

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 23/2009 OF 12TH JUNE, 2009

BETWEEN

H. YOUNG & COMPANY (E.A) LIMITED..... APPLICANT

AND

**EAST AFRICAN
PORTLAND CEMENT COMPANY LTD..... PROCURING ENTITY**

Review against the decision of the Tender Committee of the East African Portland Cement Ltd in the matter of Tender No.EAPCC/004/2009 for Civil/Structural Works and Equipment Installation for the new Coal Grinding and Dosing Facility.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Judith Guserwa	-	Member
Mr. Sospeter M. Kioko	-	Member
Mrs. Loise Ruhui	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Board Secretary
Ms. Kerina Rota	-	Secretariat
Ms. Gilbert Kimaiyo	-	Secretariat

PRESENT BY INVITATION

Applicant, H.Young &Company (E.A) Ltd

- Mr. C.N. Kihara - Advocate, C.N. Kihara & Co. Advocates
- Mr. Ann Kagui - legal Officer, C.N. Kihara & Co. Advocates
- Mr. A.G. Kimani - Quantity Surveyor
- Mr. Richard Kobala - Engineer

Procuring Entity, East African Portland Cement Company Ltd

- Mr. Mohammed Nyaoga - Advocate, Mohammed Muigai Advocates
- Mr. Georgiadis Khaseke - Advocate, Mohammed Muigai Advocates
- Ms. Sheila Kahuki - Legal Officer, East African Portland Cement Company Ltd
- Mr. Daniel Muga - Procurement Manager

Interested Candidate, Catic Beijing Co. Ltd

- Mr. Kamau Karori - Advocate, Iseme, Kamau & Maema Advocates
- Ms. Karen Mate - Advocate, Iseme, Kamau & Maema Advocates
- Ms. Janet Maina - Pupil, Iseme, Kamau & Maema Advocates
- Mr. Fuzhiquan Catic - Project Manager

BOARD'S DECISION

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

BACKGROUND

The tender was advertised by the Procuring Entity on 9th April, 2009. The tender No.EAPCC/004/2009 was for Civil /Structural Works and Equipment Installation for the new Coal Grinding and Dosing Facility. The tenders were closed and opened on 4th May, 2009 in the presence of the bidders' representatives.

The following bidders submitted their bids:-

1. M/s Cactic Beijing Co. Ltd
2. M/s H-Young & Company (E.A) Ltd
3. M/s Kenya AA Electric Crane

EVALUATION

The Evaluation Committee carried out preliminary evaluation by considering the following mandatory evaluation criteria:-

1. Tenderers standing as Civil and Structural engineering contractor
2. Status and experience of civil and structural staff of the company or of joint venture company
3. Status of civil and structural works company in house design and detailing office
4. Experience of Civil and structural works in-house drawing office staff
5. Status and experience of fabrication equipment and staff
6. Status and experience of mechanical erection equipment and staff

7. Status and experience of electrical installation equipment and staff
8. Clarity and effectiveness of site execution organization and division of responsibility
9. Provision of tax compliance certificate
10. Provision of three audited accounts
11. Signing of document by authorized person
12. Submission of tender in three copies
13. Tender validity of 120 days (tender security availability)

M/s Kenya AA Electric Crane Ltd was disqualified at the preliminary evaluation stage for failing to meet some of the mandatory requirements.

The Evaluation Committee subjected the remaining two tenders submitted by M/s Catic Beijing Co. Ltd and M/s H-Young (EA) Ltd to the detailed technical evaluation. The technical evaluation criteria was as follows:-

ITEM	CRITERIA DESCRIPTION	MAX SCORE
1	Financial capability; (a) Turn over -at least 1 Billion (b) Audited accounts (c) Gear ratio;(Current asset/current liabilities)	10 10 10
2	Human resources capacity Evidence of cross cutting professional Civil/Structural, Mechanical & Electrical Engineers	20
3	Plant & Equipment availability & Support services	20
4	Experience in similar projects; (a) experience in similar projects in the last 5	10

	years (b) Evidence of company's existence	5
5	Project schedule; Duration of carrying out the project (bidder with least duration to get maximum marks)	10
6	Quality assurance :bidders with ISO 2009 certification	5

The two remaining bidders, M/s Catic Beijing Co. Ltd and M/s H-Young Ltd qualified in the technical evaluation and proceeded for commercial evaluation.

The commercial bids were opened on 27th May 2009 and the evaluation of the financial bids commenced thereafter. Clause 20.8 of the tender document stated that the following key evaluation criteria were to be used:-

- (a) Validity and feasibility of all prices as determined by comparison between the various tenders.
- (b) Total tendered price of the project
- (c) Conditions of price(firm and fixed for the total duration of the project)
- (d) Potential additional costs not included in the tendered price
- (e) Terms of payment Vs. cash flow

The Evaluation committee conducted an evaluation of the commercial based its evaluation of the commercial bids on the following criteria:-

- Price
- Project Duration
- Differential in Costs

After the Evaluation, the Evaluation Committee noted that Catic Beijing Co. Ltd had quoted Kshs. USD 7,250,000.00 and it was converted to Kshs. 564,992,500.00 at Kshs. 77.93 shillings per dollar. M/s H. Young Ltd had quoted Kshs. 440,176,400.00.

The Evaluation Committee recommended award of the contract to M/s Catic Beijing Co. Ltd at a total cost of Kshs. 564,992,500

The Tender Committee reviewed the documents that were tabled before it and noted that the project cost if awarded to M/s H-Young Co. (EA) Ltd would cost Kshs. 440,176,400.00 while if awarded to M/s Catic Beijing Co. Ltd it would cost Kshs. 564,992,500.00. The Committee further considered that M/s H. Young Ltd would take a period of 12 months and M/s Catic Beijing Co. Ltd would take a period of 5.5 months for construction and 1.5 months for commissioning totalling seven months. Therefore, they would be differentials in costs arising from use of furnace oil instead of coal for the five months period for construction and one month for handing over totalling to six months as shown in the table below;

Month	Jan-10	Feb-10	Mar-10	Apr-10	May-10	Jun-10	TOTAL
Furnace	174,331,350	29,715,225	179,371,350	174,436,305	163,054,215	175,480,305	896,388,750
Coal	97,364,246	16,890,646	97,386,646	97,512,598	90,846,102	97,517,398	497,517,636
Difference	76,967,104	12,824,579	81,984,704	76,923,707	72,208,113	77,962,907	398,871,114

The Committee noted that after adjusting the cost differentials, exchange rates, the cost differential in favour of M/s Catic Beijing Co. Ltd will be Kshs. 235,462,791.00

The committee therefore approved the recommendation of the evaluating committee and awarded the tender to M/s Catic Beijing Co. Ltd at a total

price of USD 7,250,000.00. This is approximately Kshs. 564,992,500.00 at an exchange rate of 77.93

The Procuring Entity by a letter dated 2nd June 2009 notified both the successful and unsuccessful bidders about the outcome of the award.

THE REVIEW

This Request for Review was filed on 12th June, 2009 by H. Young & Company (EA) Ltd against the decision of the Procuring Entity dated 2nd June, 2009 in the matter of Civil/Structural Works and Equipment Installation for the new Coal Grinding and Dosing Facility. On 23rd June, 2009, the Procuring Entity filed its response to the application. The Applicant was represented by Mr. C.N. Kihara of C.N. Kihara & Advocates while the Procuring Entity was represented by Mr. Mohammed Nyaoga of Mohammed Muigai and Company Advocates. M/s Catic Beijing Co. Ltd, an interested candidate was represented by Mr. Kamau Karori an Advocate of Iseme, Kamau & Maema Advocates.

The Request for Review is made against the decision of the Procuring Entity by a letter dated 2nd June, 2009 the Procuring Entity in the matter of Civil/Structural Works and Equipment Installation for the new Coal Grinding and Dosing Facility.

The Applicant in its Request for Review has raised 5 grounds of appeal.

The Board deals with them as follows:-

GROUND 1 - BREACH OF SECTION 31(1) (a)

The Applicant submitted that the successful bidder, Catic Beijing Co. Ltd had no capacity to undertake the tender works and therefore the Procuring Entity erred in awarding it the tender. The Applicant argued that as per Clause 5.1 as read with Clause 20.5 of the tender documents, a bidder had to demonstrate that it was an established firm able to undertake Civil and Construction Engineering Works. It further argued that the successful bidder did not prove that it was a well established firm in both Civil and Construction Engineering Works and therefore the Procuring Entity erred in awarding the tender to the successful bidder.

The Applicant further, submitted that the successful bidder had no legal capacity to enter into a contract in Kenya as it was not licensed by the Ministry of Public Works.

Finally, the Applicant submitted that the evaluation of the tender was flawed. Consequently, it argued that the Procuring Entity breached Section 31(1) Sub-section (a) and (b) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act) by awarding the tender to the Catic Beijing Co. Ltd, the successful bidder. It stated that the successful bidder did not meet the criteria stated in Section 31(1) (a) of the Act and therefore did not qualify to be awarded the tender.

In response, the Procuring Entity submitted that the successful bidder was a registered company. It stated that the successful bidder had submitted its certificate of incorporation.

The Procuring Entity further submitted that there was no requirement that a tenderer had to be registered with the Ministry of Public Works.

Finally, the Procuring Entity submitted that the Successful bidder had complied with Sections 31(a) and (b) of the Act as it had provided a certificate of incorporation and all the necessary documents to demonstrate its capability to carry out the project.

On its part the successful candidate stated that it was a company dully registered in the Republic of China and that it had included the registration certificate in its bid documents. It further submitted that there was no requirement that a tenderer be registered with the Ministry of Public Works as this was an International tender.

Finally, the successful candidate submitted that it was a well established company and it had included documents showing similar projects which it had undertaken successfully.

The Board has carefully considered the submissions of the parties and examined all the documents that were submitted.

The Board has noted that this was an international tender that was advertised in the Daily Nation Newspaper of 11th March, 2009.

The relevant part of the advertisement notice read as follows:-

"

Tender No.	Description	Nature	Tender Document Fee (Kshs)	Bid Bond Fee	Closing Date
EAPCC/00 4/2009	Civil/Structural Works and Equipment Installation for the New Coal Grinding and Dosing Facility	International	5,000	USD 50,000	Extended to 4th May, 2009 11.00 am
EAPCC/00 6/ 2009	Replacement of Twincyclone One and Gas Conditioning Tower Sheel Repairs	International	3,000	Kshs. 100,000	Extended to 4 th May, 2009 11.00 am (Tenderers to collect an addendum)
EAPCC/01 0/ 2009	Supply of Drugs and Medical Laboratory Items	Open Tender	5,000	Kshs. 500,000	14 th May, 2009 11.00am
EAPCC/01 1/ 2009	Provision of External Audit Services	Open Tender	5,000	Kshs. 200,000	4 th May, 2009 11.00 am
EAPCC/01 2/ 2009	Supply of Oil and Lubricants	Open Tender	5,000	Kshs. 500,000	4 th May, 2009 11.00 am
EAPCC/01 3/ 2009	Supply of Tyres and Tubes	Open Tender	5,000	Kshs. 200,000	4 th May, 2009 11.00 am
EAPCC/01 4/ 2009	Supply of Petrol and Diesel	Open Tender	5,000	Kshs. 500,000	4 th May, 2009 11.00 am

....."

The Board has also examined Clause 5.1 of the Tender Documents which provide as follows:-

"This invitation to tender is open to well establish Civil/Structural engineering, construction, erection and equipment installation Contractors of high standing in the construction of civil/structural works and industrial structures. The Tenderer shall provide proof of its standing as such and

include a list of at least three similar projects carried out in the last 5 years complete with contact reference for these projects”.

It is clear that this was an international tender and there was no requirement in the advertisement notice or the tender document that the bidders were to be registered with the Ministry of Public Works. Therefore, the argument by the Applicant that the successful bidder was not registered with the Ministry of Public Works has no merit.

The Board has also noted that the successful bidder is a registered company in China as a state owned corporation. The certificate of incorporation shows that its registration number is 110000004804. The Board has further noted that there was no requirement in the Tender Documents that a bidder had to be registered in Kenya. Indeed, this being an international tender, such a requirement is not necessary.

The Board has also examined the Tender Documents and the evaluation reports. Clause 5.1 of the Tender Documents provided that bidders had to prove that they were well established in Civil/Structural Engineering, Construction, Erection and Equipment Installation.

This issue on technical compliance was to be evaluated using clause 17.1(a) (b) (c) and (d) which covered evaluation on statement of qualifications, project experience, staff plan and technical capacity.

The Procuring Entity carried out technical evaluation and both the Applicant and the successful candidate were determined to be responsive and qualified to the next stage of financial evaluation. The Board has also

noted that one bidder, Kenya AA Electronic Crane Co. Ltd failed at this technical evaluation stage.

Therefore the argument by the Applicant that the Procuring Entity breached Section 31 Sub-section (a) and (b) of the Act is not backed by any evidence. On the contrary, the evaluation reports clearly show that all bidders were subjected to a technical evaluation. Section 31 Sub-section (a) and (b) provides as follows:-

“(a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;

(b) the person has the legal capacity to enter into a contract for the procurement;”

As already observed, the Applicant and the successful bidder were subjected to a technical evaluation and were found to be responsive and there is no breach of Section 31(a) and (b).

In view of the foregoing, this ground fails.

GROUND 2 - BREACH OF SECTION 71(E) OF THE ACT

The Applicant submitted that the Tender Documents provided that a bidder had to produce a Tax Compliance Certificate from the Tax Authority. To the Applicant, Tax Authority as stated in clause 5.3 of the Tender Document referred to the Kenya Revenue Authority. It argued that

since the successful bidder did not submit a tax compliance certificate issued by Kenya Revenue Authority it ought to have been disqualified at that stage.

The Applicant further submitted that the Successful bidder did not quote its price in Kenya Shillings. It argued that this was a breach of clause 12.1 of the Tender Documents. It stated that by quoting in a foreign currency, this successful bidder exposed the Procuring Entity to risk in terms of foreign exchange fluctuations and uncertainty. The Applicant also argued that the price quoted by the Procuring Entity was not fixed and was variable as it was not inclusive of tax.

Finally, the Applicant submitted that the successful bidder provided a bid bond issued by a foreign Bank which did not have a corresponding Bank in Kenya. It argued that the tender notice provided that the tender security was to be issued by a reputable local or International Bank. The Applicant informed the Board that the tender security provided by the successful candidate was issued by the Bank of China which is just a local bank in the Republic of China. It argued that a tender security should be issued by a local bank or an international bank with a corresponding bank in Kenya for easy enforceability.

In response, the Procuring Entity submitted that Section 71(e) of the Act provided that the evaluated price of each bid shall be determined where applicable by converting all tenders to the same currency using a uniform exchange rate prevailing at the time. The Procuring Entity stated that it converted the price of the successful bidder using an exchange rate of 80 shillings to a Dollar which was prevailing at the time.

The Procuring Entity stated that the successful bidder quoted in both dollars and Kenya Shillings as per their tender form and price schedule.

As regards the issue of tender security, the Procuring Entity submitted that, the successful bidder provided a Bid Bond from the Bank of China. It argued that the Bank of China was an International Bank. It stated that the tender documents allowed bidders to provide a Tender security by either a local or international bank.

On its part the successful bidder associated itself with the submissions of the Procuring Entity. It stated, that it had submitted tax compliance certificate issued by the relevant tax authority in China. It further stated that the tender security was issued by the Bank of China which is an international bank. Finally, it submitted that this was an international tender and therefore a bidder can quote in an internally recognized currency.

The Board has noted that clause 5.3 of the Tender Documents provided as follows:-

“The Tenderer shall provide Tax Compliance Certificate from the tax authority and proof of financial stability by providing copies of audited accounts for the last 3 years”.

It is clear that clause 5.3 only provided that bidders were to provide Tax Compliance certificate from the Tax Authority. This being an international tender, Tax Authority could only mean, the Tax Authority where the Bidder was registered. A requirement that International Bidders must get a

Tax Compliance Certificate from Kenya Revenue Authority is not practicable. A Tax Compliance by Kenya Revenue Authority is evidence that a bidder has paid its taxes in the Republic of Kenya as per the Law. In an international tender, there is no requirement that a bidder must be registered in Kenya. Therefore, the argument by the Applicant on this limb of the ground has no merit.

As regards the issue of Tender Security, clauses 11.1 and 11.2 required the tenderers to furnish a bid security of US Dollars 50,000 in form of a guarantee from a reputable bank. Clauses 11.1 and 11.2 provided as follows:-

“11.1 The Tenderer shall furnish as part of his tender, a Bid Security from a in the amount of USD 50,000 (Fifty Thousand USD).

11.2 This unconditional Tender Security shall be in the form of a guarantee from a reputable bank”.

There is no dispute that the successful bidder provided a Bank guarantee of US Dollars 50,000 issued by the Bank of China. Further, there is no evidence that the Bank of China is not a reputable Bank as argued by the Applicant. The Board has also noted that there was no requirement in the Tender Documents that a foreign or international Bank had to have a corresponding bank in Kenya for the tender security to be valid.

The Board notes that the tender security is governed by Section 57(1) of the Act which provides as follows:-

“A Procuring Entity may require that tender security be provided with tenders”.

It is clear that the successful bidder provided the Tender Security in the manner set out in the Tender Documents. Accordingly, this limb of the ground also has no merit.

The final limb of this ground was that the successful bidder did not quote in Kenya Shillings.

As the Board has already observed this was an international tender. Section 71 of the Act regulates International Tendering. Section 71(e) provides as follows:-

- “(a).....***
- (b).....***
- (c).....***
- (d).....***
- (e) a person submitting a tender may, in quoting prices or Providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used”.***

The Board has noted that the successful bidder quoted its price both in US Dollars and Kenya Shillings. It gave its prices at shillings five hundred and eighty million using an exchange rate of Kenya Shillings 80 @ Dollar. This is quoted in the price schedule that was included in envelope no.2 which included commercial offer.

It is clear that in an international tender quotation in both local currency and the international currency would suffice. The option of which currency to use would be a subject of contract negotiation after the award of the tender.

Accordingly, the argument by the Applicant that the successful bidder ought to have been disqualified on the basis of the currency also has no merit.

Taking all the above into consideration, this ground fails.

GROUND 3 AND 5 - BREACH OF SECTION 2, 34(1), 51(C) 52(1) & (2) AND 3(A), (H) AND 66(1), (2), (3) (A), (B) AND 4 OF THE ACT

These grounds have been combined as they raise similar issues on the criteria for evaluation, the manner the evaluation was done and whether the award was made to the lowest evaluated bidder. Indeed, the two grounds were argued together.

The Applicant submitted that clauses 17.4. 1(f) and clause 20.8 in the Tender Documents had a vague evaluation criteria contrary to Section 51 of the Act. The Applicant argued that the Procuring Entity used the criteria set out in clause 20.8 to determine that it was not the lowest responsive bidder. It stated that during the commercial evaluation, the Procuring Entity considered potential damages it would suffer for the period the Applicant would take to complete the project as compared to the period provided by the successful bidder.

The Applicant stated that it provided a period of 12 months whereas the successful bidder provided a completion period of 7 months. It argued that the tender document did not provide that time was of essence. Therefore, it argued that the use of time by the Procuring Entity to calculate the loss it would suffer was a new criteria. It stated that where time is critical in the building contract the document must clearly state so.

The Applicant submitted that it had provided in its tender documents that if it failed to complete the project on time, it would pay liquidated damages of 5% of its tender price. On the other hand, the successful bidder had proposed damages amounting to 3% of its total contract price.

Finally, the Applicant submitted that the criteria set out in the tender document was vague and not specific. It argued that it was the lowest evaluated bidder and thus it should have been awarded the tender. Therefore, it submitted that the Procuring Entity breached Section 52 and 66(2) of the Act.

In response, the Procuring Entity submitted that Section 51(c) of the Act stipulates that the invitation to tender should set out the time limit for delivery and completion. Further, it stated that Section 66(2) provides that the evaluation and comparison of tenders shall be done using the procedures and criteria set out in the tender documents.

The Procuring Entity submitted that it followed the criteria that was set out in the Tender Documents. It highlighted the following clauses in the Tender Documents which were considered during the evaluation;

- (i) Clause 20.6 - provides that technical responsiveness was to be measured by project implementation schedule. It argued that an implementation schedule envisages a time limit.
- (ii) Clause 15.3.3 - provides that the technical information, specifications and design shall include among other things the project implementation schedule.
- (iii) Clause 17.4.1(f) - provides for proposed project schedule. It stated that the proposal was for achievement of all project milestones including but not limited to:-
 - (a) Commencement and completion of the studies.
 - (b) Detailed construction programme including tasks, their start dates, critical path analysis of the construction period milestone.
- (iv) Clause 20.8(b) and (e) - provides that financial evaluation would take into account potential additional costs not included in the tender price.

The Procuring Entity argued that the Tender Documents allowed it to look at potential costs not included in the tender price and the terms of payment. It stated that the delivery time between both parties were evaluated and quantified. The quantification for the potential cost was therefore provided for and was not an ambush as argued by the Applicant.

The Procuring Entity further submitted that it applied the criteria set out in the Tender Documents equally and fairly. It stated that after evaluation,

the successful bidder was picked as the most cost effective and economical. It further stated that this was done in furtherance of the main objectives of the Act as defined in Section 2 which is to maximize economy, efficiency, promote competition and ensure fairness in those procedures.

The Procuring Entity argued that the Applicant provided a completion period of 12 months. Therefore, the Applicant knew that the issue of time was to be considered and the argument that the tender documents did not provide that time was to be of essence was an afterthought.

Finally, the Procuring Entity submitted that the issue of damages is a post contract issue and was not considered in the evaluation.

The successful bidder associated itself with the submissions of the Procuring Entity.

It stated that it had included particulars of its capacity and past contracts of these nature of which it had undertaken.

Finally, the successful tenderer stated that all tenders were fairly evaluated and its bid was the lowest responsive. Therefore, it would be manifestly unfair to deny it the contract as the evaluation was done using the criteria set out in the Tender Documents.

The Board has noted that the criteria for financial evaluation was stated in clause 20.8 of the tender document. Clause 20.8 provided as follows:-

"The evaluation shall be based on the following key criteria:

- (a) Validity and feasibility of all process as determined by comparison between the various tenders.*
- (b) Total tendered price of the project.*
- (c) Conditions of price (firm and fixed for the local duration of the project).*
- (d) Potential additional costs not included in the tendered price.*
- (e) Terms of payment vs. cash flow".*

The Board has further noted that as part of the technical responsiveness the Procuring Entity was to consider the project implementation schedule as provided in clause 20.6 of the tender documents.

It is therefore, clear that as per clause 20.8(a) the Procuring Entity had provided that it will carry out a comparison of the bids by the various tenderers. Further, the bidders were required to state the period they would take to complete the project. The Applicant provided a period of 12 months whereas the successful bidder provided a period of 7 months. Therefore, bidders were aware that the issue of time was one of the critical issues that would be considered by the Procuring Entity in addition to the price.

The Board has noted that during the commercial evaluation, the Procuring Entity calculated the potential additional costs that it would incur by taking the difference in time between the implementation period given by the Applicant and the Successful bidder.

The Board has noted that clause 20.8(e) provided that the Procuring Entity would consider potential additional costs that were not included in the tender price. It noted that if the tender was to be awarded to the Applicant it would incur an additional cost amounting to Kshs Three hundred and Ninety Eight Million, Eight Hundred and Seventy One Thousand, and One Hundred and Fourteen shillings. It therefore considered the bid by the successful candidate to be more advantageous commercially even though its tender price was higher.

The Board has noted that this tender was for Civil/Structural Works and Equipment Installation for new Coal and Grinding and Dosing Facility. As the Board has stated severally, price alone is not the only factor to be considered when awarding the tender. The lowest evaluated bid is the bid that is the most advantageous to the Procuring Entity when all factors including price are considered.

The Board has further noted that the Applicant has argued that the tender document was vague. It should be noted that Clause 9 of the tender document clearly stated that a tenderer was at liberty to seek clarification on additional information. The Applicant did not seek any clarification on the issue of time or any other aspect of the tender.

The Board has carefully considered the minutes of commercial evaluation and has noted that the Procuring Entity did not introduce any new criteria during the evaluation.

The Board has further noted that the issue of proposed damages was not included in the criteria for evaluation and was financial a post award issue and it was not considered during commercial evaluation.

Taking all the above matters into consideration, these grounds also fail.

GROUND 4 - BREACH OF SECTION 67(2)

The Applicant submitted that although the letter of notification was dated 2nd June, 2009, it was dispatched by courier on 9th June, 2009. It argued that the delay in dispatching the letter was intended to deny the Applicant the right to lodge the Request for Review in time.

In response, the Procuring Entity submitted that the letters to both successful and the unsuccessful bidders were dispatched on 9th of June, 2009. Therefore, there was no mischief or delay as argued by the Applicant.

Finally, it argued that the Applicant has not suffered any prejudice as it was able to lodge its appeal on time.

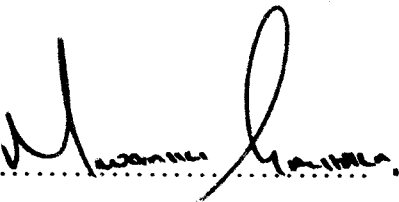
The Board has noted that the letters of notification to the successful and unsuccessful bidders were dispatched on 9th of June, 2009. Therefore, the Applicant has not suffered any prejudice as it was able to lodge its Request for Review on time.

Taking all the above matters into consideration, this Request for Review is hereby dismissed.

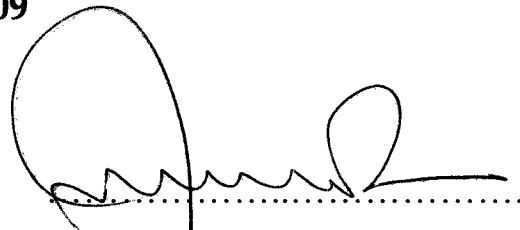
Pursuant to Section 98(b) the Board gives directions as follows:

- (a) The procurement process may proceed; and further
- (b) That the Procurement Entity's contract with the successful bidder should incorporate a clause to the effect that if the successful bidder should not complete the contract within the 7 months as per its tender document, then it will pay damages as were calculated by the Procuring Entity during the commercial evaluation, as per the Procuring Entity's table at page 6 of this Decision.

Dated at Nairobi on this 8th day of July, 2009

A handwritten signature in black ink, appearing to be 'M. M. M. M.', written over a horizontal dotted line.

**Signed Chairman
PPARB**

A handwritten signature in black ink, appearing to be 'J. M. M.', written over a horizontal dotted line.

**Signed Secretary
PPARB**