

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 61/2010 OF 10th NOVEMBER, 2010

BETWEEN

MFI LEASING LIMITED.....APPLICANT

AND

KENYA RURAL ROADS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Rural Roads Authority dated 27th October, 2010 in the matter of Tender No. KeRRA/ADM/04/2010 - 2012 for Leasing of Multi-Functional Colour Network Duplex Printers.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mrs. Pamela K. Ouma	-	Holding brief for the Secretary
Ms. Kerina A. Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, MFI Leasing Limited

- Ms Kethi D. Kilonzo - Advocate (Kilonzo & Co. Advocates)
- Mr. Rajendra Prasad - General Manager
- Mr. Moses Elebote - Business Manager
- Ms Teresia Munithi - Account Manager

Procuring Entity, The Kenya Rural Roads Authority

- Mr. Kenneth Mwangi - Procuring Manager
- Mr. Justin M. Rapando - Legal Affairs Manager
- Mr. M. Muthui - Procurement Officer

Interested Candidates

- Mr. Archith Rao - Head of Business Development, Express
Automation Limited

BOARD'S DECISION

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

BACKGROUND

The Procuring Entity invited eligible bidders through a restricted tendering method to tender for provision of Leasing of Multi-functional colour network duplex printers.

Advertisement

The Corporation Tender Committee meeting dated 9th June 2010 approved seven (7) tenderers with the capacity to provide Leasing of Multi-functional colour network duplex printers (MFP), to apply through a restricted tendering method. The following bidders were invited to submit bids through a letter dated 5th July, 2010:

1. Bell Atlantic Communications
2. Ramco Group (Office Technologies)
3. MFI Leasing Limited
4. Sharp Electronics Technologies Limited
5. The Copycat Limited
6. Express Automation
7. Xerox Technologies.

Closing/Opening:

Six (6) proposals were received by the deadline date for submission of the technical proposal on 26th July, 2010 at 11:00 a.m. as follows:-

1. Bell Atlantic Communications
2. Ramco Group (Office Technologies)
3. MFI Leasing Limited
4. Sharp Electronics Technologies Limited
5. The Copycat Limited
6. Express Automation

EVALUATION

The Evaluation was carried out by an Evaluation Committee chaired by Mr. A.L.M. Mwakaba. The evaluation was carried out in three (3) stages namely:

- a) Examination of technical conformity of the specifications/Preliminary
- b) Evaluation of the technical quality of the tender;
- c) Financial Evaluation

1. Preliminary Evaluation

The Evaluation Committee used the list of requirements from the specification as stated in the request for proposals (RFP) to assess responsiveness of each of the proposals submitted. Detailed analysis of responsiveness of each of the proposals is tabulated.

No.	Specifications		Ramco Group (Office Technologies-OTL)	MFI Leasing Limited	Sharp Electronics Technologies Limited	The Copycat Limited	Express Automation	Bell Atlantic Communications
1	All-in-one printer	Copy, print, scan and fax.	Complied	Complied	Complied	Complied	Complied	Complied
2	Paper size	A5 - A3	Complied	Complied	Complied	Complied	Complied	Non-compliant
3	Power Source	220 - 240v	Complied	Complied	Complied	Complied	Complied	Complied
4	Power Consumption	Less than 1.5kW	Complied	Complied	Complied	Complied	Complied	Complied
5	Memory	Standard 2048MB	Complied	Complied	Complied	Complied	Complied	Non-compliant
6	Hard Disk	200-N250GB (shared with printer/scanner/fax function)	Complied	Complied	Complied	Complied	Complied	Non-compliant
7	Document Feeder	Auto Reverse Document Feeder.	Complied	Complied	Complied	Complied	Complied	Complied
8	Copying Process	Laser beam scanning and electro-photographic printing	Complied	Complied	Complied	Complied	Complied	Complied
9	Copy Speed	36 copies B/W & Full colour per minute.	Complied	Complied	Complied	Complied	Complied	Non-compliant
10	Copy Resolution	600 dpi.	Complied	Complied	Complied	Complied	Complied	Complied
11	Scan Speed	70 copies B/W & Full colour per minute	Complied	Complied	Complied	Complied	Complied	Non-compliant
12	Scan Resolution	600 dpi	Complied	Complied	Complied	Complied	Complied	Complied
13	Scan Output Format	PDF/JPEG/TIFF/High compression PDF	Complied	Complied	Complied	Complied	Complied	Complied
14	Scan Options	Scan to e-mail and scan to folder, scan to box, scan to USB.	Complied	Complied	Complied	Complied	Complied	Complied
15	Address Book	Via LDAP or locally on Hard Disk Drive	Complied	Complied	Complied	Complied	Complied	Complied
16	Network Protocol	TCP/IP & Apple Talk, LPD, I PP, SNMP, HTTP.	Complied	Complied	Complied	Complied	Complied	Complied
17	Supported Operating Systems	Windows 2000/XP/Vista/Windows Server, Macintosh, Unix, Linux, Citrix.2003/2008.	Complied	Complied	Complied	Complied	Complied	Complied
18	Paper Input	2 standard trays and 1 bypass tray	Complied	Complied	Complied	Complied	Complied	Complied

19	Print Resolution	1,800 x 600 dpi	Complied	Complied	Complied	Complied	Complied	Non-compliant
20	Print Speed	36 copies B/W & Full colour per minute	Complied	Complied	Complied	Complied	Complied	Complied
21	Printing Technology & Interface	Laser, USB, Ethernet.	Complied	Complied	Complied	Complied	Complied	Complied
22	Software	Print Status, Driver Packaging, Log Management, Supports e.g. GPRS and software for technical support etc.explain	Complied	Complied	Complied	Complied	Complied	Non-compliant
23	Fax standard & Fax compression	Super G3 (optional), MH; MR; MMR; JBIG	Complied	Complied	Complied	Complied	Complied	Complied
24	Fax transmission	Analogue; i-Fax; Colour i-Fax (RFC3949-C); IP-Fax	Complied	Complied	Complied	Complied	Complied	Non-compliant
25	Fax resolution (dpi)	Max.: 600 x 600 (ultra-fine)	Complied	Complied	Complied	Complied	Complied	Non-compliant
26	Fax modem (Kbps)	Up to 33.6	Complied	Complied	Complied	Complied	Complied	Non-compliant
27	Fax destinations & Fax functions	2,100 (single + group) Polling; Time shift; PC-Fax; Receipt to confidential box; Receipt to Email/FTP/SMB; up to 400 job programs.	Complied	Complied	Complied	Complied	Complied	Non-compliant

One bidder namely Bell Atlantic Communications Ltd was found to be non-responsive to the requirements of the tender and was disqualified at this stage.

The responsive bidders namely Ramco Group (Office Technologies-OTL); MFI Leasing Limited; Sharp Electronics Technologies Limited; the Copycat Limited; and Express Automation were then subjected to the next stage of Detailed Technical Evaluation.

2. Technical Evaluation

The evaluation criteria was in accordance with the breakdown given in the Request for Proposal (RFP) and is as tabulated:-

No.	EVALUATION CRITERIA	MAX SCORES
1.	Attach a letter of authorization from the manufacturer indicating that they are your business partner for the machines being offered.	10
2.	Attach certificates and CV's of 3 (three) Engineers with diploma in electrical and electronic Engineering and relevant professional certification.	10
3.	Attach a comprehensive escalation procedure for fault reporting with contacts of the Technicians.	10
4.	Firm's financial capacity: Turnover of Ksh. 10 million. Please attach companies audited account for the last two years.	10
5.	Attach original certified Bank statement for the last two years. (this is to confirm the company liquidity)	10
6.	Provide comprehensive schedule for the preventive maintenance.	10
7.	Firm's Specific experience in the area of Leasing of Multifunctional colour Printers.	20
8.	Attach 3 reference letters from reputable firms, where you are currently offering this Service. (Please note that the employer may conduct a site visit to the bidder's client to verify).	20
	Total Scores	100

The summary results of the evaluation and the ranking of the bidders was as hereunder:

No.	Company	Technical Score out of 100%	Scores converted to equivalent of 70.	Rank
1	Express Automation.	92.25	64.58	1
2	MFI Leasing Limited.	87.50	61.25	2
3	Ramco Group (Office Technologies Limited)	74.25	51.98	3
4	The Copycat Limited.	46.50	32.55	4
5	Sharp Electronics Technologies Limited.	27.50	19.25	5

After the technical evaluation three (3) bidders out of the five (5) responsive firms attained the 70% score of the possible 100%. These firms were; Express

Automation; MFI Leasing Limited; and Ramco Group (Office Technologies Limited) (OTL). Two firms namely the Copycat Limited and Sharp Electronics Technologies Limited were declared non-responsive at this stage.

FINANCIAL EVALUATION

The three firms which attained the pass mark proceeded to the financial stage of the tendering process. The bidders were invited for a financial opening of their bids which was conducted on 9th September 2010.

The lowest priced proposal was awarded 30 points while other prices were awarded proportionate points as per the formula below;

Lowest Cost x 30

Proposal's Cost;

The bidders' financial proposals were as tabulated below;

No.	Company	Proposed cost in Kshs. per paper for black & white paper.	Proposed cost per paper in Kshs. for coloured paper	Total cost for both black/white and Coloured.
1	MFI Leasing Limited	1.45	7.55	9.00
2	Express Automation	1.05	8.70	9.75
3	Office Technologies (Ramco Group)	1.28	8.70	9.98

The financial proposal scores ranking were as listed;

1. MFI Leasing Limited - 30 points
2. Express Automation - 27.69 points
3. Office Technologies (Ramco Group)- 27.05 points

The Combined Technical and Financial Score:

The overall ranking was computed by adding the score of the technical proposal and the points scored on financial proposal.

The combined scores of the bidders were as follows: -

	Bidder	Technical Score (out of 70%)	Financial Score (out of 30%)	Combined technical and Financial Scores (in %)
1.	Express Automation	64.58	27.69	92.27
2.	MFI Leasing Limited	61.25	30	91.25
3.	Office Technologies (Ramco Group)	51.98	27.05	79.04

RECOMMENDATION

The Evaluation Committee then recommended that the leasing of multi-functional colour printers be awarded to the lowest evaluated bidder Express Automation at a total cost of Ksh.9.75 for both black & white and coloured paper. The cost was broken down as follows:

Black and white paper Ksh.1.05 per paper.

Coloured paper Ksh.8.70 per paper

THE TENDER COMMITTEE DECISION

The Corporation Tender Committee in its meeting No. CTC:6/2010 – 2011 held on 23rd September, 2010 deliberated on the recommendation of the Evaluation Committee and sought clarifications on the evaluation and the issue of provision of paper. The Tender Committee then recommended that a market survey be carried out from other bodies that used the same services that were to be procured and the matter was deferred to a later date.

The Tender Committee in its meeting No. CTC: 7/2010-2011 held on 21st October, 2010 deliberated on the matter as presented by the Procuring Entity's Procurement department. It noted the clarifications sought from the Evaluation Committee and the Market research conducted. The Tender Committee then approved the award of the contract for leasing of multi-functional network colour duplex printers to M/s Express Automation at their quoted price.

The bidders' were notified the outcome of the tender vide notifications letters dated 27th October, 2010.

THE REVIEW

The Request for Review was lodged by MFI Leasing Company Ltd against the decision of the Corporation Tender Committee of Kenya Rural Roads Authority dated 27th October, 2010 in the matter of Tender No. KeRRA/ADM/04/2010-2012 for Procurement for Leasing of Multi-functional Colour Network Duplex Printers. At the hearing the Applicant was represented by Ms. Kethi D. Kilonzo, Advocate while the Procuring Entity was represented by Mr. Kenneth Mwangi and Mr. M. Muthui. The Interested Candidate present, Express Automation Limited was represented by Mr. Archith Rao..

The Applicant requests the Board for 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.***
- 2. In the alternative the Procurement proceedings be annulled in their entirety.***

3. To direct the Respondent to provide a summary of the evaluation and comparison of tenders to the Applicant forthwith as required under section 45(3) of the Act.

4. Cost of the Request for Review.”

The Request for Review is based on eighteen (18) grounds. After carefully hearing the submissions by the parties, and considering the documents before it, the Board deals with these grounds as follows:

Grounds 1 - 9

These are not grounds of review but the Applicant's statements of facts regarding the Applicant's participation in the tender under review.

Grounds 10 - 13 Breach of Section 2 and 66 (4) of the Act

These grounds have been combined since they raise similar issues of evaluation of tenders.

The Applicant submitted that the Procuring Entity was not transparent, fair, open or accountable when evaluating the tenders as stipulated in Section 2 of the Public Procurement and Disposal Act, 2005 (hereinafter "the Act"). It argued that the Procuring Entity failed to comply with the provision of Section 66 (4) of the Act which provides for the tender to be awarded to the bidder with the lowest evaluated tender price. Further, it stated that the Procuring Entity failed to award the tender to the most responsive bidder and that the procurement under review did not meet the provisions of the Act. The Applicant further submitted that it should have earned higher marks at the technical evaluation stage on the premise that it offered a technically superior machine.

The Applicant further argued that contrary to the allegation by the Procuring Entity that the Applicant did not provide the curricula vitae of engineers, it did

provide the profiles of the ten engineers, showing their experience in a summary form. In its view failure to attach the curricula vitae should have been regarded as minor deviation which should not have affected the responsiveness of its bid in accordance with the tenor of Section 64 of the Act. It further argued that if the Procuring Entity was not satisfied with the summary, it should have sought clarification from the Applicant, which clarifications would not have, in any event altered the tender by the Applicant.

In response, the Procuring Entity stated that the Applicant was not lowest evaluated bidder. It averred that it used the Quality and Cost Based (QBS) method to evaluate the tenders as stipulated in the tender document Clauses 2.1.1 and 2.1.2 and that the bidder with the highest overall technical and financial score emerged the winner. The Procuring Entity added that the Applicant's technical score was not the highest as provided for in Clause 2.1.1. of the tender document. It stated that the evaluation combined technical scores with financial scores in order to arrive at the lowest evaluated bidder, and when this was done the Applicant did not perform well as it did not attach certificates and CV's of three engineers with diploma in electrical and electronic engineering and relevant profession certification as stipulated in the tender document. In support of this contention, the Procuring Entity pointed out that, whereas the tender document required bidders to attach curricula vitae of engineers testifying that they had a diploma, and those of electrical and electronic engineering indicating their relevant professional certification, the Applicant only gave a summary of the technical profiles of their personnel.

On the issue of failure to give the reasons as to why the Applicant's tender was not successful as requested by the Applicant in its letter of 10th November, 2010, the Procuring Entity argued that Section 45 (3) applies only where a contract has

been signed, which was not the case in this Application, as no contract has so far been signed

As regards breach of Regulation 66(3), the Procuring Entity stated that the letter from the Applicant was written on November 10th, 2010, which was the date on which the Applicant was filled. It further stated that, in any event, it had responded to the Applicant's letter on November 15th, 2010, by setting out the summary of the evaluation of the proposals. In its view, therefore, the Applicant had suffered no prejudice as it was able to file the Applicant under review.

In conclusion, the Procuring Entity urged the Board to dismiss the Application and to order that the procurement process continues.

In reply, the Applicant submitted that the Procuring Entity breached Section 45(3) read together with Regulation 66, by failing to provide the Applicant with reasons as to why its tender was not successful. In this regard it referred to its letter dated 10th November 2010, by which it requested the Procuring Entity to supply the Applicant with a summary of the evaluation report, and the reason why its tender was not successful. It argued that the letter from the Procuring Entity in response to the Applicant's request, did not give any reason as to why the Applicant's tender was not successful, as stipulated by Regulation 66(2), but merely gave a summary of the evaluation.

The Board has carefully considered the submissions of the parties and the documents that were presented.

The Board notes that the tender was processed under the restricted method as provided for in part VI of the Act. The Procuring Entity used the Request for

Proposal method and required bidders to submit their bids in a two envelope system. The bids were evaluated in three stages namely Preliminary, Technical and Financial evaluation. Our bidder was disqualified at the Preliminary stage. The Applicant and four other bidders were qualified and were evaluated for technical responsiveness whose pass mark was 70%. The Applicant attained a score of 87.50% at this stage and together with two other bidders namely Express Automation and Ramco Group (Office Technologies Limited) was invited for the opening of its financial bid.

The Board further notes that Clause 2.1.1 sets out the relative weight between technical and financial scores as follows:

***“Technical – 70%
Financial – 30%
Total – 100%”***

The Board further notes that the tender document specified in Clause 2.1.2 on financial proposal as follows:

“The lowest cost proposal will be awarded 30 points. Other cost proposal will be awarded proportionate points as per the formula below:

***Lowest Cost x 30
Proposal's Cost***

Overall ranking: the overall ranking will be computed as follows:

0.7 x points score on technical proposal + points score on financial proposal. The bidder with the highest overall score shall be considered to be the winner.

Financial proposals will be evaluated on the basis of cost and lead- time and payment terms if not specified in this document."

The Board further notes that Applicant's bid at the financial opening was the lowest at a total of Kshs. 9.00 per printed paper. The Board further notes that after combining its financial and technical score the Applicant emerged second highest with a total score of 91.25%, while the successful bidder had a total score of 92.27%. The successful bidder was recommended and awarded the tender on the basis of being the highest combined scorer as provided for in Clause 2.1.2 of the tender document and Section 82 (5) on Request for Proposals.

The Board further notes that under clause 2.1.1 of the Tender document the Procuring Entity set out eight evaluation criteria to be used in evaluating the technical responsiveness of the bids. Among these was a requirement that a bidder should attach ***"A certificate and CV's of 3 (three) Engineers with diploma in electrical and electronic Engineering and relevant professional certification."***

The question for consideration by the Board under these grounds is whether or not the evaluation of the tenders was done in accordance with the Act, as claimed by the procuring Entity, or in breach of it, as the Applicant claims. Although the Applicant has anchored its case on these grounds on section 66 of the Act, the board finds that, insofar as this was a request for proposals, the applicable section is Section 82, which provides as follows.

82(1) "The Procuring Entity shall examine the request for proposals received in accordance with the request for proposals."

Subsection (2) requires the procuring Entity to *“evaluate the technical proposals to determine if it is responsive and, and if it is, to assign a score to the technical proposal, in accordance with the request for proposals.”*

Section 82(3) states that:

“For each proposal that is determined, under subsection(2), to be responsive, the procuring Entity shall evaluate and assign a score to the financial proposal, in accordance with the procedures and criteria set out in the request for proposals.”

Subsection 81(4) further provides that *“if a request for proposals provides for additional methods of evaluation, the procuring Entity shall conduct such methods in accordance with the procedures set out in the request for proposals.”*

It is thus clear from these provisions that, in respect to evaluation of request for proposals, the Procuring Entity:

1. Must examine the request for proposals in accordance with the request for proposals;
2. Must evaluate a technical proposal to determine if it is responsive, and if it is, assign a score to the technical proposal in accordance with the procedures and criteria set out in the request for proposals;
3. Must for each proposal that is responsive, evaluate and assign a score to the financial proposal in accordance with the procedures and criteria set out in the request for proposals;

4. If there are any other methods of evaluation set out in the request for proposals the Procuring Entity must conduct such methods in accordance with the procedures and criteria set out in the request for proposals.

The question which arises from the facts of this case, therefore, is whether or not the Procuring Entity followed the procedures set out in Section 83 in order to enable it to determine that the Successful Candidate, M/S Express Automation limited, submitted the successful proposal in accordance with Section 83(5) which provides that:

“The successful proposal shall be the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical proposals and the financial proposals under sections (2) and (3) and the results of any additional methods of evaluation under section (4).”

Firstly, according to Clause 1.5.3 of the Request for Proposals (RFP), the bids were to be subjected to preliminary examination to determine their technical responsiveness and thereafter, to detailed technical evaluation. This was to be followed by financial evaluation of the proposals to determine the successful bidder. The preliminary evaluation led to one of the bidders, Bell Atlantic Communications, being knocked out of the competition for being non-responsive. Accordingly, only five out of the six bidders who submitted request for proposals, proceeded to the technical evaluation stage, among them being the Applicant.

Secondly, in carrying out the evaluation of the bids that were considered to be technically responsive, the Procuring Entity assigned a score to the technical

proposal of each bidder, in accordance with Section 83(2) of the Act, as is evident from the evaluation report, and as set out in clause 2.1.1 of the RFP.

Thirdly, in carrying out the evaluation of the financial proposals, the Procuring Entity assigned a score to each proposal in accordance with the provision of section 83(3) as is evident from the evaluation report of the financial evaluations, and in accordance with clause 2.1.1 of the RFP.

Fourthly, the Procuring Entity combined the results of technical evaluation for each bidder with the financial evaluation for each bidder as required by section 83(5) of the Act, and as set out in clause 2.1.1 of the RFP, as is evident from the evaluation report. It is this computation which leads the Procuring Entity to award the contract to the Successful Bidder.

Fifthly, under clause 2.1.1 of the RFP the Procuring Entity set out a number of evaluation criteria, among which was one that required bidders to ***"attach certificates and CV's of 3 (three) engineers with diploma in electrical and electronic engineering and relevant professional certification."*** According to the evidence tendered by the Procuring Entity, the Applicant failed to provide the curricula vitae of its engineers. Instead it provided only a summary of their qualifications, contrary to the requirements set out in the tender documents. The Applicant has not contradicted this evidence. Instead it has urged the Board to regard this omission as a minor deviation which should not have affected the outcome of the process.

According to the Procuring Entity, it used these additional criteria as set out in the tender document to evaluate the technical proposal by the Applicant.

Failure by the Applicant to comply with this criterion therefore resulted in a negative score for the Applicant's technical proposal.

The Board finds that this additional evaluation criterion was set out in the request for proposals and was used by the Procuring Entity to evaluate the proposal of the Applicant, in compliance with section 82(4) of the Act. The Board further finds that failure by the Applicant to comply with this requirement was not a minor deviation.

Taking all the above facts into account, the Board is satisfied that the evaluation was carried out properly and in accordance with section 82 of the Act.

On the issue of breach of Section 45(3) of the Act the Board finds that the section deals with the question of record keeping of procurement proceedings by Procuring Entities for purposes of enhancing transparency and accountability in the Public Procurement Administration. This is why subsection (1) goes to great lengths in setting out in detail the type of information and documentation which a Procuring Entity must preserve in its records. The ultimate objective of the section is to let the information as to why a decision to **award a contract**, or to **terminate procurement proceedings**, speak for themselves, should there be any challenge as to the integrity of the process, subsequently. We have underlined these phrases to underscore the fact that such a challenge can only come about after a contract has been awarded, or procurement process terminated, and not while the process is under way. This is the context in which subsection 45(3) should be read. The subsection provides that:

"After a contract has been awarded or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the procurement available to a person who submitted a tender, a

proposal or quotation or, if direct procurement was used, a person with whom the procuring entity was negotiating.”

In this case the notification to award the contract had been given to all the candidates, no contract has been awarded. Accordingly, the Board finds that the section does not apply.

As to breach of Regulation 66(2), the board notes that by the Applicant dated 10th November 2010, was replied to by the Procuring Entity on November 15th 2010. In that letter the procuring Entity gives a summary of the evaluation report but not the reasons for rejecting the request for proposals. This failure notwithstanding, the Applicant was able to file the subject application and to argue its case effectively. The board therefore finds that there has been no prejudice suffered by the Applicant.

Accordingly, these grounds of request for review fail.

Grounds 14, 15, 16, 17, and 18

These grounds have been combined as they raise similar issues on specifications.

The Applicant submitted that the Procuring Entity contravened Section 34 of the Act by giving descriptive and design specifications for a particular brand of multifunctional network color duplex printers rather than setting out the performance benchmarks required. It argued that the specifications prescribed by the Procuring Entity were tailored for a Konica Minolta BH C360 multifunctional colour copier that prints 36 pages per minute. In support of this contention it pointed out that the specifications for memory for copy speed; the hard disk; copy resolution; the scan speed; scan resolution; print resolution;

print speed; and power consumption, all marched with those of Minolta BH C360, which was what the Successful Bidder offered. In particular, it pointed out that according to the specifications, the Procuring Entity required a printer with a speed of 36 copies per minute, and scan speed of 70 copies per minute, without giving a range. It stated that only one machine in the market, namely, Konica Minolta BH C360, offers these speeds. It argued that insofar as these specifications related to a design of a particular Multi- functional colour network duplex printer and to the descriptive characteristics of the item to be procured, they contravened section 34 of the Act.

The Applicant further submitted that by setting out these specifications, the Applicant was prejudiced when the technical evaluation was carried out in that, the Colour Network Duplex Printer which it offered was of a superior quality by reason of the fact that it had lower power consumption; higher copy speed; higher copy resolution; higher scan resolution; higher printer resolution and higher print speed. It averred that it had offered a technically superior equipment which fully met and complied with the specifications of the tender and it therefore ought to have received a higher technical score during evaluation.

In response, the Procuring Entity stated that it did not contravene Section 34 of the Act as the specifications were not tailored towards brand. It further states that the specifications were developed based on the Procuring Entity's requirements and that it issued an addendum to all bidders on 21st July 2010. It added that the addendum clearly allowed any machine equivalent or within the same range of specifications or higher to be submitted.

The Procuring Entity submitted that the Applicant's equipment met all the specifications in accordance with clause 1.2 of the tender documents, which was why its bid was not disqualified. It pointed out that bidders who did not meet the specifications were disqualified at the technical evaluation stage, which was not the case with the Applicant, whose bid moved to the financial evaluation stage. It further stated that the specifications used met all the requirements of Section 34 of the Act as they were clear, correct and complete descriptions of the printers required and allowed fair and open competition.

After carefully listening to the submissions by the parties and perusing the documents presented to it, the Board finds as follows;

Although the Applicant has cited a number of grounds, the issue for determination by the Board is whether or not the technical specifications inscribed in the tender documents complied with the requirements of Section 34 of the Act.

The Board notes Section 34(1) provides as follows:

"The Procuring Entity shall prepare specific requirements..... that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."

The Board further notes that section 34(3) provides that:

"(3) The technical requirements shall, where appropriate-

(a) relate to performance rather than to design or descriptive characteristic;"

(b)....."

The Board further notes that under Clause 1.2.1 of the tender documents, the Procuring Entity set out in great details its specific requirements relating to the procurement of six Multi-functional Colour Network Duplex Printers. These specifications included, among other things, power consumption of the printers, their memory capacity, the type of hard disk, and copy speed per minute, copy resolution, scan speed per minute, copy resolution, scan speed per minute, print resolution. The Board further notes that the Procuring Entity issued an addendum which sought to clarify its technical requirements. The addendum informed the bidders that they were free to bid using any machine equivalent or within the same range of specifications or higher. The Board further notes that the Applicant has not denied receiving this addendum. The Board further notes that at no time either before the issuance of the addendum, or submission of the bids, did any bidder, including the Applicant, complain about the Specifications.

It is in this position of the Applicant that these seemingly neutral technical requirements are actually a description of a particular make of printer, namely, Konica Minolta BH C360, particularly as they relate to copy speed, and scan speed.

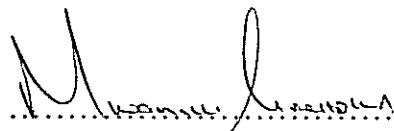
After examining this claim carefully, the Board finds that, whereas the specifications appear to have been written to favor only one machine, this situation, however, changed with the issuance of the addendum. According to the addendum bidders were informed that they could bid using any machine equivalent or within the range of specifications or higher. This is exactly what the Applicant did by bidding to supply a machine which, in its own view, was superior in quality to that offered by the successful bidder. There was no

evidence that throughout the whole process the Applicant was ever in any doubt about what the specifications were. Indeed, if there was any doubt, it would have been put to rest by the addendum which the Procuring Entity issued to the bidders clarifying that they could use any machine which was equivalent or within the same range.

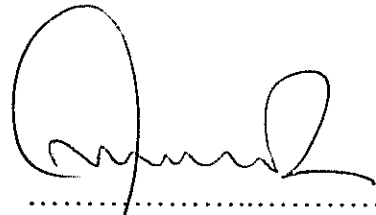
On the basis of the foregoing, the Board finds that there was no breach of Section 34 of the Act. Accordingly, this ground of the Application fails.

Taking all the above matters into account, the request for review fails. Accordingly, the procurement process may proceed.

Dated at Nairobi on this 6th day of December, 2010



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**

