

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 48/2011 OF 13<sup>TH</sup> DECEMBER, 2011**

**BETWEEN**

**INTERTEK INTERNATIONAL LIMITED.....APPLICANT**

**AND**

**KENYA BUREAU OF STANDARDS.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Kenya Bureau of Standards dated 14<sup>th</sup> December, 2011 in the matter of Tender No.KEBS/T055/2011/2012 for Expression of Interest to offer Pre-Export Verification of Conformity (PVOC) to Standards Services.

**BOARD MEMBERS PRESENT.**

Mr. P.M Gachoka - Chairman  
Mr. Sospeter Kioko - Member  
Mrs.Judith Guserwa - Member  
Mr. Akich Okolla - Member

## **IN ATTENDANCE**

Mr. C.R. Amoth - Secretary  
Mrs. Maurine Kinyundo - Secretariat  
Mr. L. Otieno - Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Intertek International Limited**

Mr. Anthony Njogu - Advocate, Daly & Figgs Advocates  
Mr. Robinson Muhando - Support Staff, Daly & Figgs Advocates  
Mr. Douglas Nyamori - L. O Manager, Intertek International Limited

### **Procuring Entity, Kenya Bureau of Standards**

Mr. Kevin Kiplagat - Advocate, Munene Wambugu & Co. Advocates  
Mr. George P. Kamami - Manager Procurement

### **Interested Candidates**

Mr. Charles Ochieng - Deputy CEO, Bureau Veritas  
Mrs. Lesaan Shani - BDM, DQS Kenya  
Mr. Josephat Njogu - Manager, Omic Tokyo

## **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 AWARD**

#### **Advertisement**

Kenya Bureau of Standards advertised the Tender for provision of pre-export verification of conformity (PVOC) to standards services on 23<sup>rd</sup> September, 2011 to be done by way of Expression of Interest.

#### **Closing/Opening:**

The tender closed/opened on 7<sup>th</sup> October, 2011 at 12:00 noon. The following ten (10) bids were opened

1. A/S Baltic Ltd
2. SGS-Societe Generale De Surveillance SA
3. Intertek International Ltd
4. DQS Kenya Ltd
5. ControlUnion International
6. M/s Bureau Veritas SA
7. Ormat International Ltd
8. TUV SUD PSB Pte Ltd
9. TUV RHEINLAND Middle East FZE
10. Overseas Merchandise Inspection

## Evaluation

The evaluation of the above bids was done in two phases namely; the technical evaluation and financial evaluation stages. The first technical evaluation was done on 17<sup>th</sup> October 2011 by a committee chaired by Mr. Erick Kirui and here the applicant was numbered as bidder number two.

The following are the results of the technical evaluation.

**TABLE ONE (1)**

Evaluation criteria	Firms									
	1	2	3	4	5	6	7	8	9	10
EOI Requirement										
a. Business name	√	√	√	X	√	√	√	√	√	√
b. Physical location	√	√	√	√	√	√	√	√	√	√
Address,	√	√	√	√	√	√	√	√	√	√
Telephone	√	√	√	√	√	√	√	√	√	√
Fax	√	√	√	√	√	√	√	√	√	√
e-mail	√	√	√	√	√	√	√	√	√	√
Organization profile	√	√	√	√	√	√	√	√	√	√
i)Conformity assessment of products with a bearing on health, safety and environment	√	√	√	X	√	√	√	√	√	√

ii)Availability of ISO/IEC 17025 accredited laboratories(owned or subcontracted)		√	√	√	x	√	√	√	√	√	√
iii)Continents where organization operates(spread)											
	Africa	√	√	√	√	√	√	X	X	√	X
	Europe	√	√	√	√	√	√	X	X	√	X
	Middle East	√	√	√	√	√	√	X	X	√	X
	North America	√	√	√	√	√	√	X	X	√	√
	South America	√	√	√	√	√	√	X	X	√	√
	Far East	√	√	√	√	√	√	√	√	√	√
	Asia	√	√	√	√	√	√	X	X	√	√
	Soviet Union(Old)	√	√	√	√	√	√	x	x	√	x

EOI Requirement		1	2	3	4	5	6	7	8	9	10
	Pacific	√	√	√		√	√	X	X	√	√
Certificate of incorporation		√	√	√		X	√	√	√	√	√

1. Qualifications and experience of key personnel											
	Diploma and above	√	√	√		√	√	√	√	√	√
	Experience in inspection	√	√	√		√	√	√	√	√	√
	Experience in undertaking similar assignments	√	√	√		√	√	√	√	√	√
	ISO 9001:2008 Certification	√	√	√		√	√	X	√	√	√
	Accreditation to ISO/IEC 17020 (added advantage)	x	√	√		x	√	√	√	√	√

**Observations made**

**Bidder 4**

- i. The Tenderer M/s DQS K limited gave the business name as DQS, GmbH (Based in Germany)
- ii. The organization profile shows that their core business is assessment, evaluation and certification of management systems.

iii. The tenderer (DQS Kenya Ltd) did not submit certificate of incorporation, instead provided DQS GmbH certificate of incorporation which is in Germany with no translation.

iv. No experience in undertaking assignment relevant to the EOI.

v. Tenderer does not hold ISO 9001:2008 certificate and/or ISO/IEC 17020 accreditation certificate.

vi. Tenderer hold ISO/IEC 17021 accreditation certificate to carry out the certification of management system.

### **Bidder 7**

i. The tenderer does not hold ISO 9001:2008 certificate. However the tenderer holds ISO/IEC 17020 accreditation certificate which is the most preferred by EOI.

### **Bidder 8**

i. The tenderer is spread in the Far East, Singapore, Malaysia, Indonesia, Phillipines, Thailand and Vietman.

### **Bidder 10**

i. The tenderer is spread in Africa, Europe and Middle East.

## **Recommendations**

Bidders 1,2,3,5,6,7,8,9 and 10 met all the requirements of EOI and are recommended to be invited to submit proposals to offer PVOC services.

Bidder 4 did not meet the requirements of the EOI as indicated in the observation noted above and therefore disqualified.

The successful bidders at this stage were notified of the outcome of the evaluation via letter date 25<sup>th</sup> October, 2011 which also invited them to tender their Requests for Proposal.

The unsuccessful bidder at this stage was also notified of the results of the evaluation at the same time as the successful bidders via a letter dated 25<sup>th</sup> October, 2011.

## **REQUESTS FOR PROPOSAL**

### **Closing/opening**

The bids for Request for Proposal were opened on 8<sup>th</sup> November, 2011 at 12:00 noon. The following seven bids were received;

1. Overseas Merchandise Inspection co. ltd
2. Intertek International ltd
3. Societe Generale De Surveillance SA
4. TUV SUD PSB Pte Ltd
5. TUV Rheinland Middle East FZE



6. Bureau Veritas SA

7. China Certification & Inspection Group

The assessment of qualification documents and the technical evaluation was conducted for four (4) days starting from 9<sup>th</sup> November, 2011. The evaluation was done and scores awarded based on the criteria provided in the Request for Proposal. The results of the evaluation are as summarized in table 2 below;

**TABLE TWO (2)**

**SUMMARY OF SCORES FOR EACH REGION BIDDED FOR.**

Region	Evaluated Bidders						Qualified Bidders
	1	2	3	5	6	7	
1		56.8	61.3	53.5	58.8		Bidders 2,3,5 and 6
2			64.0		64.3	60.5	Bidders 3,6 and 7
3		55.8	63.3	54.0	65.5		Bidders 2,3,5 and 6
4	39.5	57.9	66.7	63.0	67.2		Bidders 2,3,5 and 6
5			62.0		65.3		Bidders 3

							and 6
6			60.7		62.6		Bidders 2,3 and 6
7		61.5	66.0		66.5		Bidders 2,3 and 6
8			63.7		61.1		Bidders 3 and 6
9			63.0		60.7		Bidders 3 and 6
10		57.1	63.6	56.8	67.0		Bidders 2,3,5 and 6
11		58.7	65.6		66.9		Bidders 2,3 and 6
12		55.2	61.5		60.8		Bidders 2,3 and 6
13		52.5	57.4		60.8		Bidders 2,3 and 6
14		60.0	61.0	53.7	59.7	53.6	Bidders 2,3,5,6 and 7
15			57.0		60.0		Bidders 3 and 6
16		48.7	62.3	56.0	59.7		Bidders 2,3,5 and 6

17			59.0		61.2		Bidders 3 and 6
18		54.3	56.8		60.5		Bidders 2,3 and 6
No. of Regions Bidded for	1	11	18	6	18	2	

The applicant here was identified as bidder number two (2).

Bidder No. 1 ( Overseas Merchandise Inspection Co. Ltd) having bid for only one region (region 4) and scored less than 50 points out of the maximum 70 and was disqualified. Their financial proposal was thus returned to them unopened.

The Applicant (Intertek International) who was bidder No. 2 bid for 11 regions and scored over 50 points out of the maximum 70 points in all those regions except region No. 16 where it was disqualified. The bidder therefore was qualified for financial evaluation in regions 1,2,3,4,7,10,11,12,13,14 and 18.

The Applicant proceeded to submit technical proposal and financial bid for region Nos.1,3,4,7,10,11,12,13,14,16 and 18 despite having technically not qualified for region number 16. His financial proposal in Region No. 16 was not considered and therefore returned to him unopened.

Bidders No. 1 and 5 however qualified to submit their financial proposals and were therefore evaluated.

The Evaluation Committee then recommended Bidder No. 3 (Intertek International/the applicant) for award of tender in Regions No. 7,10,12 and 13 in which it was found to have qualified after both the technical and financial evaluations.

Bidder No. 1, Societe General De. SA was recommended for award in all the 18 regions it had qualified in, including Region No. 16 which is the subject of this appeal.

Bidder No. 5, TUVE Rheinland also qualified in Region No. 16 and was therefore recommended in that one Region.

### **TENDER COMMITTEE'S DECISION.**

The Tender Committee in its meeting of 14<sup>th</sup> December, 2011 awarded to the Applicant Regions No. 7,10,12 and 13 as recommended by the Evaluation Committee while Region No. 16 which is the subject of appeal was awarded to Bidders No. 1 and 5 respectively (i.e SGS Societe General De. SA and Tuverheinland Middle East).

## THE REVIEW

The Applicant Intertek International Limited lodged the Request for Review against the decision of Kenya Bureau of Standards on Expression of Interest for provision of Pre-export Verification of Conformity to Standards Services. The Applicant was represented by Mr. Anthony Njogu, Advocate Daly & Figs Advocates while the Procuring Entity was represented by Mr. Kevin Kiplagat, Advocate Munene Wambugu & Co. Advocates. The interested parties were Bureau Veritas, represented by Mr. Charles Ochieng its Deputy CEO, BDM, DQS Kenya represented by Mrs. Lesaan Shani and Omic Tokyo represented by Mr. Josephat Njogu, its manager.

The Applicant requests the Board for the following orders;

- 1.The Procuring Entity's award of tenders in respect of this procurement process be set aside and nullified.*
- 2. The Procuring Entity do properly and correctly evaluate the responsive bids submitted by the bidders in Tender No. KEBS/T055/2011/2012 in conformity with the provisions of the Public Procurement and Disposal Act, 2005, the Public Procurement and Disposal Regulations, 2006, and in conformity with objective evaluation criteria.*
- 3.The Procuring Entity be ordered to pay the costs of and incidental to these proceedings.*
- 4.Such other relief as this Honorable Board may deem just and expedient.*

The Applicant raised four grounds of review which the Board deals with as follows;

**GROUND 1: Breach of Section 34, 82 and 85 (2)**

This ground is framed as follows;

*“The procuring entity in carrying out its evaluation would appear to have considered a non-responsive bid that was not in accordance with the specific requirements of the Request for Proposal dated 26<sup>th</sup> October, 2011(“the RFP”). The RFP was clear that any financial evaluations were to be conducted on the basis of royalties payable only and no other fees. In considering and acting on such proposals, the procuring entity has acted in breach of Sections 34, 82 and 85 (2) of the Public Procurement and Disposal Act,2005, and Clauses 2.11.2 and 2.22.2 of the Appendix to instructions to Tenderers as contained in the RFP.”*

The Applicant submitted that the Procuring Entity failed to comply with Sections 34, 82 and 85 (2) of the Public Procurement and Disposal Act ( hereinafter referred to as “the Act” ). It stated that the Request for Proposal ( RFP) clearly set out at clause 5.2 7 that amongst the services to be provided by the Contractor was to witness the loading and sealing of containers as part of the inspection and verification services. The Applicant alleged that whereas the Request for Proposal (RFP) was clear that the financial proposal was to be evaluated on the basis of royalties payable only, it was made clear during the reading out of the financial proposals on 28<sup>th</sup> November 2011 that one of the bidders not only quoted royalty fee but

had included training and equipment costs as royalty deductions items. It further alleged that the said Bidder had included separate additional verification charges for witnessing of loading and sealing of containers.

It stated that the figures quoted by the said bidder were publicly read out at the opening of the financial proposals. Finally, on this issue, the Applicant submitted that the inclusion of additional charges on witnessing and loading of containers was a contravention of the fee structure stipulated in clause 6.3.1 of the Request for Proposal.

In response, the Procuring Entity denied the allegation by the Applicant that the minutes of the financial evaluation did not reflect a true picture of the proceedings on that day. It stated that the Applicant's submissions were unsubstantiated allegations and the burden of proof rested on it. It stated that the submissions by the Applicant were mere allegations and that the Applicant had not proved whatever they alleged to have happened at the financial opening.

The Procuring Entity stated that the gist of this ground was that in the opinion of the Applicant, the Procuring Entity considered a bid that was not responsive. It stated that the Applicant did not disclose the name of the bidder for one to know whether that bidder was successful or not. It stated that unless one knows the Bidder who the Applicant alleges was not responsive, it is not possible to know the implication of the reading of the figures as the mere reading did not contravene any Section of the Act or the Request for Proposal. The Procuring Entity asserted that a true reflection of

what transpired at the opening of the financial proposals is captured in the minutes which had been provided to the Board.

Finally, on this issue, the Procuring Entity denied that it breached Section 34, 82 and 85 (2) of the Act. It stated that Section 34 simply state that the Procuring Entity shall prepare specific requirements relating to each tender which the Procuring Entity did. It pointed out that Section 82 of the Act merely provided the manner the evaluation shall be done, which was the procedure followed by the Procuring Entity of doing a technical evaluation followed by the financial evaluation. It also pointed that Section 85 (2) provide that the contract may not vary from the requirement of the terms of reference and it stated that the Applicant did not demonstrate how this provision was breached.

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

The Board notes that the issue for determination in this ground is whether the Procuring Entity conducted the financial evaluation in accordance with the criteria set out in the Request for Proposal.

At the outset, the Board notes that the first part of this ground is vague and speculative. The Applicant states that the Procuring Entity appears to have considered a non responsive bid. The Applicant has not identified the bidder it is referring to. It is important to note that this tender was divided into 18 regions. The Bidders were free to participate in any or all the regions. Indeed, the Applicant participated in eleven regions and was



successful in regions number 7, 10, 12 and 13. The question that begs an answer is which bidder and region is the applicant complaining about?

The other issue raised by the Applicant is that the Procuring Entity did not conduct the financial evaluation on the basis of royalties payable only. It is alleged that the Procuring Entity took into account other fees that were not provided in the tender document.

Board further notes that Section 34, 82 and 85 (2) of the Act and clauses 2.11.2 and 2.22.2 of the Request for Proposal which the Procuring Entity allegedly breached provide as follows;

***Section 34(1);***

***The procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, 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.***

***(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.***

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

***a.) relate to performance rather than to design or descriptive characteristics; and***

***b.) be based on national or international standards.***

*(4) The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless-*

*a.) there is no other sufficiently precise or intelligible way of describing the requirement; and*

*b.) the requirements allow equivalents to what is referred to.*

*Section 82(1);*

*The procuring entity shall examine the proposals received in accordance with the request for proposals.*

*(2.) For each proposal, the procuring entity shall evaluate the technical proposal to determine if it is responsive and, if it is, the procuring entity shall assign a score to the technical proposal, in accordance with the procedures and criteria set out in the request for proposals.*

*(3.) 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.*

*(4) If the request for proposals provides for additional methods of evaluation, the procuring entity shall conduct such methods in accordance with the procedures and criteria set out in the request for proposals.*

*(5) 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 and financial proposals under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4).*

*Section 85 (2);*

*The contract may not vary from the requirements of the terms of reference, the request for proposals or the terms of the successful proposal except in accordance with the following-*

- a.) The contract may provide for a different price but only if there is a proportional increase or reduction in what is to be provided under the contract; and*
- b.) The variations must be such that if the proposal, with those variations, was evaluated again under Section 83, the proposal would still be the successful proposal.*

The Board further notes that Clause 2.22.1 of the instruction to tenderers provided as follows;

*“ Tenderers who do not receive at least 50 points out of the maximum 70 points in the evaluation of their technical proposals shall be disqualified and their financial proposals returned unopened.”*

The Board has carefully perused the tender documents of the Applicant and Successful Bidders. The Board observes that the Applicant bid for eleven regions and was evaluated equally on all those regions based on the criteria provided in the Appendix to instructions to Tenderers. Upon examination of the technical evaluation results, the Board has noted that the Applicant bid for regions no 1,3,4,7,10,11,12,13,14,16, and 18. It was successful and passed the technical evaluation stage in all regions apart from region No.16. Upon financial evaluation, the Applicant was successful and was awarded the tender in regions number 7, 10, 12 and 13.

The Board notes that from the submissions made at the hearing it is clear that the Applicant is aggrieved with the results of region No.16 where it is the current contractor. The technical scores for that region shows that the Applicant scored 48.7 marks which is less than the cut off marks of 50 points out of the maximum 70. As a result, the Applicant's financial proposal for region 16 could not be considered as the Applicant did not meet the minimum mark as set out in clause 2.22.1. It is therefore clear that the Applicant's contention that the financial proposals were not evaluated properly is misplaced. The Applicant did not reach the financial evaluation stage in region No.16 because it failed at the technical evaluation stage.

The Board has noted three other bidders quoted for region No.16 and the three bidders scored 62.3, 56.0 and 59.7 per cent which were all over the required minimum points of 50 out of the maximum score of 70 points.

The Board has also noted that the Applicant had submitted a combined financial proposal and therefore it had to be invited for the opening of the

financial proposals as it was successful in certain regions. The Board has further examined the Technical evaluation report and noted that the Applicant scored zero marks in region NO. 16 in the following categories;

- (i) Company organization and structure in the region
- (ii) Physical presence in each country in the region
- (iii) Evidence of certification to 150 9001 and or accreditation to 150/ICC 17020 in the region
- (iv) Consumer organizations
- (v) Any extra equipment /kits; and
- (vi) Evidence of training schedule

Upon perusal of the Applicant's tender document and that of the Successful Bidders the Board is satisfied that the Procuring Entity followed the criteria set out in the Request for Proposal in the evaluation process.

In view of the foregoing, the Board finds that there is no basis to hold that the Procuring Entity breached Section 34, 82 and 85 (2) and Clause 2.11.2 and 2.22.2 as claimed by the Applicant. Accordingly, this ground fails.

## **FOUNDATIONS 2 AND 3: Breach of Section 2 and 31 (6) of the Act.**

The two grounds were consolidated and stated as follows;

### ***Ground 2;***

*"The Applicant was disqualified from certain portions of the tender and this was verbally announced during the opening of financial proposals on 22<sup>nd</sup> November, 2011. This disqualification was stated in the presence of all the bidders in the room but has not been captured in the minutes of the financial proposals opening. As such, the Procuring Entity has acted in breach of Sections 31(6) of the Act."*

### ***Ground 3;***

*"The Applicant has been denied the tender award in a manner contrary to the provisions of the Public Procurement and Disposal Act and despite having submitted the a highly competitive proposal given its experience in the PVOC program. This has compromised the integrity and fairness of these tender proceedings and is contrary to the specific objectives of the Act as stated at Section 2 thereof."*

The Applicant stated that there was lack of fairness in the tender process and that it was excluded from the tender process contrary to the provisions of Section 31 (6) of the Act. It stated that it was excluded from certain regions on 28<sup>th</sup> November 2011 when the financial proposals were being opened.

The Applicant alleged that the minutes provided by the Procuring Entity were not a true reflection of the proceedings of the financial opening. It alleged that a true reflection of the financial opening is outlined in the supplementary affidavit filed by its representative, Mr. Nyamori, who attended the meeting. The Applicant stated that the Procuring Entity had stated that it was disqualified because its tender documents did not exhibit the company organization structure and physical presence in region No 16. It also stated that the other reason given for its failure in region No.16 was that it failed to provide evidence on 150 9001/ Accreditation to 150/ICC 17020, evidence of training schedule, any extra equipment/kits and also evidence of the training schedule.

The Applicant asserted that it provided all the required information and documents in its technical proposal. It further asserted that the letter dated 17<sup>th</sup> November 2011 inviting it to witness the opening of financial proposals was clear that its technical proposal had been deemed satisfactory. Therefore, the issue of disqualification which was then stated at the financial opening did not explain what happened between 17<sup>th</sup> November 2011 and 28<sup>th</sup> November 2011 which rendered part of the technical proposal below the evaluation point threshold which necessitated its disqualification. It argued that the information in its technical evaluation was for all regions and it is therefore improper for the Procuring Entity to award it certain regions and disqualify it in others.

In response, the Procuring Entity denied all the allegations by the Applicant. It vehemently denied that certain aspects of the Applicant's

tender were verbally disqualified at the opening of financial proposals on 22<sup>nd</sup> November 2011. It stated that it did the evaluation in accordance with Section 82 of the Act, by carrying out the technical evaluation first, which was then followed by the financial evaluation.

The Procuring Entity stated that the Applicant had put its financial proposals for all the eleven regions in one document. Therefore, it had to open the financial proposals for the regions where the Applicant was successful together with the regions it had failed. It stated that ordinarily the financial proposals for the region the Applicant had failed would not have been opened, but this was not possible in this tender as the Applicant had submitted one document.

The Procuring Entity submitted that the tender was for 18 separate regions and bidders were free to bid for all or certain regions. The evaluation was done for each region separately and therefore, it was possible for a bidder to win in certain regions and fail in others. It stated that the Applicant failed to meet the conditions in certain regions and that is why it failed. It denied the allegation of unfair treatment as submitted by the Applicant.

The Procuring Entity denied that it failed to supply the Applicant with minutes of the tender evaluation. It stated that the tender documents at clause 2.18.2 did not stipulate the period within which the minutes would be given to the bidders. It stated that it provided the Applicant with the minutes. It reiterated the fact that the Applicant failed because the Procuring Entity was evaluating the adequacy and sufficiency of the information given by the bidders. It urged the Board to compare the



information given by the Applicant against the information provided by the other bidders.

The Procuring Entity stated that the fact that the Applicant has been providing services in region No.16 was irrelevant as this was a fresh tender and open to competition and the Applicant was required to supply all the information that was set out in the tender specifications.

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

The issues for determination in these grounds are whether;

- (i) the Applicant was disqualified at the time of the opening of financial proposal on 22<sup>nd</sup> November 2011; and
- (ii) whether the financial evaluation was done fairly and in a manner that promotes integrity and fairness in the tender proceedings as contemplated by Section 2 of the Act.

The Board has noted that the Applicant alleges that on 22<sup>nd</sup> November 2011 when the financial proposals were opened, it was verbally announced that certain portions of its tender had been disqualified. The Applicant also alleges that the financial evaluation minutes presented to the Board are not a true reflection of the proceedings of 22<sup>nd</sup> November 2011.

As already stated in ground No. 1, the Applicant bid for 11 out of the 18 regions. Its technical proposal was successful in all the regions except region No.16 which it scored 48.7 marks which was below the cut off marks of 50 marks.

The Board notes that after technical evaluation, Applicant's financial proposals for the 10 regions that it had passed were evaluated and it was successful in four regions, namely regions No.7, 10, 12 and 13. The Board observes that the technical evaluation was done on a clear and elaborate criteria. The results of the technical evaluation are as follows;

**TABLE THREE (3)**

**Bidder No. 2**

The bidder submitted proposal for region Nos. 1,3, 4,7,10,11,12,13,14,16 and 18

Technical Requirement		Aspects Evaluated													
		Max Points	Region 1	Region 3	Region 4	Region 7	Region 10	Region 11	Region 12	Region 13	Region 14	Region 16	Region 18		
The company's organization and structure and its capacity through its physical presence to provide PVoC services in the region(s) in which it is bidding. The number and scope of ISO/IEC 17025 accredited test laboratories the bidder has committed to work with. Presence of Current ISO 9001:2008 certification and/or ISO/IEC 17020 accreditation shall be added advantage. (Total Max Points 20)	Company's organization and structure in the region(s)	5	5	5	5	5	5	5	5	5	5	5	5		
	Physical presence in each country in the region	6	1.5	1	2	3	1.1	2.6	1.2	0.5	6	0	0.25		
	Number and scope of ISO/IEC 17025 accredited test labs committed by the bidder in each country in the region	5	1.25	0.8	1.9	2.5	0	2.1	2	0	0	1.7	0		
	Evidence of certification to ISO 9001 and/or accreditation to ISO/IEC 17020 in the region.	4	2	2	2	4	4	2	0	0	0	2	0	2	
The company's experience in providing similar verification of conformity services on behalf of Governments or regulatory authorities including current and former contracts, and its record in satisfactorily fulfilling its duties and obligations with those Governments and/or regulatory authorities. (Total Max Points 10)	Evidence of current or former similar contracts executed.	5	5	5	5	5	5	5	5	5	5	5	5		
	Evidence of satisfactory performance	5	5	5	5	5	5	5	5	5	5	5	5		
	Relevance of qualifications and training of key personnel	4	4	4	4	4	4	4	4	4	4	4	4		
Qualifications, training and experience of the company's personnel assigned to perform conformity assessment tasks required under the contract. Curriculum vitae for management and supervisory staff directly involved in the management of the service required. The CVs must have been recently signed by the owners and countersigned by the tenderer's authorized representative. (Total Max Points 10)	Experience of key personnel in conformity assessment	4	4	4	4	4	4	4	4	4	4	4	4		
	Evidence of signed and countersigned CVs	2	2	2	2	2	2	2	2	2	2	2	2		
	Efficiency in conformity assessment processes	2	2	2	2	2	2	2	2	2	2	2	2		
The information communications technology resources and how the resources will be deployed for achieving the following objectives: (Total Max Points 8)	Efficiency in customer enquiry and complaint handling	2	2	2	2	2	2	2	2	2	2	2	2		
	Secure transmission of data, documents and reports resulting from activities under the contract to the KEBS or any entity as authorized by KEBS.	2	2	2	2	2	2	2	2	2	2	2	2		
	Ability to maintain secure conformity assessment database accessible to the client's designated personnel.	2	2	2	2	2	2	2	2	2	2	2	2		

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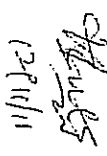

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Risk management system that will be employed by the company to optimize resources by effectively targeting high-risk shipments for inspection and testing and for detecting irregularities in import documentation. (Total Max Points 8)	Risk based classification of goods subject to PVOC.	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
	Risk grading of trade entities/loads	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
	Detection of irregularities in import documentation	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
	Prevention of certification of counterfeit goods.	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
	Inspections bodies	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
	Laboratories	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
	Market surveillance organizations or consumer organizations. (Total Max Points 4)	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
	Evidence of a schedule to provide technical support	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	A schedule of how tenderer shall provide technical support required in the schedule of requirements (Total Max Points 5)	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
	Provision of all AOC Equipment/Kits	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3
	Any extra equipment/Kits	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	Evidence of a training schedule	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	Appropriateness and relevance of technical training proposed	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4
	<b>Total Score</b>	<b>70</b>	<b>56.75</b>	<b>55.8</b>	<b>57.9</b>	<b>61.5</b>	<b>57.1</b>	<b>58.7</b>	<b>58.2</b>	<b>58.5</b>	<b>60</b>	<b>48.7</b>	<b>54.25</b>					

**Evaluation notes:**

The scores were awarded based on the criteria given in ANNEX 1.


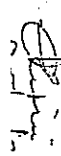
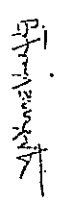

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The Board notes that the evaluation criteria were elaborate and objective. Having examined the tender documents of the Applicant and those of the Successful Bidders, the Board is satisfied that the evaluation was done fairly and objectively. Bidders were being scored on the adequacy and on the basis of the documents submitted. As the Board has already noted in ground 1, the 18 regions were evaluated separately and the fact that a bidder was successful in one region is not a basis to argue that it should have succeeded in the other regions. As already noted in ground number 1 the Applicant's complaint is based on region No.16, where it is the current contractor. However, the Board notes that this region like the other regions was open to competition. The Applicant failed to meet the cut off mark that was set in clause 2.22.1 of the tender documents and it did not proceed to financial evaluation in this region. That notwithstanding, the Board has examined the financial evaluation and it is evident that the financial evaluation was done using the criteria which was set out in the tender document as follows;

**TABLE FOUR (4)**

The bidder submitted technical proposal and financial quote for region Nos. 1,3, 4,7,10,11,12,13,14,16 and 18, but did not technically qualify for region No. 16 and hence financial quote for region No. 16 has not been considered.

Technical Requirement	Aspects Evaluated	Max Points	Region 1	Region 3	Region 4	Region 7	Region 10	Region 11	Region 12	Region 13	Region 14	Region 16	Region 18
			5	5	5	5	5	5	5	5	5	5	5
The company's organization and structure and its capacity through its physical presence to provide PVoC services in the region(s) in which it is bidding. The number and scope of ISO/IEC 17025 accredited test laboratories the bidder has committed to work with. Presence of Current ISO 9001:2008 certification and/or ISO/IEC 17020 accreditation shall be added advantage. (Total Max Points 20)	Company's organization and structure in the region(s)	5	5	5	5	5	5	5	5	5	5	5	5
	Physical presence in each country in the region	6	1.5	1	2	3	1.1	2.6	1.2	0.5	5	0.25	0.25
The company's experience in providing similar verification of conformity services on behalf of Governments or regulatory authorities including current and former contracts, and its record in satisfactorily fulfilling its duties and obligations with those Governments and/or regulatory authorities. (Total Max Points 10)	Number and scope of ISO/IEC 17025 accredited test labs committed by the bidder. In each country in the region	5	1.25	0.8	1.9	2.5	0	2.1	2	0	0	0	0
	Evidence of certification to ISO 9001 and/or accreditation to ISO/IEC 17020 in the region.	4	2	2	2	4	4	2	0	0	2	2	2
Qualifications, training and experience of the company's personnel assigned to perform conformity assessment tasks required under the contract. Curriculum vitae for management and supervisory staff directly involved in the management of the service required. The CVs must have been recently signed by the owners and countersigned by the tenderer's authorized representative. (Total Max Points 10)	Evidence of current or former similar contracts executed.	5	5	5	5	5	5	5	5	5	5	5	5
	Evidence of satisfactory performance	5	5	5	5	5	5	5	5	5	5	5	5
The Information communications technology resources and how the resources will be	Relevance of qualifications and training of key personnel	4	4	4	4	4	4	4	4	4	4	4	4
	Experience of key personnel in conformity assessment	4	4	4	4	4	4	4	4	4	4	4	4
Efficiency in conformity assessment processes	Evidence of signed and countersigned CVs	2	2	2	2	2	2	2	2	2	2	2	2
		2	2	2	2	2	2	2	2	2	2	2	2

Date: 01/17





At the risk of repetition, the Board notes that the Applicant's financial evaluation was not considered for region No. 16 as it had not passed the technical evaluation stage. The Applicant's financial proposals for all the other regions that it had qualified in technical evaluation stage were considered and it was successful in at least four regions.

Therefore, the Board finds that the Applicant's allegation that it was treated unfairly has no basis.

Accordingly, these grounds also fail.

#### **GROUND 4: Breach of Regulation 73 (2) (c) and Clause 2.26 of the Request for Proposal**

This ground stated as follows;

*"The procuring entity has unreasonably and contrary to the law hastened the signing of contracts pursuant to the award of the contracts for various regions under the PVOC to standards programme. Despite issuing notification to bidders on 1<sup>st</sup> December, 2011 of the award of tenders, the procuring entity has proceeded to direct the Applicant to submit a signed acceptance letter by 14<sup>th</sup> December 2011, have contract negotiations on 14<sup>th</sup> December 2011 and attend the signing of contract on 15<sup>th</sup> December, 2011. This would constitute the signing of contracts within the 14 day window contemplated under Regulation 73 (2)(c) thereby prejudicing bidder's right to seek administrative review of the award. This action is also contrary to Clause 2.26 of the RFP."*

The Applicant submitted that notification to bidders was issued on 1<sup>st</sup> December 2011 and that the appeal window as contemplated by Regulation 73 (2) (c) was to expire on 15<sup>th</sup> December 2011. It alleged that the Procuring Entity engaged in negotiations with the successful bidders within the 14 days appeal window and had contemplated signing of the contract on 15<sup>th</sup> December 2011. It stated that this was meant to lock out the Applicant from challenging the decision of the Procuring Entity.

In response, the Procuring Entity denied that it rushed the process of signing of the contract. It stated that the existing contract was expiring on 17<sup>th</sup> December 2011. It was therefore necessary to engage the successful bidders so that the Procuring Entity would be in a position to sign the contract on 16<sup>th</sup> December 2011 after the expiry of the appeal window. The Procuring Entity asserted that it did not breach the Act by engaging in negotiations.

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

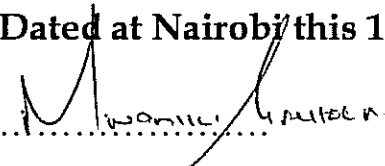
The Board notes that the complaint in this ground was that the Procuring Entity attempted to rush the process by engaging in negotiations with the Successful Bidders before the expiry of the 14 days appeal window.

The Board notes that though the Procuring Entity engaged in negotiations with the Successful Bidders, no contract was signed within the appeal window. The Act does not prohibit the Procuring Entities from engaging in negotiations with the Successful Bidders. What the Act specifically

prohibits is the signing of the contract before the expiry of the Appeal window to allow aggrieved bidders to lodge an appeal with the Board, if they so desire. The Board has stated in several decisions that the appeal window is a stand still period when a Procuring Entity should not take any action that can adversely affect the rights of the aggrieved bidders. In this tender, the Board notes that no contract was signed within the appeal window. The Board further notes that the Applicant was able to lodge its Request for Review within time. The Applicant has not demonstrated the prejudice it suffered as a result of the negotiations with the Successful Bidders. As already noted, the Procuring Entity did not take any action that adversely affected the rights of the Applicant. The upshot of this is that this ground has no merit and it fails.

Taking into consideration all the above matters, all the grounds of appeal fail and the Request for Review is hereby dismissed with no orders as to costs. The Board orders pursuant to Section 98 of the Act that the procurement process may proceed.

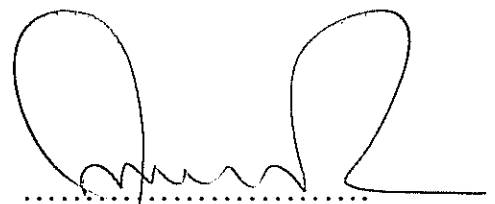
**Dated at Nairobi this 11<sup>th</sup> day of January, 2012**



.....  
M. Wanjau

**CHAIRMAN**

**PPARB**



.....

**SECRETARY**

**PPARB**

