

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 60/2015 OF 25TH NOVEMBER, 2015

BETWEEN

TRADE CIRCLES LIMITED..... APPLICANT

AND

**MINISTRY OF STATE FOR DEFENCE.....PROCURING
ENTITY**

Review against the decision of the Ministry of State for Defence Ministerial Tender Committee meeting No.15/15/16 meeting dated 13th November, 2015 in the matter of Tender No. MOD423 (0609-2015-2016) Tender for the Supply of Milled Rice

BOARD MEMBERS PRESENT

- | | | |
|-----------------------------------|---|-----------------------|
| 1. Mrs. Josephine Wambua Mon'gare | - | Member (in the chair) |
| 2. Mr. Peter B. Ondieki, MBS | - | Member |
| 3. Mrs Gilda Odera | - | Member |
| 4. Mrs. Rosemary Gituma | - | Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding Brief for Secretary
 2. Ms. Shelmith Miano - Secretariat
-

PRESENT BY INVITATION

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Applicant – Trade Circles Ltd

1. Mark Nduati - Advocate
2. James Kariuki - Director

Procuring Entity – MINISTRY OF STATE FOR DEFENCE

1. S. C. Yator - Lawyer
2. J. M. Kibara - Major
3. Kennedy Ogwengo - CSCMO

Interested Parties

1. Antony Thuo - Advocate, Akamai Ventures
2. F. K. Ndiga - C.E.O, Akamai Ventures
3. Halima Gure - Director, Halima Gure Enterprises
4. Abdulahi Ali - Director, Korbash Traders
5. Joseph Mwangi - Director, Smart Four
6. E. Chengecha - Director, Smart Four

BOARD'S DECISION

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

BACKGROUND OF AWARD

Introduction and Advertisement

The Ministry of State for Defence advertised for Tender No. MOD423 (0609-2015-2016) for the Supply of Milled Rice.

The subject tender was advertised in the month of July, 2015 the tenders closed and opened on 23 July, 2015. A Tri- Service team of Officers was tasked to conduct physical evaluation on 12 August, 2015 and presented their report and market survey on 07 September, 2015. KEBs report was received on or about 28 October, 2015.

Closing/Opening

As at the closing and opening of the tenders, Fifty Seven (57) firms had returned their Tender documents. Eighteen (18) firms did not return their tender documents:

PRICES

Quoted and current prices are as tabulated here below:

S/N	Firms	U/Ac 50 Kg	Quoted Prices	
			Nairobi Region (Kshs) Current Contract Prices 4,600.00	Mombasa Region (Kshs) Current Contract Prices 4,500.00
1.	Yammy Products		4,950.00	4,850.00
2.	Etherm Energy Solutions Ltd		5,000.00	6,000.00
3.	Dabar Investments Ltd		6,500.00	6,000.00
4.	Trade Circles Ltd		3,450.00	4,000.00
5.	Nai Distributors Ltd		3,950.00	3,900.00
6.	Deroso Logistics		7,850.00	7,850.00
7.	Zenith Office Expedition Solutions (K) Ltd		7,500.00	7,500.00
8.	Sato Enterprises Ltd		8,500.00	8,500.00
9.	Bayan Construction Co Ltd		4,000.00	3,900.00
10.	Pedanco General Supplies		4,650.00	4,550.00
11.	Microbit Systems Ltd		4,200.00	3,800.00
12.	Blue Waters Restaurant Ltd		6,625.00	6,625.00
13.	Golden Image Supplies Ltd		4,400.00	4,300.00
14.	Markers Consulting Ltd		4,600.00	4,800.00
15.	Seo and Sons Ltd		4,500.00	4,400.00

16.	Kiwaka General Merchants Ltd		4,300.00	4,600.00
17.	Stewany Agencies		5,620.00	5,650.00
18.	Caperina Enterprises Ltd		4,800.00	4,800.00
19.	Casids Services Ltd		4,400.00	4,400.00
20.	Northern wing General Supplies Ltd		4,200.00	4,250.00
21.	Jamarat Apartments Ltd		4,350.00	4,000.00
22.	Smart Four Holdings Ltd		5,000.00	N/Q
23.	Kagethi Investments		9,000.00/8,000.00	9,000.00/8,200.00
24.	Korbash Traders Ltd		4,000.00	3,900.00
25.	Sea Tech Ltd		5,600.00	2,500.00
26.	Nakel Investments		5,050.00	4,500.00
27.	H H J Spices & Cereals Ltd		3,700.00	3,700.00
28.	Matelink Media Services Ltd		11,000.00	12,500.00
29.	Index (EA) Commercial		No Quote	No Quote
30.	Trendy Investment Co. Ltd		4,299.00	N/Q
31.	Things of Desires		5,336.00	5,220.00
32.	Rabbix Supplies		10,950.00	12,410.00
33.	Lucitec Enterprises		5,000.00	6,500.00
34.	Sundales International Ltd		5,100.00	5,100.00
35.	Lionix Merchants Ltd		4,200.00	4,100.00
36.	Inmitec Solutions Limited		5,620.00	5,620.00

37.	Lasting Enterprises Limited		8,125.00	8,125.00
38.	Emkwen Suppliers		6,500.00	6,500.00
39.	Tanad Transporters Ltd		9,500.00	10,000.00
40.	Ends International Co. Ltd		6,000.00	7,500.00
41.	Emifag Agencies		6,000.00	6,000.00
42.	Tarena Sparkle Limited		5,000.00	N/Q
43.	Halima Gure Enterprises		3,900.00	3,800.00
44.	Master Rock Co. Limited		3,800.00	3,800.00
45.	Lukenya Green Ltd		4,490.00	4,490.00
46.	Falcon Global Logistics		4,950.00	4,400.00
47.	Impact Contractors Ltd		4,300.00	4,300.00
48.	Bimani Enterprises		5,128.00	5,128.00
49.	JMW Limited		4,000.00	N/A
50.	Winnie Florists		7,150.00	6,980.00
51.	Alpha Merchantile Limited		7,995.00	N/A
52.	Bell Atlantic Comm. Ltd		2,500.00	2,500.00
53.	Green Shamrock Ltd		7,500.00	8,500.00
54.	Six Star Enterprises		7,500.00	7,500.00
55.	Akamai Creative Ltd		4,600.00	4,500.00
56.	Miwan Holdings Limited		N/Q	3,700.00
57.	Nirav Agencies Ltd		3,900.00	3,900.00

MARKET SURVEY

5. The subject survey was conducted by the Tri-Service team of Officers and presented as tabulated here below:

S/N	Item	U/ Acc	Firms			Average Mkt Price Per 50 Kg
			Uchumi	Nakumatt	Tuskys	
1.	Rice	50kg	5,000/=	4,900/=	4,850/=	4,916/=

DOCUMENTATION

6. Fifty One (51) firms provided all the documents as specified in the Appendix to Instructions to Tenderers i.e. Bid Bond, Certificate of Incorporation/Registration, Valid Council Business Permit, Valid Tax Compliance Certificate, VAT/PIN Certificate,

7. The following Six (6) firms did not provide documents as shown below (enclosed also see the observations of the tender opening team):

Sato Enterprises, Markers Consulting Ltd , Stewany Agencies , Northern Wing, End International Co Ltd, JMW Ltd .

PHYSICAL EVALUATION

8. To ascertain the firms' potential capabilities to service the contract, a Tri- Service team of Officers conducted a Physical Evaluation on pre – determined parameters and awarded points as tabulated here below:

S/N	Firms	Line of Business	Tpt	Total	Position	Remarks
1.	Akamai Creative Ltd	30	15	45	1	Recommended
2.	Korbash Traders Ltd	30	15	45	1	Recommended
3.	HHJ Spices & Cereals Suppliers Ltd	29	15	44	3	Recommended
4.	Blue Waters Restaurant Land	29	15	44	3	Recommended
5.	Seo and Sons Ltd	29	15	44	3	Recommended
6.	Bimani Enterprises	29	15	44	3	Recommended
7.	Bell Atlantic Communication Ltd	29	15	44	3	Recommended
8.	Six Star Enterprises Ltd	28	15	43	8	Recommended

9.	Kiwaka General Merchants Ltd	28	15	43	8	Recommended
10.	Caperina Enterprises Ltd	28	15	43	8	Recommended
11.	Halima Gure Enterprises	28	15	43	8	Recommended
12.	Lukenya Greens Ltd	28	15	43	8	Recommended
13.	Impact Contractors Ltd	27	15	42	13	Recommended
14.	Nirav Agencies Ltd	27	15	42	13	Recommended
15.	Bayan Construction Co Ltd	27	15	42	13	Recommended
16.	Index (EA) Commercial Project	27	15	42	13	Recommended
17.	Tanad Transporters Ltd	27	15	42	13	Recommended
18.	Ethern Energy Solutions Ltd	26	15	41	18	Recommended
19.	Trade Circles Ltd	26	15	41	18	Recommended
20.	Deroso Logistics	26	15	41	18	Recommended
21.	Sea Tech Ltd	26	15	41	18	Recommended
22.	Zenith Office	25	15	40	22	Recommended

	Expedition Solutions Ltd					
23.	Things of Desire (K) Ltd	30	10	40	22	Recommended
24.	Green Shamrock Ltd	29	10	39	24	Recommended
25.	Pedanco General Supplies	23	15	38	25	Recommended
26.	Master Rock Company Ltd	21	15	36	26	Recommended
27.	Emifag Agencies Ltd	26	10	36	26	Recommended
28.	Lucitec Enterprises	20	15	35	28	Recommended
29.	Mate Link Media Services Ltd	25	10	35	28	Recommended
30.	Golden Image Supplies Ltd	22	10	32	30	Recommended
31.	Miwan Holdings Ltd	21	10	31	31	Recommended
32.	Winnie Flourists	20	10	30	32	Recommended
33.	Lionix Merchants Ltd	29	00	29	33	Not Recommended
34.	Yammy Products	25	00	25	34	Not Recommended

35.	Alpha Mercantile Ltd	20	05	25	34	Not Recommended
36.	Sundales International Ltd	20	00	20	36	Not Recommended
37.	Tarena Sparkle Ltd	00	00	00	37	Not Recommended

NB:

Master Rock Company Ltd and Alpha Mercantile Ltd were erroneously evaluated; the firms did not provide samples. Consequently, they were not responsive.

SAMPLES

Twenty (22) firms did not provide samples

And the results of thirty Five (35) firms who submitted their sample to ascertain the quality of rice, by KEBs for test analysis and the report is summarized as below:

S/N	Firms	Quoted price Nairobi	Quoted price Mombasa	Physical Evaluation (Points)	Parameter Tested	Remarks
1	Akamai Creative Ltd	4,600.00	4,500.00	45	9 out of 9	Pass
2.	Bell Atlantic Communication Ltd	2,500.00	2,500.00	44	9 out of 9	Pass

3.	Blue Waters Restaurant Ltd	6,625.00	6,625.00	44	9 out of 9	Pass
4.	Impact Contractors Ltd	4,300.00	4,300.00	44	9 out of 9	Pass
5.	Six Star Enterprises	7,500.00	7,500.00	43	9 out of 9	Pass
6.	Kiwaka General Merchants Ltd	4,300.00	4,600.00	43	9 out of 9	Pass
7.	Caperina Enterprises Ltd	4,800.00	4,800.00	43	9 out of 9	Pass
8,	Lukenya Green Ltd	4,490.00	4,490.00	43	9 out of 9	Pass
9.	Bayan Construction Co Ltd	4,000.00	3,900.00	42	9 out of 9	Pass
10.	Tanad Transporters Ltd	9,500.00	10,000.00	42	9 out of 9	Pass
11	Nirav Agencies Ltd	3,900.00	3,900.00	42	9 out of 9	Pass
12.	Etherm Energy Solutions Ltd	5,000.00	5,000.00	41	9 out of 9	Pass
13.	Trade Circles Ltd	3,450.00	4,000.00	41	9 out of 9	Pass
14.	Deroso Logistics	7,850.00	7,850.00	41	9 out of 9	Pass
15	Zenith Office Expedition Solutions (K) Ltd	7,500.00	7,500.00	40	9 out of 9	Pass
16.	Green Shamrock Ltd	7,500.00	8,500.00	39	9 out of 9	Pass
17.	Pedanco General	4,650.00	4,550.00	38	9 out of 9	Pass

	Supplies					
18.	Miwan Holdings Limited	N/Q	3,700.00	31	9 out of 9	Pass
19.	Golden Image Supplies Ltd	4,400.00	4,400.00	30	9 out of 9	Pass
20.	Winnie Florists	7,150.00	6,980.00	30	9 out of 9	Pass
21.	Yammy Products	4,950.00	4,850.00	25	9 out of 9	Pass
22.	Tarena Sparkle Limited	5,000.00	N/Q	N/A	9 out of 9	Pass
23.	Seo and Sons Ltd	4,500.00	4,400.00	44	7 out of 9	Pass
24.	Bimani Enterprises	5,128.00	5,128.00	44	7 out of 9	Pass
25.	Halima Gure Enterprises	3,900.00	3,800.00	43	7 out of 9	Pass
26.	Index (EA) Commercial Projects	No Quote	No Quote	42	7 out of 9	Pass
27.	Sea Tech Ltd	5,600.00	2,500.00	41	7 out of 9	Pass
38.	Things of Desires (k) Ltd	5,336.00	5,220.00	40	7 out of 9	Pass
29.	Matelink Media Services Limited	11,000.00	12,500.00	35	7 out of 9	Pass
30.	Emifag Agencies	6,000.00	6,000.00	36	7 out of 9	Pass
31.	Lucitec Enterprises	5,000.00	6,500.00	35	7 out of 9	Pass
32.	Lionix Merchants Ltd	4,200.00	4,100.00	29	7 out of 9	Pass
33.	Sundales International	5,100.00	5,100.00	20	7 out of 9	Pass

	Ltd					
34.	Korbash Traders Ltd	4,000.00	3,900.00	45	6 out of 9	Pass
35.	H H J Spices & Cereals Supplies Ltd	3,700.00	3,700.00	44	6 out of 9	Pass

BRANCH COMMENTS

The branch comments are as follows:

Bell Atlantic Communication Ltd was ranked second by the physical evaluation team and emerged the lowest responsive bidder, their quoted prices of KShs 2,500.00 for both regions is far below the average prevailing market price of KShs 4,916.70.

BRANCH RECOMMENDATION

Based on Physical evaluation, quoted, current contract prices and the prevailing market price, MTC is was requested to award the contract for the supply of Milled Rice to the Defence Forces as follows: Milled Rice;

Firm:Akamai Creative Ltd .

Region/Price: Nairobi at Kshs 4,600.00 per 50 Kg delivered.(2)

Mombasa at Kshs 4,500.00 per 50 Kg delivered

Ministerial Tender Committee

The Ministerial Tender Committee meeting No.15/15/16 held on or about 13th November, 2015 approved the award To M/s Akamai Creative Ltd Nairobi at Kshs 4,600.00 per 50 Kg delivered. (2) Mombasa at Kshs 4,500.00 per 50 Kg delivered

REVIEW

The Request for Review was been filed by M/s Trade Circles Ltd on 25th November, 2015, which was represented by the firm of M/s Nduati Charagu & Co. Advocates, in the matter of Tender No. MOD423 (0609-2015-2016) Tender for Supply of Milled Rice.

The Applicant was represented by Mr. Mark Charagu, Advocate, while the Procuring Entity was represented by Mr. Major S. C. Yator. The Interested Parties Akamai Ventures was represented by Mr. Antony Thuo, Advocate while Halima Gure Enterprises was represented by Ms. Halima Gure, Director while Korbash Traders was represented by Mr. Abdulahi Ali Director and Smart Four was represented by Joseph Mwangi, Director.

The Request the Board for the following orders:

1. *THAT pending the hearing and determination of this Review there be a stay of the respondent's decision to award the subject matter to the alleged successful bidder who did not meet the criteria laid out in the Tender.*
2. *THAT the Board be pleased to review and set aside the awarding of the Tender and Order for the awarding of the Tender to the Applicant for having met all requisite requirements.*

PRELIMINARY OBJECTION

At the commencement of the Board observed that the Successful Bidder had filed alongside its memorandum of response a preliminary objection challenging the Jurisdiction of the Board to hear the Appeal as filed was time barred by dint of regulation 73 (2) (c) of the Public Procurement and Disposal Regulations, 2006 as amended. The Board directed the parties to argue the Preliminary Objection together with the substantive issues in the interest of time.

Applicant's case

In support of its request for Appeal the Applicant raised four grounds. The Applicant submitted that it had participated in the above mentioned tender subject matter of the review and that to the best of its knowledge it had offered the lowest price for the category in issue and that its price, compared to the Successful Bidder was lower by Kshs.1, 200 for the supply of Milled rice to the Ministry of Defence.

The Applicant further submitted that it had on the 23rd day of July 2015 it presented the most competitive and/or lowest supply price per 50kg bag of Rice at Kshs. 3,450.00 and Kshs. 4,000.00 for Nairobi and Mombasa respectively, a position it observed at the tender opening as all the tender prices were read out in front of the representatives of the bidders present. Having submitted a Tender Document that was responsive to the Procuring Entity Tender Documents the Applicant further stated that despite its prices being the lowest and having attained and complied with

all the other requirements, the Procuring Entity did not award the tender to it but instead awarded the said tender to another company despite ourselves satisfying all the other technical requirements, and that the price offered by the successful tenderer was a much higher price than that offered by it.

The Procuring Entity in response stated that it awarded the tender to the lowest evaluated tenderer M/S AkamaiCreative Ltd, for Nairobi at Kshs. 4,500 per 50kg and Kshs.4, 600 for Mombasa region and that due diligence was carried out to evaluate tenders on both commercial and technical capacity before the tender award was made. The Procuring Entity state that the Applicant bid price was way below the prevailing Market prices and in any event the Applicant was not the lowest priced.

The second ground upon which the Applicant premised its Request for the Appeal was that The Applicant was yet to receive any notification as to the status of that above aforementioned tender despite it having seeking to the served with a notification of tender award and/or regret from the Procuring Entity. It was the submissions of the Applicant that on or around the 20thNovember 2015 while the director of the Applicant was visiting the offices of the Procuring Entity to sign a contract in a different category learnt from the said office that its bid had not been successful and that, accordingly a letter had been dispatched to it to this effect. On 23rdNovember 2015, the Applicant, through its Advocates M/S Nduati Charagu Advocates wrote to the Procuring Entity with a copy of the said

letter to the Public Procurement Oversight Authority inquiring into the fate of its tender, as it was yet to receive the letter of notification. Subsequently and having not yet heard from the Procuring Entity the Applicant filed this Request for Review on 25th November 2015. It was the submissions of the Applicant that to date it has not received the letter of notification from the Procuring Entity advising it of the outcome of the procurement process for the supply of milled rice. The Applicant further submitted that because it had learnt, albeit informally, that it was not successful in the category for supply of milled rice, it filed the Request for Review because in its opinion it had met all the criteria set out by the Procuring Entity in the tender document and had in its opinion offered the best price for the said tender.

The Applicant, in urging the Board to award it the tender submitted that the objectives for which the Act was enacted would be defeated if in this tender the Procuring Entity was allowed to blatantly violate the law. The Applicant referred the Board to Section 2 of the Public Procurement and Disposal Act, 2005, which sets out the objectives of public procurement as being “to maximise economy and efficiency”, and “to promote the integrity of the procurement procedures”. In its opinion, the choice in awarding this tender to a bidder whose price was higher by Kshs.1, 200 per bag of 50kg rice was a violation of these objectives and flew in the face of Article 227 of the constitution of Kenya, 2010. The Applicant therefore urged the Board to find in its favour and annul the award made by the Procuring Entity and substitute it with an order of award to the Applicant.

The Procuring Entity in response started its submission by stating that it had conducted a proper evaluation of all the tenders submitted and that a decision to award the tender to the Successful Bidder was reached on the 13th of November 2015. In its submission the Procuring Entity averred that the Applicant's bid was not the lowest evaluated bid after the evaluation process by its tender evaluation committee. It was the submissions of the Procuring Entity that although the Applicant offered a bid of Kshs.3, 450 for Mombasa and Kshs.4, 000 for Nairobi its bid was rejected because in its opinion it was lower than the prevailing Market prices for rice in the two locations. The Procuring Entity went on to inform the Board that upon completion of all the evaluation process it awarded the tender to M/ S Akamai creative limited the Request for Review at the price of Kshs. 4,000 for Mombasa and Kshs.4, 500 for Nairobi. In the opinion of the Procuring Entity and after conducting its own market survey as envisioned by Clause 2.25.1 of the Tender Document the price offered by the Applicant was way below the prevailing market prices and not sustainable. In its opinion it found the offer by the Procuring Entity more tenable as in the Procuring Entity's opinion it was near the prices offered by the institutions it visited while conducting its survey which included the Nakumatt, Uchumi, Tusksys and Naivas Supermarkets.

On the second issue of time and in joining issue with the Successful Bidder the Procuring Entity submitted that it had upon conclusion of the evaluation process on 13th November 2015 and through Notification letters

written on 16th November 2015 informed all bidders of the outcome of the evaluation. It was the submission of the Procuring Entity that the said letters were received for dispatch by its Mailing and Dispatch Department on 17th November 2015 and entered in the register on the said date. To this end the Procuring Entity produced a dispatch register with letters indicated as being posted to bidders. Arising from the said submissions the Procuring Entity stated that the appeal by the Applicant had been brought out of time by nine days. This, in the opinion of the Procuring Entity contravened the provisions of Regulation 73(2) (c) of the 2006 Regulations as amended in 2013. The Procuring Entity therefore urged the Board to find that it lacked jurisdiction to entertain the Appeal by operation of the law and to proceed and dismiss the appeal for want of jurisdiction. Overall the Procuring Entity urged the Board to find the Appeal unmerited and dismiss to allow the Procuring Entity to proceed and complete the procurement process.

There were four interested bidders who took part in these proceedings. The Successful bidder filed a memorandum of Response to the Request for Review and also raised a preliminary objection. Through its advocates, Mr. Thuo, Advocate for the Successful Bidder urged the Board to find that the Appeal had been filed out of time. It stated that it had received its letter of notification by the 18th of November 2015 through the post office advising it that it had been adjudged the Successful Bidder in the tender. Similarly, it submitted that the Applicant ought to have received its letter of notification by the said date of 18th November 2015. It was the Successful

Bidders position that the Appeal by the Applicant ought to have been filed before the Board by the 24th November 2015 as in its opinion time began to run on 18th November 2015 and that 7 days therein should have lapsed on 24th November 2015. It urged the Board to find that it lacked Jurisdiction to entertain the Appeal by operation of the law.

On the second issue as to whether the Applicant offered the lowest evaluated bidder the Successful Bidder urged the Board to find that there were other parameters against which tenders were being evaluated and having met all of them it emerged successful overall and was awarded the tender on merit. In the opinion of the Successful Bidder the reasons why it emerged the winner were

- (a) That the firm had offered the most responsive bidder with prices closer to the prevailing market
- (b) The firm is reliable having supplied the products in the past without requesting price adjustment
- (c) The firm passed in all parameters of the products tested by Kenya Bureau of Standards (KEBS)
- (d) The firm ranked first in physical evaluation.

For this reasons the Successful bidder urged the Board to uphold the award to itself and find that it was properly evaluated and dismiss the Request for Review filed by the Applicant.

Three other interested bidders made brief submissions to the Board. On her part Ms. Salima Gure of Halima Gure Enterprises submitted that during

the tender opening she was present when the prices were read out and that the Successful Bidder had not offered a bid bond. This position was also reiterated by Mr. Abdulahi Ali of Korbashe Traders. Both parties confirmed having received their letters of notification on 18th November 2015. Mr. Joseph Mwangi of Smartco E.A. Limited submitted that he was also present at the tender opening and he received the notification letter long after being notified by the Board of the existence of this case in the month of December 2015.

The Board's findings

Having heard the submissions by all the parties present and having perused the documents filed therein and the original tender documents submitted to the Board in respect of this Request for Review the Board has identified the following issues for determinations;

- 1. On the preliminary issue of jurisdiction, whether the request for Review has been brought before the Board outside the 7 days mandatory period set by Regulation 73(2)(c) of the Public Procurement and Disposal Regulations, 2006 as amended by legal Notice no. 106 of 2013 and therefore ousting the jurisdiction of the Board to entertain the Request for Review.*

Arising from the submissions of all the parties the Board notes the following;

1. That the Procuring Entity invited bidders through an open tender through advertisement notice in the Daily newspaper of 8th July, 2015.

2. The validity period for these tenders was set at 180 days from the date of tender opening.
3. The tenders closed and were opened on 23rd July, 2015. The 180 days tender validity period started running a day after opening and will lapse in 20th January, 2016.
4. The evaluation was carried in September, 2015. The Ministerial Tender Committee meeting to adjudicate on the tender MOD423 (0609-2015-2016) took place on or about the 13th November, 2015 and approved the award. Both the successful and unsuccessful bidders were notified by letters dated 16th November, 2015.
5. The Instant Request for Review was filed on 25th November, 2015.

It is the position held by the Applicant throughout this Application for Review that it is yet to receive the letter of Notification from the Procuring Entity informing it of the reasons as to why its bid was unsuccessful. Indeed the Board notes that by a letter dated 23rd November 2015 the Applicant through its Lawyers wrote to the Principal Secretary , Ministry of defence and copied the said letter to the Public Procurement Oversight Authority requesting that it be issued with a letter of Notification in order to allow it due recourse in law. This, the Board was informed, was premised on the informal findings by the Applicant that its bid was unsuccessful and had already been awarded to another bidder. During the hearing the Board was informed that all letters to the Successful Bidder and the unsuccessful bidders were done on the same date on the 16th November 2015 and that the said letters were handed over to the Internal Department

concerned with dispatch of mail at the Procuring Entity's office. The Board noted that the Procuring Entity produced a mailing register from its internal dispatch department indicating that all letters were dispatched on 17th November to the bidders. As the Board has previously held severally the onus of proof of service rests entirely with the Procuring Entity and this onus cannot be shifted to the Applicant. The Burden in proving when these letters were posted is therefore on the Procuring Entity. In times where a party alleges not to have received the mailed letter then the Procuring Entity should produce evidence to collaborate its position that it indeed it mailed the said letters. In this case the Board notes that the Procuring Entity did not produce any evidence from a third party such as a courier or even records form the Postal Corporation of Kenya to collaborate the date when these letters were dispatched. In view of the same the Board holds that this burden has not shifted and the duty to persuade the Board lay entirely upon the Procuring Entity. The Board is not persuaded that indeed these letters were dispatched on 17th November 2015 as alleged or at all that they were all dispatched on the same date. Indeed other than the Applicant the Board heard from Mr. Joseph Mwangi of Smartco E.A Ltd that he had only recently in December 2015 just received his notification letter from the Procuring Entity long after he had already been notified of the existence of the Request for Review. The Board is therefore not persuaded that service of the Notification was carried out as envisioned by Section 67 of the Act which states as follows:-

“(1) before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.

(2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.

(3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security.”

The Board therefore holds that in view of the fact the Applicant has not been served then the appeal as filed is within time and as a result therein, the Board finds it has jurisdiction to entertain the said Appeal.

Having dispensed off with the issue of Jurisdiction and the Board having held that it has jurisdiction to determine the Appeal on merit the Board will then determine the substantive Appeal. The issue that therefore emerges from the Request of Review which the Board must then determine is

“Whether the Procuring Entity was justified in rejecting the Applicant’s bid on account that is bid price for the 50kg bag of rice was unconscionable because it was below the prevailing market prices.”

The Board was informed that the Successful Bidder offer was successful because of the following reasons;

- (a) That the firm had offered the most responsive bidder with prices closer to the prevailing market
- (b) The firm is reliable having supplied the products in the past without requesting a price adjustment

- (c) The firm passed in all parameters of the products tested by Kenya Bureau of Standards(KEBS)
- (d) The firm ranked first in physical evaluation.

The Board upon on perusal of documents submitted before it observed that indeed the evaluation process was carried out in several stages which included the setting up of a Tri-Service team of officer's whose task was to contact physical Evaluation which it did on 7thSeptember, 2015 and thereafter presented the evaluation report on all the fifty six firms participated in the tender and had progressed to that stage of evaluation. These fifty six (56) firms had been subjected to the following process

I. Documentation

This stage the Board observed that mandatory documents listed in tender Documents were checked as specified in the Appendix to Instructions to Tenderers and only 51 firms qualified at this stage Applicant and Successfully Bidder included. Among those that qualified, the Applicant was one of them.

II. Physical Evaluation

At this stage all the bidders were subjected to criteria as specified in the Appendix to Instructions to Tenderers and that the Applicant together with 31 other firms were apportioned scores and recommended/approved after Physical Evaluation to proceed to the next stage. The Board noted at this stage that the Applicant was among those firms whose submitted samples which were taken to Kenya Bureau of Standards for analysis and testing. The Boards also observed that the sample offered by the Applicant passed the analysis done by KEBS and graded as being 9/9.

III. Market survey

The Board noted that after all the other evaluation stages were finalized a Tri-Service team of officer's from the Procuring Entity conducted a market survey in various Supermarkets in Nairobi the purpose of the exercise was to compare prevailing market prices of various items its. The result of survey for the price of rice was filed as per the table below:-

S/ N	Item Description	U/Acc	Uchumi	Nakumatt	Tuskys	Average Per 50kg
01	Rice	50kg	5,000	4,900	4,850	4,916.70

The Board notes that after all the stages were completed the evaluation team returned a recommendation to award the contract for supply of rice to the Ministry of Defence force as follows:-

a) Akamai Creative Ltd for Mombasa region at ksh.4, 600 per 50kg delivered.

b) M/S Akamai for Nairobi region at ksh.4, 500 per 50kg delivered.

The Board notes that the Applicant offered a bid price that was way much lower than the Successful Bidder. The Board also notes that other than the issue of pricing the Applicant had passed all the other stages of evaluation that the Procuring Entity had subjected his bid through. The Board has also noted the provisions in the Tender Document in clause provided that the award to the successful bid would be made subject to a survey on the prevailing market prices; this clause, the Board notes was vague as to how these prevailing market prices were to be determined. Common sense dictates that a bulky consumer cannot go to the high end supermarkets to carry out a prevailing price survey as these entities are driven by profit. It is also common sense that these retailers from whence the survey was conducted also purchase their goods from wholesalers in order to be able to make a profit on retail. In any event if the Survey was to be conducted from the Supermarkets in Nairobi, then nothing would have prevented the Procuring Entity from stating so in the Tender Document. The Board is not persuaded that a survey from the Supermarkets segment of the markets was objective enough to give a proper determination of the prevailing markets. A proper sample should have also included other dealers

especially those that sell the produce in bulk. Another reason offered by the Procuring Entity as to why the Successful Bidder was awarded despite other bidders offering a better and more competitive bid was the fact that he was the existing supplier and therefore had proven to be reliable in the previous contract. The Board finds that this reason was used to lock out potential bidders who would have supplied the produce at competitive rates but since they had not dealt with the Procuring Entity previously were denied an opportunity to prove themselves. In any event this reason adduced by the Procuring Entity was not part of the evaluation criteria set out in the tender document. To introduce the same at evaluation and award a bidder on basis of previous experience with the Procuring Entity is to defeat the purpose for which this law was set. Section 2 of the Act sets out the objective for which the Act was established;

2. *The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives —*
 - (a) to maximise economy and efficiency;*
 - (b) to promote competition and ensure that competitors are treated fairly;*
 - (c) to promote the integrity and fairness of those procedures;*
 - (d) to increase transparency and accountability in those procedures; and*
 - (e) to increase public confidence in those procedures.*
 - (f) to facilitate the promotion of local industry and economic development.*

If Procuring Entities are therefore allowed to only deal with bidders with whom they have dealt with before is to defeat the objective of the law. It is also a contravention of Article 227 of the constitution which provides that;

Article 227(1); Procurement of public goods and services

“When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”

Overall and arising from the above findings the Board finds and holds that the Procuring Entity erred in rejecting the Applicant’s bid on account that it offered a price lower than what it considered *“prevailing market rates”*. This holding was arrived as a result of a misinformation by the Procuring Entity on what consisted a proper sample to determine market rates for the commodity it sought to procure.

In view of the findings of the Board in the above issues and for reasons adduced therein the Board finds the Request for Review by the Applicant has merit and will allow it.

The Board’s Final orders

In conclusion therefore and in exercise of the powers conferred upon it by provisions of Section 98 of the Act, the Board makes the following orders;

- a) **The Request for Review by the Applicant , M/S Trade Circles Limited, in respect of Tender Number; MOD/423(0609-2015-2016)**

For supply of Milled Rice filed before the Board on 25th November 2015 be and is hereby allowed

- b) The award by the Procuring Entity of the said Tender No. MOD/423(0609-2015-2016) to M/S Akamai Creative Limited is set aside and nullified.
- c) Pursuant to Section 98 (b) of the Public Procurement and Disposal Act, 2005, the Board directs that the Procuring Entity to award said Tender Number MOD/423(0609-2015-2016) to the Applicant, M/S Trade Circles Limited at the tender price of Kshs. 3,450 for Nairobi region and Kshs.4, 000 for Mombasa region for a 50kg bag of Milled rice respectively.
- d) That the Procuring Entity is directed to proceed and conclude the procurement process with the Applicant forthwith but not later than fourteen(14) days from the date of the ruling herein.
- e) THAT the Board makes no orders as to costs.

Dated at Nairobi on this 15th day of December, 2015.


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CHAIRMAN

PPARB


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SECRETARY

PPARB

