

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 4/2012 OF 14THFEBRUARY, 2012

BETWEEN

MEA LIMITED.....APPLICANT

AND

NATIONAL CEREALS AND

PRODUCE BOARD.....PROCURING ENTITY

Review against the decision of the Tender Committee of the National Cereals and Produce Board dated 3rd February, 2012 in the matter of the Supply and Delivery of 30, 000 MT of DAP fertilizers.

BOARD MEMBERS PRESENT

Mr. P.M Gachoka - Chairman

Mr. Akich Okola - Member

Ms. Natasha Mutai - Member

Ms. Judy Guserwa - Member

Mr. Joshua Wambua - Member

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11
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IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, MEA LIMITED

- Mr. D. Ndegwa - Sales, MEA Ltd
- Mr. T. Gitau - Director
- Mr. Muthomi Thionkolu - Advocate, Mohammed&Muigai
Advocates.
- Mr. KeniKariuki - Mohammed &Muigai Advocates

Procuring Entity, National Cereals and Produce Board

- Mr. P. Lutta - Lutta& Co. Advocates
- Mr. Geoffrey Omenke - Advocate, NCPB
- Ms. Priscah Ngea - L.A, NCPB
- Ms. Sussane Lutta - Pupil, Lutta& Co. Advocates

Mr. Maruti Lawrence - Pupil, Lutta & Co. Advocates

Mr. Cornel K. Ngelechey - CA, NCPB

Mr. John Ngetich - S.C. O, NCPB

Mr. D.C Mundia - PM, NCPB

Mr. PM Karanja - Ag. BS, NCPB

Mr. M. Ndungu - P/O, NCPB

Interested Candidates

Mr. John Ohaga - Advocate, Export Trading Co. Ltd

Mr. Brian Mvindi - Advocate, Export Trading Co. Ltd

Mr. S.K Bhartia - G.M Solai Stores

Mr. A.J Mehta - Manager, Solai Stores

Mr. Paul Mureithi - Pabari Distributors

Mr. Pradip Patel - Export Trading Co. Ltd

Mr. Mohammed Ali - Holbud Ltd

Mrs. Doricila Asiko - Accountant, Euroworld Commodities

Mrs. Pauline Kapoya - Manager, Ama Trading Co. Ltd

Ms. Harriet Joseph - Manager, Ama Trading Co. Ltd

BACKGROUND OF AWARD

(Open Tender)

The tender for the Supply and Delivery of 30,000 Metric tones of Diamonium Phosphate (DAP) Fertilizer was advertised by the National Cereals and Produce Board on 23rd November, 2011 in the Daily Nation Newspaper.

Closing/Opening

The above tender was supposed to close/open on 28th December, 2011 at 12 noon Kenyan time. As at the time of tender opening, the following eleven firms had returned their bids;

- i. MEA Ltd
- ii. Pabari Distributors
- iii. Yara Switzerland
- iv. Export Trading Co. Ltd
- v. Holbud Ltd
- vi. Euroworld commodities
- vii. Afri Ventures FZE
- viii. Helicon Corporations Inc.
- ix. Stradilor Ltd.
- x. Saudi Industrial Export
- xi. Farmers World Limpopo

EVALUATION

The tenders were first subjected to a preliminary evaluation on 13th January, 2012 in order to ascertain Bidders' conformity with mandatory requirements and consequently to technical evaluation.

The results of the mandatory evaluation were as tabulated below;

TABLE 1-Mandatory Evaluation.

DETAILS		TENDERERS											
		1	2	3	4	5	6	7	8	9	10	11	12
	TENDER FOR SUPPLY & DELIVERY OF DAP FERTILIZER TENDER NO. NCPB/FERT//DAP/01/2011-2012	HELICOM CORPORATION	AFRI VENTURES FZE	GYPSUM E.A LTD	HOLBUD LTD	EURO-WORLD COMMO-DITIES	PABARI DISTRIBUTORS	EXPORT TRADING CO.	MEA LTD	STRADILOR LTD	YARA SWITZERLAND	SAUDI INDUSTRIAL EXPORT	FARMERS WORLD LIMPOPO
No	Mandatory Requirements												
1	Bid quantity of 30,000±10% metric tons	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
2	Tender submitted in the right format	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x
3	Duly signed bids by an authorised person and any erasure, overwriting or correction initialled.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
4	Bid bond from a reputable commercial bank and valid for 90 days from the date of tender opening.	x	✓	x	x	✓	✓	✓	✓	x	x	x	x
5	Copy of certificate of Incorporation and articles of association or equivalent instruments establishing the tendering company	✓	✓	✓	✓	✓	✓	✓	✓	x	x	x	✓
6	Audited Accounts for year 2009 and 2010	✓	✓	x	✓	x	✓	✓	✓	x	x	✓	x
Key													
✓ Complies													
x Does not comply													

The following issues were noted out of the above tabulated mandatory evaluation;

- (a) The bid bonds submitted by Helicom Corporation Ltd and Yara Switzerland were issued by foreign banks and channelled through local banks. The local banks had absolved themselves from any liability/claims with regards to the bonds.
- (b) Gypsum E.A Ltd, Saudi Industrial Export and Farmers World Limpopo did not attach bid bonds to their technical proposals.
- (c) The bid bond submitted by Holbud Ltd though issued by a local bank was valid for 30 days only.
- (d) That the bid bond submitted by Stradilor Ltd was issued by an Insurance company and not a reputable commercial bank as required. The firm also submitted accounts for year 2011 only.

After the preliminary evaluation of the Tender No. NCPB/DAP/01/2011-2012, only four firms out of the eleven that had bided qualified to proceed to the technical evaluation stage. These firms were;

- i. Afri Ventures FZE
- ii. Pabari Distributors
- iii. Export Trading Company, and
- iv. MEA Ltd

The results of the technical evaluation of the bids that qualified from the preliminary evaluation were as tabulated below;

TABLE 2-Technical Evaluation

SUPPLY AND DELIVERY OF 30,000 MT OF DAP FERTILIZER TENDER NO. NCPB/FERT/ DAP/01/2011-2012	AFRIVENTURES FZE 2	PABARI DISTRIBUTORS 6	EXPORT TRADING CO. 7	MEA LTD 8
Up to 45 days = 30 marks	30	0	30	30
46 - 50 days = 20 marks				
51 - 55 days = 10 marks				
Above 55 days - 0 marks				
Liquidity Ratio	10	10	5	5
1 : 2 and above = 15 mks				
1: 1-1.99=10 mks				
1:0.5-0.99 =5mks				
1 : < 0.5 = 1 mks				
Profitability Ratio	5	5	2	2
20% & above = 15 mks				
15%-19%= 10 mks				
10%- 14% = 5 mks				
1% - 10% = 2 mk				
No. of previous Clients	12	3	6	15
6 clients & above - 15 mks				
5 clients - 12 mks				
4 clients - 9 mks				
3 clients - 6 mks				
2 clients - 3 mk				
1 client - 1 mk				
0 client - 0 mk				
Total Size of cargo handled	10	5	5	5
100,000 mt& above - 15 mks				
75,000 - 99,000 mt - 10 mks				
50,000 -75,000 mt - 5 mks				
25,000 mt -49,999 mt - 3 mks				
Below 25,000 mt - 1 mk				
Compliance of tenderers' offer with the tender specifications (10mks)	10	10	10	10
Non compliance (0mks)				
Total Marks (Parts I, II,III,IV)	77	33	58	67

From the above results of the technical evaluation, it was noted that only one firm, that is Afriventures FZE, attained the requisite score of 70 marks and above to proceed to the financial evaluation.

RECOMMENDATIONS.

In view of the results of the Technical Evaluation, the Evaluation Committee was of the opinion that the tender in dispute was non-responsive. The Evaluation Committee therefore recommended that the tender be terminated subject to the concurrence of the Tender Committee.

TENDER COMMITTEE'S DECISION

The Tender Committee in its meeting of 13th January, 2012 under Min. No. NCPB/02B/TC/20/2011-2012 deliberated upon the recommendations of the Evaluation Committee and decided to uphold those recommendations and consequently terminated Tender No. NCPB/FERT/DAP/01/2011-2012 for the Supply and Delivery of 30,000 metric tones of DAP Fertilizer.

DIRECT PROCUREMENT

The Tender Committee decided to undertake direct procurement after terminating Tender No. NCPB/FERT/DAP/01/2012 for the supply and delivery of 30,000 metric tones of Diamonium Phosphate (DAP) Fertilizer that had initially been conducted by way of open tender.

The Tender Committee in its meeting of 19th January, 2012 also made a resolution that all those who participated in the initial tender plus a few known international fertilizer manufacturers/dealers be invited for negotiations on all matters pertinent to the acquisition of the fertilizer.

The matters that were listed as forming part of the negotiations for the supply and delivery of 30,000 metric tones of diamonium phosphate (DAP) fertilizer covers the following areas;

- i. Price
- ii. Quantity
- iii. Delivery schedule
- iv. Quality parameters
- v. Contract and payment terms

Invitations were consequently sent on 23rd January, 2012 to the following fifteen (15) firms;

- vi. MEA Ltd
- vii. Pabari Distributors
- viii. YARA Switzerland
- ix. Export Trading Co. Ltd
- x. Holbund Ltd
- xi. Euroworld Commodities
- xii. Afri ventures FZE
- xiii. Helicom Corporations Inc
- xiv. Stradilor Ltd
- xv. Transammonia Ag
- xvi. Azomures SA
- xvii. Ferteberia
- xviii. Gavillon Fertilizer LLC
- xix. Agri Commodities
- xx. Swiss Singapore Overseas Ltd

The invitations for negotiations required the invited firms to email their offers covering each of the above listed area of negotiations, and the said negotiations were scheduled to be conducted between 26th January, 2012 and 31st January, 2012.

The following table represents the results of the confirmed and final offers;

TABLE 3- Confirmed and Final offers

No.	NAME OF FIRM	FINAL AND CONFIRMED OFFER
01	Afri Ventures FZE	Wrote to the effect that they could not get a cargo for March but only for April hence could not offer given the strict deadlines.
02	Pabari Distributors	<ol style="list-style-type: none"> 1. Quantity: 30,000 MT +/- 10% on sellers option 2. Price Offer :- <ol style="list-style-type: none"> (a) Sight L/C - USD 625 per MT (b) 90 days deferred credit - USD 633 per MT (c) 180 days deferred credit -USD 641 per MT 3. Delivery Schedule: 6 - 8 weeks after receipt of a workable L/C 4. Delivery terms - CFR Mombasa in bulk, discharge 3000 MT SSheX EIU Basis
03	Export Trading Co. Ltd	<ol style="list-style-type: none"> 1. Quantity: 30,000 MT +/- 10% on sellers option 2. Price Offer :- <ol style="list-style-type: none"> (a) Sight L/C - USD 625 per MT (b) 90 days deferred credit - USD 630 per MT (c) 180 days deferred credit -USD 640 per MT 3. Validity: 1 week from 30th January 2012 subject to reconfirmation 4. Delivery Schedule: partial delivery of 19,700MT immediately and balance quantity within 10 days. 5. Payment terms: Irrevocable, confirmed Letter of Credit 6. Country of origin: USA 7. Packing: Bulk
04	MEA Ltd	<ol style="list-style-type: none"> 1. Quantity: 30,000 MT 2. Price Offer :- <ol style="list-style-type: none"> (a) Sight L/C - USD 640 per MT (b) 90 days deferred credit - USD 655 per MT (c) 180 days deferred credit -USD 670 per MT 3. Delivery Schedule: 35 days from receipt of a workable L/C 4. Discharge rate: 2,500 MT PWWD SSheX 5. Country of origin: U.S.A/ Morocco at sellers option 6. Validity: 3rd February 2012
05	Stradilor Ltd	<ol style="list-style-type: none"> 1. Quantity: 30,000 MT 2. Price Offer :-

		<p>(a) Sight L/C - USD 708 per MT (b) 90 days deferred credit - USD 732 per MT (c) 180 days deferred credit - USD 761 per MT</p> <p>3. Delivery Schedule: 30 - 45 days from receipt of a workable L/C 4. Payment terms: Irrevocable, confirmed Letter of Credit</p>												
06	Swiss Singapore Overseas Ltd	<p>1. Quantity: 30,000 MT +/- 10% at sellers option 2. Price Offer :- Sight L/C - USD 660 per MT 3. Shipment: March/1st half April at sellers option 4. Packing: Bulk 5. Country of origin: Russia 6. Validity: subject to unsold/reconfirmation 7. Discharge rate: 3,000 MT PWWO SSHEX EIU basis.</p>												
07	Helicom Corporation Inc.	<p>1. Quantity: 30,000 MT +/- 10% on sellers option 2. Price Offer per MT</p> <table border="1"> <thead> <tr> <th></th> <th>Morocco</th> <th>Russia</th> </tr> </thead> <tbody> <tr> <td>Sight L/C</td> <td>USD 630</td> <td>USD 615</td> </tr> <tr> <td>90 days deferred credit</td> <td>USD 636</td> <td>USD 621</td> </tr> <tr> <td>180 days deferred credit</td> <td>USD 642</td> <td>USD 627</td> </tr> </tbody> </table> <p>3. Validity: 2nd February 2012 4. Delivery Schedule: -Morocco - 30 days -Russia - 60 days</p>		Morocco	Russia	Sight L/C	USD 630	USD 615	90 days deferred credit	USD 636	USD 621	180 days deferred credit	USD 642	USD 627
	Morocco	Russia												
Sight L/C	USD 630	USD 615												
90 days deferred credit	USD 636	USD 621												
180 days deferred credit	USD 642	USD 627												
08	Holbud Ltd	<p>1. Quantity: 30,000 MT +/- 10% at sellers option 2. Price Offer :- USD 649.50 per MT (did not indicate the applicable terms of payment) 3. Delivery Schedule: 9/10 March if LC is received on 9/10 February 4. Packing: Bulk 5. Country of origin: Baltic/ Black Sea</p>												
09	Euroworld Commodities	<p>1. Quantity: 30,000 MT 2. Price Offer :- (a) Sight L/C - USD 625 per MT (b) 90 days deferred credit - USD 635 per MT (c) 180 days deferred credit - USD 645 per MT 3. Delivery Schedule: 4 - 6 weeks from receipt of a workable L/C 4. Discharge rate: 3,000 MT PWWO SSHEX EIU basis 5. Origin: USA/Russia</p>												
10	Yara Switzerland	<p>1. Quantity: 30,000 MT +/- 10% at sellers option 2. Price Offer :- Sight L/C - USD 621 per MT 3. Shipment period from loadport: LAYCAN within February - March 2012 sellers option 4. Packing: Bulk 5. Country of origin: Morocco 6. Validity: till 3rd February 2012 7. Discharge rate: 3,000 MT PWWO Fridays, Saturdays, Sundays and legal holiday included.</p>												

ANALYSIS OF CONFIRMED OFFERS

The analysis of the offers confirmed in writing based on the prices for the various payment terms options and delivery period was done as tabulated below;

TABLE 4- Analysis of confirmed offers

	Pabari Distributors	Export Trading Co. Ltd	MEA Ltd	Stradilor Ltd	Swiss Singapore Overseas Ltd	Helicom Corporation	Holbud Ltd	Euroworld Commodities	Yara S.v. zert Ltd	
						Moro-cco	Russi a			
Sight L/C price per MT (USD)	625	625	640	708	USD 660	630	615	649.50	625	621
Deferred 90 days credit (USD)	633	630	655	732	-	636	621	-	635	-
Deferred 180 days credit (USD)	641	640	670	761	-	642	627	-	645	-
Delivery Schedule	6 - 8 weeks	10 days	35 days	30 - 45 days	March/ 1 st half April at sellers option	30 days	60 days	9/10 March	4 - 6 weeks	Ship-ment March

After comparing the attractiveness of the confirmed offers in terms of delivery period, price, payment terms and other pertinent parameters, the NCPB negotiation panel resolved as follows: -

- (a) That Export Trading Co. Ltd had the most attractive offer.
- (b) To zero in the negotiations on 90 days deferred L/C payment terms on the following grounds: -

- The Board has no money for a sight L/C. Furthermore it is more expensive than the cost of suppliers' credit.
 - It was noted that the Board would be able to sell the fertilizer in 2-3 months and use the revenue generated to settle the L/C hence an L/C of more than 90 days was unnecessary.
- (c) To invite Export Trading Co. Ltd for further negotiations with the Board based on the 90 days deferred letter of credit payment terms.

RECOMMENDATIONS

Having considered the results of the negotiations and in particular the delivery period, price, terms of payment and other pertinent factors, the Negotiating Panel recommended to the Tender Committee that the entire quantity of 30,000 MT +/- 10 % of bulk DAP fertilizer be procured from Export Trading Company Ltd at the negotiated price of USD 625 per metric ton CFR Mombasa translating to a global figure of USD 18,750,000.

TENDER COMMITTEE'S DECISION

The Tender Committee adjudicated upon the recommendations of the Negotiating Panel on 3RD February, 2012 and resolved under Min. No. NCPB/02B/TC/24/2011-2012 to award the tender for the supply and delivery of 30,000 metric tones of Diamonium Phosphate (DAP) Fertilizer to Export Trading Company Ltd at the Negotiated price of US\$ 625 per metric ton CFR Mombasa translating to a global figure of USD 18,750,000

+/- 10% to be delivered in 10 days' time and payment to be on a deferred 90 days LC.

THE REVIEW

The Applicant MEA Limited lodged the Request for Review against the decision of National Cereals and Produce Board. The Applicant was represented by Mr. Muthomi Thionkolu, Advocate Mohammed Muigai Advocates while the Procuring Entity was represented by Mr. Lutta, Advocate Lutta & Co Advocates. The interested party, Export Trading Co. Ltd was represented by Mr. John Ohaga, Advocate Ochieng', Onyango, Kibet & Ohaga Advocates. Other interested candidates present were Pabari Distributors Limited represented by Mr. Paul Mureithi, its manager, Holbud Ltd represented by its Liason officer Mr. Mohammed Ali, Euroworld Commodities represented by its Accountant Ms Doricilah Asiko and Ama Trading Ltd represented by its manager Ms Pauline Kapoya.

The Applicant requests the Board for the following Orders;

- (a) the Decisions of the Procuring Entity are hereby annulled;***
- (b) the tender proceedings are hereby annulled in their entirety;***
- (c) the Procuring Entity is hereby ordered to retender;***
- (d) alternatively, and without prejudice to prayers (a) to (c) above, the Procuring Entity is hereby directed to award the Tender to the Applicant;***

(e) the Applicant is hereby awarded the costs of and incidental to this Request for Review; and

(f) such other, further or incidental orders and/or directions as the Honourable Board shall deem just and expedient.

The Board deals with the ten grounds of review as follows:-

GROUND 1, 2 and 9: Breach of Sections 2, 26(3)(b) and 29 of The Act; and Article 227 of The Constitution

These grounds have been consolidated because they raise similar issues on the procurement method used by the Procuring Entity.

The Applicant submitted that Section 2 of the Public Procurement and Disposal Act, referred to as the Act and Article 227 of the Constitution required that tendering procedures be (*inter alia*), fair, open and transparent; and that with respect to the subject tender these requirements were not met.

The Applicant averred that Section 29 (1) of the Act required procuring entities to use either open tendering or an alternative procurement procedure set out under Part VI. It further averred that Section 29 (2) of the Act stated that a Procuring Entity may use an alternative procurement procedure (i.e. a procedure other than open tendering) "only if that [alternative] procedure was allowed under Part VI," and that the obvious meaning and implication of Section 29 of the Act was that a Procuring

Entity could not invent its own procurement procedure that is not set out in the Act.

The Applicant alleged that the method of "*direct negotiations with identified suppliers*" was not one of the methods of procurement set out in the Act, and that by using the said method in the subject tender, the Procuring Entity invented its own method of procurement.

The Applicant argued that the Procuring Entity's contention that it used direct procurement as per the provisions of Section 74(2) and (3) of the Act could not be correct because the said section only allowed direct procurement if:-

Section 74(2);

- a. *"there is only one person who can supply the goods, works or services being procured; and*
- b. *there is no reasonable alternative or substitute for the goods, works or services."*

Section 74(3)

- a. *there is an urgent need for the goods, works or services being procured;*
- b. *because of the urgency the other available methods of procurement are impractical; and*
- c. *the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity."*

It further argued that the Procuring Entity's claim for urgency could not cure deliberate, manifest, fraudulent and/or any other breaches of the Act; and that it ran counter to the provisions of Section 26 of the Act, which required Procuring Entities to have procurement plans and to ensure that procurement decisions were made in a structured and systematic manner. It stated that this requirement particularly applied where the planting periods are seasonal, well known and documented.

The Applicant further submitted that the Procuring Entity was estopped from pleading urgency in the subject procurement in view of its pleadings filed in the High Court of Kenya at Nairobi in **Misc Civil Application No 281 of 2011** where at para 40 of an affidavit sworn by its MD, it stated that it '...had large stocks of fertilizer at its facilities ready for supply to any interested person...'.

In conclusion, the Applicant submitted that in view of the matters set out in the preceding parts of its statement, it contended that the Procuring Entity's decision fell far short of the requirements set out in Section 2 of the Act and Article 227 of the Constitution.

In its response, the Procuring Entity denied that it had acted in any unlawful manner and or contrary to any provisions of the Act and the Regulations as alleged by the Applicant. It further denied that it had invented its own procurement method, and that the method it had used was direct procurement which was a method provided for under Section 74 of the Act.

It submitted that due to the urgency of the procurement arising out of the need to have fertilizer available for supply to the farmers for the planting season which was just about to start, it had no option but to resort to use the direct procurement method, which method had been authorized by its Tender Committee.

The Procuring Entity further denied the Applicant's claim that the circumstances that gave rise to the urgency in procurement were as a result of any dilatory conduct on its part. It submitted that it had acted as an agent on behalf of its parent ministry and as such had to wait for the approval of the procurement budget from the ministry before it could start the procurement process. It further submitted that it had only received the confirmation of funds in October/November 2011 and proceeded to advertise the tender using the open tendering method of procurement.

It stated that the result of that process was that there was only one tenderer who was deemed to be technically responsive and this was not deemed to be a sufficient number to be able to obtain a competitive price. It further stated that it decided to terminate the tenders on 28th December 2011 and as a result there was insufficient time to re-tender in time for the planting season, hence it resorted to using direct procurement as allowed for under Section 74 of the Act.

With regard to its pleadings filed in the High Court of Kenya at Nairobi in **Misc Civil Application No 281 of 2011** where at para 40 of an affidavit

sworn by its MD, it had stated that it '...had large stocks of fertilizer at its facilities ready for supply to any interested person...', the PE referred the Board to the last two pages of the said affidavit where it had listed all its stocks of fertilizer. It urged the Board to read para 40 of the affidavit in the context of the listed fertilizer stocks.

The Procuring Entity concluded that it complied fully with the Act and its Regulations by also constituting a negotiation panel and followed the procedures for negotiations set out under Regulations 58 and 62(4) pursuant to Section 75(a) of the Act.

The Successful Bidder, Export Trading Company Limited, fully associated itself with the Procuring Entity's submissions.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board has perused the documents submitted and notes that the subject matter of this review involved tender No. NCPB/FERT/DAP/01/2011-2012 that had been advertised on 23 November 2011 by way of open tendering which the Procuring Entity terminated in its Tender Committee meeting of 13th January, 2012 for reasons that the tender was non responsive because there was only one responsive bidder. The Board further notes that the Procuring Entity in its subsequent Tender Committee meeting of 19th January 2012, made a decision to adopt Direct Procurement method to procure the subject fertilizer.

The Board notes that Section 29(1) of the Act makes it mandatory for Procuring Entities to conduct each procurement by way of open tendering. The said provision stipulates;

Section 29(1);

“For each procurement, the Procuring Entity shall use open tendering under Part V or an alternative procurement procedure under Part VI.”

The Board notes the Procuring Entity’s submission that it could not re-advertise the terminated tender No. NCPB/FERT/DAP/01/2011-2012 and instead used direct procurement as allowed under Section 74(3) of the Act because there was no time to re-tender under open tendering as a result of the urgent need for the fertilizer to be supplied to the farmers at the start of the planting season; and that the circumstances that gave rise to the said urgency were not foreseeable.

The Board notes that Section 74(1) of the Act states the instances in which a Procuring Entity may be allowed to use direct procurement as opposed to other methods. The provision states;

Section 74(1),

“A Procuring Entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.”

Subsections (2) and (3) of Section 74 provide as hereunder;

Section 74(2);

- a. “there is only one person who can supply the goods, works or services being procured; and***

b. there is no reasonable alternative or substitute for the goods, works or services."

Section 74(3);

"A procuring entity may use direct procurement if the following are satisfied-

- d. there is an urgent need for the goods, works or services being procured;*
- e. because of the urgency the other available methods of procurement are impractical; and*
- f. the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity."*

The Board also notes that Regulation 62(2) requires Procuring Entities while adopting direct procurement, to record the reasons upon which it makes a determination that the relevant condition set out in Section 74 of the Act has been satisfied. The above provision states;

Regulation 62(2);

"Where a procuring entity uses direct procurement, the procuring entity shall record the reasons upon which it makes a determination that the relevant condition set out in Section 74 of the Act has been satisfied."

On examination of the procurement method and process used by the Procuring Entity in the procurement of the subject fertilizer after the

termination of tender No. NCPB/FERT/DAP/01/2011-2012, the Board finds that the procurement method used was that of Direct Procurement which was provided for in the Act under Section 74, and that in compliance with the said provision under Regulation 62(2), the Procuring Entity recorded in its Tender Committee meeting of 19th January, 2012 the reasons leading to the urgency of using direct procurement as follows;

- *“That the Board's stock of planting fertilizer is quickly running out despite the high demand in South Rift where the planting is ongoing and North Rift Region where farmers are preparing to plant*
- *That arising from the increased demand, the Procurement process for DAP fertilizer should be hastened and stop gap arrangements to procure some DAP fertilizer to meet demand during the delivery period which is expected to be atleast 45 days should be made.”*

The issue for the Board to consider is whether the Direct Procurement method was used in compliance with Section 74(1) and (3) of the Act, namely, not to avoid competition and whether the circumstances that gave rise to the urgency were not foreseeable and were not as a result of dilatory conduct on the part of the Procuring Entity.

The Board notes Sections 26 and 27 of the Act which states that Procuring Entities shall establish procedures for the purposes of ensuring that its decisions are made in a systematic and structured way; and that the responsibility for ensuring that its procurements comply with the Act is that of the accounting officer.

It is essential for Procuring Entities to take into account the timelines provided for in the Act and its Regulations with respect to the various procurement stages, in order to be able to plan ahead for its procurements.

The Board further notes that in the case of this procurement, the planting seasons are well established and known to the Procuring Entity and its parent ministry, The Ministry of Agriculture, a fact which is not in dispute by the parties. Therefore, the issue for determination by the Board is whether by starting the procurement process by advertising the open tender on 23 November, 2011, the Procuring Entity had complied with the Act in terms of having established procedures for the purpose of ensuring that its decisions were made in a systematic and structured way in the procurement of the DAP fertilizer; whether the Procuring Entity provided for adequate procurement planning and did not act in a dilatory manner.

With the open tender advertised on 23 November 2011 and closed on 28 December 2011, the Board finds that if the tender evaluation was done within 30 days as per Regulation 16(5)(b) the tender evaluation report would have been concluded on 27 January 2012, and the earliest the Procuring Entity's Tender Committee could have awarded the contract would have been on 28 January 2012 with bidders notified immediately thereafter. The Procuring Entity would also had to have taken into account the provision under the Act for applications for review to be filed within 14 days of notification, and a 30 day period for the appeal to be heard and determined by the PPARB.

Assuming that bidders were notified immediately on 29 January 2012 and that the notification was received by all bidders on the same date, the appeal window would have started running on 30 January 2012, such that the appeal window would have closed on 12 February 2012. The application for review would then have had to be heard and determined within 30 days from 13 February 2012, such that the decision of the PPARB would have been delivered latest on 14 March 2012. Assuming that the application was dismissed in favour of the Procuring Entity, the procurement process would continue and based on the average delivery times quoted by bidders of 6-8 weeks, the earliest time the DAP fertilizer would have been delivered would have been 26 April 2012.

From the Procuring Entity's submissions, this would have been way into the planting season.

From the foregoing, it is clear that in order to have procured the DAP fertilizer in time for the planting season, the Procuring Entity ought to have started its procurement process earlier than it had.

Accordingly, the Board finds that the conditions stipulated under Section 74(3) of the Act that permit Procuring Entities to use Direct Procurement were not met, and therefore this limb of the grounds of appeal succeeds.

GROUND 3- Breach of Section 30(1) of the Act

The Applicant alleged that Section 30 (1) of the Act stated that no Procuring Entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement method.

The Applicant further alleged that in view of past practices on the part of the Procuring Entity, the Applicant contended that the issuance of two tenders in respect of the CAN and DAP fertilizers was fraudulent, and that in particular, the termination of the tender in respect of the CAN Fertilizer was calculated to enable the Procuring Entity to invoke urgency, when crops were due for top dressing, as a justification for the use of an alternative procurement procedure.

In its response, the Procuring Entity submitted that the two tenders were terminated under Section 36 of the Act and all the parties were duly notified of the termination which was accepted. It further submitted that it had adopted direct procurement due to the urgency and need to have DAP fertilizer for the planting season which was just about to start.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board notes that Section 30 (1) of the Act prohibits a Procuring Entity from structuring any particular procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure. The said provision states;

Section 30(1);

“No Procuring Entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure.”

The Board notes from the documents submitted that the Procuring Entity had advertised for two tenders which were tenders for the supply and delivery of fertilizer and which bore different tender numbers, namely, Tender No. NCPB/FERT/DAP/01/2011-2012 and Tender No. NCPB/FERT/CAN/01/2011-2012 which was also terminated for reasons similar to the subject DAP fertilizer procurement.

From the documents submitted and the Applicant’s arguments, the Board finds that the Applicant has not shown how or what procedure the Procuring Entity in advertising two tenders with respect to the supply and delivery of fertilizers of different chemical compositions, namely, CAN and DAP, the Procuring Entity was trying to avoid.

Accordingly, this ground of appeal fails.

GROUND 4, 6 and 7: Breach of Sections 36(7), 64 and 65 of the Act

The Applicant alleged that although the Procuring Entity claimed to have terminated the Tender, it proceeded to ask the Applicant to quote an offer in respect of the same tender, bringing into question the efficacy of the purported termination. It further alleged that Section 36(7) of the Act required a Procuring Entity that terminated a tender to make a written report to the Public Procurement Oversight Authority. The Applicant

submitted that it was unaware of any such report, and therefore contended that the decision of the Procuring Entity offended the provisions of Section 36 (7) of the Act.

The Applicant alleged that it had submitted a responsive tender that met all the mandatory requirements set out in the Tender Document, and faulted the allegation in the Termination Letter citing non-responsiveness of all tenders as the basis for the purported termination of the Tender.

The Applicant further alleged that the Invitation for Negotiation contradicted the Termination Letter to the extent that it cited the non-responsiveness of the tenders of "*several reputable firms*" as the basis for the purported termination of the Tender.

The Applicant submitted that Section 65 of the Act envisioned the termination of a tender when "none" of the received bids was responsive, and not when the bids of "*several reputable firms*" were non-responsive.

In conclusion, the Applicant averred that in view of the foregoing, the Procuring Entity's decision offended the provisions of Sections 64 and 65 of the Act.

In its response, the Procuring Entity denied the allegation that all tenders were non-responsive as only one tenderer was responsive but that this was not deemed to be a sufficient number to enable the Procuring Entity to obtain a competitive price.

The Procuring Entity submitted that it had terminated the tender under Section 36 of the Act and all the parties were duly notified of the

termination. It further submitted that the tender that was terminated was tender No. NCPB/FERT/DAP/01/2011-2012 whereas the Invitation for Negotiation did not have a tender number, but a Reference Number NCPB/FERT/01/2011-2012, and as such it had not invited the Applicant or any other bidder to negotiate or give a price in respect of the terminated tender.

In conclusion, the Procuring Entity stated that it had duly notified the PPOA of the termination of tender number NCPB/FERT/DAP/01/2011-2012 as required under Section 36(7) of the Act.

The Board has carefully examined the documents presented before it and the parties' submissions.

Upon perusal of the documents submitted, the Board notes that the tender that was terminated was tender number NCPB/FERT/DAP/01/2011-2012, and that the Procuring Entity had notified the PPOA of the same by submitting a report dated 6th February, 2012 which was received by the Authority on 8th February, 2012.

Accordingly, this limb of the grounds fails.

On the issue as to whether the Invitation for Negotiations was in respect of the tender which had been terminated, the Board finds that although the fertilizer to be procured was the same DAP, the tender number of the terminated tender was No. NCPB/FERT/DAP/01/2011-2012 whereas, the Reference Number of the Invitation Letter was NCPB/FERT/01/2011-2012

and that the letter did not have a tender number. Accordingly, this limb of the grounds also fails.

With regard as to whether the Applicant had submitted a responsive bid and whether the termination of tender No. NCPB/FERT/01/2011-2012 was done in accordance with the Act, the Board finds that it is the Invitation to Negotiations Letter Ref NCPB/FERT/01/2011-2012 which is the subject of this appeal and not the terminated tender. Accordingly, the Board cannot make any findings on the terminated tender.

However, the Board observes that Section 36(1) of the Act allows for termination of tenders by Procuring Entities any time before a contract is signed. The provision states;

Section 36(1);

“A Procuring Entity may, at any time, terminate procurement proceedings without entering into a contract.”

The Board further observes that Section 65 of the Act provides that if the Procuring Entity determines that none of the submitted tenders is responsive, the Procuring Entity shall notify each person who submitted a tender. The Board also observes that in the terminated tender, there was one responsive bidder and the Procuring Entity should have conducted evaluation of the responsive bidder. However, as already observed, the issue before the Board is not the terminated tender.

GROUND 5: Breach of Section 37 (2) and (3)

The Applicant alleged that under Section 37 (1) and (2) of the Act, the prescribed mode of communication between procuring entities and bidders in the case of open tendering, direct procurement and request for quotations was to be in writing; and the said section prohibited electronic communications.

The Applicant further alleged that Section 37(3) of the Act, however, envisioned electronic communications "*to the extent allowed under written directions of the Authority.*" The Applicant submitted it had raised the issue of authorized electronic communication immediately the Procuring Entity invited it to submit its offer by email. It averred that the Procuring Entity ignored this important issue, and that therefore the decision of the Procuring Entity to request electronic bids offended the provisions of Section 37 (3) of the Act.

In its response, the Procuring Entity submitted that the Applicant had not *emailed* any offer but that it had tabled a hard copy in its meeting with the Negotiating Committee and later placed its final offer in the Procuring Entity's Tender Box; and that the Applicant's offer was then opened together with other bidders' offers.

The Successful Candidate, Export Trading Company Limited, supported the Procuring Entity's position and added that any email communication used was only a method of delivery or transmittal of the written invitations and offers received. It concluded by stating that the Applicant had cured

the alleged defect by submitting its offer in writing as required under the Act.

The Board has carefully examined the documents presented before it and the parties' submissions.

From the documents submitted, the Board notes that the Procuring Entity on 23rd January, 2012 sent out letters of Invitation to Negotiate to all those firms which had earlier on participated in the terminated open tender together with a few other reputable firms in the fertilizer business; and that bidders were required to email their offers to the Procuring Entity. The relevant part of the letter states as follows:

“Please email an offer covering each one of the afore listed items so as to reach us prior to negotiations.....”

The Board further notes that the Applicant had written to the PPOA on 26th January, 2012 enquiring whether the Authority had authorized the use of electronic communication; and that the Authority had responded by a letter dated 9th February, 2012 that it had not sanctioned this method.

The Board notes that Section 37 of the Act applies to a situation where tenders have already been submitted and not where Procuring Entities are inviting bidders to submit their bids. Therefore, the Procuring Entity ought to have sought permission from the PPOA to use electronic communication.

GROUND 8: Breach of Section 68(2)

The Applicant submitted that Section 68 (2) of the Act stated that a procurement contract cannot be entered into until the expiry of 14 days following the date of notification.

The Applicant alleged that in the ordinary course of commerce, a supplier would not ship a consignment ahead of the award of contract, yet there was in existence a Bill of Lading and Shipping Manifest which showed that the Successful Bidder had shipped the consignment of DAP fertilizer even ahead of the signing of contract; and that the party to be notified according to the Bill of Lading, was the Procuring Entity. It further alleged that this vindicated the Applicant's contention that the whole tendering process had been fundamentally flawed and designed to award the contract to a preferred and pre-determined bidder.

In view of the foregoing, therefore, the Applicant contended that the decision of the Procuring Entity offended the provisions of Section 68 (2) of the Act.

In its response, the Procuring Entity submitted that it had duly accepted the offer made by the Successful Bidder, Export Trading Company Ltd., which was the most effective in terms of costs and time; and that it had been awarded the contract to supply the fertilizer on 6th February, 2012 early in the morning.

The Procuring Entity claimed that it could not authenticate the purported Bill of Lading submitted by the Applicant and that it was unaware of the same.

The Successful Candidate, Export Trading Company Limited, submitted that it had leased warehouses from the Procuring Entity, that it was in the business of fertilizer supply and as such that there was nothing unusual about it having a shipment on the high seas.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board notes that Section 68 (2) of the Act is categorical on when exactly a contract for procurement may be entered into. The provision states as follows;

Section 68(2);

"The written contract shall be entered into within the period specified in the notification under section 67 (1) but not until at least fourteen days have elapsed following the giving of that notification."

From the documents submitted, the Board finds that after the negotiations were completed, the Procuring Entity decided to award the tender for supply and delivery of diamonium phosphate (DAP) fertilizer to the Successful Bidder, Export Trading Company Ltd., vide a letter dated 6th February, 2012.

The Board also finds that from the documents submitted that no contract has been signed with respect to the subject tender under review and that no evidence has been provided by the Applicant to that effect.

However, the Board observes that the Negotiation Panel's report states that the Successful Bidder already had 19,700MT of DAP fertilizer at its warehouse and that it could deliver the balance of the 30,000MT required within 10 days of 31 January 2012. The Board also observes that another bidder Afri Venture FZE had stated that it had 10,000MT of DAP at its warehouse in Mombasa. In this regard, the Board finds that there was nothing irregular in a bidder having fertilizer stocks either within or out of the country.

GROUND 10: Statement of Loss and Damages

The Applicant claimed that it had suffered and risked suffering substantial loss and damage from the Procuring Entity's decision, including loss of business opportunity, loss of legitimate expectation and being subjected to a fraudulent and fundamentally flawed procurement process.

In its response, the Procuring Entity averred that the Applicant's application for review of the procurement was in bad faith and grounded on the mistaken belief that only the Applicant should have been allowed to supply such bulk fertilizer.

The Procuring Entity further averred that the Applicant having been uncompetitive and being a competitor to the Procuring Entity in the fertilizer sector in Kenya was attempting to scuttle the procurement process so as to frustrate it in acquiring fertilizer for distribution after knowing the prices so that it can have another chance to participate.

The Procuring Entity submitted that it was of the view that annulling the process would be unfair to the other participants; and that it would also defeat the purposes of the quick and urgent procurement given that the planting season was just about to begin and any delay in supply of fertilizer to farmers when rains began would spell doom for food security in the country.

The Procuring Entity further submitted that the Applicant would have an opportunity to directly offer to the farmers its fertilizer at high prices due to the tight supply that will emerge.

As the Board has consistently held in previous decisions, the costs of tendering and any loss/damage arising out of participating in the tender process are a commercial risk that each tenderers bears.

In conclusion, as the Board has already found under Grounds 1, 2 and 9, it is clear that in order to have procured the DAP fertilizer in time for the planting season, the Procuring Entity ought to have started its procurement process earlier that it had. Therefore, the Board finds that the conditions stipulated under Section 74(3) of the Act that permit Procuring Entities to use Direct Procurement were not met, because the alleged emergency that led to the use of Direct Procurement for the supply of DAP fertilizer was not occasioned by an emergency arising out of unforeseeable circumstances and non-dilatory conduct on the part of the Procuring Entity.

However, the Board is alive to the fact that the planting season is upon the farmers and that the farmers urgently require the fertilizer which the Procuring Entity should be able to supply to ensure food security in the country. The Board has to consider the appropriate remedy under Section 98 of the Act in the circumstances of this tender.

The salient issues to consider are the following:-

- i) There is no dispute that the Procuring Entity failed to do proper procurement planning for the purchase of the fertilizer;
- ii) The procurement process does not satisfy the conditions set out in Section 74(3) of the Act;
- iii) The Procuring Entity failed to comply with Regulation 62(3) by not reporting the subject procurement, with a contract price of USD 18.75mn which is over the Ksh 500,000 threshold under the said Regulation, to the PPOA within fourteen days of notification of the award; and
- iv) The Procuring Entity is not the consumer of the fertilizer being procured, but the farmers who are relying on the supply of fertilizer at subsidized prices.

Subsequently, in spite of the glaring flaws aforementioned, the Board takes judicial notice that the planting season is on and that the farmers in the country require fertilizer for the planting, failure to which, there will be a food crisis in the country.

In view of the foregoing, annulment of the tender will hurt the public interest and therefore, the Board is persuaded by the holding in the Court of Appeal decision in Civil Case No. 109 of 2007 between *EAST AFRICAN CABLES LIMITED v PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD & ANOTHER* [2007] eKLR where Court held that "... ..While we agree that the applicant has an undoubted right of challenging the decision of the superior court and that the court has a duty to see that procurement laws are not breached, nevertheless, the court has a reciprocal duty to ensure that it does not hamstring such bodies like the 2nd respondent from performing their lawful duty or duties as bestowed upon them by the relevant law.

We think that in the particular circumstances of this case, if we allowed the application, the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable....."

Accordingly, the Board orders, pursuant to Section 98 of the Act, that:-

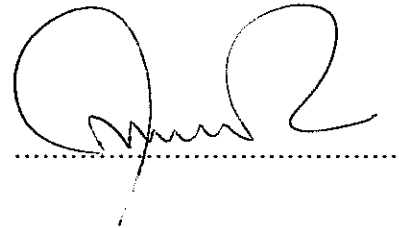
- i) The procurement process may continue; and
- ii) That this Decision be and is hereby referred to the Director General of the PPOA to carry out an investigation on the conduct of this tender and that appropriate action be taken against the accounting officer

who under Section 27 of the Act is responsible for ensuring compliance with the Act.

Dated at Nairobi on this 6th day of March, 2012

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

**CHAIRMAN
PPARB**

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

**SECRETARY
PPARB**