

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

**CONSOLIDATED REVIEW NOs.7/2010 OF 27TH JANUARY, 2010 AND
8/2010 OF 29TH JANUARY, 2010**

BETWEEN

NORTROLL A/S AND LUCY ELECTRIC (UK) LTDAPPLICANTS

AND

KENYA POWER AND LIGHTING CO. LTD..... PROCURING ENTITY

Reviews against the decision of the Tender Committee of Kenya Power and Lighting Co. Ltd dated the 15th January, 2010 in the matter of Tender No.KPLC1/4/3/1/PT/ITT/10/09 for Supply, Installation and Commissioning of 11kV Distribution Automation System.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Sospeter Kioko	-	Member
Eng. C. A. Ogut	-	Member
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. P. M. Wangai	-	Holding Brief for Secretary
Ms. Kerina A. Rota	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.7/2010

Applicant, Nortroll A/S

- Mr. Owino Opiyo - Advocate, Aming'a, Opiyo, Masese & Co.
Advocates
- Mr. Eystein Eriksen - Managing Director
- Mr. David Nicholas - Local Agent

PRESENT BY INVITATION FOR APPLICATION NO.8/2010

Applicant, Lucy Electric (UK) Ltd

- Mr. Geoffrey Oriaro - Advocate, Oriaro & Co. Advocates
- Mr. Chris Murunga - Managing Director
- Mr. Graham Pryce - International Sales Manager

Procuring Entity, Kenya Power & Lighting Co. Ltd

- Mr. C. N. Kihara - C. N. Kihara & Co. Advocates
- Mr. Robert Mahenia - Advocate, Kenya Power & Lighting Co.
Ltd
- Mr. Samuel Ndirangu - Telecommunications Engineer
- Mr. Francis Maina - Telecommunications Engineer
- Ms. Mary Ngethe - Senior Accountant
- Ms. Peris Wanjohi - Pupil, C. N. Kihara & Co. Advocates

Interested Candidates

- Mr. Hubert Mendonca - Sales and Marketing Manager, ABB Ltd
- Ms. Lydia Kariuki - Advocate for El- Mor Ltd

BOARD'S DECISION

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

BACKGROUND

This tender was advertised by the Procuring Entity on 8th October, 2009. The tender was for Supply, Installation and Commissioning of 11kV Distribution Automation System. The tender was opened on 26th November, 2009 in the presence of bidders' representatives. The tenders were received from the following five bidders:

1. Nortroll A/S
2. ABB SA
3. El-Mor Electric Ltd
4. Lucy Electric (UK) Ltd
5. Power Tech

Preliminary Evaluation

This was conducted by a committee chaired by Mr. Samuel Ndirangu and was based on the following mandatory requirements:

1. Valid Tender security
2. Confidential business questionnaire
3. Dully completed tender form
4. Registration Certificate
5. PIN Certificate

6. Tax and VAT Certificates
7. Submission of the required number of sets of tender document
8. Test certificates and their reports
9. Relevant quality certificates
10. Guaranteed technical particulars and statement of compliance to technical specifications

The tender submitted by Power Tech was found non-responsive for failing to comply with all the mandatory requirements of the tender. The other four tenderers proceeded to the technical evaluation stage.

Technical Evaluation

Technical Evaluation was conducted to determine the responsiveness of the tenders to the technical specifications. All the four bidders were found technically responsive and they proceeded to the financial evaluation stage.

Financial Evaluation

The financial bids were opened on 17th December, 2009 in the presence of the bidders' representatives. The tender submitted by Nortroll AS was rejected for failing to quote for GSM Modem and GSM Modules in its main offer. A summary of the financial evaluation for the other three bidders was follows:

Bidder	Tender Sum (Kshs)
Lucy Electric (UK) Ld	235, 950, 173.56
ABB SA	427, 446, 289.67
EL- MOR Electric Ltd	214, 760, 422.11

In view of the above information, the evaluation committee recommended the award of the tender to EL- MOR Electric Ltd at its tender sum of USD. 2, 846, 194. 00. This was equivalent to Kshs. 214, 760, 422.11 at the exchange rate of Kshs. 75.4553 per US dollar.

In its meeting held on 30th December, 2009, the Corporation Tender Committee concurred with the recommendation of the evaluation committee and awarded the tender to EL-MOR Electric Ltd.

Notification letters to the successful and unsuccessful bidders are dated 15th January, 2010.

THE REVIEWS

The Request for Review No.7/2010 was lodged by Nortroll A/S on 27th January, 2010 while Request for Review No.8/2010 was lodged by Lucy Electric (UK) Ltd on 29th February, 2010. The two Reviews were against the decision of the Tender Committee of Kenya Power & Lighting Co. Ltd in the matter of Tender No.KPLC1/4/3/1/PT/ITT/10/09 for Supply, Installation and Commissioning of 11kV Distribution Automation System. The Applicant for Application No.7/2010 was represented by Mr. Owino Opiyo, Advocate while the Applicant in Application No.8/2010 was represented by Mr. Geoffrey Oriaro, Advocate. The Procuring Entity was represented by Mr. C. N. Kihara, Advocate. The Successful Bidder, El-MOR Electric Ltd was represented by Ms. Lydia Kariuki, Advocate.

At the commencement of the hearing, it was agreed by consent of all parties, that both Requests for Review be heard concurrently as they were filed against the same procurement process and involved the same parties.

APPLICATION NO.7/20010 OF 27TH JANUARY, 2010

The Applicant in its Request for Review has raised four grounds of appeal and urged the Board:-

- “1. To nullify the Procuring Entity’s decision of Awarding this subject to any other bidder/bidders at any higher amount and the Award be made to the Applicant (NORTROLL A/S) at Kshs. 168,000,000/= being the lowest bidder.
2. To find NORTROLL’S Tender of Kshs. 168,000,000/= is most responsive as set out in the Regulations 30(4) and 30(5) and as per Procurement Entity’s instructions in Clause 22.2.
3. To cause the Procurement Entity to compensate the Applicant the costs of this Appeal”.

The Board deals with the four grounds as follows:-

GROUND 1 AND 2: BREACH OF SECTIONS 66(2) AND (4) OF THE ACT.

These grounds have been consolidated because they raise similar issues.

The Applicant submitted that the Procuring Entity breached Section 66(2) and (4) of the Public Procurement & Disposal Act, 2005 (hereinafter referred to as

"the Act") by awarding the Tender to the successful bidder at a higher price than that of the Applicant. It stated that its tender price was Kshs.168,000,000.00 and the successful bidder price was Kshs. 214, 760, 422.11. The Applicant argued that its tender was responsive and since its price was lower than that of the successful tenderer, it should have been awarded the tender.

The Applicant further submitted that it was disqualified at the financial evaluation stage for failing to complete its price schedule properly. It argued that the failure to complete its price schedule with respect to GSM Modem and GSM Modules was a minor deviation that could have been corrected pursuant to Section 63(1) of the Act without affecting the substance of the tender. It stated that such errors could have been waived as errors and oversights under Clauses 3.29.1 and 3.29.3 of the tender document since they were not material deviations. It further stated that GSM Modem and GSM Modules were factored in the technical proposal which was found responsive by the Procuring Entity. The Applicant argued that its total price was also inclusive of GSM Modem and GSM Modules and that this was clarified by its letters dated 18th and 21st January, 2010 to the Procuring Entity. Therefore, it argued that the omission should not have been a basis for disqualifying the Applicant.

In response, the Procuring Entity denied that it breached Section 66(2) and (4) of the Act as alleged by the Applicant. It submitted that the Applicant's tender was not the lowest evaluated as it was defective and lacked the unit price for GSM modem and modules. It claimed that there was no way one could operate the Air Break Switches without the GSM Modem and Modules as they are critical components of the system. It further claimed that the Applicant's total amounts were wrong and uncorrectable.

It stated that in the Applicant's tender (Solution A), the Applicant did not give the quantities and totals of item 3 on the Step down Transformer. The Procuring Entity stated that the omission in the Applicant's tender were fundamental and could not be corrected as arithmetic errors without making substantial alteration on the financial bid. The Procuring Entity argued that it was difficult to correct the omissions by the Applicant as arithmetic errors as it had not indicated the unit price.

Citing Clause 3.11.1 of the tender document, the Procuring Entity argued that it was a mandatory requirement to indicate in the price schedule, the unit price and the total tender price of the goods a bidder intended to supply. It further argued that the explanation given by the Applicant for the omissions in its tender by letters dated 18th and 21st January, 2010 were not acceptable as the letters were received the award of the tender.

In conclusion, the Procuring Entity stated that the Applicant's tender, Solution B was not considered as alternative offers were not allowed. The Procuring Entity further stated that it faced an inconsistent bid from the Applicant and claimed that at times the Applicant stated that the errors of omission in its bid were caused by an oversight, and wanted the omissions to be corrected by using the information in its Tender Solution B.

On its part, the Successful Candidate stated that it was informed that its Tender had been accepted by a letter dated 15th January, 2010. It submitted that Section 66(1) of the Act requires the Procuring Entity to evaluate and compare the responsive tenders other than tenders rejected under Section 66(3) of the Act. It further submitted that according to Section 66(4), the successful tender shall be the tender with the lowest evaluated price.

It further submitted that for a Tenderer to be successful it must not only submit a low priced bid, but must also submit a bid that is responsive to the Tender requirements. It stated that Section 64(1) defines a responsive tender as one which is in conformity to all the mandatory requirements in the tender documents. It referred to paragraphs 3.36.1; 3.37.1; 3.37.2 of the Tender Documents which state as follows:-

i) Paragraph 3.36.1:

“KPLC may confirm to its satisfaction whether the Tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily”.

ii) Paragraph 3.37.1:

“KPLC will award the contract to the successful Tenderer whose Tender has been determined to be substantially responsive, technically and compliant and has been determined to be the lowest evaluated tender, and further, where deemed necessary, that the Tenderer is confirmed to be qualified to perform the contract satisfactorily”.

iii) Paragraph 3.37.2:

“Award will be done and indicated in the Appendix to Instructions to Tenderers”

Paragraph 3.37.2 of the Instructions to Tenderers provides as follows:

“Award is on lowest compliant bidder”

It submitted that it complied with the above mentioned clauses and that the bid by the Successful Tenderer conformed to all the mandatory requirements.

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

The Board notes that it is not disputed that the Applicant did not provide the prices for GSM Modem and GSM Modules in the price schedule. The key issue for the Board to determine is whether or not that omission by the Applicant was fundamental or was a minor omission that could be cured by way of clarification.

The Board has perused the Blank copy of the Tender Document issued to the bidders and noted that Section VI of the Tender Documents provided summary of the evaluation criteria. The evaluation was carried out in three stages namely; preliminary, technical and financial evaluation and the bids by Nortroll A/S, ABB SA, EL-MoR Electric Ltd and Lucy Electric (UK) Ltd proceeded to technical evaluation. All the four bids were found responsive to the technical specifications and they proceeded to the financial evaluation.

The Board further notes Clause 3.11.1 of the tender document provides as follows:

“The tenderer shall indicate on the Price Schedule, the unit prices and the total tender prices of the goods it proposes to supply under the contract”.

The Board also notes that although the Applicant had included GSM System in its technical bid, it did not indicate the price of the GSM Modem and

Modules. The Board further notes that the Applicant's Solution B was not considered pursuant to Clause 3.19 of the Instructions to Tenderers which provided that bidders were not allowed to give alternative offers.

The Board has perused the original Tender Documents submitted by the Applicant and noted that the Applicant did not price its GSM Modem and GSM Modules in its financial bid, which was a mandatory requirement. Therefore, the Board finds that the bid (Solution A) by the Applicant was properly disqualified because the Applicant did not indicate the price of the GSM Modem and Modules in its financial bid.

In view of the foregoing, this ground fails.

GROUND 3: BREACH OF SECTION 67(1) OF THE ACT.

The Applicant submitted that the Procuring Entity failed to notify it the winner of the tender contrary to Section 67(1) of the Act.

In response, the Procuring Entity submitted that the Applicant's complaint has no merit as the provisions of Section 67(1) of the Act does not obligate the Procuring Entity to notify the Applicant of the winner of the award.

The successful bidder supported the Procuring Entity by stating that Section 67(1) only requires the notification to the successful tenderer. It submitted further that since the Applicant was not the successful tenderer, it could not have been notified under Section 67(1) of the Act, 2005.

The Board notes that Section 67(1) states that:

“Before the expiry of the period during which tenders must remain valid, the Procuring Entity shall notify the person submitting the successful tender that his tender has been accepted”.

The Board notes that Section 67(1) does not require the Procuring Entity to notify the unsuccessful bidders who the successful bidder was. Further, the Board observes that Section 67(2) of the Act requires the Procuring Entity to notify both the successful and the unsuccessful bidders the outcome of the tender at the same time.

The Board notes that the successful and the unsuccessful bidders were notified of the outcome of the award through letters dated 15th January, 2010.

Therefore, this ground also fails.

GROUND 4: BREACH OF SECTION 63(2) OF THE ACT.

The Applicant alleged that the Procuring Entity failed to seek any clarifications from the Applicant prior to award of the Tender in contravention of Section 63(2) of the Act, 2005. It argued that the errors that led to the rejection of its tender were minor and would have been corrected without affecting the substance of its tender had the Procuring Entity sought clarification from it.

In response, the Procuring Entity submitted that the omissions in the Applicant's tender were not minor and could not have been cured even if it invoked Section 63(2) of the Act. It further stated that Section 63(2) of the Act was not applicable as argued by the Applicant since it deals with correction of errors and not clarification.

The Board notes that Section 63 relates to correction of arithmetic errors and not clarifications in a tender by the Procuring Entity. The Board observes that Section 63(2) of the Act was therefore wrongly cited by the Applicant. The correct Section of the Act that the Applicant should have cited is Section 62(1) of the Act which states that "The Procuring Entity may request a clarification of a tender to assist in the evaluation and comparison of tenders". However, The Board notes that Section 62(1) of the Act is discretionary and not mandatory and can only be invoked by the Procuring Entity to seek minor clarifications that do not affect the substance of the tender.

The Board finds that the Procuring Entity did not breach Section 62(1) of the Act, 2005 by failing to seek clarification from the Applicant.

In view of this, this ground of appeal also fails.

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

APPLICATION NO.8/2010 OF 29TH JANUARY, 2010

The Applicant has raised seven grounds of appeal and urged the Board to make the following orders:

- "1. To annul/cancel or set aside the award of tender to the successful tenderer and award the tender to the Applicant, or alternatively;
2. To annul the procurement proceedings in their entirety, and
3. To direct the Respondent to retender taking in to account the requirements to provide a tender document that provides sufficient information".

The Board deals with the seven grounds raised by the Applicant as follows:

GROUND ONE: BREACH OF SECTION 31(A) OF THE ACT

The Applicant submitted that the Procuring Entity breached Section 31(a) of the Act by awarding the tender to a bidder who did not have the technical, financial and production capability to perform the contract. It submitted that the Procuring Entity did not examine the experience, qualification and track record of the Successful Bidder before making the award. The Applicant stated that it had checked the website of the Successful Bidder and found that the references provided are on food and beverage industry. It pointed out that the Successful Bidder's experience is in electrical works and not in power distribution network as required in the tender document. It argued that, by making the award to El- MOR Electric Ltd, the Procuring Entity acted contrary to Clause 3.9(e) of the tender document which required bidders to demonstrate their capability by providing references from their previous customers of similar projects.

The Applicant further argued that the Successful Bidder is not a manufacturer and therefore it ought to have provided a manufacturer's authorization in the form and content provided in Manufacturer's Authorization Form, which was a mandatory requirement pursuant to Clause 3.13.3 of Section VI of the tender document

With regard to the criterion on financial capability, the Applicant submitted that the Procuring Entity did not carry out evaluation in accordance with Clause 6.3.1.4 of the tender document. It argued that had Procuring Entity carried out a proper evaluation, it would have found that the Successful Bidder did not have the required financial capability. The Applicant urged the

Board to establish whether the turnover of the Successful Bidder was at least four times its tender sum as required in the tender document.

Finally, the Applicant stated the Procuring Entity acted in a discriminatory manner by seeking clarification from the Successful Bidder alone and allowing it to change its price. It stated that whereas price quoted by the Successful Bidder was Kshs. 235, 744, 000.00 as read out at the opening of financial proposals, the tender was awarded at Kshs. 216, 000, 000.00.

In response, the Procuring Entity submitted that the Successful Bidder was evaluated and found to have the necessary technical and financial capability to perform the contract. It argued that the Successful Bidder had demonstrated to the satisfaction of the Procuring Entity that it had a track record and had complied with all the technical specifications set out in the tender documents. It argued that this was evidenced by the references that were provided in the bid submitted by the Successful Tenderer. These included the manufacturer's authorization, warranty, ISO certificates and detailed training program for the personnel of the Procuring Entity.

The Board has carefully considered the arguments of parties and the documents presented before it.

The Board has also perused the copy of the tender document issued to the bidders and the evaluation report. The Board notes that the tender documents had detailed evaluation criteria which required the Procuring Entity to evaluate the tenders in three stages namely preliminary, technical and financial evaluation. Bidders were required to pass in one stage before proceeding to the next stage.

The Board further notes that even though the preliminary evaluation was done in accordance with the tender document, the technical and financial evaluations were not carried out in accordance with the technical criteria and financial criteria stipulated in Clauses 3.30.1 and 3.13.3 respectively in the tender document. Clause 3.30.1 of the Instructions to Tenderers States as follows:

“KPLC will evaluate and compare the Tenders that have been determined to be substantially responsive, in compliance to the Technical requirements set out in the Tender Document and as per the Technical Evaluation Criteria as prescribed in the Summary of Evaluation Process”.

Upon perusal of the Technical Report, the Board notes that the Successful Bidder, El-Mor Ltd did not offer a number of items specified in the tender document. For example, items 1 to 23 Air Break Switches, and whether its operating mechanism is compatible with the operating head in use by the Procuring Entity. The Successful Bidder is also shown as not having provided the Supplier’s Guarantee and Warranty, and the required Statement of Compliance to tender specifications.

As regards the financial evaluation, the Board notes that Clause 3.13.3 of the Instructions to Tenderers required bidders to provide documentary evidence:-

“(a) that, in the case of a Tenderer offering to supply goods under the contract which the Tenderer did not manufacture or otherwise produce, the Tenderer has been duly authorized by the goods’ manufacturer or producer to supply the goods. The authorization shall strictly be in the form and content as prescribed in the Manufacturer’s Authorization Form in the Tender Document.

(b) that the Tenderer has the financial capability necessary to perform the contract. The Tenderer shall be required to provide the documents as specified in the Appendix to Instruction to Tenderers including a current Tax Compliance Certificate issued by the relevant tax authorities.

(c) that the Tenderer has the technical and production capability necessary to perform the contract.

(d) that, in the case of a Tenderer not doing business within Kenya, the Tenderer is or will be (if awarded the contract) represented by an agent in Kenya equipped and able to carry out the Tenderer's maintenance, repair, spare parts and stocking obligations prescribed in the Conditions of Contract and or in the Technical Specifications".

The Board also noted that the financial evaluation criteria were clearly set out at Clause 6.3 of Section VI of the tender document and that Clause 6.3.1.4 required the Procuring Entity to ascertain the financial capability of the bidders through their audited financial statements for the year 2008 by:

a) Checking and considering the Tenderer's liquidity ratios are acceptable to KPLC and meet the threshold of:

(i) Current ratios 1:1 i.e. current assets: current liabilities

(ii) Quick ratios (acid test) of 1.0 i.e. (Cash +Accounts Receivables + short term investments) divided by current liabilities

- b) Checking and considering the Tenderer's solvency ratios in particular the Debt to Assets Ratio is acceptable to KPLC i.e. meets the threshold of at least 1:1
- c) Turnover in the last financial year of at least four (4) times the total tender value.

Upon perusing the copy of the evaluation report submitted by the Procuring Entity, the Board notes that the tenders were evaluated in three stages (preliminary, technical and financial) and only one bidder was disqualified at the preliminary evaluation stage. The other four bidders were found responsive both at preliminary and technical evaluation.

From the financial evaluation report submitted by the Procuring Entity, the Board notes that the evaluation committee did not consider all the parameters set out in Clause 6.3 on the evaluation criteria to determine the successful bidder. In particular the Board notes that there is no information in the evaluation report to show that the Procuring Entity carried an evaluation as provided by Clause 6.3.1.4 of Section VII which provided as follows:

a) Checking and considering the Tenderer's liquidity ratios are acceptable to KPLC and meet the threshold of:

(i) Current ratios 1:1 i.e. current assets: current liabilities

(ii) Quick ratios (acid test) of 1.0 i.e. (Cash +Accounts Receivables +short term investments) divided by current liabilities

b) Checking and considering the Tenderer's solvency ratios in particular the Debt to Assets Ratio is acceptable to KPLC i.e. meets the threshold of at least 1:1

c) Turnover in the last financial year of at least four (4) times the total tender value.

Instead, the Board notes that the evaluation committee only conducted a price comparison of the prices quoted by the bidders. This was contrary to the mandatory financial evaluation criteria set out in Clause 6.3 of the tender document.

In view of this information, the Board finds that the evaluation was not conducted fairly and hence the Procuring Entity could not have arrived at the lowest evaluated bidder as envisaged under the tender documents and the Act.

Accordingly, this ground of appeal succeeds.

GROUND TWO: BREACH OF SECTION 45(3) OF THE ACT

The Applicant submitted that the Procuring Entity breached Section 45(3) of the Act by failing to provide a summary of the evaluation and comparison of tenders to it despite a written request. It cited Sections 44(2) (c) and 44(3), and argued that it was entitled to a summary of the evaluation and comparison of tenders. It contended that the argument by the Procuring Entity that the information the Applicant requested for was confidential is untenable and could not exonerate the Procuring Entity from its obligations.

In response, the Procuring Entity submitted that the Applicant's complaint had no merits since Section 45(3) of the Act relates to the information that

should only be disclosed to a bidder after the signing of a contract or termination of procurement proceedings. It further submitted that the reasons for rejection of the Applicant's tender were contained in the notification letter dated 15th January, 2010 sent to the Applicant and that further the same information was availed to the Applicant after its advocate made a further request, through a letter dated 19th January, 2010.

The Board notes that by a letter dated 19th January, 2010, the Applicant requested the Procuring Entity to give it the reasons for the rejection of its tender together with the details of the technical and financial evaluations. The Procuring Entity responded by a letter Ref: KPLC1/4/3/1/PT/ITT/01/09/SN/mm dated 22nd January, 2010. Having requested for the reasons why it was unsuccessful, the Board holds that the Applicant was entitled for a summary of the evaluation report pursuant to Section 44(3) of the Act and not detailed evaluation report. However, the Board notes that the Procuring Entity had fourteen days to give the summary from 19th January, 2010 as stipulated under Regulation 66(2). This period had not lapsed by 29th January, 2010 when the Applicant filed this Request for Review.

GROUND THREE, FIVE, SIX AND SEVEN

These are not grounds of appeal but mere statements that are not backed by any breach of the Act/Regulations as stipulated by Regulation 73(2) (a). Accordingly, the Board need not comment on them.

GROUND FOUR

This is a complaint that the Procuring Entity breached Section 52(2) of the Act by failing to provide clear and relevant information to allow fair competition

amongst the bidders. It cited items 8 and 9 of the price schedule, and argued that the tender document allowed for options by allowing installation of the distribution by the supplier or by the Procuring Entity without directing the bidders whether to quote for both or not. It argued that this anomaly was misleading and disadvantageous to a bidder quoting for both, as its price would be higher. It argued that the clarification given by the Procuring Entity at the pre-bid conference could not be construed to be part of the tender document as the tender document was never amended.

In response, the Procuring Entity submitted that this ground was too general and had not raised specific issues. It was therefore difficult to respond to general issues. The Procuring Entity further stated that it organized for a pre-bid conference on 26th October, 2009 where all the issues sought by the bidders were clarified and later communicated to the bidders in writing.

The Successful Bidder argued that the Tender Documents were comprehensive and met the requirements stipulated in Section 52 of the Act and Regulation 38.

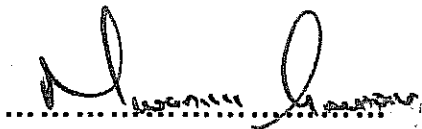
The Board has perused the blank copy of the tender document issued to the bidders and notes that the tender documents had all the key aspects of a standard tender document. The tender document contained an invitation to tender, instructions to tenderers, schedule of requirements, technical specifications among others which enabled the bidders to participate in the procurement process. The Board further notes that Clause 3.6.1 of the Instruction to Tenderers allowed bidders to seek clarification of the tender documents from the Procuring Entity. The Applicant has admitted that it did not exercise its right by seeking such clarifications and therefore its argument that the contents of tender document were insufficient is an afterthought.

In the circumstances, this ground of appeal fails.

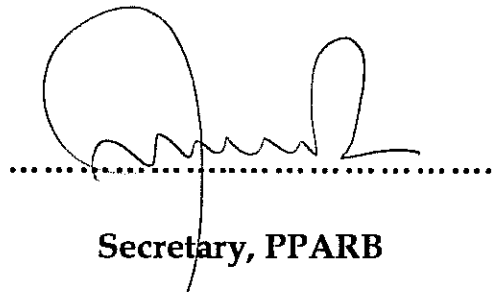
Taking into consideration all the above matters, the Request for Review succeeds and the Board orders as follows:

- a) The award of the tender to El-MOR Ltd be and is hereby annulled pursuant to Section 98(a) of the Act.
- b) The Procuring Entity is hereby directed to re-evaluate the tenders and strictly adhere to the evaluation criteria set out in the Tender Documents.
- c) The Procuring Entity should extend the tender validity period as appropriate to enable it conduct the re-evaluation exercise.

Dated at Nairobi on this 25th day of February, 2010



Chairman, PPARB



Secretary, PPARB