

REPUBLIC OF KENYA  
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD  
APPLICATION NO. 33/2015 OF 7th JULY, 2015

BETWEEN

FRONTIER ENGINEERING LIMITED.....Applicant

AND

MARSABIT COUNTY GOVERNMENT.....Procuring Entity

The Review against the decision of Marsabit County Government in the matter of Tender No. MBT/COU/WATER/112/2014-15 for the construction of Sasala water pan at Forolle.

BOARD MEMBERS PRESENT

- |                               |            |
|-------------------------------|------------|
| 1. Mr. Paul Gicheru           | - Chairman |
| 2. Mrs. Josephine W. Mong'are | - Member   |
| 3. Mr. Nelson Orgut           | - Member   |
| 4. Mrs. Rosemary K. Gituma    | - Member   |

IN ATTENDANCE

- |                       |               |
|-----------------------|---------------|
| 1. Mr. Stanley Miheso | - Secretariat |
| 2. Ms. Shelmith Miano | - Secretariat |

## PRESENT BY INVITATION

### **Applicant - FRONTIER ENGINEERING LIMITED**

1. Alex Masika - Advocate
  2. Akelola Drammen - Advocate
  3. Ismail Adan - Director Frontier Engineering Ltd
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### **Procuring Entity - MARSABIT COUNTY GOVERNMENT**

1. GodanaYatani - Advocate
2. Yaltani Halakhe - Supplies Manager,
3. Joseph Mirgichan - Director
4. Hussein Alinoor - Chief Officer, Finance
5. Molu Huqa - Chief Officer, Roads

### **Interested Parties**

1. RobaAbkul - Operations Manager Dikus Transporters Ltd
2. Jumal Edin - Director, Hilah Construction Co. Ltd
3. Ibrahim Adano - Director Salsabil Construction Ltd
4. Mohamed Said - Operation Manager, Ordofa Construction Ld

## BOARD'S DECISION

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

## BACKGROUND OF AWARD

The tender was advertised in the local dailies on 29<sup>th</sup>May, 2015. Nine firms bought tender documents.

The opening was held on 17<sup>th</sup>June, 2015. Four bidders responded.

The tenders were opened in the presence of tenderers and/or their representatives.

## EVALUATION

The tender was evaluated in three stages i.e.

1. Tender responsiveness
2. Technical analysis
3. Financial analysis

## TENDER RESPONSIVENESS

In accordance with the requirements of the conditions of tendering under Clause 23.1, 23.3 and 23.4 only substantially responsive tenders were to be subjected to detailed evaluation.

The mandatory evaluation results were as follows:-

Bidder Name	NCA Reg	Official RCPT	Tax Compl	Bid Bond	PIN	Cert of Reg./In corp.	Site Visit	R/NR
M/s Dikus Transporter	YES	YES	YES	YES	YES	YES	YES	R
M/s Wotech Kenya Ltd	YES	YES	YES	YES	YES	YES	YES	R
M/s Pioneer Engineering	YES	YES	YES	YES	YES	YES	YES	R
M/s Frontier Engineering	YES	YES	YES	YES	YES	YES	YES	R

For purposes of determining responsiveness, the technical evaluation committee set the minimum requirements for responsiveness as:-

1. Within plus or minus 15% of the Engineer's estimate
2. Any other two from the following:-
  - a. Class of registration
  - b. Official receipt
  - c. Tax compliance

d. Certificate of incorporation

e. Bidders visit to the site

Bidder Name	Fully filled confidential business questionnaire	Fully filled bills of quantities	+/- 15% Engineers Estimate	Fully filled tender questionnaire	Fully filled forms of tender
M/s Dikus Transporter	YES	YES	YES	YES	YES
M/s Wotech Kenya Ltd	YES	YES	NO	YES	YES
M/s Pioneer Engineering	YES	YES	NO	YES	YES
M/s Frontier Engineering	YES	YES	YES	YES	YES

The responsive bidders were further evaluated.

#### COMBINED SCORE

The technical analysis were allocated 50% of the total score

The committee scored the combined technical and financial analysis as follows:-

	Bidder Name	Technical Score	Financial Score	Total/combined score
1	M/s Dikus Transporter	62%	18%	80%
2	M/s Frontier Engineering	49%	29%	78%

#### REQUEST FOR REVIEW NO. 33/2015

The Request for Review was lodged by M/s Frontier Engineering Limited on 7<sup>th</sup> July, 2015 in the matter of the tender for the Construction of the Sasala Water Pan at Forolle.

The Applicant sought for the following orders:

1. *Annul in whole the decision of the tender committee of the Procuring Entity.*
2. *The procuring entity to re-tender.*
3. *The Procuring Entity be condemned to pay Costs of this Request for Review to the Applicant.*

The Applicant raised five grounds in support of the Request for Review namely:

1. *The tender committee of the Procuring Entity acted in breach of Regulation 67(2) of PPDA, 2005 as read together with Regulation 66 of the PPD Regulations 2006 (as amended) and Clause 28.2 of the Tender Document by proceeding to award the tender to the successful tenderer without simultaneously notifying the Applicant of the outcome of the tender. The Applicant states that it has not received any proper or valid notification letter from the Procuring Entity to-date.*
2. *That despite complying with all the mandatory requirements of the tender, including specific eligibility and qualifications requirements of the tender, the Procuring Entity acted in breach of Section 64 of PPDA, 2005, as read together with Regulation 48 of the PPD Regulations 2006 (as amended) and Clause 23.2 of the Tender Document for failing to find the Applicant's tender was responsive and conformed to all the mandatory requirements and as a consequence whereof the Applicant was unfairly evaluated and wrongfully disqualified at the Financial evaluation stage.*

3. *That the tender committee of the Procuring Entity acted in breach of Section 52(3(i) of PPDA, 2005 as read together with Regulation 38 of the PPD Regulations 2006 (as amended) for failing to set concisely and with precision the procedures and criteria to be employed in the evaluation and comparison of tenders. As a consequence whereof the tender was devoid of competitiveness and open for abuse resulting in the tender being unfairly evaluated and wrongfully awarded to one of the Applicant's competitors.*
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4. *That the entire process largely lacked transparency contrary to Section 2 of the PPDA, 2005 as the entire tender was unfairly evaluated and the tender process conducted in secrecy without promotion of integrity and fairness in the procedure. Furthermore, the tender was awarded to M/s Dikus Transporters Ltd who were in any event NOT the lowest evaluated bidders in terms of price and as a consequence whereof the Procuring Entity acted in breach of the salient provisions of Section 64(4) of the PPDA, 2005.*
5. *As a result of the Procuring Entity's actions, the Applicant is bound to suffer loss and damage that include:*
- i) Loss of profit it would have made from the tender not forgetting the benefits that could have accrued to the Procuring Entity and the public in terms of quality construction works in question and at a competitive price*
  - ii) Loss of earnings it could have accrued from this contract as the same has been unfairly awarded to a competitor*

- iii) It has been unfairly denied an opportunity of undertaking the contract and probably at a reasonable minimum cost*
- iv) It has expended considerable amounts of money towards preparing and making itself ready for the entire tendering process*

Before proceeding to consider the parties arguments in this matter, the Board wishes to observe that the Applicant filed a consolidated notice of Preliminary Objection in Review application numbers 33, 34 and 35 but the Board directed that the said points of Preliminary objective be heard as part of the main Request for Review when the application came up for hearing.

The parties therefore proceeded to argue their respective cases in the light of the above directions.

### THE APPLICANT'S CASE

Mr. Alex Masika who appeared in these proceedings on behalf of the Applicant stated that the Applicant had information that the award of the subject tender had been made to the successful on 30<sup>th</sup> June 2015 and realizing that it had not been served with a letter of Notification in accordance with Section 67 of the Act, the Applicant proceeded to file this Request for Review on 7<sup>th</sup> July 2015. Mr. Masika submitted that he had noted from the Procuring Entity's response to the Request for Review that the Procuring Entity had annexed a letter of notification

dated 26<sup>th</sup> June 2015 to its response to the Request for Review but he stated that he had examined the letter contained in the response and had found that the format of the one sent to the successful bidder was different in form from that addressed to the Applicant. Counsel for the Applicant however submitted that his client was not served with the letter of notification and that the failure to serve the Applicant with the letter of notification was in clear breach of the Provisions of clause 28.2 of the tender document on "Notification of Award" which states as follows:-

*"At the same time that the Employer notifies the successful tenderer that his tender has been accepted, the Employer shall notify the other tenderers that their tenders have been unsuccessful".*

Mr. Masika went on to submit that the Department of Water Environment and Natural Resources had purportedly gone ahead to sign a contract dated 13<sup>th</sup> July, 2015 with the successful bidder contrary to the Provisions of Section 68 of the Act. He further contented that the Applicant had complied with all the specific requirements and qualifications for the award of the tender and had returned the most responsive bid in terms of price. He faulted the Procuring Entity for breaching the Provisions of Section 64 of the Act as read together with Regulation 48. He asserted that the evaluation criteria was not precisely set out in the tender document and thereby resulting in the process lacking competitiveness and fairness among competitors since there was



no precise criteria on the basis of which the competitors in this tender could be evaluated and weighted.

Counsel for the Applicant further submitted that the Procuring Entity had awarded the subject tender to a bidder namely M/s Dikus Transporters Limited which had offered a higher price than the Applicant in violation of the Provisions of Section 66(4) of the Act.

Mr. Masika concluded his submissions by asking the Board to grant the prayers set out in the Request for Review.

In response to the submissions by Counsel for the Applicant, Mr Godana Yatani, the Legal Services Director of the County Government of Marsabit who appeared on behalf of the Procuring Entity, opposed the Applicant's application and stated that the difference in the format of the Notification letter dated 26<sup>th</sup> June, 2015 addressed to both the successful bidder and the unsuccessful bidders was immaterial. He stated that that the Procuring Entity had sent out letters of regret to the other bidders including the Applicant and was certain that those letters had been received and could not understand what could have prevented the Applicant from receiving it's letter. He however alleged that the letters were sent to all the bidders by ordinary post and not by registered post as required by the Provisions of clause 28.1 of the tender document which states as follows:-

*"prior to the expiration of the period of tender validity prescribed by the Employer, the Employer will notify the successful tenderer*

*by cable, telefax or telex and confirmed in writing by registered letter that the his tender has been accepted.....”* and it goes on to state in clause 28.2 how the unsuccessful tenderers would be similarly notified.

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As regards the legality of the signed contract, Mr Godana, stated that the moment notifications had gone out, the Procuring Entity had the discretion to enter into a contract with the successful bidder within 14 days. He stated that the Procuring Entity received the notification regarding the filing of this Request for Review on 15<sup>th</sup> July, 2015 and that the contract was signed after the requisite 14 days window within which any Request for Review against the award should have been lodged. He therefore reiterated that the contract was signed in accordance with the provisions of the law and that the Board did not therefore have jurisdiction to hear and determine the Request for Review under Section 93(2) (c) of the Act, the moment the successful bidder and the Procuring Entity enter into a contract. Reacting to an inquiry from the Board on whether the Provisions of Section 68 of the Act were applicable where all the bidders had not been duly notified, Mr Yatani stated that as far as the Procuring Entity was concerned, all the bidders except the Applicant had confirmed receipt their letters of notification and he could not understand why the Applicant had not.

On the question of the existence of an award criteria, Mr Yatani referred the Board to the minutes of the tender evaluation committee signed on 24<sup>th</sup> June, 2015 which he reckoned were self explanatory in terms of the stages that all the bidders were to be subjected to in order to determine

the most responsive bid. He stated that this tender was evaluated at the Preliminary, technical and the financial stages to determine the issue of its responsiveness to the mandatory requirements and compliance with the technical and the financial requirements. He further submitted that some of the mandatory requirements were outlined in the advertisement notice and that bidders were subjected to the said requirements. As to whether the tender had been awarded to the lowest evaluated bidder, Mr Yatani maintained that the term the lowest evaluated bidder and the lowest price quoted were two different things. He however confirmed that this was an open tender and that bidders were to be assessed according to the criteria as set by the tender committee.

Counsel for the Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review with costs.

In reply to the submissions made by Counsel for the Procuring Entity, Mr. Masika for the Applicant referred the Board to the Provisions of Regulation 77 of the Public Procurement and Disposal Regulations 2006 which requires that a Preliminary Objection to be filed within 5 days from the date of notification of the filing of a Request for Review with the Board. He pointed out that the Preliminary Objection was filed on 21<sup>st</sup> July, 2015 and even if it were to assumed that the Procuring Entity got to know about the Request for Review on 15<sup>th</sup> July, 2015, the Preliminary Objection should have at the very least been filed by 20<sup>th</sup> July, 2015. Mr. Masika stated that a letter from the Secretariat was dispatched to parties the moment the Request for Review was filed on 7<sup>th</sup> July, 2015 and it is inconceivable that it took up to 15<sup>th</sup> July, 2015 for

the Procuring Entity to be aware of the filing of the Request for Review. He added that the Procuring Entity had not discharged the burden of proving the manner in which it had served the letter of notification on the Applicant. ~~Mr Masika concluded his response by stating that the~~ signed contract could only stand if there was evidence to show that the Applicant had been duly notified and referred the Board to the case **Betech Contractors versus The Tender Committee of Mogotio District (PPARB No. 42 of 2010)** in which the Board held that where a contract had not been signed in accordance with the Provisions of the Act, then the Board has the jurisdiction to hear the matter. On the issue of the appeal being filed out of time, Mr Masika maintained that, in the absence of evidence that the letter of notification had been served on the Applicant by the Procuring Entity, the time for the filing of the Request for Review could only start running from the date when the Applicant was notified of the outcome of it's tender and that therefore the Request for Review was properly before the Board.

#### **THE DECISION OF THE BOARD**

The Board has heard the submissions made by the parties and has additionally read the documents filed by the parties in support of and in opposition to this Request for Review. The Board has framed the following issues for determination based on the notice of Preliminary Objection and the Request for Review:-

1. **Whether the Request for Review had been filed out of time thereby depriving the Board of the jurisdiction to hear it.**

2. Whether the contract signed on 13<sup>th</sup> July, 2015 between the Procuring Entity and Dikus Transporters Ltd, the successful bidder herein was done in accordance with the law and whether the Board has jurisdiction to hear the Request for Review under the Provisions of Section 93 (2) (c) of the Act.
3. Whether the tender document contained any criteria for evaluation and whether all the bidders were treated fairly and competitively in accordance with the Provisions of the Act.
4. Whether the tender was awarded to the lowest evaluated bidder in accordance with the provisions of Section 66(4) of the Act.

The Board will now proceed to determine each issue and pronounce its findings.

#### ISSUE NO. 1

Whether the Request for Review had been filed out of time thereby depriving the Board of the jurisdiction to hear it.

In order to determine whether the Board has jurisdiction to hear the Request for Review as filed, it is necessary to establish the factual issue of when the Applicant was notified that it's tender was unsuccessful and when the legal time for the filling of the Request for Review started running in order to determine whether the Request for Review was filed within or out of time.

The Board has examined the notification letter dated 26<sup>th</sup> June, 2015 addressed to the successful Bidder, M/S Dikus Transporter, P.O Box 51687-00200 Nairobi titled Notification of Award for Tender No. MBI/COU/WATER/112/2014-15 Construction of medium level dam at

Sasala. The tender sum was stated as Ksh 33,962, 800 and the letter was signed by one Y. Halakhe, the S.C.M.O Marsabet County. Receipt of the letter was acknowledged by one Roba Abkul, the COO of Dikus Transporters Ltd by a letter dated 29<sup>th</sup> June 2015 addressed to the Procurement Officer, Marsabit County, confirming acceptance of the offer as per the conditions of the contract.

The Board has also looked at other letters titled "Regret Letter" addressed to M/s Pioneer Engineering & Construction Ltd P.O. Box 101556-00101 Nairobi, Wotech Kenya Ltd P.O. Box 14837- 00800 Nairobi and Frontier Engineering Ltd P.O. Box 71227-00622 Nairobi all dated 26<sup>th</sup> June 2015. There is nothing in the documents submitted to the Board to show that any of the recipients acknowledged receipt of any of the letters despite the Procuring Entity's Counsel's assertion during his submissions that "all the Bidders that received the regret letters acknowledged receipt of the letters except the Applicant".

Under the Provisions of Clauses 28.1 and 28.2, at page 20 of the tender document, the said clause specifically states *as follows:-*

*"the Employer will notify the successful tenderer by cable, telefax or telex and confirmed in writing by registered letter that his tender has been accepted .....".* And in clause 28.2 it states that *"at the same time that the Employer notifies the successful tenderer that his tender has been accepted, the Employer shall notify the other tenderers that their tenders have been unsuccessful."*

The Applicant in his submissions stated that he learnt that the tender had been awarded on 30<sup>th</sup> June, 2015. This is significant if one considers that the successful Bidder happens to have acknowledged the acceptance of the offer on 29<sup>th</sup> June, 2015 by actually writing officially to the Procuring Entity. The Procuring Entity did not however provide any evidence of service in the form of a cable, telefax, telex or a certificate of service by registered post to demonstrate that it effected service of the notification on the unsuccessful bidders including the Applicant in terms of clause 28.2 of the tender document.

In the absence of any evidence of service of the letter of notification upon the Applicant, the Board finds that the Procuring Entity did not effect service of the notification on the Applicant and that this Request for Review was filed within time and is competently before the Board.

This ground of the Applicant's Request for Review therefore fails and is accordingly dismissed.

## ISSUE NO 2

Whether the contract signed on 13<sup>th</sup> July, 2015 between the Procuring Entity and Dikus Transporters Ltd, the successful bidder herein was done in accordance with the law and whether the Board has jurisdiction to hear the Request for Review under the Provisions of Section 93 (2) (c) of the Act.

The second issue, just like the first one, is largely hinged on the issue of notification. If notification is taken as having not been served the

Procuring Entity would have no basis to sign a contract with the successful Bidder.

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Section 68(2) of the Act provides that *"The written contract shall be entered into within the period specified in the notification under Section 67(1) but not until at least fourteen days have elapsed following the giving of that notification."*

Section 67(1) provides that *"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."* And Section 67(2) provides that *"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."*

The foregoing therefore means that where the Provisions of Sections 67(1) and 67(2) have not been complied with, a contract cannot be deemed to have been properly entered into under the Provisions of Section 68(2) of the Act.

The Board has previously held so in various cases including the case of **Betech Contractors - vs- The Tender Committee of Mogotio District PPRBA No. 42 of 2010** relied upon by Counsel for the Applicant.

The Board has further looked at the form of contract dated 13<sup>th</sup> July, 2015 which was entered into between the successful bidder and the Procuring Entity against the contents of the tender documents and finds that whereas the Procuring Entity as per the tender document is the County



Government of Marsabit, the purported agreement was entered into between the Department of Water Environment and Natural resources and the successful bidder.

The said department was not the Procuring Entity for the purposes of this tender and any agreement could only have been entered into between the Procuring Entity which is a County Government with the capacity to enter into contracts in it's own name.

The Board further wishes to state that once an order of stay of any further procurement proceedings is issued by the Board no contract can lawfully be entered in regard to the subject procurement and it therefore follows that the contract purportedly entered into between the successful bidder and the Procuring Entity cannot take away the jurisdiction of the Board to hear and determine this matter.

It follows therefore that the contract signed between the Department of Water, Environment and Natural Resources and M/s Dikus Transporter Ltd of P.O Box 51687 -00200 Nairobi in the matter of tender No. MBI/COU/WATER/112/2014-15 Construction of medium level dam at Sasala for the tender sum of Ksh 33,962, 800 is hereby annulled.

Consequently the second point of the Procuring Entity's Preliminary Objection is similarly dismissed.

### ISSUE NO. 3

Whether the tender document contained any criteria for evaluation and whether all the bidders were treated fairly and competitively in accordance with the Provisions of the Act

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The Board has carefully looked at the tender document prepared by the Procuring Entity for the purposes of this Procurement and wishes to observe as follows:-

Sub-clause 2.1(Eligibility requirements) at page 6 of the tender document provides as follows: *"This invitation to tender is open to all tenderers who are qualified as stated in the appendix at page 22 of the tender document.*

Page 17 of the tender document under clause 23(Determination of Responsiveness) sets out how the determination of the most responsive tender was to be carried out. Instead of using the tender document to evaluate the tenders, the tender evaluation committee came up with a separate evaluation titled **"County Government of Marsabit - Evaluation Report"** with clauses 1-5 purporting to set out the parameters for evaluation. The tender evaluation committee went a head to use the evaluation criteria they themselves had set up in determining the issue of responsiveness and awarded various marks to various bidders. The tender evaluation committee then went ahead to use this to determine the winning Bidder and submitted the results to the Chairman of the tender committee for award. In addition, contrary to the criteria for award under an open tender, the tender processing

committee combined the scores from technical and financial evaluation to arrive at the winning bidder. Although the Technical score of the Applicant was given as 49% compared with the winning Bidder's score of 62% there is nothing to indicate that the Applicant had failed to achieve the required minimum score required to proceed to financial evaluation. When it came to the results of financial evaluation, the Applicant is scored at 29% against the winning Bidder's 18% and both scores were combined in order to arrive at the winning bidder. All this criteria was not contained in the tender document but was developed by the tender evaluation committee contrary to the Provisions of Section 66(2) of the Act which states as follows:-

*"The evaluation and comparison of tenders shall be done using the procedures and the criteria set out in the tender documents and no other criteria shall be used."*

The Board wishes to state that a tender evaluation committee cannot by virtue of the Provisions of Sections 34, 52 and 66 of The Public Procurement and Disposal Act 2005 come up with an evaluation criteria under the said Provisions. It is only the Procuring Entity that is empowered to prepare a tender document containing the evaluation criteria which must be clearly set out in the tender document. Upon the preparation of the tender document, the tender evaluation committee must then strictly comply with the criteria in the tender document but not come up with a criteria of their own and then evaluate tenders on the basis of such a criteria.

The Board has severally held that a Procuring Entity can only evaluate tenders based on the evaluation criteria set out in the tender document and no other criteria should be used.

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In the case of *Richardson Company Ltd -vs- The Registrar of the High Court of Kenya (2008 - 2010 PPRB)* at page 232 the Board held as follows:-

“He Board has examined the tender documents and noted that the financial evaluation parameters were not set out in the Tender Documents. At the hearing, the Procuring Entity stated that those parameters are set out in the International Financial Reporting Standards (IFRS). However the tender documents did not provide that those parameters or the IFRS would apply. As the Board held severally, a Procuring Entity can only use the criteria set out in the Tender Document for Evaluation. This is clearly stated in Section 66(2) of the Act”.

The High Court has further held in the case of *JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Price Enterprises -vs- the Public Procurement Administrative Review Board (Judicial Review No. 137 of 2015)* that where the Board finds that there was a problem in the tender document, it ought to direct the Procuring Entity to retender.

As the Board has observed above, the tender document in this tender did not contain a criteria for the technical evaluation of bidders setting

out how the marks for each item would be awarded. The tender processing committee instead opted to come up with its own criteria which was not contained in the tender document.

In view of the above glaring shortcomings, the Board has no option but to allow this ground of the Applicant's Request for Review.

#### ISSUE NO. 4

Whether the tender was awarded to the lowest evaluated bidder in accordance with the provisions of Section 66(4) of the Act.

Section 66(4) of the Public Procurement and Disposal Act 2005 provides that for the purposes of an open tender, *"The successful tender shall be the tender with the lowest evaluated price."* By failing to observe the requirement of Section 66(2) of the Act, it follows that Section 66(4) was also violated in equal measure.

The Board has observed from the evaluation report that whereas the Applicant offered a tender price of Kshs. 30,216,565, the successful bidder was awarded the subject tender at the higher price of Kshs. 33,962,480 which was contrary to the express provisions of Section 66(4) of the Act since the successful bidder was not the lowest bidder. Contrary to the submissions made by Counsel for the Procuring Entity, all the two bidders proceeded for technical and financial evaluation. There is therefore no question that the applicant's bid was also subjected to financial evaluation.

A perusal of Clause 27.1 of the tender document for this tender further shows that the Procuring Entity had set out the award criteria for this tender in the following terms:-

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***Award criteria***

*27.1"Subject to sub-clause 27.2, the Employer will award the contract to the tenderer whose tender is determined to be substantially responsive to the tender documents and who has offered the lowest evaluated tender price subject to possessing the capability and resources to effectively carry out the contract works as required in sub-clause 2.1 and 2.2 hereinabove;"*

It is abundantly clear from the above Clause of the tender document that the award of the tender was to be made to the lowest evaluated bidder in terms of price and the Board therefore wonders how the Procuring Entity awarded the tender to the tenderer who had offered the higher evaluated price.

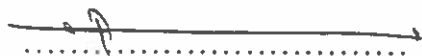
This ground of the Applicant's Request for therefore also succeeds and is allowed.

**THE FINAL ORDERS OF THE BOARD**

In view of all the above findings and in the exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board makes the following orders:

1. The Request for Review filed by the Applicant on 7<sup>th</sup> July 2015 in respect of Tender No. MBT/COU/WATER/112/2014-15 is hereby allowed.
2. The award of the subject tender to M/s Dikus Transporters Ltd together with the entire procurement process herein is hereby annulled.
3. The Procuring Entity is directed to retender afresh for the subject project on the basis of a tender document that clearly sets out the evaluation criteria and how the said criteria is to be evaluated.
4. THAT the Procuring Entity shall retender and complete the entire Procurement process including the making of an award within a period of 30 days from the date hereof and shall supply the secretary of the Board with the evidence of compliance with this order at the expiry of the said period of Thirty (30) days.
5. In view of the orders made above each party shall bear it's costs of this Request for Review.

Dated at Nairobi on this 28<sup>th</sup> day of July, 2015



CHAIRMAN  
PPARB



SECRETARY  
PPARB



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