

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 9/2012 OF 6th MARCH, 2012

BETWEEN

KIRAWIRA CONSTRUCTION CO. LTD.....APPLICANT

AND

KENYA RURAL ROADS AUTHORITY

KAKAMEGA REGIONPROCURING ENTITY

Review against the decision of the Constituency Roads Tender Committee of the Shinyalu Constituency dated 3rd February, 2012 in the matter of Tender No. KAK/2-45-11/12 - 620 and Tender No. KAK/2-45-11/12 - 639 for Lukume - R.Isiukhu - Kisaina Road .

BOARD MEMBERS PRESENT

Mr. Akich Okola	-	Member, (in the Chair)
Eng. C. A. Ogut	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Ms. Pauline Opiyo - Secretariat
Ms. Maurine Namadi - Secretariat

PRESENT BY INVITATION:

Applicant - Kirawira Construction Co. Ltd

Mr. Imbenzi Gilbert - Advocate
Mr. Lubembe Andrew - Director
Mr. Lubembe Eric - Director
Mr. Patrick A. Lubembe - Director

Procuring Entity - Kenya Rural Roads Authority

Mr. Justin Rapando - Advocate
Ms. Margaret Muthui - Procurement Manager
Mr. Jared Omondi - Regional Manager, Kakamega
Mr. Jakait Baraza - Procurement Officer
Mr. Levi Ahindukha - V/Chairman C. R.T.C.

Interested Parties

Mr. Robert Lutta	-	Director, Samart Construction Co. Ltd
Mr. Jonathan Makove	-	Director, Mazembe Gen. Stores
Mr. James Ashiundu	-	Supervisor Mazembe Gen. Stores

"BOARD'S DECISION

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

BACKGROUND

Advertisement:

The Kenya Rural Roads Authority, Kakamega Regional Office invited tenders from contractors prequalified in Shinyalu Constituency - Financial Year 2011-2012 for routine maintenance works (Grading and Gravelling Equipment based) for six (6) roads in the constituency, two of which were Lukume - R. Isiukhu - Kisaina Tender Nos. KAK/2-45-11/12-620 and KAK/2-45-11/12-639 that are the subject of this appeal.

Interested bidders were to obtain tender documents from the KeRRA Kakamega Regional Office from 9/11/2011 during working hours (8.00 am - 5.00 pm) upon payment of a non-refundable fee of Kshs. 2000.00(Kenya

shillings two thousands only) per document in form of banker's cheque payable to Kenya Rural Roads Authority.

Closing/Opening:

The initial deadline for submission of tenders as stipulated in the advert was 30th November 2011 but this was changed to 7th December 2011 through an addendum issued on 29th November 2011. The tenders were opened on 7th December, 2011.

The bids received in respect of Tender No. KAK/2 - 45 - 11/12 - 620 and Tender No. KAK/2 - 45 - 11/12 - 639 were as follows:

Table 1 - Tender No. Kak/2 - 45 - 11/12 - 620 Lukume - R. Isiukhu - Kisaina

S/N	Bidder Name	Bid Sum
1	Kirawira Const. Co. Ltd	4,688,800.00
2	Samart Construction Co. Ltd	4,710,500.00
3	Mutts Con. (K) Ltd	4,476,000.00
4	Mazembe G. Stores Ltd	4,234,870.00

Table 2 - Tender No. Kak/2 - 45 - 11/12 - 639 Lukume - R. Isiukhu - Kisaina

S/N	Bidder Name	Bid Sum
1	Kwamusoga Investments Ltd	4,598,440.00
2	Likifa (K) Ltd	4,906,200.00
3	Kirawira Const. Co. Ltd	4,697,400.00
4	Jon-Nama Enterprises Ltd	4,242,430.00

EVALUATION

The tenders were evaluated by a committee appointed by the Regional Manager. The evaluation committee was composed of the Regional Accountant, CDF Representative - Shinyalu and Assistant Procurement Officer.

The evaluation was carried out in three stages namely:

1. Preliminary

This involved analysing whether the contractors had met the conditions set out in the advertisement.

2. Technical

Tenders that were responsive at the Preliminary stage were subjected to technical evaluation which involved comparing the contractors' rates to the Engineer's estimates.

3. Financial

At this stage, contractors' tender sums were compared to the Engineer's estimates and tenders that were Lowest evaluated and within reasonable margin were recommended for award.

The details for the evaluation of Tenders No. KAK/2 - 45 - 11/12 - 620 and Tender No. KAK/2 - 45 - 11/12 - 639 are as follows:

ROAD NAME: LUKUME - R. ISIUKHU - KISAINA

TENDER NO: KAK/2 - 45 - 11/12 - 620

Table 3 - Preliminary Evaluation

S/N	Bidder Name	Receipt	Prequalified	Tender Form	Bus. Ques t.	Pre-Tender Site Visit	Tax Comp.	Remarks
1	Kirawira Const. Co. Ltd	√	√	√	√	√	√	R
2	Samart Const. Co. Ltd	X	√	√	√	√	√	NR
3	Mutts Const. (K) Ltd	√	√	√	√	√	√	R
4	Mazembe G. Stores Ltd	√	√	√	√	√	√	R

Key

√ - Compliant

X - Not compliant

R - Responsive

NR - Non Responsive

Technical Evaluation - Comparison of Contractors' Rates to Engineer's Rates

Table 4 - Kirawira Const. Co. Ltd

S/N	Activity	Contractor's Rates	Engineer's Rates	% Deviation	Remarks
1	Heavy Grading	8.50	8.00	+6.25	R
2	Gravel Patching	1,300.00	1,300.00	-	R
3	Unskilled Labour	300.00	400.00	-25	NR

Table 5 - Mutts Con. (K) Ltd

S/N	Activity	Contractor's Rates	Engineer's Rates	% Deviation	Remarks
1	Heavy Grading	7.50	8.00	-6.25	R
2	Gravel Patching	1,250.00	1,300.00	-3.85	R
3	Unskilled Labour	350.00	400.00	-12.5	R

Table 6 - Mazembe Gen. Stores Ltd

S/N	Activity	Contractor's Rates	Engineer's Rates	% Deviation	Remarks
1	Heavy Grading	7.15	8.00	-10.63	R
2	Gravel Patching	1,175.00	1,300.00	-9.62	R
3	Unskilled Labour	350.00	400.00	-12.5	R

Financial Evaluation

Table 7 - Price Comparison Schedule

S/N	Contractor Name:	Bid Sum	Engineer's Estimate	% Deviation	Ranking	Remarks
1	Kirawira Const. Co. Ltd	4,688,800.00	4,705,400.00	-0.4	3	
2	Mutts Con. (K) Ltd	4,476,000.00	4,705,400.00	-4.9	2	
3	Mazembe G. Stores Ltd	4,234,870.00	4,705,400.00	-10	1	

Recommendation:

The evaluation committee recommends the tender for routine maintenance of LUKUME - R. ISIUKHU - KISAINA be awarded to M/S Mazembe G. Stores Ltd at their tender sum of Kshs 4,234,870.00 (Kenya Shillings Four Million Two Hundred Thirty Four Thousand Eight Hundred Seventy Only) being the lowest evaluated bidder.

ROAD NAME: LUKUME - R. ISIUKHU - KISAINA

TENDER NO: KAK/2 - 45 - 11/12 - 639

Table 8 - Preliminary Evaluation

S/N	Bidder Name	Receipt	Pre qualified	Tender Form	Bus. Ques t.	Pre-Tender Site Visit	Tax Comp .	Remarks
1	Kwamusoga Invest. Ltd	√	√	√	√	√	√	R
2	Likifa (K) Ltd	√	√	√	√	√	√	R
3	Kirawira Const. Co. Ltd	√	√	√	√	√	√	R
4	Jon-Nama Enterp. Ltd	√	√	√	X	√	√	NR

Key

√ - Compliant

X - Not compliant

R - Responsive

NR - Non Responsive

Technical Evaluation - Comparison of Contractors' Rates to Engineer's Rates

Table 9 - Kwamusoga Investments Ltd

S/N	Activity	Contractor's Rates	Engineer's Rates	% Deviation	Remarks
1	Heavy Grading	7.25	8.00	-9.38	R
2	Gravel Patching	1,220.00	1,300.00	-6.15	R
3	Unskilled Labour	350.00	400.00	-12.5	R

Table 10 - Likifa (K) Ltd

S/N	Activity	Contractor's Rates	Engineer's Rates	% Deviation	Remarks
1	Heavy Grading	8	8.00	-	R
2	Gravel Patching	1,400.00	1,300.00	+7.69	R
3	Unskilled Labour	300.00	400.00	-25	NR

Table 11 - Kirawira Const. Co. Ltd

S/N	Activity	Contractor's Rates	Engineer's Rates	% Deviation	Remarks
1	Heavy Grading	8.50	8.00	+6.25	R
2	Gravel Patching	1,300.00	1,300.00	-	R
3	Unskilled Labour	300.00	400.00	-25	NR

Financial Evaluation

Table 12 - Price Comparison Schedule

S/N	Contractor Name:	Bid Sum	Engineer's Estimate	% Deviation	Ranking	Remarks
1	Kwamusoga Invest. Ltd	4,374,480.00	4,713,800.00	-7.2	1	
2	Likifa (K) Ltd	4,906,200.00	4,713,800.00	4.1	3	
3	Kirawira Const. Co. Ltd	4,697,400.00	4,713,800.00	-0.3	2	

Recommendation:

The evaluation committee recommends the tender for routine maintenance of LUKUME - R. ISIUKHU - KISAINA be awarded to M/S Kwamusoga Investment Ltd at their tender sum of Kshs 4,374,480.00 (Kenya Shillings Four Million Three Hundred Seventy Four Thousand Four Hundred Eighty Only) being the lowest evaluated bidder.

TENDER COMMITTEE DECISION

The Constituency Roads Tender Committee (CRTC:2/2011-2012) – Shinyalu Constituency at its meeting held on Friday 1st February 2012, under minute No 4:2010-2012 adjudicated Tender No. KAK/2-45-11/12 - 620 Lukume - R.Isiukhu - Kisaina Road, hereafter referred to as 'Tender No. 620' and Tender No. KAK/2-45-11/12 - 639 Lukume - R.Isiukhu - Kisaina Road, hereafter referred to as 'Tender No. 639', in Shinyalu Constituency and awarded the tender to the lowest evaluated bidder in each case as recommended by the Evaluation Committee.

The Tender Committee's decision was communicated to the tenderers via letters dated 3rd February, 2012.

THE REVIEW

The Applicant lodged this Request for Review on 6th March 2012 against the decision of the Shinyalu Constituency Roads Tender Committee dated 1st February 2012 in the matter of Tender No. KAK/2-45-11/12 - 620 and Tender No. KAK/2-45-11/12 - 639 for Lukume - R.Isiukhu - Kisaina Road. The Applicant was represented by Mr. Gilbert Imbenzi , Advocate while the Procuring Entity was represented by Mr. Justin Rapando ,Advocate. Interested candidates were M/S Samart Construction Company Ltd represented by Mr. Robert Luta, Director and M/S Mazembe General Stores Ltd represented by Mr. Jonathan Makove, Director.

PRELIMINARY ISSUES

At the outset of the proceedings, the Board on its own motion raised the issue of whether it had jurisdiction to hear the Application based on the fact that a contract in respect to Tender No. 620, one of the tenders subject of this Application, had been signed and whether or not the Application was filed within time.

In this respect, the Board called the attention of the parties to Section 93 (2) (c) of the Public Procurement and Disposal Act, hereafter referred to as 'the Act' and Regulation 73(2) (c) of the Public Procurement and Disposal Regulations hereafter referred to as 'the Regulations', which provide as follows;

Section 93 (2) (c)

"the following matters shall not be subject to review under subsection (1)-

.....

(c) where a contract is signed in accordance with Section 68; and

.....”

Regulation 73(2) (c)

“The request referred to in paragraph (1) shall –

.....

(c) be made within fourteen days of –

(i) the occurrence of the breach complained of where the request is made before the making of an award: or

(ii) the notification under Section 67 or 83 of the Act

(d)”

The Procuring Entity submitted that it had notified the Applicant and other bidders of the award of the tenders vide letters dated 3rd February 2012. It further submitted that it telephoned the Applicant and other bidders on 3rd February 2012 or thereabout requesting them to pick up the letter of notification referred to above. It further stated that the Applicant visited the premises of the Procuring Entity on or about 3rd February 2012 and picked up the letter of notification dated 3rd February 2012.

Finally, the Procuring Entity submitted that it had already entered into a contract with the Successful Bidder regarding tender number 620 and therefore the Board lacked jurisdiction to entertain the Request for Review.

In response, the Applicant stated that it did not receive any notification of the award. It further stated that it only became aware that the award of the contract had been made when it noticed on 20th February 2012 that the Successful Bidder had moved to the site. It submitted that following this, it wrote to the Procuring Entity on 21st February, 2012 requesting for the evaluation report and the decisions made in respect to the subject tender. The Applicant further stated that in response to its letter, it received a letter from the Procuring Entity dated 23rd February 2012 informing it that it was unsuccessful. It argued that this letter constituted a notification to it pursuant to Section 68 of the Act and this being the case, its Request for Review which was filed on March 6th 2012 was within the statutory period of appeal as set out in Regulation 73 (2) (ii).

Finally, it stated that the contract signed between the Procuring Entity and the alleged Successful Bidder did not satisfy the requirements of Section 68, and therefore the Board had jurisdiction to hear and determine the matter on its merits.

On its part, the Successful Bidder stated that it picked up the notification letter dated 3rd February 2012 on or about that date following the receipt of a telephone call from the Procuring Entity.

Another bidder, M/s Samart Construction Co. Ltd stated that it received the letter of notification by post on a date that it could not recall.

After hearing the submissions of the parties the Board finds as follows:

1. There was no evidence adduced by Procuring Entity to support the claim that the letter of notification dated 3rd February 2012 was ever sent by mail or otherwise, or picked up by the Applicant;
2. The letter dated 23rd February 2012 addressed by the Procuring Entity to the Applicant was the first time the Applicant received notification that the award had been made to the Successful Bidder;
3. Counting from 24th February 2012, the Applicant had up to 8th March 2012 to lodge a Request for Review;
4. The Applicant lodged its application on 6th March, 2012; and
5. The contract entered into did not satisfy the requirements of Section 68 of the Act.

Taking all the above matters into account, the Board finds that it has jurisdiction to hear the Request for Review since it was filed within statutory period provided for in the Act and the Regulations.

The Board therefore proceeded to hear the Application on merit.

The Applicant has raised six grounds of Appeal and urged the Board to make the following orders:

- 1. That the decision made in respect of tender nos. 620 and 639 be quashed and that the Respondent to be ordered to re-advertise the same.**
- 2. That the Respondent gives the Applicant time to complete the ongoing contract.**

3. That the costs of this application to be paid by the Respondent.
4. Any further and other orders that the Board deems fit and just in the circumstances of the case.

Ground 1 – Breach of Section 60 of the Act

The Applicant submitted that tender box was not sealed at 10.00am as stipulated in the Invitation to Tender. It further submitted that the tender box had been opened by the Procuring Entity on 7th November, 2011 as stated in paragraph four on page two of the Procuring Entities response. It stated that upon realising that the Tender box was not sealed, it protested but its protest was ignored by the Procuring Entity. It further stated that the Procuring Entity breached Section 60 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act).

In response, the Procuring Entity submitted that the tender opening committee closed/opened the tenders on 7th December, 2011 immediately after 10.00 a. m. as stipulated in the Invitation to Tender. It averred that the committee executed its task in full adherence to Section 60(2) of the Act.

The Board has considered the submissions of the parties & examined the documents presented before it. The issue to be determined is whether the sealing of the tender box is provided for under the Act, the Regulations or the Tender Documents.

The Board has further perused copies of the Invitation to Tender, Tender Addendum No.1, the Tender Opening Minutes and Registers submitted by the Procuring Entity and notes as follows:

- i) The submission of tenders was expected to close on 7th December 2011 at 10.00 a.m.
- ii) Tenders were expected to be opened immediately thereafter.

The Board further notes the provisions of Section 60(2) of the Act which states as follows:

(2) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

The Board further notes that Regulation of 44(c) the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the regulation) provides as follows:

“the tender box remains locked until the time for tender opening”

The Board notes that the tender opening minutes indicated that tenders were opened on 7th December 2011 at 10.00 a.m.

With regard to the claim by the Applicant that the tender box must have been opened on 7th November, 2011, the Board observes that according to the Tender Opening register, which indicates that the Applicant was present during the opening of the Tender Box, the tender box was in fact opened on 7th December, 2011. Accordingly the statement in the Procuring Entity's response to the effect that the tender box was opened on 7th November, 2011 was clearly a typographical error.

After considering the submissions by the parties, the Board finds that the sealing of the Tender Box is not a requirement under the Act and the Regulations. The Board further finds that there was also no provision for the sealing of the Tender Box either in the Tender Documents or in the Invitation to Tender as claimed by the Applicant.

Accordingly, this ground of the Request for Review fails.

Ground 2 - Breach of Sections 26(4), (5) & (6) and 27 (1) & (2) of the Act

The Applicant stated that Section 60(1) of the Act requires that the membership of the tender opening committee should comprise at least three persons. It submitted that the tender opening committee was improperly constituted because in the absence of a procurement officer it meant that the committee did not have a secretary. It argued that whereas the Act provides that a procurement professional must be the secretary to the tender committee, the tender opening committee did not have a procurement officer. It alleged that in the absence of a procurement officer who should also be the secretary to the committee, no minutes were recorded during the tender opening exercise. In its view, this was a breach of Sections 26(4), (5) & (6) and 27 (1) & (2) of the Act.

In response, the Procuring Entity averred that Sections 26(4), (5), (6) and 27(1), (2) of the Act which the Applicant alleged were breached by the Procuring Entity clearly deal with issues on Tender Committee and its composition and have nothing to do with the Tender Opening Committee. It submitted that Section 60(1) clearly shows how the Tender Opening Committee should be

constituted as well as its membership. It averred that there is nowhere in the Act or Regulations which makes it mandatory that a procurement officer should be a member of the tender opening committee. It further submitted that the officers from the regional office who participated in this tender opening exercise were properly appointed.

The Procuring Entity stated that contrary to the claim by the Applicant, that there were no minutes of the Tender Opening, such minutes were in fact kept and available.

The Board's notes that of Section 26(4), (5) & (6) and Section 27 (1) & (2) of the Act and Regulation 8(3) (q) provide as follows:

Sections 26(4), (5) & (6):-

"26. (4) A public entity shall establish a tender committee, procurement unit and such other bodies as are required under the regulations for the purpose of making such decisions on behalf of the public entity as are specified in this Act and the regulations.

(5) A tender committee or body established under subsection (4) shall be established in accordance with the regulations and shall -

(a) consist of not less than five members;

(b) have as its secretary, the procurement professional in charge of the procurement unit.

(6) A procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract."

Section 27 (1) and (2):-

"27 (1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.

(2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfills its obligations under subsection (1).

Regulation 8(3)(q):-

8 (3) The functions of the procurement unit shall be to -

(a)

... ..

(q) act as a secretariat to the tender, procurement and disposal committees;"

The Board further notes that Section 26(4) of the Act specifically refer to:-

"a Tender Committee and other bodies as are required under the regulations for the purpose of making such decisions on behalf of the public entity as are specified in this Act and the regulations."

The Board has perused documents submitted to it and established that the minutes of the tender opening were prepared despite the non-inclusion of a procurement officer in the committee.

The Board finds that Section 60(1) of the Act, as already cited herein, provides for the appointment and membership of the Tender Opening Committee but does not make it mandatory to have a procurement officer in that committee.

The Board further finds that the Tender Opening is an ad-hoc committee and is not one of the decision-making bodies within the internal organization of Procuring Entities provided for under Part III of the Act and Regulations. The Board also finds that the Tender Opening is not one of the committees that must have a Procurement Officer as its secretary.

Regarding the claim that there were no minutes of the tender opening, the Board finds that such minutes were prepared and kept by the Procuring Entity. These minutes indicate that the Applicant was present during the tender opening. The Board also finds that, according to the minutes of the tender opening, the claim by the Applicant as stated herein above that it protested during the opening of tender box, that the said box was not sealed is not sustainable.

With regard to the allegation that the Procuring Entity breached Section 27 (1) & (2) of the Act, the Board finds that the Applicant did not provide any evidence to indicate that the Procuring Entity or its Accounting officer abdicated their responsibility in ensuring that the Act and the Regulations are complied with respect to each of its procurements.

Accordingly this ground of the Request for Review also fails.

Grounds 3, 5 and 6 – Breach of Sections 30 of the Act

These grounds have been consolidated since they raise similar issues on the splitting of the tender and perceived loss.

The Applicant alleged that Tender Nos. 620 and 639 were split yet they relate to the same road. It stated that it was the same contract yet it was split contrary to Section 30 of the Act. It further stated that by splitting the contract the Procuring Entity acted in complete variance of the provisions of Section 30 of the Act there by causing prejudice to the Applicant.

It submitted that it already had an existing contract in respect to the same item, and further that the Procuring Entity had not written to the Applicant terminating the said contract. It further submitted that it had already received part payments for executed works. It averred that it would be highly prejudiced unless the decision of the Procuring Entity was quashed because it had a claim in respect of the ongoing works. It argued that the amount of loss and damage it stands to suffer is irreparable and enormous.

In response, the Procuring Entity submitted that the reasons for splitting the tender were:

(a) The road is quite long, roughly 27kms and past experience has shown awarding one contractor to carry out routine maintenance on it has not yielded excellent results. This includes results by the Applicant who was awarded the whole road last financial year (2010-2011).

(b) Dividing the road into two contracts leads to faster and efficient execution of the works and aids in distributing resources (proceeds of the work) to more than one contractor, with less risks of non performance by the contractors.

It averred that whereas Section 30 of the Act provides that "***No Procuring Entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure,***" the reasons given for having two contracts on the same road have nothing to do with avoiding any procurement procedure.

The Procuring Entity further submitted that the two tenders were to be paid for using funds for the financial year 2011-2012 unlike the Applicant's contract whose funding was for the financial year 2010-2011.

The Procuring Entity submitted that it was aware that the Applicant has an existing contract in respect of the same road. It stated that each year the Constituency Roads Committee (CRC) sits and reviews the position of the roads in the constituency and prioritizes their maintenance in that particular year. During the financial year 2011-2012, the CRC thought it fit to have two contracts for the Lukume -R. Isiukhu - Kisaina road.

The Board notes that the purpose of Section 30 of the Act is to ensure that the Procuring Entity does not resort to the use of uncompetitive methods of procurement. In this case, the Board notes that, contrary to the allegation by the Applicant, the Procuring Entity posted the tender invitations at the Constituency Development Fund (CDF) and District Commissioner's (DCs) offices and four bidders participated in each of the tenders thereby increasing competition.

In view of the above, the Board finds that although the object of the procurement was the same road, the decision by the Procuring Entity to split the procurement of routine maintenances services into two separate tenders did not result in the use a less competitive method of Procurement. The Board therefore, holds that the Procuring Entity did not breach Section 30 of the Act.

Regarding the existing contract, the Board notes that the contract arose from a tender which is not a subject of the instant review. Indeed, as pointed out by the Procuring Entity, the contract was concluded between the two parties in the year 2010/2011 and was therefore a separate transaction from the tender under review.

The Board further notes that, during the hearing, the Applicant stated that the contract in question commenced on 4th of July 2011 and was to be concluded on 27th October 2011 and further that it had been subject of several variation orders. Taking the above into consideration, the Board finds that in so far as this contract arose from a tender that was different from the instant tender, the Board cannot deal with matters arising from that tender as disputes arising from the contract can only be dealt with as per the provisions of the contract.

Accordingly, this ground of review fails.

Grounds 4- Breach of Sections 31 of the Act

The Applicant submitted that the Tender Documents did not specify the criteria to be used in evaluation of the tenders contrary to Section 31 of the Act. It further submitted that Section 31 of the Act provides that the criteria be set in

the Tender Documents to be a guideline on the qualification of persons tendering. It alleged that the Procuring Entity acted in complete variance with the provisions of Section 31 of the Act thereby putting the Applicant in a disadvantaged position. It averred that the Procuring Entity opted to use and adopt a completely different criterion in respect of Tender Nos. 620 and 639.

In conclusion, it urged the Board to uphold its Application and order for a repeat of the process.

In response, the Procuring Entity denied the allegation that the Tender Documents did not have the criteria to be used in evaluation as alleged by the Applicant. In support of this contention, it referred the Board to Clause 7 of the tender document which states as follows with regard to evaluation of tenders:

"7 Tender Evaluation

7.1... ..

7.2 Prior to the detailed evaluation of Tenders, the Employer shall determine if each tender:-

- a) Meets the eligibility criteria defined in paragraphs 1.2 and 1.5***
- b) Has been properly signed;***
- c) Is accompanied by the required securities;***
- d) Is substantially responsive to the requirements of the Tender Documents.***

7.3 A substantially responsive tender is one which conforms to all the terms conditions and specifications of the tender documents without material deviation or reservation."

It submitted that Section 7 of the Instructions to Tenderers clearly spelt out how the Procuring Entity was to evaluate the bids. It argued that the invitation to tender also had specific requirements that the bidders were to meet and those requirements were structured into the preliminary, technical and financial evaluation stages and then used uniformly in the evaluation of all tenders.

The Procuring Entity averred that Section 31 of the Act dealt with the requisite qualifications for one to be awarded a contract. It stated that it has not in any way acted in a manner that denied the Applicant qualification for award of tender. The Procuring Entity further submitted that the criteria for evaluation were the same for all the bids and that there was no reason for using a different criterion on Tender Nos. 620 and 639.

In conclusion, it argued that the Applicant was simply using the appeal to frustrate the procurement process in order to get a second chance to compete due to the fact that it did not emerge successful and urged the Board to dismiss the application.

On its part, an interested candidate M/s Samart Construction Company Ltd informed the Board that its bid was unsuccessful due to its price. It stated that it was satisfied with the process which in its view was fair.

The Board has carefully examined the Tender Documents and the evaluation report and notes the Procuring Entity provided the criteria and procedure for evaluation and award of tenders at Sections 7 and 8 of the Instructions to Tenderers.

The Board further notes that although the Applicant has cited Section 30, the applicable section is Section 66(2) of the Act which deals with disclosure of evaluation criteria in a tender document.

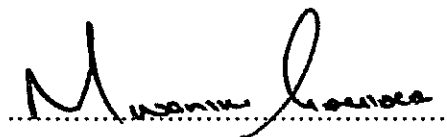
The Board finds that the Procuring Entity applied the set criteria in the evaluation and award of the tenders. Following the evaluation the Applicant's bids were ranked No. 3 and No. 2 in Tender Nos. 620 and 639 respectively and therefore were not the lowest evaluated bids.

Accordingly, the Board finds that the Procuring Entity did not breach section 66(2) of the Act.

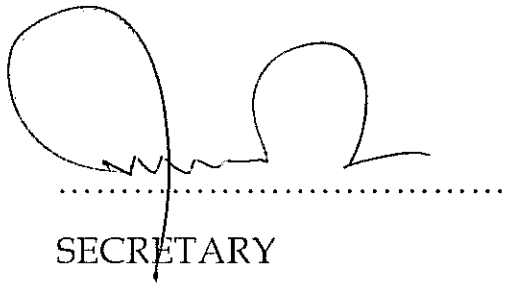
With regard to costs, as the Board has held on several occasions in the past, tendering is a business risk and therefore the costs associated with it should be borne by the bidders. Accordingly, there are no orders as to costs.

Taking into considerations all the above matters, the Request for Review fails and is hereby dismissed. The Board orders, therefore, pursuant to Section 98 of the Act that the procuring process may proceed.

Dated at Kakamega on this 23rd day of March, 2012.



CHAIRMAN
PPARB



SECRETARY
PPARB