

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 30/2015 OF 30TH JUNE, 2015

BETWEEN

NOBLE GASES INTERNATIONAL LIMITED.....Applicant

AND

KENYATTA NATIONAL HOSPITAL.....Procuring Entity

Review against the decision of Kenyatta National Hospital in the Matter of Tender No. KNH/T/18/2015-2016 for Supply and Delivery of Medical Gases

BOARD MEMBERS PRESENT

- | | |
|---------------------|------------|
| 1. Mr. Paul Gicheru | - Chairman |
| 2. Mr. Hussein Were | - Member |
| 3. Mr. Nelson Orgut | - Member |
| 4. Mrs. Gilda Odera | - Member |

IN ATTENDANCE

- | | |
|-----------------------|---------------|
| 1. Mr. Stanley Miheso | - Secretariat |
| 2. Ms. Maureen Namadi | - Secretariat |

PRESENT BY INVITATION

Applicant - Noble Gases International Limited

1. Sarah Okimaru - Advocate

2. Nick Omari - Advocate
3. Howard - Advocate

Procuring Entity - Kenyatta National Hospital

1. Tollo Mududa - Advocate
2. Jessica Oluoca - Advocate
3. Ordril Monica - Pupil
4. Simon Waithaka - Staff
5. Calvin Nyachoti - Staff

Interested Party

1. Nazima Malik - Advocate
2. Zulekha Amin - Trainee Advocate
3. Mark Kotonya - Trainee Advocate
4. Malia Msiika - Managing Director.
5. Brian Simiyu - Manager

BOARD'S DECISION

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

BACKGROUND OF AWARD

This was an open tender that was advertised in the *Daily Nation* newspaper of 7th and 8th May, 2015. The opening was held on 20th May, 2015. Two bidders responded. The tenders were opened in the presence of tenderers and/or their representatives.

TENDER EVALUATION

The Tender Evaluation/Processing Committee carried out the evaluation of the submitted tenders in three stages namely the preliminary technical and financial evaluation.

Preliminary Evaluation

The preliminary evaluation was to determine proof of supply of the following:

- a) Supply of two tender documents securely bound and clearly marked 'original' and 'copy'.
- b) Tender form duly completed and signed.
- c) Original Bid Bond provided and valid for 150 days from the date of tender opening with the value of the bid bond being 1% of the total bid amount inclusive of all the taxes and duties.
- d) A business questionnaire duly completed.
- e) A copy of a Tax Compliance Certificate/exemption certificate.
- f) A Certificate of Incorporation/evidence of registration whichever is applicable.

Two (2) bids were presented for evaluation. One bidder passed and one was found to be non-responsive at the preliminary evaluation stage as shown in the table below:

No	Bidder Name	a	b	c	d	e	f	Score	Remarks
1	BOC Kenya Limited	√	√	√	√	√	√	6/6	Pass
2	Noble Gases International Ltd	√	√	X	√	√	√	5/6	Fail

The evaluation committee made the following observations upon the Preliminary Evaluation of bidder number 2.

- A copy of the Tax Compliance Certificate was loosely attached
- The Bid Bond attached was for M/s Noble Gases Ltd and not for M/s Noble Gases International Ltd.

The only bidder M/s Boc Kenya Limited which met the mandatory requirements at the preliminary evaluation stage proceeded to the next stage of technical evaluation.

Technical Evaluation

The bidder was evaluated on the basis of the requirements on responsiveness based on the following criteria:

1)	The successful bidder for liquid oxygen must provide a 10,000 liters storage tank at no extra charges
2)	The Successful bidder should charge for contents <u>ONLY</u> for the product in cylinders with no rental fees for the cylinders.

The committee further recommended the inclusion under technical evaluation of various technical items when developing the evaluation criteria for future tenders.

Financial Evaluation

The financial evaluation involved the following:

- a) Determination of the evaluated price for each bid using the following:
 - i) Check for any arithmetic errors in the Tender;
 - ii) Conversion of all tender prices to same currency using a uniform exchange rate prevailing at the closing date of the tender;
 - iii) Application of any discount/discounts offered on the tender
- b) Ranking of Tenders according to their evaluated prices.

Only one bidder made it to the Financial Evaluation stage. The Tender Processing Committee made several observations on this tender at this stage.

An analysis of the variances in the total prices of the tender items was done as tabulated below.

Item	Unit of Issue	BOC	TPC	Variance
Nitrous Oxide	Cyl.16560	15,950,000	15,950,000	0
Medical Oxygen	Cyl.11.36 m3	1,091,328	1,091,328	0
Medical Liquid Oxygen	Litres	75,098,400	75,098,400	2,400
Dissolved Acetylene	Cyl 7.9 m3	139,084	139,084	0
Industrial Oxygen	Cyl. 8.5m3	60,552	60,552	0
Compressed Air	Cyl. 8.5m3	60,552	60,552	0
Carbon Dioxide	Cyl.2kg	464,000	464,000	0
Carbon Dioxide	Cyl. 22kg	93,960	93,960	0
Nitrous Oxide	Cyl. 900	153,120	153,120	0
Medical Oxygen	Cyl.11.36m3	44,892	44,892	0
TOTAL		93,155,888	93,153,488	2,400

Additionally, the committee recommended that the hospital should buy a Weighing scale for measuring the weight of medical gases, specifically cylinders at delivery.

Financial Analysis for the bidder was carried out and given below:

Item Description	Unit of Issue	Qty Required	Unit Price	Total Price (Kshs)
Nitrous Oxide	Cyl. 16560	1100	14,500.00	15,950,000
Medical Oxygen	Cyl. 11.36m3	1920	568.40	1,091,328
Medical Liquid Oxygen	Litres	1,200,000	62.58	75,096,000
Dissolved Acetylene	Cyl. 7.9m3	20	6,954.20	139,084
Industrial Oxygen	Cyl. 8.5m3	36	1,682.00	60,552
Compressed Air	Cyl. 8.5m3	36	1,682.00	60,552
Carbon Dioxide	Cyl. 2kg	200	2,320.00	464,000
Carbon Dioxide	Cyl. 22kg	6	15,660.00	93,960
Nitrous Oxide	Cyl. 900	60	2,552.00	153,120
Medical Oxygen	Cyl. 11.36m3	10	44,892.00	44,892
Total				93,153,488

The Tender Processing Committee recommended the award of the tender to the only bidder which passed the preliminary evaluation stage and proceeded both to the technical and the financial evaluation stages namely M/s Boc Kenya Limited.

THE TENDER COMMITTEE'S DECISION

The Tender Committee, at its meeting number 49/2014-2015 held on 16th June, 2015 approved the recommendation of the Tender Processing Committee and awarded tender No. KNH/18/2014-2015 for Supply and Delivery of Medical Gases to the only responsive bidder, Messrs BOC Gases Kenya Limited at the price quoted in their tender.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Noble Gases International Limited (hereinafter "the Applicant") of P. O. Box 43863 – 00100, email jnyotta@gmail.com, Nairobi on 30th June, 2015 and was amended on 16th July, 2015. The Request for Review was against the decision of the Kenyatta National Hospital (hereinafter referred to as the "Procuring Entity") in the matter of Tender No KNH/18/2014-2015 for the Supply and Delivery of Medical Gases.

The Applicant sought for the following orders:

- 1. The entire decision of the Procuring Entity contained in the letter dated 16th June 2015 and received by the Applicant on 23rd June 2015 in the matter of the request for proposal for the TENDER NO. KNH/T/18/2015-2016 be annulled;*

2. *The aforesaid decision be substituted with a finding that the bid by the Applicant was substantially responsive and the same be evaluated and considered by the procuring entity;*
- ~~3. *The tender be awarded to the Applicant and/or in the alternative, the procuring entity re-tenders in accordance with the Laws of Kenya;*~~
4. *The Procuring Entity be condemned to pay the Costs of this Request for Review.*

The Applicant raised fourteen grounds in support of the request for review.

During the hearing of the Request for Review, the Applicant was represented by M/s Sarah Okimaru and Mr. Nick Omari Advocates while the Procuring Entity was represented by Mr. Tollo Mududa, Advocate. M/s Nazima Malik Advocate appeared on behalf of the Successful bidder.

THE APPLICANT'S CASE

Ms Sarah Okimaru, advocate, who appeared on behalf of the Applicant submitted that on 23rd June, 2015, the Applicant received a notification from the Procuring Entity vide a letter dated 16th June, 2015 notifying it that the Applicant's bid was unsuccessful for the reasons enumerated in the said letter. She stated that this decision on the part of the Procuring Entity was in breach of the express provisions of Sections 2 and 64 of the Public Procurement and Disposal Act, 2005 in that the Procuring Entity

rejected the Applicant's bid at the preliminary evaluation stage on account of very minor oversights which did not in any way materially affect the substance of its tender or depart from the requirements set out in the tender documents, *to wit*:

- i) That a copy of the Tax Compliance Certificate was loosely attached but presented;
- ii) That the Bid bond attached to the Applicant's bid was for M/s Noble Gases Limited and not for M/s Noble Gases International Limited'.

Counsel for the Applicant contended that the Procuring Entity unduly focused on very insignificant considerations in assessing the responsiveness of the Applicant's bid notwithstanding that minor deviations were curable under the provisions of the tender document and more particularly under clause 2.22.3 of the Instructions to Tenderers, which provides as follows:-

"The Hospital entity may waive any minor informality or non-conformity or irregularity in a tender which does not constitute a material deviation, provided such waiver does not prejudice or effect the relative ranking of any tenderer."

It was the Applicant's further case that the Procuring Entity failed to announce any absence or inadequacy of the tender security during the opening of the tenders as enjoined by the Provisions of Clause 2.20 of the Instructions to tenderers, therefore implying that its bid was substantially

responsive and should have proceeded to the next stage of evaluation and ought not to have considered the alleged non material errors and/or deviations when conducting the comparison and evaluation of the Applicant's bid as mandated by the Provisions of Section 64(3) of the Act.

The Applicant therefore contended that the decision of the Procuring Entity's tender evaluation committee violated the overall spirit of the Act as enshrined in Section 2 of the Act, in that the Procuring Entity failed to promote.

- a) Economy and efficiency as the Applicant which may have submitted the most responsive bid was unreasonably disqualified from the process preliminarily;
- b) Competition was not enhanced as the Procuring Entity acted unfairly towards the Applicant and in favour of the other tenderer;
- c) Viewed circumspectly, the whole procurement process lacked integrity and smacked of bad faith;
- d) There was no transparency and accountability as the Applicant's bid was rejected on flimsy grounds which did not affect the substance of the tender;
- e) The procuring entity's conduct as a whole eroded public confidence in the procurement system.

Counsel for the Applicant further submitted that the Procuring Entity's decision to disqualify it at the Preliminary Evaluation stage was unfair and was actuated by malice, presumably to confer undue leverage to its competitor, more so considering that the subject tender attracted bids

from only two entities. Counsel for the Applicant buttressed her argument by stating that it was awarded a similar tender for the year 2014/2015 on the basis of a tender security identical to the current one and which was issued in the name of Noble Gases Ltd. She stated that based on this past practice, the Applicant was under a legitimate expectation that the Procuring Entity would treat the bid bond in a similar way and not disqualify it on this ground.

On the issue of notification, Counsel for the Applicant argued that the Procuring Entity infringed on the mandatory provisions of Section 67 (2) of the Act by failing to inform the Applicant about the outcome of its tender simultaneously with the notification issued to the successful bidder as required by the above Provisions of Section 67(2) the Act. Counsel for the Applicant in an attempt to demonstrate the argument that the Procuring Entity was biased against the Applicant, Counsel for the Applicant stated that the Procuring Entity was in violation of the Provisions of Section 94 of the Act as read together with the Provisions of Regulation 74 (2) of the Regulations which required the Procuring Entity to suspend all procurement proceedings upon service of the Request for Review. The Applicant alleged that the Procuring Entity had acted in contravention of the order of stay issued by the Board in that it had contracted the successful bidder to supply the tendered goods, notwithstanding the fact that the Applicant was the current supplier. Counsel for the Applicant further argued that the Procuring Entity having opted for open tendering was estopped from using an alternative procurement method.

Counsel for the Applicant added that overall, the Procuring Entity acted in a manner that was inconsistent with the principles and the values set out in the Constitution of Kenya and more specifically in Article 227 thereof and that as a consequence of the Procuring Entity's decision, the Applicant stated that it was bound to suffer loss and damage in terms of lost income and profit that would have accrued to it from the award of the instant tender, more so taking into account the resources already expended towards preparing for the tendering process.

In conclusion Counsel for the Applicant stated that the interests of the taxpayer were liable to suffer since the public would not be able to obtain value for money and stood to seriously be jeopardized and therefore urged the Board to grant the prayers sought.

THE PROCURING ENTITY'S RESPONSE

In response to the Applicant's submissions, Mr. Tollo Mududa Advocate for the Procuring Entity submitted that Clause 2.22 of the tender document stipulated that the Tender Processing Committee shall, during the preliminary evaluation, examine the tenders to determine whether they were complete, identify any computational errors, confirm whether sufficient security had been furnished, whether the tender was properly signed and whether the tenders were generally in order. He further submitted that under the Provisions of the tender document, a bidder was required to furnish the Procuring Entity with a Tender Security equivalent to 1% of the tender price denominated in Kenya shillings from either a

reputable bank or an insurance company appearing in the list provided by The Public Procurement Oversight Authority. He added that Clause 2.14.5 of the tender document made it abundantly clear that any tender document whose bid bond was not in accordance with the tender document or any document that was not securely bound in accordance with the requirement in the tender document would be rejected as non-responsive and that the Procuring Entity had no discretion on this criteria.

On the issue of notification, Counsel for the Procuring Entity stated that it duly notified the Applicant that its tender was unsuccessful by a letter dated 16th June 2015 and set out the following two reasons why the Applicant's tender had been declared as unsuccessful.

- a) That a copy of Tax Compliance Certificate loosely attached although present and
- b) That the bid bond attached was for M/s Noble Gases Limited and not for M/s Noble Gases International Limited.

With regard to the Applicant's contention that the Procuring Entity focused on insignificant considerations consisting of minor and curable deviations, the Procuring Entity termed the Applicant's contention as invalid and stated that the requirement for a bidder to comply with the requirement on a tender security and the attachment of a Tax Compliance Certificate were not minor deviations in a tender worth hundreds of millions of shillings. Counsel for the Procuring Entity stated that under the Provisions of Clause 2.19.3 of the tender document, no tender may be modified after the deadline for the submission of tenders. He added that

the bid security being an insurance bid bond may very well raise difficulties in realizing the security should the tenderer be guilty of breach during the tendering process because the underwriter may easily avoid liability for the bid bond as it referred to a non-existent entity and that this was not a risk the Procuring entity was ready to take.

The Procuring Entity refuted the Applicant's contention that it violated the overall spirit of the Act and the Regulations stating that it advertised for the tender despite the fact that there are only two known bidders who have traditionally supplied the Hospital with medical gases and that all parties were entitled to be subjected to equal treatment based on the same standards of evaluation. Counsel for the Procuring Entity additionally stated that the Applicant's allegation about the Procuring Entity's actions being unfair and being actuated by malice to presumably confer unfair advantage on the Applicant's competitor was unfounded and without any basis considering that the Applicant was the incumbent supplier. On the issue of the bid bond, Counsel for the Procuring Entity stated that the fact that a similar bid security may have been accepted in the past was a moot point as two wrongs do not make a right.

In conclusion Counsel for the Procuring Entity denied that the Applicant stood to suffer financial loss as a result of lost income due to the Procuring Entity's action stating that the Applicant's bid never made it to the technical evaluation and financial evaluation stages. The Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review and award it the costs of the same.

THE INTERESTED PARTY'S RESPONSE

Ms. Nazima Malik advocate for the Successful bidder in answer to the Applicant submissions stated that the Applicant had not denied that the copy of its Tax Compliance Certificate was not securely bound to the tender document. She further submitted that the tender document provided a format for a tender security form at page 45 of the Memorandum of Response which categorically required the name of the tenderer to be inserted in the form. She however submitted that the Applicant did not insert it's name in the bid bond but instead inserted the name of Noble Gases Limited which was a separate and distinct legal entity from the bidder which was Noble Gases International Limited and which was also the Applicant in this Request for Review.

The Interested Party argued that as the bid bond was in the name of a different company, the Procuring Entity would not have been in a position to enforce it because any attempt by the Procuring Entity to enforce the security against the party which had issued it would in turn be met with the defence that the bid bond had been issued to Noble Gases Limited but not to Noble Gases International Ltd which is a different entity and that the party which had issued the bid bond would be within it's right to resist the enforcement of the security on that ground. Counsel for the Successful bidder therefore submitted that the Procuring Entity was not protected against risk as required by the Provisions of clause 2.14.3 of the Instructions to Tenderers in view of the above circumstances.

Counsel for the successful bidder averred that Regulation 47 (1) (b) of the Public Procurement and Disposal Regulations 2006 made it mandatory for the Procuring Entity to ensure that the tender security submitted to it was in the required form and that the Procuring Entity was therefore entitled to declare the Applicant's bid bond as non-responsive for having failed to be issued in the name of the bidder. Counsel for Successful bidder additionally stated that the defect in the bid bond did not amount to a minor deviation but was a matter of substance.

The successful bidder relied on the case of the **Republic Vs PPARB-Kenya Medical Supply Agency and three others** to demonstrate that a bid bond issued in the wrong name was not a minor deviation but was a matter that affected the substance of the tender.

Counsel for the successful bidder stated that a bidder in the above cited case had provided a scanned copy of a document when the tender document required all the documents to be submitted in original form. The applicant however successfully argued before the judicial review Court that a scanned copy of a document was not an original document and therefore the mandatory requirements of the tender document were not met emphasizing that the con-compliance with the requirement that the tender document must be compiled and the tender security be submitted in the required format was an even more fatal defect.

While responding to the Applicant's submissions on the issue of legitimate expectation, Counsel for the successful bidder stated that the

doctrine of legitimate expectation must be based on full disclosure and stated that in this instance there was no disclosure by the applicant that the company named in the bid bond did not exist and the Applicant could not therefore rely on the doctrine of legitimate expectation. In any event, Counsel for the successful bidder argued that the doctrine of legitimate expectation and the doctrine of estoppel were not applicable against an express statutory requirement.

On whether the parties to this tender were notified simultaneously of the outcome of their tender, Counsel for the successful bidder stated that the Applicant had admitted that it had been notified of the decision of the Procuring Entity and that it had not demonstrated the prejudice it had suffered as it was able to file its Request for Review within time.

In conclusion Counsel for the successful bidder submitted that the Request for Review lacked merit and prayed that the same be dismissed with costs.

THE APPLICANT'S REPLY

In a short reply to the submissions made by Counsel for the Procuring Entity and Counsel for the Successful Bidder, Counsel for the Applicant stated that it was relying on the doctrine of legitimate expectation and not on the principle of estoppel. Counsel for the Applicant reiterated her earlier submissions that since the Procuring Entity had allowed it to use a bid bond in the name of Noble Gases Ltd in the past, then the

Applicant was under a legitimate expectation that the Procuring Entity would continue to act likewise.

THE BOARD'S FINDINGS

The Board has carefully considered the oral and the written submissions made by the parties and has examined all the documents that were submitted to it and has identified the following issues for determination in this Request for Review.

- (i) *Whether or not the Procuring Entity breached the Provisions of Section 64(2) of the Public Procurement and Disposal Act by failing to treat the grounds on the basis of which the Applicant had been declared unsuccessful as minor deviations under the Act.*
- (ii) *Whether the Procuring Entity breached the provisions of Section 67 (2) of the Act by failing to inform the Applicant of the outcome of it's tender simultaneously as it did to the successful bidder.*

ISSUE NO. 1

Whether or not the Procuring Entity breached the Provisions of Section 64(2) of the Public Procurement and Disposal Act by failing to treat the grounds on the basis of which the Applicant had been declared unsuccessful as minor deviations under the Act.

On the first issue framed for determination, the Board has considered the arguments put forward by the parties on the reasons for the Applicant's bid being declared as being none responsive at the preliminary evaluation. The grounds upon which the said bid was declared as non-responsive were that:-

- a) The copy of the Tax Compliance Certificate forming part of the Applicant's tender document was loosely attached.
- b) The Bid Bond contained in the Applicant's tender document was in the name of M/s Noble Gases Ltd and not in the name of the bidder M/s Noble Gases International Limited.

In determining the above issue, the Board has taken into account the provisions of Sections 64 and 66 of Act which govern the evaluation of tenders.

The said Sections of the Act state as follows:-

Section 64(1) *"A tender is responsive if it conforms to all the mandatory requirements in the tender document. "*

Section 64(2) *"The following do not affect whether a tender is responsive:*

- (a) *Minor deviations that do not materially depart from the requirements set out in the tender document*
- (b) *Errors or oversights that can be corrected without affecting the substance of the tender.*

Section 66(1) *"The Procuring Entity shall evaluate and compare the responsive tenders other than the tenders rejected under Section 63(3). "*

Section 66 (2) "The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."

The Board has perused the documents provided and finds that the Procuring Entity carried out a Preliminary evaluation using the criteria set out at Section VII of the tender document. The preliminary evaluation criteria set out in Section VII required bidders to:-

- a) Submit two tender documents securely bound and clearly marked 'original' and 'copy';
- b) A tender form duly completed and signed;
- c) An original Bid Bond provided and valid for 150 days from the date of tender opening whose value was to be 1% of the total bid amount inclusive of all taxes and duties;
- d) A Business questionnaire duly completed;
- e) A copy of a Tax Compliance Certificate/exemption certificate; and;
- f) A Certificate of incorporation/evidence of registration whichever is applicable.

The Board further finds that the bidders were scored at the preliminary evaluation stage as follows:

No	Bidder Name	a	b	c	d	e	f	Score	Remarks
1	BOC Kenya Limited	√	√	√	√	√	√	6/6	Pass
2	Noble Gases International Ltd	√	√	X	√	√	√	5/6	Fail

From the evaluation score at the preliminary evaluation stage, the applicant failed in only one item, namely the Bid bond.

The Board has perused the original tender document submitted by the Applicant and finds that the Applicant submitted a Tax Compliance Certificate which the Applicant itself admitted was loosely attached to the tender document. The Board, while fully aware of the requirements of Section VII (Stage 1) (item 1) of the tender document which provides for the submission of '*two tender documents securely bound...*', it has nonetheless also looked at the provisions of clause 2.22.3 of the same document, which provides as follows:

"The Hospital entity may waive any minor informality or non-conformity or irregularity in a tender which does not constitute a material deviation, provided such waiver does not prejudice or effect the relative ranking of any tenderer."

The Board finds on the basis of the all the foregoing that although the letter of notification stated two reasons for the Applicant's disqualification, the preliminary evaluation report indicated that the Applicant failed in only one criteria namely that of failing to provide a bid bond in its name. Taking into consideration the above cited provisions of the tender document and the requirements of Section 64 (2) of the Act, the Board finds that a loosely attached Tax Compliance Certificate is a minor deviation which would not materially depart from the requirements set out in the tender documents.

Turning to the second ground for disqualification, the Board finds that the Applicant's bid bond was in name of M/s Noble Gases Ltd while the bidder in this tender was M/s Noble Gases International Ltd. In its oral submission before the Board, the Applicant admitted that it had no subsidiary company by the name of M/s Noble Gases Ltd nor was it aware of the registration of a company by the name of M/s Noble Gases Ltd. In the absence of any evidence that M/s Noble Gases International Ltd exists, the Board has no basis on which to hold that Noble Gases Ltd is a registered company or that it can lawfully be issued with a bid bond.

As rightly observed by Counsel for the successful bidder, the Procuring Entity would not be in a position to enforce a bid bond issued in the name of an Entity other than the bidder since the party against whom such enforcement is sought in the event of a breach would be perfectly within its rights to resist the enforcement of the bid bond against it on the ground that the bid bond was issued to an entity with a different name.

The Board further notes that in her submissions before the Board, Counsel for the Applicant conceded that Noble Gases Ltd was not a subsidiary of Noble Gases International Ltd. The Board however wishes to observe that even if the former Company was a subsidiary of the later, the two are considered in law to be separate legal entities which are independent of each other.

The Board further finds that the mere fact that the Procuring Entity has previously accepted a bid bond issued in the name Noble Gases Ltd cannot create any legitimate expectation that this would continue to happen or cure the defect presented by the difference between the two names. The difference in the two names is so fundamental and cannot give rise to the principle of legitimate expectation and the Applicant ought to have taken utmost care in ensuring that it provided a bid bond that could be encashed in the event that there was default.

The Board therefore finds that the bid bond submitted by the Applicant to the Procuring Entity was not in the required format and that the Applicant's tender was therefore rightly found as non-responsive under the Provisions of Section 64(2) of the Act.

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

ISSUE NO. 2

Whether the Procuring Entity breached the provisions of Section 67 (2) of the Act by failing to inform the Applicant of the outcome of its tender simultaneously as it did to the successful bidder.

In determining this issue the Board has considered the provisions of Section 67 (2) of the Act which states as follows:-

Section 67 (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".*

The Board finds on the basis of the above Provision that the Procuring Entity's Tender Committee awarded the tender to the successful bidder on 16th June 2015. The Board further finds that the Procuring Entity wrote a letter dated 16th June 2015 to both the successful and the unsuccessful bidders and that the letter to the unsuccessful bidder was admittedly received and stamped by the Applicant on 23rd June 2015.

The Board has not been furnished with any evidence to suggest that notification to the successful and the unsuccessful bidder was therefore done simultaneously. This however notwithstanding and as the Board has previously held, the Applicant did not demonstrate that it suffered any prejudice as it was able to file its Request for Review within time after becoming aware of the outcome of the tender process.

The Board therefore finds that though the two bidders were not notified of the outcome of their tenders simultaneously, the Applicant did not however suffer any prejudice for the reasons stated above.

GENERAL OBSERVATIONS BY THE BOARD

The Procuring Entity in its memorandum of response filed on 6th July 2015 included the evaluation report of the tender processing committee and numerous documents which are considered as confidential documents by law. Section 44 (1) of the Act however forbids a procuring entity, its agents or employees or a member of a board or committee of a procuring entity from disclosing confidential information relating to a procurement

save for disclosure to an applicant seeking a review and this disclosure shall only constitute a summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used under sections 44 and 45 of the Act.

The disclosure of the evaluation report and other documents which are considered confidential by the procuring entity in its response goes against the provisions of sections 44 and 45 of the Act.

The second observation which the Board wishes to make is with regard to the conduct of the Procuring Entity and the parties after the Request for Review was filed. The filing of a request for review operates as a stay of the procurement proceedings under the provisions of Section 94 of the Act and Regulation 74(2) of the Regulations. It however came to the attention of the Board during the hearing that the Procuring Entity placed orders for the supply of gases to both the successful and the unsuccessful bidders when this Request for Review was pending before Board. There were 13 orders in all, 12 having gone to the successful bidder and one to the Applicant.

The Procuring Entity stated during the hearing that it approved the direct procurement of the medical gases as an interim measure for the duration that the review was still pending before the Board. The Board finds that this conduct on part of the Procuring Entity contravenes the Provisions of the Act with regard to the choice of procurement methods as no parallel

procurements can go on at the same time. The Procuring Entity had advertised the tender as an open tender. It could not therefore in the midst of the procurement process in an open tender embark on another procurement process for the same goods under a different procurement method, namely that of a direct procurement. In the Board's mind, what would have been so difficult for the Procuring Entity to extend the contract for the incumbent supplier for the limited period of the review. The Board takes a dim view of the conduct of the Procuring Entity in this regard and reminds it that it is an offence under the provisions of the Act to contravene an order issued by the Board.

DECISION OF THE BOARD

The above observations notwithstanding and in view of all the foregoing findings and in exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board therefore makes the follows orders on this Request for Review:-

1. **The Request for Review filed by the Applicant on 30th June 2015 in respect of Tender No. KNH/T/18/2014-2015 is hereby dismissed.**
2. **The Procuring Entity is therefore at liberty to proceed with procurement process to its logical conclusion.**
3. **In view of the Procuring Entity's action in disregarding the order of stay issued by the Board and in further view of the fact that both the successful bidder and the Applicant were beneficiaries**

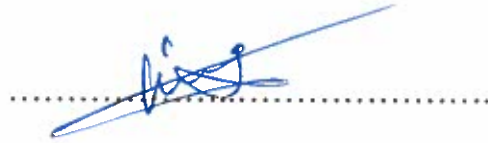
of the said action, the Board directs that each party shall bear it's own costs of this Request for Review.

Dated at Nairobi on this 28th July, 2015

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CHAIRMAN

PPARB

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SECRETARY

PPARB

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