

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.18/2014 of 15th MAY, 2014

BETWEEN

THE INSTA PUMPS ENGINEERING LTD..... APPLICANT

AND

**MICHUKI TECHNICAL
TRAINING INSTITUTE.....PROCURING ENTITY**

~~Review against the decision of the Tender Committee of Michuki
Technical Training Institute dated 25th April 2014 in the matter of the
Tender for the Construction of a Sewer Line, Septic Tank and Soak Pit
for Michuki Technical Training Institute, Kangema.~~

BOARD MEMBERS PRESENT

Mr. Paul Gicheru - Chairman

Mrs. Rosemary K. Gituma - Member

Mrs. Gilda Odera - Member

Mr. Paul Ngotho - Member

Mr. Peter Ondieki, MBS - Member

IN ATTENDANCE

Stanley C. Miheso - Holding brief for Secretary
Judy Maina - Secretariat

PRESENT BY INVITATION

Applicant - **The Insta Pumps Engineering Limited**

Ephantus Mugo - Technical Manager

John N. Goshu - Director

Procuring Entity - **Michuki Technical Training Institute**

Patrick Kahonge - Advocate

J. G. Ndirangu - Principal

Interested Party

George Kimani - Director, Blage Contractors Ltd.

BOARD'S DECISION

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

BACKGROUND OF AWARD

The Tender for Construction of A Sewer Line, Septic Tank and Soak Pit for Michuki Technical Training Institute, Kangema was advertised on 23rd March, 2014.

The Tenders were opened on 14th April, 2014 at the Michuki Technical Training Institute Boardroom by a committee of seven (7) people appointed by the Principal/Secretary to the Board of Governors. The following information was read out aloud to the bidders and was also recorded:-

	FIRM'S NAME & ADDRESS	BID AMOUNT	BID SECURITY AMOUNT	BID SECURITY ISSUER
1)	Tenaco Eng works Ltd	15,730,992.00	100,000	Family bank
2)	Blage contractors Ltd	9,346,486.56	340,000	Amaco insurance
3)	Insta -pumps Engineering Ltd	13,821,790.11	300,000	Africa banking Ltd

The tenderers present were requested to sign the tender attendance register. The tenders were sorted out as per the tender numbers. Three tenders were received from the tender box.

EVALUATION

The Evaluation committee met on 15th April, 2014 at 11:00 am. The exercise of evaluation was to be done in 2 phase's i.e.

- 1). Detailed examination.
- 2). Bidder price and Arithmetic analysis.

i) Detailed examination.

The committee subjected all the tenders to the following criteria to

confirm compliance with the conditions of the advertisement:

1. A copy of the registration certificate with the National Construction Authority in category 'NCA 6'
2. A copy of the certificate of company/firm registration
3. A Bid bond of 2% of the bid price in the form of a bank guarantee from a reputable bank or PPOA approved insurance firm and must remain valid for 120 days from the date of the tender opening.
4. A valid PIN and VAT Certificate
5. A valid Tax Compliance Certificate
6. Reports of audited accounts and bank statements of the bidder for the last 3 years
7. A sound financial standing and adequate access to a bank credit line
8. Details of similar works completed within the last five years giving details of clients
9. Details of contractor's equipment and plants and type of ownership
10. The names, qualifications and experience of key personnel available for the specified type of works, attach copies of curriculum vitae and certificates
11. Litigation history of the company (both court and arbitration history)
12. Tender receipts

The three tenderers were evaluated & analysed in respect to their responsiveness to the tender conditions as shown below:

Examination Responsiveness Table

Y=Responsive

N=Non-Responsive

S/no	Tenderer	registration certificate with the National Construction Authority in category 'NCA 6'	Copy of certificate of company/ firm registration	Bid bond of 2% of the bid price in form of a bank guarantee from a reputable bank or PPOA approved insurance firm and must remain valid for 120 days from the date of the tender opening.	Valid PIN and VAT Certificate	Valid tax Compliance Certificate	Reports of audited accounts and bank statements of the bidder for the last 3 years	Sound financial standing and adequate access to bank credit line
1	Tenaco engineering work	Y	Y	N1	Y	Y	N2	N3
2	Blage Contractors Kenya Limited	Y	Y	Y	Y	Y	Y	Y
3	Insta pumps	Y	Y	N4	Y	Y	N5	Y

S/no	Tenderer	Details of similar works completed within the last five years giving details of clients	Details of contractor's equipment and plants and type of ownership	The names, qualifications and experience of key personnel available for the specified type of works, attach copies of curriculum vitae and certificates	Litigation history of the company (both court and arbitration history)	Tender receipts	Rating
1	Tenaco Engineering Works	Y	Y	Y	Y	Y	N
2	Blage Contractors Kenya Limited	Y	Y	Y	Y	Y	Y
3	The Insta Pumps Engineering Ltd	Y	Y	Y	Y	Y	N

General overview on non-responsive tenders at detailed evaluation

Bidder No.1: M/s Tenaco Engineering Works

N1 - The bid bond provided was not sufficient. The bid bond was for Kshs.100,000 instead of Kshs. 314,619.84 which is the minimum amount as per the tender price of ksh.15,730,992.00.

N2 - The bidder had attached audited accounts though no auditor's report was attached to authenticate the report. The bidder had not attached bank statements for the minim period required

N3 - The bidder lacked proof of his financial standing and ways of accessing bank credit.

The bidder was found not responsive.

Bidder No.3: M/s Insta Pumps Engineering Ltd

N4 - The bidder had attached a bid bond of ksh.300,000 though valid for only Ninety (90) days validity period instead of 120 days.

N5- the bidder had attached audited accounts for the required period though no bank statements for the period required were attached.

The bidder was found not responsive

Comments on responsiveness:

Only Bidder No.2 M/s Blage Contractors Kenya Limited was responsive at this stage and hence was subjected to further financial analysis.

ii) Bidder's price and Arithmetic analysis

Analysis of Bidder's Prices

Tenderer	Tender Sum	official estimate	Deviation from the official estimate
Blage Contractors Kenya Limited	9,346,486.56	9,798,781.00	- 4.62%

Arithmetic analysis of the above bidder's price was done and an error of Ksh.2,070,182.40 was identified which increased the total tender sum to Ksh.11,416,668.96

Analysis of the Bidder's Error

Bid No.	Tenderer	Tender Sum (ksh)	official estimate	Corrected tender sum	Deviation of the corrected tender sum from the official estimate
2	Blage Contractors Kenya Limited	9,346,486.56	9,798,781.00	11,416,668.96	16.52%

M/s Blage Contractors Kenya Limited was still the lowest evaluated bidder after the correction of the errors at the corrected bid price of Kshs. 11,416,668.96 hence it was found responsive.

iii) Evaluation Committees Recommendation

3 options were made regarding the tender because of the errors.

- M/s Blage Contractors Kenya Limited be awarded the tender with the corrected figure at the total tender sum of Ksh.11,416,668.96
- Carry out an Arithmetic analysis on the other responsive bidders though there was none remaining after detailed evaluation.
- Disregard the whole exercise and re-advertise afresh.

Members of the evaluation committee recommended that the tender be awarded to M/s. Blage Contractors Kenya Limited at a tender sum of Kshs.11,416,668.96 (Eleven Millions four hundred and sixteen thousands six hundred and sixty eight shillings and ninety six cents only)

TENDER COMMITTEE'S DECISION

The Tender committee met on 25th April, 2014 at 11.00 a.m. and considered the responsiveness and the non responsiveness of the three tenders as per the tender advertisement. The profile of the tender details of similar works completed within the last five years was considered amongst other requirements.

The contents of the tender advertisement amongst other factors were considered while awarding the tender. The tender committee awarded the tender to M/s. Blage Contractors Kenya Limited at the corrected tender sum of Ksh.11,416,668.95.

REPRESENTATION AND THE PRELIMINARY ISSUES

When this application came up for hearing before the Board, the Applicant appeared in person and was represented by Mr. Ephantus Mugo, Technical Manager and Mr. John N. Gosho, Director. The Procuring Entity was represented by Mr. Patrick Kahonge, Advocate while the Successful Bidder M/s Blage Contractors Ltd also appeared in person through Mr. George Kimani who is one of its Directors.

Before the commencement of the hearing, counsel for the Procuring Entity intimated to the Board that he wished to raise a preliminary objection on the ground that this Request for Review was filed out of time but later abandoned the objection and the parties thereafter agreed to have the Request for Review heard and determined on merits.

The arguments for and against the Request for Review were fairly brief and the Board will now proceed to set them out the arguments as per the grounds put forward by the parties before proceeding to give its decision on the issues as framed by the Board.

THE REQUEST FOR REVIEW

This Request for Review was lodged by M/s The Insta Pumps Engineering Ltd on 15th May, 2014 in the matter of the Tender for the Construction of a Sewer Line, Septic Tank and Soak Pit for Michuki Technical Training Institute Kangema.

The Applicant seeks for the following orders:

1. *The board do allow the requests for Review.*
2. *The board annuls all steps the respondent has taken and all acts done by the respondent consequent upon and immediately following the opening of tenders on 14th April 2014 by the respondent.*
3. *The Board Orders the respondent to award the tender to the applicant who having submitted the lowest responsive tender was most qualified.*
4. *In the alternative, in accordance with clause 98 (a) and (b) the respondent is directed to re-tender afresh.*
5. *The Board do direct the respondent to make available to the board at the hearing of this request the applicant's entire tender and that of the winning tenderer as submitted for inspection by the board and the applicant.*
6. *The board do make such and further orders as it may deem fit, just and appropriate to meet the ends of justice in the circumstances of this request.*
7. *The respondent be compelled to pay the applicant the costs arising from and incidental to the procuring proceedings.*

The Applicant raised five grounds of review which are set out below:-

Grounds 1 and 5 - Breach of Section 64(1) of the Public Procurement and Disposal Act, 2005(hereafter referred to as "the Act"), Regulation 47(1)(d) of the Public Procurement and Disposal Regulations, 2006 (hereafter referred to as "the Principal Regulations") read together with Clause 3.14 of the Instructions to Tenderers (hereby referred to as "the ITT").

The Applicant argued that the Respondent erred in awarding the tender herein to a non-qualified bidder since the successful bidder contravened Clause 3.14 of the instructions to tenders by submitting only 1 copy of the tender document instead of two.

The Applicant also argued that it was the most qualified tenderer both in form of compliance with all the tender requirements, experience and that its price was fair compared to the market rates and consequently that the Applicant therefore stood to lose financially on the contract it allegedly fairly won and that the Procuring Entity also stood to gain if the tender was awarded to it.

In response, the Procuring Entity stated that its award of the tender to the successful bidder was based on preliminary, technical and financial evaluation and that the said bidder was the lowest evaluated bidder for the purposes of this tender.

The Procuring Entity further submitted that the Applicant was not the most qualified tenderer in form of compliance with the requirements for award and that the Applicant's bid bond was for a shorter period than that required in the invitation to the tenderers. The Procuring Entity also stated that the Applicant did not submit its bank statements for the period required in the tender advertisement and the tender document.

The Procuring Entity therefore argued that having failed to comply with the above mandatory requirements the Applicant was disqualified for lack of the mandatory requirements and could not term itself the lowest evaluated bidder.

The Procuring Entity and the successful bidder however conceded that the successful bidder only submitted the original tender document and not copies of the tender since according to the successful bidder this was not required in the invitation to tenderers as advertised.

Grounds 2 - Breach of Sections 2(b), 42(1)(c) and 44(1)(b) of the Act.

On this ground of review, the Applicant argued that the Procuring Entity's engineer's estimate and the tender sum given by the Successful Bidder were very similar. The Applicant therefore argued that in its opinion this near equivalence pointed to collusion as the Procuring Entity ~~must have passed over the estimate to the Successful Bidder in order to~~ defeat the essence of open tendering.

In response to the Applicant's argument the Procuring Entity stated that the Engineer's estimates were done by the Ministry of Public Works and that the Bills for Quantities for the works were based on the said estimates. The Procuring Entity denied that it colluded with the successful bidder and stated that due process was followed in the tendering process as required by law.

The Successful Bidder denied the allegations of collusion and stated that no evidence was produced to support the allegation and in any event it was not a party to the alleged collusion.

Grounds 3 - Breach of Sections 60(5)(c) of the Act and Clause 5.2 of the ITT.

The Applicant submitted that the Procuring Entity flouted the mandatory requirements of the tender document by not disclosing the presence or absence of tender securities during the opening of the bids and the appropriate details of the submitted tenders in contravention of Clause 5.2 of the ITT 15 of the tender document.

In response to the above argument, the Procuring Entity stated that it didn't flout the tender regulations as the announcement was duly made and the requirement for the mandatory tender security was met.

The Procuring Entity additionally submitted that both the Applicant and the successful bidder provided tender securities but that the Applicant submitted a security valid only for ninety (90) days while the Successful Bidder supplied a tender security which was valid for a period of one

hundred and twenty (120) days as required by the tender document a fact that was confirmed by the successful bidder in his response to this ground.

Ground 4 - Breach of Sections 45(3) and 67(2) of the Act and Regulation 66(2) of the Principal Regulations.

On this ground of review, the Applicant argued that the Procuring Entity contravened the Provisions of Section 83(2) of the Act by failing to notify the Applicant of the award. The Applicant stated that it only learnt of the award through third parties. The Applicant further stated that it's request for an evaluation report of the tender was declined by the Procuring Entity.

In response to the Applicant's argument, the Procuring Entity argued that this tender was awarded on 25th April, 2014 while the notification was sent to all bidders on 28th April, 2014. The Procuring Entity further stated that the Applicant was again issued with an extra copy of the notification on 8th May, 2014. The Procuring Entity contended that it adhered to the official process of notification as required by Clause 6 of the conditions on service of the notifications.

CORRECTION OF ERRORS

During the course of the hearing of the Request for Review, it emerged from the documents and the arguments by the parties that the Successful Bidder had submitted a tender for the sum of Kshs.9, 346, 486.56 in its

tender document but that the Procuring Entity proceeded to award the Applicant the tender at a tender sum of Kshs.11, 416, 668.96.

The Applicant argued that in so doing, the Procuring Entity did not comply with the Provisions of Section 63 of the Act on correction of errors since it had not notified the successful bidder of the correction of the said error and that to the best of the Applicant's knowledge it was not aware of any communication showing that the successful bidder had accepted the correction.

The Procuring Entity through its principal Mr. J.G. Ndirangu confirmed that the only notification it had sent to the Successful Bidder was that notifying it of the award of the tender and that it had not issued the successful bidder with the notification of the correction of the error because the Applicant had filed a Request for Review before the Board which had issued an order staying the procurement process.

The Successful Bidder on the other had contended in an apparent contradiction to the Procuring Entity's position that it had been notified of the correction of the error and that it had accepted the correction. The successful bidder did not however avail the alleged notification or its letter of acceptance to the Board.

ISSUES FOR DETERMINATION

The Board has considered all the documents presented before it and the arguments made to it by the parties and has framed the following issues for determination:

- 1. Whether or not the Successful Bidder's bid qualified for evaluation given that the Successful Bidder submitted one copy of its tender document instead of two?*
- 2. Whether or not there was collusion between the Successful Bidder and the Procuring Entity as alleged by the Applicant?*
- 3. Whether the Procuring Entity complied with statutory procedures in correcting errors in the Successful Bidder's bid?*
- 4. Was the Procuring Entity justified in disqualifying the Applicant's bid?*
- 5. Who should bear the costs of this Application for Review?*

The Board has not framed any issue on whether or not the Applicant was served with a letter of notification in view of the fact that the Procuring Entity was not able to produce any evidence of service and had accordingly abandoned its preliminary objection. The Board will therefore proceed and determine the above five issues on the basis of the factual information and evidence placed before it.

Issue No 1 - Whether or not the Successful Bidder's bid qualified for evaluation given that the Successful Bidder submitted one copy of its tender document instead of two (Grounds for Review No's 1 and 5)

The Applicant submitted that it was a tender requirement for bidders to present two sets of tender documents but that the Successful Bidder submitted the original tender without an additional copy and that, therefore, the Successful Bidder's bid should have been considered non-responsive as provided for under Section 64 of the Act.

The Applicant stated that as a consequence of this failure, the Successful Bidder's bid should have been rejected due to the successful bidder's failure to submit the required number of tender documents which would have then left the Applicant's tender, which was the second lowest tender, as the lowest one upon the rejection of the successful bidder's tender.

The Applicant's final position was therefore that the Successful Bidder, having submitted one copy of its Tender Document instead of two copies, it was not eligible for the award of the Tender.

The Applicant referred the Board to paragraph 3.14 of the tender document which states as follows:-

"The tenderer shall prepare one original of the documents comprising the tender documents as described in Clause 3.2 of these Instructions to Tenderers, bound with the volume containing the Form of Tender, and clearly marked "ORIGINAL". In addition, the tenderer shall submit copies of the tender, in the number specified in the invitation to tender, and clearly marked

as "COPIES". In the event of discrepancy between them, the original shall prevail" (emphases added).

Both the Procuring Entity and the Successful Bidder admitted in their submissions before the Board that the Successful Bidder indeed submitted the original copy of its tender document. The Successful Bidder however argued that it was the duty of the Procuring Entity to specify the number of copies it required it to submit in the invitation to tenderers as advertised.

The Board has examined the invitation to tenderers and the provisions of Clause 3.14 of the Tender Document. The Board finds that Clause 3.14 of the Tender Document required the tenderers to supply the original tender together with such other number of copies as the Procuring Entity would state in its invitation to tenderers.

The Board also finds that the advertisement which constitutes the invitation to tenderers did not state the number of copies the bidders were supposed to supply. There was also no addendum or letter placed before the Board by the Applicant to show that this apparent omission in the invitation to tenderers was corrected by the Procuring Entity or that the Procuring Entity later called for the supply of copies and that the Successful Bidder failed to supply the copies as demanded.

The Board therefore holds that the Successful Bidder cannot therefore be condemned for an omission on the part of the Procuring Entity for having supplied only the original tender document. In any event the

Applicant did not point out how the submission of the original tender document by the Successful Bidder affected the evaluation of the Applicant's bid.

Accordingly, ground numbers 1 and 5 of the Request for Review fail and are hereby dismissed.

Issue No 2 - Whether or not there was collusion between the Interested Party and the Procuring Entity as alleged by the Applicant

The Board took keen interest of this allegation as the matter touched on an allegation of corruption which if proved is an offence which would result in criminal proceedings and would be against public policy and would eventually lead to the nullification of the award.

The Applicant accused the Procuring Entity and the Successful Bidder of collusion. The Procuring Entity and the successful bidder vehemently denied the accusation and challenged the Applicant to produce evidence to prove it. The Applicant did not submit any such evidence of collusion. It turned out at the hearing that the Applicant's allegation of collusion was based purely on what it considered to be the close correlation of the Interested Party's bid and the engineer's estimate.

The Board has examined the Successful Bidder's bid which is about 95% of the engineer's estimate. Such proximity, is not an offence or proof of collusion.

Incidentally, the Successful Bidder's corrected bid is 16.52% above the engineer's estimate. Since the allegation of collusion was based on the allegation of the apparent proximity stated above, then the Applicant if well advised should have had the courtesy of withdrawing to withdraw the allegation on learning that the Successful Bidder's bid was no longer so close to the engineer's estimate but not to push the argument before the Board without any proof.

The Board reiterates that collusion and corruption are serious offences under the law and any allegation of such practices must not only be set out in the request for review with particularity but that it must also be strictly proved. It is not enough for an Applicant to allege collusion without any factual basis to support such an allegation. The Board further observes that it has a duty to ensure that there is integrity in public procurement and welcomes well-founded accusations of corruption but will not entertain baseless or reckless allegations of corruption against procuring entities or tenderers alike in the absence of proof. In this case, the Board finds that the Applicant has not discharged its burden of proof and that, therefore, the allegation of collusion fails and the Applicant's second ground of review is accordingly dismissed.

Issue No. 3 - Did the Procuring Entity comply with statutory procedure for correcting the Interested Party's bid?

The Board also took note of the upward correction of the Interested Party's bid from the sum of Kshs.9, 346, 486.56 to Kshs.11, 416, 668.96 such a correction may in some cases be a potential avenue for mischief. The Board wishes to put it on record that it has perused the original

tender documents and is persuaded that the correction was made necessary on the discovery of arithmetical errors. The Board has looked at the correction and notes that the correction itself was based on valid reasons which were purely arithmetical and was not without basis. However, the same cannot be said about the procedure followed by the Procuring Entity in dealing with the issue of correction of the arithmetical errors.

The Applicant complained that a correction to the tune of Ksh.2.5m pointed to an attempt to defraud the public. The Board does not share that view. The procedure for correcting errors is stipulated in paragraph 5.7 of the Instruction to Tenderers and is in any case allowed by Section 61(1) of the Act. Why is that? To err is human. Furthermore, the Act does not specify the margins beyond which errors should or should not be corrected.

This power and the right must however be exercised in accordance with the Provisions of Section 63 of the Act which provides as follows:-

63.(1) The procuring entity may correct an arithmetic error in a tender.

(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.

(3) If the person who submitted the tender rejects the Correction, the tender shall be rejected and the person's tender security shall be forfeited.

The provision is couched in mandatory terms. The Procuring Entity must under the Act give notice of the correction promptly to the person

who submitted the tender and the person notified must accept or reject the correction upon notification.

The Procuring Entity attempted to explain the failure to issue notification by saying that it froze the procurement process once it learnt that the Applicant had lodged a request for Review. That cannot be, and the Board holds that the Procuring Entity should have notified the Successful Bidder of the correction promptly and also prior to awarding the successful bidder the tender.

The Board has however noted that even after that correction, the successful bidder still emerged as the lowest evaluated bidder at the sum of Kshs. 11,416,668.96 compared to the Applicant's bid of over Kshs. 13,821,790.11.

The Board therefore finds that the Procuring Entity failed to notify the ~~Successful Bidder of the correction of the error as required by the Act.~~ This is a matter that the Board will consider while making its final orders on this Request for Review.

Issue No 4 - Was the Procuring Entity justified in disqualifying the Applicant's bid?

The Procuring Entity and the successful bidder argued that the Applicant's bid was non-responsive for failure to comply with two requirements which were contained in the Procuring Entity's invitation as contained in the advertisement of the tender in The Standard newspaper,

"Interested eligible bidders/contractors meeting the criteria below shall be considered:

Reports of audited accounts and bank statements of the bidder for the last 3 years.

Sound financial standing and adequate access to bank credit line" (emphases added).

The Procuring Entity and the Successful Bidder therefore argued that having failed to comply with these requirements, its Request for Review amounted to an academic exercise as the Applicant would not even be entitled to be awarded or participate further in the tender even if it was to be re-evaluated.

The Applicant admitted that its bid security was for 90 days, i.e. the period from 14th April to 12th July 2014. The Applicant did not therefore meet the 120 days validity period as required.

In addition to the validity period, the same newspaper advertisement required bidders to submit bank statements for 3 years as a separate requirement. The Applicant admitted that it did not submit any bank statements and attempted to justify the omission by saying that it submitted proof of a line of credit. The Procuring Entity clearly required the submission of **both** the bank statements and proof of credit.

The Procuring Entity had made it clear in the advertisement and in the tender documents what a bidder was to submit in order be considered eligible. The documents submitted by the Applicant failed on the above

two counts namely; the failure to supply a valid bid bond and bank statements. This admission was made by the Applicant's representative who appeared before the Board in his submissions before the Board.

The Board finds that the Procuring entity was justified in disqualifying the Applicant for failure to provide bank statements and a bid bond that did not cover the specified period of one hundred and twenty (120) days and the Applicant can only blame itself for that.

In view of this finding, it is not material for the Board to consider the circumstances under which the Applicant's bid bond was returned to the Applicant or whether the subject bid bond was still alive or not. Furthermore, nothing turns on the fact that the Applicant collected the bid bond at the Procuring Entity's request in writing or otherwise.

Issue No. 5- Who should bear the costs of this Application for Review?

The Applicant in its Request for Review had requested the Board to award it costs.

The Procuring Entity on its part urged the Board to award it the "cost" of the tendering process and the other costs arising from the implementation of the project. It did not justify this rather unusual claim for "costs". The Board observes that costs are usually claimed for expenses related to the application. Loss and expenses are distinct heads of claim and must never be confused with costs.

In response to the Procuring Entity's prayer for "costs" the Applicant submitted that it should not be condemned to pay any of the "costs" claimed since in its opinion its case had merits.

The Board has considered the rival arguments on the issue of the claim for “costs” as set out by the Applicant and the Procuring Entity.

The Board notes that the claim by the Procuring Entity amounts to a claim for special damages which was not pleaded and particularised. In any event, the request for review was filed by the Applicant and the Procuring Entity did not file its own application setting out such a prayer. The Board cannot therefore grant a relief which was not formally sought before it and when the prayer is not for costs but for a disguised item of loss and damage.

The Board has also noted that as a result of the Applicant’s Request for Review, the issue of the correction of errors in the figures in the tender document and the letter of notification emerged and therefore that the request was not entirely without merit.

The Board is therefore hesitant to award the “costs” claimed as doing so might discourage parties with meritorious claims from requesting for review and in this case will not award the costs as claimed by either party.

THE ORDERS

Consequently and under the powers conferred upon the Board by the Provisions of S.98 of the Public Procurement and Disposal Act, the Board makes the following orders on this application for Review:-

1. The Applicant's request for review which was filed on 15th May 2014 be and is hereby dismissed but subject to the following orders, directions and conditions:-

(a) The Procuring Entity shall immediately cancel all the letters of notification issued to all bidders and shall first comply with the Provisions of Section 63 of the Act on correction of errors.

(b) Upon compliance with the Provisions of Section 63 of the Act, the Procuring Entity shall be at liberty to issue fresh notifications and proceed with the procurement process in accordance with the Provisions of the Act and the Regulations.

(c) The Procuring Entity shall formally notify and provide evidence of compliance with the above directions to the Board through it's Secretary within seven (7) days from the date hereof.

(d) In the absence of compliance with any of the above conditions, the notification of award to the successful bidder shall automatically stand set aside and nullified and the Procuring Entity shall re-tender for this procurement.

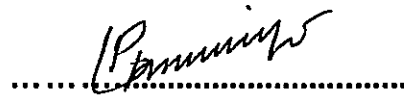
2. Each party shall bear its own costs of this request for review.

Dated at Nairobi this 6th June, 2014.


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Chairman

PPARB


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Secretary

PPARB

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