

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 51/2013 OF 16TH DECEMBER, 2013

BETWEEN

TRICON WORKS KENYA LIMITED.....APPLICANT

AND

KENYA FORESTRY RESEARCH INSTITUTEPROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Forest Research Institute in the matter of Tender No: KEFRI/HQT/HB-04/2013-2014 for the proposed hostel block development for Kenya Forest Research Institute (hereinafter referred to as KEFRI) at Marigat, Kenya.

BOARD MEMBERS PRESENT

Mr. Paul Gicheru	- Chairman
Mr. Peter Bitia Ondieki	- Member
Mrs Rosemary K Gituma	- Member
Mr. Paul Ngotho	- Member
Mr. Hussein Were	- Member

IN ATTENDANCE

Mr. Philemon Kiprop	- Secretary
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Ms Judith Maina

- Secretariat

PRESENT BY INVITATION

Applicant - Tricon Works Kenya Limited

1. Mr. Anthony E. Kiprono - Advocate
2. Josephat Kibet - M.D
3. Josephat Kibet - HRM

Procuring Entity - Kenya Forestry Research Institute

1. Mr. Mathews Okoth - Advocate
2. Mr. Nixon N. Sikini - SCA
3. Mr. Julius M. Mwilu - HSC

BACKGROUND OF AWARD

Invitation to tender

The Procuring Entity advertised the Tender No. KEFRI/HQT/HB-04/2013-2014 for the Proposed Hostel Block Development For Kenya Forestry Research Institute (KEFRI) at Marigat, Kenya in the *Standard* and *Star* newspapers of 5th and 17th December 2012, respectively.

Tender Closing/opening

The bids closed/opened on 17th September, 2013 and Twelve (12) bids were received as shown below:-

1. Black wood Construction Ltd.
2. Nelliwa Builders and Civil Engineers Ltd.
3. Monaco Engineering Ltd.
4. Midas Development Ltd.
5. Alf Construction Company Ltd.
6. Right Options Ltd.
7. Fulcrum Group of Companies Ltd.
8. Tricon Works Kenya Ltd.
9. Mweha Enterprises Ltd.
10. Technet Services Ltd.
11. Thunder Plumbing and Construction Co. Ltd.
12. Pemu Engineering and Equipment Company Ltd.

TENDER EVALUATION

The twelve tenders listed above were subjected to a preliminary examination.

The Preliminary Examination involved the examination of tenders for compliance with requirements as specified in the Request for Proposal and Notice of Tenders in KEFRI website, www.kefri.org. At this stage, bidder's responsiveness was determined based on a "YES/NO" (implying compliant and non-compliant, respectively). Only bidders that complied with the statutory requirements and the mandatory requirements as set out in the tender documents were considered qualified to proceed to the next stage of evaluation. The results of the Preliminary Examination are tabulated in table 1 below.

Table: Preliminary Evaluation

NO	PRELIMINARY EXAMINATION (SUB CONTRACTOR)	B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11	B12
1	Must provide a Bid Security in form of Bank Guarantee or Bid Bond from an Insurance company approved by Public Procurement Oversight Authority (PPOA) in the amount of Kshs.500,000/- valid for 120 days from date of opening of tender	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2	Must provide Copies of Company Registration	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
3	Current Tax Compliance Certificate,	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
4	PIN Registration Certificate	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
5	VAT Registration Certificate	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
6	Satisfactorily complete Confidential Business Questionnaire	Yes	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
7	Registration with the Ministry of public works as Building Contractor Category E or above and must appear in current Ministry of Public Works Building Contractor's Register	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
8	Must have completed a minimum of two projects of similar magnitude and complexity in the last five years	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes	No
9	Must provide evidence of financial, personnel and equipment capability necessary for carrying out the works	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
10	Must provide Litigation History (both court and arbitration cases)	No	No	No	Yes	No	No	No	Yes	No	No	Yes	Yes
	RESULT												

Bidder B1, B2, B3, B4, B5, B6, B7, B9, B10, B11 and B12 failed in the preliminary examination and therefore are not qualified to proceed to subsequent stage of evaluation. The reasons for the failure are indicated in Table 2 below.

Table 2: Reasons for failure

BIDDER	RESULTS	REASONS FOR FAILURE
B1	Failed in item number 10	Did not provide litigation history (both court and arbitration cases)
B2	Failed in items number 3,6 and 10	Did not have Current Tax Compliance Certificate
		Did not fill Confidential Business Questionnaire
		Did not provide litigation history (both court and arbitration cases)
B3	Failed in item number 10	Did not provide litigation history (both court and arbitration cases)
B4	Failed in item number 6 and 7	Is not registered with the Ministry of Public Works as Building Contractor Category E or above
		Did not fill Confidential Business Questionnaire satisfactorily
B5	Failed in item number 1 and 10	Did not provide a Bid Security
		Did not provide litigation history (both court and arbitration cases)
B6	Failed in item number 10	Did not provide litigation history (both court and arbitration cases)
B7	Failed in item number 8 and 10	Did not have a minimum of two completed projects of similar magnitude and complexity in the last five years
		Did not provide litigation history (both court and arbitration cases)
B9	Failed in item number 10	Did not provide litigation history (both court and arbitration cases)
B10	Failed in item number 8 and 10	Did not have a minimum of two completed projects of similar magnitude and complexity in the last five years
		Did not provide litigation history (both court and arbitration cases)
B11	Failed in item number 10	Did not fill Confidential Business Questionnaire satisfactorily
B12	Failed in item number 2 and 8	Did not provide Copies of Company Registration
		Did not have a minimum of two completed projects of similar magnitude and complexity in the last five years

Table 3: Qualified Bidder

BIDDER	NAME	RESULTS
B8	Tricon Works Kenya Ltd	Pass

The bidder indicated in Table 3, qualified at the preliminary stage of evaluation and therefore was determined to proceed to the next stage of evaluation.

It is evident from the above analysis of the Preliminary Examination that the eventual outcome of the examination was largely premised on the bidders compliance with the statutory requirements and the mandatory requirements as set out in the tender document and the instructions to tenderers.

It was not disputed that upon carrying out the Preliminary Examination, the Procuring Entity carried out both a technical and a financial evaluation on the basis of advice from consultants it engaged after the Preliminary examination and on the basis of various advices from its Audit department and other Officers.

The first outcome of these evaluations was the award of the tender the subject matter of this dispute to M/s Blackwood Construction Limited through a letter of award dated 23rd October, 2013 appearing in the Procuring Entity's Response to the Request for Review.

The award of the tender to M/s Blackwood Construction Limited however appeared to have been shortlived since the Procuring Entity's tender committee terminated the entire Procurement process in a meeting held on 27th November 2013 and re-advertised the same tender.

The termination of the tender was based on an alleged oral advice by the Public Procurement Oversight Authority. It is this termination and subsequent re-advertisement that triggered the filing of the Request for Review whose contents the Board does not intend to set out verbatim.

The Procuring Entity filed a notice of Preliminary objection and a substantive reply which ran into 34 paragraphs accompanied by a 661 page bundle of documents in opposition to the Request for Review.

THE REVIEW

The Request for Review before the Board was lodged on 16th December, 2013 against the decision of the Kenya Forestry Research Institute dated 27th November, 2013 in the matter of Tender No: KEFRI/HQT/HB-04/2013-2014 for the Proposed Hostel Block Development for Kenya Forestry Research Institute at Marigat, Kenya.

The Applicant was represented by Mr. Anthony E. Kiprono, Advocate, while the Procuring Entity was represented by Mr. Mathews Okoth, Advocate from the firm of Prof. Tom Ojienda & Associates Advocates

At the hearing of the Request for Review, the Board ordered that the arguments on the Preliminary objection and the substantive application be heard together on account of the following reasons:-

- (i) The Preliminary objection did not raise pure points of law and was not based on admitted facts and could not therefore be argued or determined without reference to contested facts and documents.
- (ii) A Request for Review lodged with the Board was required by law to be heard and determined within Thirty (30) days and it was therefore necessary to

determine the Request for Review expeditiously owing to the short period remaining before the expiry of the thirty (30) days period.

Learned Counsel for the Applicant started his submissions by urging the Board to reject all the three points of Preliminary objection raised by the Procuring Entity on the grounds that the Applicant had not been notified of the award and or the subsequent termination of the tender process by the Procuring Entity. Counsel argued that without such notification time was at large and that his client could not be reasonably expected to challenge an action which it did not have notice of.

On the issue of the contention by the Procuring Entity that this Board did not have jurisdiction to Review its decision to terminate the Procurement Process by virtue of the provisions of Sections 36(5) and 36 (6) of The Public Procurement and Disposal Act No. 3 of 2005 it was the Applicant's view that although a Procuring Entity can terminate Procurement Proceedings under the provisions of Section 36 of the Board has jurisdiction to inquire into the question of whether the Provisions of Section 36 of the Act had been complied with and where the Board determines that the said Provisions were not complied with it was duty bound to intervene.

The Applicant therefore urged the Board to dismiss the three points of Preliminary objection and urged the Board to proceed and determine the Request for Review on the merits.

On the merits of the Request for Review, the Applicant cited what it saw as several breaches of the Act and the Regulations by the Procuring Entity.

The Applicant's first complaint was that the Procuring Entity failed to comply with the provisions of Section 66 (6) of the Act as read together with Regulations 46 (1) and 16 (4) (b) and (c) (as amended) which provide for the period within which the Procuring Entity ought to have evaluated the tenders. The Applicant submitted that the result of this failure was that the Procuring Entity did not award the tender within Thirty (30) days.

The second complaint put forward before the Board by the Applicant was that the Procuring Entity's purported termination of the Procurement process was unlawful, illegal, null and void having been undertaken in complete breach of the provisions of Section 36 of the Public Procurement and Disposal Act.

Counsel submitted that though a Procuring Entity could terminate Procurement Proceedings under Section 36 of the Act, that power was not absolute and that a Procuring Entity could only benefit from a termination under Section 36 of the Act only if it demonstrated that it had complied with the provisions of Section 36 of the Act. The Applicant also argued that the said provision of the Act enjoined a Procuring entity to act judiciously, for good reason but not capriciously.

The Applicant submitted that the Procuring Entity in this case had

not complied with any of the Provisions of Section 36 of the Act and pointed out several instances of such non-compliance.

The Applicant denied receiving any notice of termination under Section 36 (2) or the reasons for such termination. The Applicant further stated that it was not aware of any written notice of termination which had been given by the Procuring Entity to the Director of the Public Procurement Oversight Authority.

The Applicant also challenged the allegation that the decision to terminate was as a result of oral advice given to the Procuring Entity by the Public Procurement Oversight Authority as alleged by the Procuring Entity in its Reply. The Applicant contented that the Public Procurement Oversight Authority was an Institution of repute which could not give oral advice on such a serious issue as the termination of a Procurement Process casually. The Applicant argued that statutory Entity's must act on the basis of written but not oral communication.

Apart from denying being served with any notice under Section 36 (2) of the Act, the Applicant referred the Board to the notifications of award of tender and regrets contained at pages 24 and 35 of the Procuring Entity's response and denied that his client had been served with a notice informing it that it's tender was unsuccessful.

The Applicant also challenged the Procuring Entity's decision to invite consultants and other third parties to participate in the Procurement process once a tender/evaluation committee had been

constituted and that such intervention was contrary to the tender document and the provisions of the Act and the Regulations made thereunder.

The Applicant faulted the opinion of the consultants that advised that litigation history was a mandatory requirement. The Applicant urged the Board to look at the tender document which in the Applicant's view set out litigation history as one of the mandatory requirements that was to be provided by each tenderer. The Applicant further argued that under the Provisions of the Act a mandatory requirement could not be termed as a minor deviation.

The Applicant therefore urged the Board to dismiss the Preliminary objection and allow the Application for Review.

The Procuring Entity opposed the application for Review. The Procuring Entity first argued that the Board did not have jurisdiction to hear and determine the Request for Review on the grounds that:-

- (i) The provisions of Section 93 (2) (b) of the Public Procurement and disposal Act NO. 3 of 2005 precluded the Board from reviewing a decision of the Procuring Entity to reject all tenders.
- (ii) The Provisions of Section 36 (5) and 36 (6) of The Public Procurement and Disposal Act No. 3 of 2005 insulated the Procuring Entity's decision to terminate the Procurement Process from Review by the Board.
- (iii) The Board did not have jurisdiction to hear and determine the Request for Review lodged before it since it was filed out of

time under the provisions of Section 93 (1) of the Public Procurement and Disposal Act as read together with Regulation 73 (2) (b) of the Public Procurement regulations 2006 (as amended).

Mr. Okoth largely based his arguments on the first and the second points of preliminary objection on the provisions of the Act and argued that under the provisions of section 36 (6) of Act, once a Procuring Entity had terminated a tender/tender process, the Board did not have jurisdiction to review the decision to terminate no matter the circumstances of such a termination.

On the third point of the preliminary objection counsel urged the Board to find that the Applicant's application for Review was based on the procuring Entity's alleged delay to evaluate the bids within a period beyond 15 days in violation of the provisions of Section 56 of the Act and the Regulations. According to Counsel therefore, the 15 days period lapsed on the 15th day after the tender opening date of 17th September 2013. The Procuring Entity therefore argued that the Applicant ought to have lodged the Request for Review within seven (7) days from the end of the 15 days.

The Procuring Entity further argued that if the Applicant was challenging the award and/or the decision to terminate the tender/tender process it ought to have done so within seven (7) days of the events complained against.

On the merits of the application for Review, the Procuring Entity contended that delay in evaluating and awarding a tender could not invalidate Procurement Proceedings where there were reasonable grounds to explain the delay. The Procuring Entity attributed the delay in this matter to time lost in consultations to determine whether litigation history was a mandatory requirement in this tender and therefore urged the Board to find that there were indeed reasonable grounds for the delay.

The Procuring Entity defended its decision to involve consultants and other third parties in the evaluation process. The Procuring Entity argued that it took this decision based on the provisions of Section 28 of the Act and Regulation 19 of the Regulations. The Procuring Entity however confirmed to the Board that it had constituted its own tender committee for the purposes of this tender and that the consultants were not part of the tender committee.

On the issue of termination, the Procuring Entity argued that it had terminated the Procurement process on the basis of an oral advice from the Public Procurement Oversight Authority (PPOA) in order to avoid the prospect of litigation by tenderers. The Procuring Entity informed the Board that the tender had since been re-advertised and reiterated its submission that the Board had no jurisdiction to Review a tender or a tender process under the provisions of Section 36 (6) of the Act.

The Procuring Entity however admitted through Mr. Julius M. Mwilu one of its Officers who appeared before the Board that it did not dispatch the letter of notification of the award of tender dated 23rd October 2013. In Mr. Mwilu's own words he prepared the letters to be sent to the bidders but a letter came to his office instructing him not to communicate the decision and he therefore withheld the letters.

On the issue of notification of the termination of the tender process, the Procuring Entity conceded that it had not notified all the bidders of its decision to terminate the award. The Procuring Entity argued that immediately the decision to terminate was made, it prepared a letter of notification and made telephone calls to the bidders to come and collect the notifications of termination but that only four bidders turned up to collect the letters as evidenced by the delivery book that is presented before the Board.

The Procuring Entity however readily conceded that it did not make a written communication of the decision to terminate the tender process to the Director General of the Public Procurement Oversight Authority as required by section 36 (7) of the Act.

THE ISSUES FOR DETERMINATION

Having read the documents filed and the submissions made by the parties, the Board finds the following to be the issues that fall for determination in the Request for Review now before the Board:-

- (a) Whether the Board has jurisdiction to hear and determine the Request for Review before it by virtue of the provisions of section 36 (5) & 6 and 93(1) and 2(b) of the Act.**

- (b) Depending on the outcome of the issue on jurisdiction, whether the procuring Entity breached the provisions of Sections 27, 36, 65, (2), 67 and 66 (6) of the Public Procurement and Disposal Act 2005 and Regulations 46 (1) 16 (4) (b) and (c), 65(2) and 66 (1) of the Public Procurement and Disposal Regulations 2006 (as amended).**

Issue No. 1

Whether the Board has jurisdiction to hear and determined the Request for Review before by virtue of the provisions of section 36 (5) & 6, 93(1) and 2(b) of the Act.

Where an issue of jurisdiction is raised at any stage of the proceedings, the Board is under an obligation to determine the issue before delving into the merits of the main Request for Review. The Procuring Entity challenged the Board's jurisdiction to hear and determine the Request for Review on essentially two grounds, namely that the Request for Review had been filed out of time and that the Board did not have

jurisdiction to intervene where the decision being challenged was a decision to terminate a tender or a tender process under the provisions of Section 36 of the Public Procurement and Disposal Act.

The Board has considered the arguments on these two issues and finds that the issue of whether or not the Request for Review was filed in time can only be made by reference to whether or not the Procuring Entity communicated the decision sought to be impeached and when it did so. The Applicant's complaint before the Board was that it had not received a notification of any decision from the Procuring Entity. This failure in the Applicant's view rendered time at large since a party could not be expected to challenge a decision it had no notice of.

The Board respectfully agrees with the Applicant's submissions that breach can only be established upon notification of a decision. The question of whether or not there was notification is an issue of fact which can only be determined by looking at the evidence. The issue of whether there was notification was strongly contested in the Request for Review before the Board. The issue cannot therefore be determined by way of Preliminary objection.

On the issue of section 36 (6) of the Act, the Board holds that the powers conferred upon the Procuring Entity by law are not absolute and that the provisions of Section 36 (6) of the Act can only aid a party who has terminated a tender or a tender process in compliance with the provisions of Section 36 (6) of the Act. Where a complaint of non-

compliance with the provisions Section 36 of the Act are raised, the Board is bound to inquire into the question of whether the termination was lawful or not.

The Board therefore holds that it has jurisdiction to hear and determine the Request for Review now before it. The Board notes that some of the complaints raised by the Applicant were that the provisions of section 36 of the Act were not complied with by the Procuring Entity while purporting to terminate the Procurement process and that the termination was not based on any valid reason. The nature of the complaints raised therefore call for an inquiry by the Board.

The decision of the Board on the issue of Section 36 is not without support. In the case of **Tudor Services Ltd = vs= National Oil Corporation (Application No. 21 of 2009)** the Board held that the powers conferred upon the procuring entity under section 36 of the Act must be exercised in good faith and in full compliance with the requirements set out under the Act. The Board proceeded to nullify the termination of an award by the Procuring Entity for failure to comply with the provisions of Section 36 of the Act.

In case of **Horsebridge Network systems (EA) Ltd = vs = The Central Bank of Kenya Limited (PPOARB NO. 65 of 2012)** the Board nullified the termination of an award of a tender inter-alia on the ground that the Procurement Entity had not filed a report of the termination with the

Director General of the Public Procurement Oversight Authority (PPOA) as required by the provisions of Section 36 (7) of the Act.

In the case of **Muema Associates = vs = Turkana County Council (Application NO. 35 of 2008)**.

The Board held that while exercising the power to terminate an award of a tender under the provisions of Section 36 of the Act, the Procuring Entity must inter-alia:-

- (i) Give sufficient notice to all bidders of the decision to terminate the Procurement Proceedings.
- (ii) The Procuring Entity must give reasons for its decision.
- (iii) The Procuring Entity must give a report to the Authority regarding its decision to terminate Procurement Proceedings as per Section 36(7) of the Act.

The Preliminary objection by the Procuring Entity is therefore dismissed and the Board shall now proceed to determine the Request for Review on merits.

Issue No. 2

Depending on the outcome of the issue on jurisdiction, whether the procuring Entity breached the provisions of Sections 27, 36, 65, (2), 67 and 66 (6) of the Public Procurement and Disposal Act 2005 and Regulations 46 (1) 16 (4) (b) and (c), 65(2) and 66 (1) of the Public Procurement and Disposal Regulations 2006 (as amended).

The above issue captures grounds 2, 3, 4, 5, 7 and 8 of the Applicant's Request for Review and the issues raised by the parties to this Request for Review in their submissions. Broadly speaking, the issues raised by the above legal provisions and the submissions by the parties can be condensed into the following sub-issues in the order of their priority.

- (i) Whether the Procuring Entity's decision to terminate the tender process was carried out in accordance with Section 36 of the Act.
- (ii) Whether or not the Procuring Entity was right in procuring and employing the services of consultants and other third parties in evaluation of the tenders when the process of evaluation had already commenced.
- (iii) Whether or not the Applicant was notified of the outcome of any evaluation and or award of tender or the termination of the tender process.
- (iv) Who should pay costs?

This dispute substantially arose after the re-advertisement of the tender the subject matter of this dispute pursuant to a purported termination of the tender process by the Procuring Entity. The re-advertisement was contained in the Standard Newspaper Edition of 5th December, 2013 and the Star Newspaper of Tuesday 17th December, 2013. The Procuring Entity based the decision to terminate on an alleged oral advice to the Procuring Entity by the Public Procurement Oversight Authority and attributed the need to seek such advice to an uncertainty on whether the

history of litigation was a mandatory requirement in the tender as earlier advertised or whether it was a minor deviation. This confusion arose after the procuring entity sought the opinion of consultants and third parties who were not part of the tender processing committee formed to evaluate this tender.

The Board has severally held that the issue of procurement is not only governed by Article 227 of The Constitution but is also governed by the provisions of the Public Procurement and Disposal Act and the Regulations made thereunder.

A termination of the tender process must therefore be undertaken within the strict confines of section 36 of the Act and the regulations. The Board has also held and reiterates that such power must be exercised judiciously and must be based on valid grounds. The power must not be exercised capriciously.

The Board notes that Section 36(1) of the Act allows a Procuring Entity to terminate procurement proceedings at any stage without entering into a contract upon compliance with the following requirements:

Section 36(2) "***The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.***"

36(4) "If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened."

36 (7)" A public entity that terminates procurement proceedings shall give the Authority a written report on the termination."

The Board also notes that the Procuring Entity in its response to the Request for Review admits that it invited bidders through phone calls to collect their letters of termination of procurement proceedings. Only four bidders collected their letters.

Section 37(1) provides as follows:

"If the procurement procedure used is open or restricted tendering or a request for proposals, communications between the procuring entity and a person seeking a contract for the procurement shall be in writing".

It is not in dispute that the decision to terminate the tender process was done pursuant to an alleged advice to the procuring entity by the Public Procurement Oversight Authority. The Procuring Entity did not produce any evidence that it sought such advice in writing or that such advice was given to it in writing. The Board finds that The Public Procurement Oversight Authority is a statutory body which can only act or give advice in writing particularly on a serious matter such as the termination of a Procurement process.

On notification of the decision to terminate, the Procuring Entity claimed that it prepared letters of notification of the termination and then

telephoned the bidders to collect the letters from their offices. Only four bidders allegedly turned up. The Procuring Entity confirmed that the Applicant was not one of the bidders who turned up to collect the notification. It did not produce any evidence of posting of the notification. No certificate of posting or any other means of service of a notification was produced before the Board. The action of calling tenderers by phone without the production of proper evidence of dispatch amounts to a casual handling of the Procurement process and is in breach of the provisions of Section 37 (1) of the Act that provides for the form of communication between the Procuring Entity and tenderers which requires that such communication must be in writing.

The Board therefore holds that there was no notification and there was therefore no compliance with provisions of Section 36 (2) of the Act. The Procuring Entity also conceded that there was no compliance with the provisions of Section 36 (4) and (7) of the Act and that no written report was filed by the Procuring Entity with the Director General of the Public Procurement Oversight Authority (PPOA).

On the root cause of the termination, the Board notes that the received bids were subjected to three stages of evaluation namely; preliminary evaluation, detailed Technical evaluation and financial evaluation. One bidder namely; Tricon works Ltd qualified at the Preliminary Evaluation stage by meeting all the mandatory requirements and was therefore recommended by the Evaluation Committee to proceed to the next stage by a committee constituted as provided for by the Act and the

Regulations. The other Bidders were disqualified for various reasons as earlier noted. This was done in accordance with Regulation 47(2) of the Act and the Procuring Entity's Tender Document at Clause 5.8 at page 12. These two state as follows:-

47 (2) the evaluation committee shall reject tenders, which do not Satisfy the requirements set out in paragraph (1).

Clause 5.8 The employer will evaluate and compare only tender determined to be substantially responsive in accordance with clause 5.5

The Board further notes that the subsequent stages of evaluation, that is, the detailed technical evaluation and financial evaluation was handled by AAKI consultants through a quantity surveyor, Integrated YMR Partnership. At the technical evaluation stage, the consultant at initial stage made litigation history a minor deviation, a requirement previously made mandatory in the Tender documents and made so by the Evaluation Committee. Based on the above move by the consultant four more bidders namely; Blackwood Construction, Monaco Engineering, Right Option Ltd, Mweha Enterprises and the Applicant were recommended by the consultant to proceed to the financial evaluation stage. At this stage arithmetic error check was carried out as provided for in the tender document, a further evaluation of unit rates and mechanical and Electrical Services adjustment was also carried out under a criteria and process not stipulated in the Tender Documents. The consequence of this is that the Applicant together with the other three bidders were ranked lower and therefore only Blackwood Construction Limited was recommended for award by the Tender

processing committee which in turn upheld the decision of the Consultant in its meeting of 14th October, 2013.

The Board observes that regulation 49(1) bestows upon the evaluation Committee the responsibility to carry out a Technical Evaluation and financial evaluation (Reg. 50(1)) and make recommendation after carrying out the preliminary evaluation. The Procuring Entity's Tender Document at page 13 Clause 6.9 clearly states who will carry out the evaluation process for the tender under review contrary to what was carried out by the consultant. The Board observes that best practice requires when constituting evaluation committees the Procuring Entity should co-opt experts in evaluation committee to provide observer and or an advisory role to the committee. This should be done at the point of constituting the tender processing committee.

The Board observes that there is no mention of consultants in the tender document and therefore the report as submitted by the consultant is contrary to the Act, the regulations and the Procuring Entity's Tender Document. The Tender Committee in considering a report by the consultant acted against the provision of Regulation 51(2) which states that:

"The evaluation report prepared under paragraph (1) shall be considered by the tender committee, prior to awarding the contract or taking any other action in relation to the procurement as may be necessary".

The tender document further inter-alia provides as follows at clause 5.5.

Clause 5.5.....

A material deviation or reservation is one (a)... (b)... (c) whose rectification would affect unfairly the competitive position of the other tenderer presenting substantially responsive tenders.

Clause 5.6 if a tender is not substantially responsive, it will be rejected, and may not subsequently be made responsive by correction or withdrawal of the non-conforming deviation or reservation

The Board finds that the action of the consultant in making litigation history a minor deviation is contrary to the Regulations and the requirement in the Tender Documents.

The Board further observes that the Procurement Process appears to have been flawed after the point of preliminary examination. The Procuring Entity not only arrogated its duty to evaluate the tender to persons who were not members of the Tender Processing committee but further that the Procuring Entity also failed to notify the successful and the unsuccessful bidders of its decision to award or reject their tenders.

The Procuring Entity produced letters dated 23rd October 2013 as part of its response indicating that it had carried out an evaluation and had awarded the tender but quite surprisingly, it did not notify the bidders of the outcome of the evaluation but instead withheld the letters. Mr. Mwilu who appears to have been one of the central players in the

Procurement process informed the Board that upon preparing the letter dated 23rd October, 2013 he received a letter instructing him not to dispatch the letters and he thus withheld the letters of notification.

The Board therefore finds and holds that there was no notification of the award of tenders to any of the tenderers as required by law.

It was not disputed before the Board that there was an inordinate delay in the evaluation of the tenders. The Procuring Entity urged the Board to find that delay in itself was not fatal if it was based on reasonable grounds. This may well be so. The Board however finds that there were no reasonable grounds for the delay in the circumstances of this case. The delay was solely caused by the intervention of consultants and the Staff of the Procuring Entity who instead of leaving the duty to evaluate the tenders to the relevant tender/evaluation committee entered into the arena of evaluation thereby giving contradictory opinions. If the job had been left in the hands of the relevant body, no such confusion would have arisen. The delay in the conclusion of the evaluation was therefore not based on any reasonable ground.

The upshot of all the foregoing findings is that the Request for Review succeeds and in exercise of the powers conferred upon the Board by Section 98 of the Act, the Board makes the following orders:-

1. The purported termination of the Procurement Proceedings of Tender **NO. KEFRI/HQT/HB-04/2013-2014** and any process or

steps taken pursuant to the purported termination are hereby declared null and void.

2. The Purported notification of award dated 23rd October 2013 to in respect of the above tender is declared null and void and it set aside.
3. The Procuring Entity through it's already duly constituted tender committee shall continue with the evaluation of the technical and financial bids in accordance with the Act and the evaluation criteria set out in the tender documents and complete the process within 15 days from today.
4. The Procuring Entity shall take steps to extend the validity of the bid and bid securities for the period necessary for it to comply with these orders:
5. The Board makes no orders as to the costs of this Request for Review.

Dated at Nairobi on this 14th day of January, 2014


.....
CHAIRMAN
PPARB


.....
SECRETARY
PPARB

