Party directing the Interested Party to accept the said notification within 7 days and that a formal contract would be entered into between the parties upon receipt of the acceptance letter. The Applicant further submitted in its Request for Review and reiterated the same in its Further Statement that before the expiry of fourteen days, the Procuring Entity proceeded to migrate the services to be executed in the subject tender to the Interested Party contrary to section 167 of the Act.

In response to the above, the Procuring Entity in its Response submitted that no contract has been signed between it and the Interested Party and further denied the Applicant's averment that the Procuring Entity engaged the services of the Interested Party before the lapse of fourteen days from the date the letter of notification of award was issued to the Interested Party.

On its part, the Interested Party also denied executing a contract with the Procuring Entity and further submitted that it is a stranger to the Applicant's allegations that it began providing services to the Procuring Entity before the lapse of fourteen days from the date of notification of award.

The Board studied the letter of notification of award dated 23<sup>rd</sup> March 2020 issued to the Interested Party which contains the following details:-

***"We refer to the above tender in which you participated***

***We wish to notify you that you have been awarded the tender for the Supply, Installation and Commissioning of Broadband Internet, Wide area Network, Email Services, WI-FI Network and Integration of IP based voice communication at annual total cost of Kshs. 15, 892,512/-(Fifteen Million, Eight Hundred Ninety-Two Thousand, Five Hundred and Twelve) only, inclusive of all taxes for the period starting from 1<sup>st</sup> April 2020 to 31<sup>st</sup> March 2021. The contract is renewable annually for the next two years, subject to satisfactorily performance established after the review of the performance during the contract period.***

***Kindly confirm acceptance of the award within seven days from the date of this letter. A formal contract will be entered between the parties upon receipt of the acceptance letter"***

The Interested Party proceeded to signify its acceptance of award of the subject tender through a letter dated 25<sup>th</sup> March 2020 addressed to the Procuring Entity stating as follows:-

***"We acknowledge letter of award Ref: AFA/SCM/7/84 with regards to Supply, Installation and Commissioning of Broadband Internet, Wide area Network, Email Services, WI-FI Network and Integration of IP based voice communication services at annual cost of Kshs. 15, 892,512/- (Fifteen Million,***

***Eight Hundred Ninety-Two Thousand, Five Hundred and Twelve only)***

***We understand the content and shall abide as stated,"***

Having studied the two letters cited above, the Board notes that section 87 (1) and (2) of the Act provide that:-

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

***(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award"***

The following provisions illustrate that a procuring entity has the obligation to notify the successful bidder of award of a tender to it within the tender validity period, and that the successful bidder has the obligation to accept the said award in writing within the time frame specified in the said notification of award. The Interested Party herein was required to accept award of the subject tender to it within 7 days, being the time frame specified in its notification, and it proceeded to comply with the said timelines.

It is worth noting that section 87 of the Act does not specify the time frame for accepting an award. Such a time frame is at the discretion of the procuring entity who specifies the same when notifying the successful bidder. However, the framers of the Act were keen to impose a stand-still period within which a procuring entity and a successful bidder are precluded from entering into a contract. Sections 135 (3) and 167 (1) of the Act provide as follows:-

***"135 (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period***

***167 (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."***

From the foregoing, it is worth noting that section 135 (3) of the Act gives a procuring entity discretion to specify the period within which a contract will

be executed provided such a contract cannot be executed before the lapse of 14 days following the giving of the said notification. Such a stand-still period is available to enable an aggrieved bidder, such as the Applicant herein to approach this Board through a Request for Review filed under section 167 (1) of the Act.

It is therefore not mandatory for the Procuring Entity to indicate that no contract will be entered before the lapse of 14 days. Such a stand-still period exists automatically by operation of the law. Even if the Interested Party herein accepted its award within 5 days, a procurement contract is not implied by such conduct, since a procurement contract must meet the formal requirements under section 135 of the Act.

As regards the Applicant's allegation that the Procuring Entity migrated services in the subject tender to the Interested Party before the lapse of fourteen days from the date of notification of award, the Board was not furnished with any proof to support such allegation, neither was any contract supplied to the Board executed before the lapse of fourteen days under section 135 (3) of the Act. Accordingly, the Applicant's allegation has not been substantiated to the Board's satisfaction.

In totality of the second issue, the Board finds, the Applicant's allegation that the Procuring Entity failed to comply with the stand-still period under section 135 (3) read together with section 167 (1) of the Act when issuing a letter

of notification of award to the Interested Party pursuant to section 87 (1) of the Act, has not been substantiated.

On the third issue for determination, the Applicant in its Request for Review referred to Clause 2.13.1 of Section II. Instructions to Tenderers of the Tender Document to support its view that the tender validity period of the subject tender was specified to be 60 days after the date of tender opening. The Procuring Entity in its Response to the Request for Review took a different view and submitted that the Appendix to Instructions to Tenderers at page 16 of the Tender Document specified the tender validity period to be 90 days and not 60 days as stated by the Applicant. The Interested Party associated itself with submissions by the Procuring Entity and further stated in its Memorandum of Response that the provisions of the Appendix to Instructions to Tenderers of the Tender Document prevail in the circumstances.

The Board having considered the above submissions, observes that, Clause 2.13.1 of Section II. Instructions to Tenderers of the Tender Document that was cited by the Applicant provides as follows:-

***"Tenders shall remain valid for 60 days or as specified in the invitation to tender after date of tender opening prescribed by Agriculture and Food Authority pursuant to paragraph 2.18..."***

Paragraph 2.18 referenced in the above provision specified the tender opening date to be 12<sup>th</sup> February 2020 and this fact is not in dispute before the Board. The contention before us is that Clause 2.13.1 referenced in the Appendix to Instructions to Tenderers at page 16 of the Tender Document provides a different tender validity period from the one specified in the Instructions to Tenderers. The provision in the Appendix to Instructions to Tenderers states as follows:-

***"Validity of tenders 90 days from the tender opening date"***

The Board notes that Clause 2.13.1 as specified in the general provisions on Instructions to Tenderers specified the tender validity period to be 60 days, while the Appendix to Instructions to Tenderers specified this period as 90 days. However, the introductory sentence to the Appendix to Instructions to Tenderers of the Tender Document states as follows:-

***"The following information for procurement of services shall complement or amend the provisions of the instructions to tenderers. Wherever there is a conflict between the provisions of the instructions to tenderers and the provisions of the appendix, the provisions of the appendix herein shall prevail over those of the instructions to tenderers."***

Needless to say, the above clause supports the Board's finding that Clause 2.13.1 of Section II. Instructions to Tenderers of the Tender Document was amended by the Appendix to Instructions to Tenderers to the effect that the

tender validity period of the subject tender is 90 days from the date of tender opening and not 60 days.

The Procuring Entity awarded the subject tender to the Interested Party on 23<sup>rd</sup> March 2020. By this time, the tender validity period had run for 40 days after the date of tender opening. This leads the Board to find that the award of the subject tender was made within the tender validity period.

In summary, the Board finds that the Tender Validity Period still existed as at the time the Procuring Entity awarded the subject tender to the Interested Party.

In determining the appropriate orders to grant in the circumstances, this Board has established that whereas evaluation took a cumulative period of 20 days, award was made within the tender validity period and no evidence was provided of a contract signed in violation of section 135 (3) of the Act, the 1<sup>st</sup> Respondent failed to provide written reasons for re-constituting the evaluation committee to undertake a re-evaluation exercise in breach of section 45 (1) of the Act and Article 10 (1) and 2 (c) of the Constitution. The Board has also established that the re-constituted evaluation committee conducted a due diligence exercise simultaneously and prematurely on three bidders at the Preliminary Evaluation Stage, contrary to the procedure provided in section 83 of the Act.



This Board finds it just to direct the 1<sup>st</sup> Respondent to properly exercise his discretion in accordance with the Act and the Constitution in directing a re-evaluation, taking into consideration the Board's findings in this case on his responsibilities in the subject procurement process and the manner in which a due diligence ought to be conducted, if the Procuring Entity elects to conduct a due diligence exercise.

### **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Act, the Board proceeds to make the following orders:-

- 1. The Procuring Entity's Letters of Notification of Unsuccessful bid dated 23<sup>rd</sup> March 2020 issued to the Applicant and M/s Liquid Telecommunications Kenya Ltd with respect to Tender No. AFA/T/03/2019-2020 for the Supply, Installation and Commissioning of Broadband Internet, Wide area Network, Email Services, WI-FI Network and Integration of IP based voice communication, are hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Award dated 23<sup>rd</sup> March 2020 issued to the Interested Party herein, with respect to the subject tender, be and is hereby cancelled and set aside.**

- 3. The Procuring Entity's Re-evaluation Report dated 20<sup>th</sup> March 2020 containing the summary of evaluation and comparison of tenders with respect to the re-evaluation process, be and is hereby nullified.**
- 4. The Professional Opinion dated 23<sup>rd</sup> March 2020 issued by the Procuring Entity's Interim Manager-Procurement with respect to the re-evaluation process, be and is hereby nullified.**
- 5. The Procuring Entity is hereby directed to conclude the procurement process to its logical conclusion and in the event the 1<sup>st</sup> Respondent wishes to direct a re-evaluation, he must do so in accordance with the Act and the Constitution and conclude the procurement process within fourteen (14) days from the date of this decision, taking into consideration, the Board's findings in this case.**
- 6. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 27<sup>th</sup> day of April 2020**

**CHAIRPERSON**

**PPARB**

**SECRETARY**

**PPARB**