

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 41 / 2011 OF 9TH NOVEMBER, 2011

BETWEEN

CM LABS SIMULATIONS, INC.....APPLICANT

AND

KENYA PORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Ports Authority dated 17th October, 2011 in the matter of Tender No. KPA/203/2010-11/TE for Supply, Installation and Commissioning of Gantry Crane Training Simulator.

BOARD MEMBERS PRESENT

Mr. Mwaniki Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Akich Okola	-	Member
Mrs Loise Ruhiu	-	Member
Amb. C.M. Amira	-	Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Ms. Pauline Opiyo - Secretariat
Ms. Shelmith Miano - Secretariat

PRESENT BY INVITATION:

Procuring Entity - Kenya Ports Authority

Mr. Johnson Gachanja - Principal Procurement Officer (CTC & T)
Mr. Stephen Kyandih - Legal Officer

Applicant- CM Labs Simulations Inc.

Mr. Paul Chege - Advocate
Mr. Andrew Kimani - Director, Pasico Eastern Africa Ltd

BOARD'S DECISION

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

BACKGROUND OF THE AWARD

Advertisement:

The Procuring Entity invited tenders for Supply Installation and Commissioning of Training Simulator for Gantry Cranes on Tuesday 28th

June 2011. This was an international tender and notices inviting bids were published in the Daily Nation and Standard Newspapers of Tuesday 28th June, 2011. The notice was also posted on the KPA and PPOA websites. The deadline for submission was Wednesday 27th July 2011 before 0900hrs.

Tender Closing/Opening:

The following seven(7) firms expressed interest by buying the tender documents:

No. Name

- 1 CM LABS Simulations
- 2 Altair Company Ltd
- 3 Thorncliffe Ltd
- 4 Transas Marine Int.Ab,Gothenburg,Sweden/Kingston Trading Co.
- 5 TST LTD
- 6 Applied Researchint.Pvt Ltd
- 7 Globalsim Inc

At the time of tender closing/opening, three (3) firms had submitted their tenders. The particulars recorded at the opening were as follows:

Name of Bidder	Tender Security		Duly filled Confidential Business Questionnaire	Duly filled Anti-Corruption Declaration
	Name of Bank	Validity		
M/s CM Labs Simulation	Ecobank Ltd	26 th December 2011	√	√
M/s TST The Solution Team	Ecobank Ltd	24 th December, 2011	√	√

M/s Global Sim	Ecobank Ltd	24 th December, 2011	√	√
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The financial envelopes were sealed and the bidders countersigned the package which was forwarded for safe custody in the Managing Director's office.

EVALUATION

The tender was submitted in a two-envelope system (Envelope A- Technical and Envelope B- Financial). The tenders received were subjected to three stages of evaluation namely; Preliminary Evaluation, Detailed Technical Evaluation and Financial Evaluation.

Stage 1 - Preliminary evaluation – Checking for mandatory requirements

Stage 2 - Detailed technical evaluation:

- Adherence to technical specifications (70 marks)
(Bidders to meet the mandatory technical requirements and thereafter to score 60 out of 70 marks)
- Tenderer's experience (15marks)
- Training (5marks)
- Financial Strength of the Tenderer (10marks)

Stage 3 - Financial Bid Evaluation.

Bidders were required to score a minimum of 75% in Technical Evaluation to proceed to the next stage of financial evaluation.

The evaluation was conducted in accordance with the criteria set out in the Invitation for Bids and clauses 12 and 19 of the Instructions to Tenderers (as subsequently amended in the Tender Data Sheet).

Preliminary Evaluation:

Tenders were evaluated against the following mandatory requirements as outlined in the invitation for bids and the tender documents:

1. Profile
2. Authorization
3. Tender Security
4. Technical Specifications and Technical schedules
5. Training
6. Warranty, defect liability support Under-takings etc
7. Major Component Manufacturer Documentation Form
8. Defects liability period support plan
9. Spare Parts
10. Accompanying technical documents
11. Information regarding litigation,

Non-Substantial Deviations

The committee made the following observations:

- i. Quality certificate e.g. ISO certification or equivalent*

The committee deliberated on the criteria and noted that there was no specific certificate /standard specified and by allowing for equivalents it meant firms could offer different forms of certificates. The criteria therefore could not be evaluated as a mandatory requirement .

ii. Technical specifications and schedules

The committee noted that this requirement is more applicable for the purchase of heavy equipment and machinery e.g. cranes, reachstackers and tractors. The Authority is basically buying software anchored on standard computer hardware. The bidders details of the equipments and part numbers are therefore not applicable. The committee noted that this criterion had been indicated as a mandatory requirement which was erroneous since the same was supposed to be scored. The committee deliberated on the requirement and waived it as a mandatory requirement opting to develop a detailed scoring checklist which was used to evaluate the bidders.

iii. Training - Details of training to be offered at no extra cost before commissioning of the Crane training simulator

While training was indicated as mandatory, the committee also noted that the item contained marks to be evaluated. The members therefore checked for mention of training under mandatory requirement and used the scoring criteria provided in awarding marks.

iv. Warranty undertakings – warranty, defect liability support undertakings etc.

Written undertaking:

- *of ability to supply spares for at least 10 years after handing over*
- *to supply the Equipment accompanied by Maintenance Program for execution of maintenance schedules, should the tenderer be awarded the contract*
- *to supply the Equipment accompanied by all necessary manuals from the original manufacturer of each major component to be of good quality, plastic*

covered, and in the English language required to operate and maintain the Equipment and in three (3) copies for each of the following categories: -
(Operation, Maintenance-Parts)

The committee observed that the IT industry is continually evolving with products being phased out regularly. Some of the hardware is therefore not likely to be in existence for the 10 year period. The committee deliberated on the issue and found the submission reasonable and therefore did not penalize the bidders for this non-conformity.

v. Misplaced criteria:

Clause 6: The committee noted that some subcriteria under criteria no 6 was misplaced (probably a copy and paste error) and was not relevant to the current tender the committee deliberated and after consultations waived the item being a minor issue.

Clause 9 - Spare parts: The committee noted that under criteria No 9 was misplaced (probably a copy and paste error) and was not relevant to the current tender the committee deliberated and decided to delete the item.

Substantial Deviations

In the bid by M/s CM Labs the tender security indicated M/s Pasico as the bidder. The Manufacturer's Authorization Form (MAF) by M/s CM lab to Pasico to bid was a scanned copy and not an original as required in the tender document. The document did not have Duly signed Written Power of Attorney authorizing the signatory of the tender to commit the Tenderer, in accordance with ITT Clause 20.2; and 12.0. Further there was no

Business Questionnaire or documentation indicating the signatories from M/s Pasico and their powers of attorney.

On preliminary check of the rest of the document, it was noted that M/S CM Labs did not submit evidence of having designed and supplied crane simulations systems of the nature and type prescribed in the last five years as required under clause 12 in the ITT and TDS. The firms submitted partial evidence of design and supply of simulators for oil rigs and other types of cranes not relevant to KPA. The manuals submitted (vortex simulator instruction guide and student guide) were for offshore and shipmounted cranes.

The firm was therefore disqualified from further evaluation.

A summary of the results of Preliminary Evaluation were as follows:

Preliminary/Mandatory Requirements		M/s CM Labs Simulation	M/s TST the Solution team	M/s Global Sim
1. Profile	Particulars of Tendering Company including the Company background, statutory registration documents e.g. VAT & PIN Certificate (Mandatory)	√	√	√
	Duly filled and signed Confidential Business questionnaire and Anti-Corruption Declaration Commitment/ Pledge (Mandatory)	√	√	√
	Quality certificate e.g. ISO certification or equivalent (Mandatory) .		M/s Ari BS ISO 9001:2008 certified	Equivalent internal quality certification
2. Authorization	Original Manufacturer's Authorization Form in the format provided in the tender document -	? Bidder is the manufacturer	The Manufacturer is M/s Ari simulation	Bidder is the manufacturer

	<p>valves; including manufacturer, country of origin, make, model and/or series, these should consist of the original component manufacturer's part numbers and performance data sheets this SHALL apply to part list clause 20.0 table 1, clause 21.0 table 2, clause 22.0 table 3.</p> <p>Failure to provide this information shall lead to an automatic disqualification. (Mandatory)</p> <p>(b) List and samples of accompanying technical documents i.e. parts manuals, operation manuals, maintenance manuals for the Crane training simulator, etc in hard and soft copy formats. (Mandatory)</p>			
5. Training	<p>Detailed programmes complete with timescales for training</p> <p>i) factory-based pre-shipment training courses for at least four of the procuring entity's Crane training simulator maintenance staff and operators.</p> <p>ii) details of training</p>	√complied	√complied	√complied
				But not detailed

	to be offered at no extra cost before commissioning of the Crane training simulator in Mombasa. (Mandatory)			
6. Warranty, defect liability support Undertakings etc	<p>(a) A detailed statement of the tenderer's Defects Liability Support Plan during a warranty period of not less than 24 months from the date of commissioning or 4000 service hours. (Mandatory)</p> <p>(b) defects liability period support plan (NOTE: The manufacturer's engineer shall give a minimum 4 months on site technical support as long as the Procuring entity has given notice to require their presence. Thereafter, the manufacturer's engineer shall be availed on site within 48 hours of notification) (Mandatory) <u>A written undertaking:</u></p> <p>(c) of ability to supply spares for at least 10 years after handing</p>	√complied	√complied	√complied
		√complied	√complied	√complied
		X not	√complied	√complied

	and spare parts- stocking obligations prescribed in the Conditions of Contract and/or Technical Specifications (Mandatory)			
7. Major Component Manufacturer Documentation Form	This should list the major components used on the installation and their manufacturers' details to include name, address & location, contacts and name of the contact person and be submitted in the format provided in the tender document (Mandatory)	√complied	√complied	X not complied
8. Defects liability period support plan	(NOTE: The manufacturer's engineer shall give a minimum 4 months on site technical support as long as the Procuring entity has given notice to require their presence. Thereafter, the manufacturer's engineer shall be availed on site within 48 hours of notification) (Mandatory)	√complied	√complied	√complied
9. Spare Parts	Recommended list of Spares to be supplied with the Transformers and high Voltage Switchgear for three year's preventive maintenance	√complied	√complied	√complied

	consumption after the 24 months Defect Liability period (Mandatory)			
10. Accompanying technical documents	Operator manuals, Maintenance manuals etc Any other item and information which the Tenderer considers may support his technical proposal. (Mandatory)	√complied	√complied	√complied
11. Information regarding litigation,	(Litigation history in the last ten years in the format provided) (Mandatory)	√complied	√complied	√complied
RECOMMENDATION		FAIL	PASS	PASS

Detailed Technical Evaluation:

The committee further carried out detailed technical evaluation using a detailed checklist. The summary of results of the technical evaluation is as shown below:

Evaluation Criteria		weight	M/s Global Sim	M/s TST/ARI
			average score	average score
A	System Configuration	20	19.07	17.67
B	Simulation	70	61.02	62.07
C	Administration	10	7.42	7.60
		100%	87.5%	87.3%
Remarks			Pass	Pass
Factored out of 70			61.3	61.1
PASSMARK 60/70 = 85.7%				

Request for Clarifications and Responses from Tenderers

The committee through the PSM sought clarification from M/s TST on some aspects of their bid submission. In the submission they provided a clause by clause compliance checklist where they indicated compliance with KPA specifications. However A number of these compliances could not be confirmed from the Sample Operator Manual and instructors's Manual provided. The committee sought a Simulation Sytem manual that demonstrates compliance with the specifications for Training System Configuration Trainee Hardware Computer Hardware and Software: Control Software Dynamic models

The clarification is attached marked appendix 8

On the basis of the clarification M/s TST /ARI simulation were adjudged responsive.

Evaluation - Other Factors (Experience ,training and Financial Capability)

Both firms were evaluated against the rest of the criteria and the results are tabulated below:

Item	Factor under Consideration	Rating (%)	TST	Global Sim
2	Tenderer's experience	15	13	13
3	Training	5	2.5	1
4	Financial capability	10	6	8

The two firms thus scored the following marks :

Item	Factor under Consideration	Rating (%)	TST	Global Sim
1	Adherence to technical specifications	70	61.3	61.1
2	Tenderer's experience	15	13	13
3	Training	5	2.5	1
4	Financial capability	10	6	8
TOTAL			82.8	83.1

Technical Evaluation Conclusions and Recommendations

According to the evaluation criteria contained in the tender document the two firms M/s TST/ARI Simulation and M/s Global Sim both qualify for the next stage of tender evaluation having scored above the 75% pass mark.

Optional offer- classroom based simulator:

One of the bidders M/s TST offered an option of a simulator for room deployment as opposed to the trailer based one that was specified. Among the advantages of this proposal include:

- i. No need for a trailer to be carrying the container, safer for the equipment no vibration
- ii. No need for special arrangements for tractors to tow the trailer to site
- iii. Easier to keep fully air-conditioned to protect the equipment. Not susceptible to harsh weather. It is safer roomier and more convenient for students and can accommodate more.
- iv. Doesn't need special provisions of mains power during training and storage

The committee would like to verify and evaluate both scenarios by visiting installations where both systems are installed

The tender provides for the next evaluation stage as follows:

In determining satisfaction as to whether the bidder(s) whose technical submission(s) has/have been scored above the required pass mark of 75%, the Procuring Entity reserves the right to conduct site visits to the reference sites and manufacturing plant prior to opening of financial submission "Envelope B" so as to establish whether the information provided in the technical submission is accurate and a true reflection of the features of the proposed simulator.

Where site visits are conducted, the Evaluation Criteria shall be based on:

- *Quality of workmanship*
- *Reliability of the simulator*
- *Availability of spare parts*
- *Durability of the simulator*
- *Cost of Maintenance*

The Bidder(s) whose site(s) is/are visited **MUST** score a minimum of **15 out of 20 points** of the site visit criteria so as to be considered for contract award.

The committee noted that this is the first time that such a training software and related equipment are being procurement. The Authority has invested significant funds in the acquisition of ship to shore gantry cranes, rubber tyred gantry cranes and lately mobile harbor cranes. There has been significant increment in the number of accidents involving the operators. It

is imperative therefore that the operators be retrained and the simulator shall provide the necessary infrastructure for the training. The simulator shall also be useful in training other staff that may be identified as crane operators to create a pool of operators. Eventually the Authority may consider offering training for operators from other ports. In view of the above it is important that KPA acquires the right simulator and establishes at a competitive total acquisition cost. This makes it imperative to learn from the experiences of other ports that have installed crane training simulators. To this end the committee therefore has selected the following reference site where the bidders have installed simulators as the next stage in the evaluation prior to financial bid opening:

Reference sites selected for site visits were as follows:

TST/ARI SIMULATION	GLOBAL SIM
1. Mundra Port and Special Economic Zones (MPSEZ) Installed QC,RTG,MHC, GSU	1. South Africa Ports Authority Installed STS and RTG,
2. Jawaharlal Nehru Port Trust (JNPT) Installed QC,RTG,RMG	2. Port Authority of Thailand Installed QC,RTG,RMG, MHC

FINANCIAL EVALUATION

Financial bids for the two firms were opened on Wednesday 30th September 2011 and evaluated on 10th and 13th October, 2011.

1.0 Form of Tender and Schedule of Prices

Members started the evaluation by confirming prices in the form of tender and the schedule of prices.

The committee made the following observations:

- Bid price in the form of tender as read out in the tender opening were as follows:

Bidder	Tendered amount in form of tender	Delivery Period
M/s Global Sim	USD 883,828 (United States Dollars Eight Hundred and Eight-three Thousand, Eight Hundred and Twenty -Eight) - CIF Mombasa	150 weeks*
M/s TST The Solution Team	USD 865,000 (United States Dollars Eight Hundred and Sixty-five Thousand - CIF Mombasa	20 weeks

- The committee noted that there were some deviations between the figures contained in the forms of tender and the schedule of prices. For purposes of evaluation, the committee felt there was need to establish the composition / detailed breakdown of the bid prices to enable comparison on a like to like basis.
- M/s TST has filled out the form of tender as required in the tender document and also provided the following details in their schedule:
 - a. Spare parts during warranty period (table 2) USD 42,000
 - b. Strategic spare parts (table 3) USD 80,500
 - c. Cost of training
 - i. Local USD 35,000
 - ii. Overseas USD 10,500

2.0 Evaluation and Comparison of Bids

2.1.1 TST

The Committee interpreted the above to imply that the price in the form of tender i.e. USD 865,000 is inclusive of all the three items (a-c) above thus the breakdown should be as follows:

Supply install and commission simulator	USD 697,000*
Spare parts during warranty period (table 2)	USD 42,000
Strategic spare parts (table 3)	USD 80,500
Cost of training:	
Local	USD 35,000
Overseas	USD 10,500
TOTAL	USD 865,000

2.1.2 M/s Global Sim

The firm has only filled out the form of tender as USD 883,828 with delivery shown as 150 weeks. The committee felt the need to clarify the following:

- Spare parts during warranty period (table 2) indicated as N/A. It is not clear what the N/A means. Does it mean there is no warranty?
- Strategic spare parts (table 3) indicated as “included above” confirm.
- Cost of training indicated as “included above”. Training of trainers overseas should be clearly covered and also local training in Mombasa should also be clearly indicated and costed as provided in the tender document.

- For purposes of comparison the committee would like the prices to be disaggregated (provided separately).
- The committee notes that M/s Global Sim did not fill out the price schedules as required. This makes comparison of the bids difficult. There is therefore the need to clarify or be guided

The committee therefore wrote to the PSM to seek clarification from the bidders.

3.0 Clarification and Evaluation

Responses were received from both bidders and the committee reconvened on 13th October 2011. The clarified bids were tabulated as follows:

ITEM	TENDERED AMOUNT	
	TST	GLOBAL SIM
Supply, installation and commissioning of a simulator	USD 865,000	USD 883,828
Training (local)	USD 35,000 included above	included
Training (overseas)	USD 10,500 included above	USD 25,000
TOTAL	USD 865,000	USD 908,828
Warranty	2 years	2 years
Delivery period	20 weeks	150 days

4.0 Recommendation

The committee observed that the lowest bidder is M/s TST. The committee therefore recommends a site visit to the following reference sights where the firm has supplied similar simulators:

COUNTRY	TST / ARI SIMULATION
MALASYIA	1. Westports Port Klang Malaysia Westports.
INDIA	2. Mundra Port and Special Economic Zones (MPSEZ) Installed QC, RTG, MHC, GSU.
	3. Jawaharlal Nehru Port Trust (JNPT) Installed QC, RTG, RMG.

The committee strongly recommended a visit to one Global Sim references site (PORT Authority of Thailand, Installed QC, RTG, RMG, MHC) so as to obtain a comparative feel of both systems. The reference site is within range of the TST sites and would be of minimal cost but of great learning experience to the Authority.

A brief of the tendering process and the tender evaluation reports was tabled before the Tender Committee. The Tender Committee was requested to consider and if deemed fit;

- i. Award the tender to M /s TST at USD 865,000.00, (CIF Mombasa) equivalent to Kshs 91,690,000.00 with delivery period of 20 weeks.
- ii. Direct as appropriate.

TENDER COMMITTEE DECISION

The tender committee at its meeting No. 006/2011 -12 of 17th October, 2011 considered the request and, upon deliberations, approved award of the tender to M/s TST at USD 865,000.00 (CIF Mombasa) equivalent to Kshs 91,690,000.00 with delivery period of 20 weeks.

Letters of notification dated 17th October, 2011 were collected by bidders' representatives or dispatched to bidders between 19th and 21st October, 2011.

THE REVIEW

The Applicant M/s CM Labs Simulations Inc. lodged this Request for Review on 9th November, 2011 against the decision of the Kenya Ports Authority Tender Committee dated 17th October, 2011 in the matter of tender No. KPA/203/2010-11/TE for Supply, Installation and Commissioning of Training Simulator for Gantry Cranes. The Applicant was represented by Mr. Paul Chege, Advocate and the Procuring Entity was represented by Mr. Stephen Kyandih, Advocate.

The Applicant requests the Board for the following orders:-

- a. "That the procuring entities decision of awarding the tender to the alleged successful bidder be annulled.*
- b. That the procuring entity be ordered to re-evaluate all the bids in accordance with the Act."*

PRELIMINARY OBJECTION

The Procuring Entity raised a Preliminary Objection as part of its response to the Request for Review on the ground that the Request for Review was filed out of time in contravention of Regulation 73 (2), (c).

At the commencement of the hearing, the Procuring Entity stated that it would argue the Preliminary Objection together with its submissions

The Applicant raised 4 grounds of appeal which were argued together and the Board deals with them as follows:-

Grounds 1, 2, 3 and 4 : Breach of Sections 2, 31(1)(a), 67 and Regulations 47 and 48

The Applicant submitted that the Procuring Entity breached Section 67 of the Act by failing to notify it of the outcome of the tender as required under the Act. It further submitted that the notification letter dated 17th October 2011 was not sent to the Applicants' address in Canada as set out in the tender document. It stated that the letter which was addressed to the Applicant and its local agent Pasico Eastern Africa Ltd was sent to the Kenyan address of the local agent. It argued that the Bidder was not by this letter notified as required under Section 67 of the Act as its address is 420 Notre Dame Street West, Suit 505 Montreal, QC H2Y IV3 Canada. Further, it argued that the Procuring Entity should have notified it via its e-mail address which was provided in the bid documents. Finally, on this ground, it submitted that the Request for Review was filed within time.

The Applicant further argued that the Procuring Entity applied the evaluation criteria in a discriminatory manner contrary to Section 31(1) of

the Act. It stated that the reasons given by the Procuring Entity for its disqualification were not valid due to the following reasons:-

(i) Bid Security

It stated that it was unfairly discriminated on the basis that it had not provided a bid security. It further stated that it had submitted a bid security issued in the name of its local agent Pasico Eastern Africa Ltd. Finally it argued that its bid security was valid and therefore the Procuring Entity breached Regulations 47 and 48 by disqualifying its bid based on this ground.

(ii) Manufacturer's Authorization Form

It alleged that it was unfairly disqualified for giving a scanned copy of the Manufacturer's Authorization Form. It stated that it was a manufacturer and therefore argued that it was not necessary for it to provide a Manufacturer's Authorization Form and hence should not have been disqualified on this basis.

(iii) Power of Attorney

With regard to the Power of Attorney, the Applicant alleged that it was unfairly disqualified on the basis that it had not signed a Power of Attorney in favour of its local agent Pasico Eastern Africa Ltd. It stated that there was no such requirement in the tender document.

In response, the Procuring Entity submitted that the Applicant was properly disqualified from the tender process due to the following reasons:-

(i) Notification

The Procuring Entity submitted that the Applicant's letter of notification on the Tender Award was collected and signed for on 21st October 2011 by one Mr. Jacton Mwakina, who works for Pasico Eastern Africa Ltd. It stated that the Request for Review as filed on 09/11/2011 was filed out of time as there was proper notification in accordance with Section 67 of the Act. It further argued that the Applicant had admitted under paragraph 5 of the statement of facts that it had received the notification letter on 25th October 2011. It argued that even if the 25th October 2011 was taken as the date of notification, the appeal window would have closed on 8th November 2011 and therefore the Request for Review having been filed on 9th November, 2011, was filed out of time and should be dismissed.

(ii) Bid Security

The Procuring Entity submitted that under Clause 19.1 of the tender document, Bidders were supposed to submit a bid security of Five Hundred Thousand Shillings (Kshs.500,000.00). It stated that the bid security submitted by the Applicant together with its tender document was in the name of Pasico Eastern Africa Ltd whose relationship with the Applicant was not clear as there was no Power of Attorney included in the tender document. It argued that Regulations 47 and 48 are clear that any bidder who fails to comply with a mandatory requirement ought to be disqualified at the preliminary evaluation stage. It therefore argued that it was justified in disqualifying the Applicant at the preliminary evaluation stage.

(iii) Manufacturer's Authorization Form

The Procuring Entity stated that the Applicant submitted a scanned copy of the Manufacturer's Authorization Form and not the original as required by

Section 12.1(g) of the tender data sheet. It stated that this was a mandatory requirement which the Applicant failed to comply with.

(iv) **Power of Attorney.**

The Procuring Entity stated that it could not establish the relationship between the Applicant who bought the tender document and one Pasico Eastern Africa Ltd as there was no Power of Attorney authorizing the said Pasico Eastern Africa Ltd to sign the tender documents on behalf of the Applicant. It further stated that this was important since the un-notarized Manufacturer's Authorization Form provided that the contract would be negotiated and signed by Pasico Eastern Africa Ltd who was a third party in the instant tender process.

In conclusion, the Procuring Entity submitted that the Applicants bid was non-responsive and was properly disqualified. It stated that the evaluation was done using the criteria set out in the tender document and that there was no discrimination as alleged by the Applicant. It urged the Board to dismiss the Request for Review.

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

On the issue of notification, the Board notes that at Paragraph 5 of the statements of facts, the Applicant states as follows:-

".....By a letter dated 17th October 2011 and received by the Applicants local agent M/S PASICO Eastern Africa Ltd on 25th October 2011, the respondent purported to notify the Applicant that its bid was not successful....."

From the foregoing, it is clear that the Applicant received the notification letter dated 17th October 2011. If one takes the 21st October 2011 when the notification was collected by one Jacton Mwakina, the appeal window

closed on 4th of November 2011. Even if one takes 25th October 2011 as the notification date, the appeal window closed on 8th November 2011. The Board notes that this Request for Review was filed on 9th November 2011 which was clearly out of time. In view of the admission by the Applicant that it had received the notification letter on 25th October 2011, its allegation that the Procuring Entity breached Section 67 of the Act cannot stand.

On the issue of Bid Bond, the Board notes that Clause 19 (19.1) of the Instructions to Tenderers provided as follows:

*"In addition, pursuant to ITT Clause 12, if specified in the Tender Data Sheet, the **Tenderer shall furnish** as part of its Tender a Tender Security in **original form** and in the amount and currency specified in the Tender Data Sheet."*

It is clear that a bidder was required to provide a bid security of Kshs. 500,000.00. The Board notes that the tender security provided by the Applicant was in the name of Pasico Eastern Africa Ltd. The Board further notes that M/s Pasico Eastern Africa Ltd was in this instant tender not a bidder but a local agent. The Board further notes that the tender requirement was for the bidder to issue the bid security and therefore a bid security in the name of an agent who did not have Power of Attorney could not suffice. As Provided in Section 57(3) of the Act, ***a tender security shall be forfeited if the person submitting the tender withdraws from the tender after the deadline, rejects an arithmetic error or refuses to enter into a written contract or fails to furnish the performance security.***

In view of the foregoing, it is clear that the tender security should be in the name of the bidder to enable the Procuring Entity to enforce the tender security in the event of default. Accordingly, the Board holds that the

Applicant was properly disqualified in accordance with Regulations 47 and 48.

With regard to the manufacturers authorization form, the Board notes that the Applicant was a manufacturer but nothing turns on this point in view of the holding on issues 1 and 2.

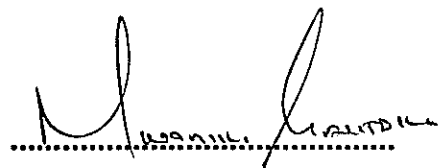
Finally, with regard to the Power of Attorney, the Board holds that if a bidder intends to appoint a local agent, it is necessary for it to provide a signed Power of Attorney to confirm that it had delegated its authority to the local agent. The Board notes that there was no Power of Attorney issued to Pasico Eastern Africa Ltd.

Finally the Board has already held, this request for review was filed out of time and there was no valid bid security and therefore the Request for Review cannot stand.

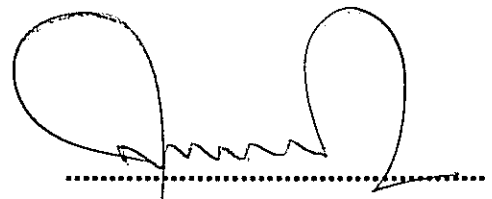
Taking into account the foregoing, the Request for Review fails and is hereby dismissed with no orders as to cost.

The Board orders, Pursuant to Section 98 of the Act, that the procurement process may proceed.

Dated at Nairobi on this 5th day of December, 2011.



CHAIRMAN
PPARB



SECRETARY
PPARB

