

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 6/2014 OF 19TH JANUARY, 2015

BETWEEN

POLUCON SERVICES (K) LIMITED.....APPLICANT

AND

KENYA BUREAU OF STANDARDS (KEBS).....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Bureau of Standards dated 4th December, 2014 in the matter of Tender No. KEBS/T056/2014-2015: Provision of Pre-Export Verification of Conformity (PVoC).

BOARD MEMBERS

Paul Gicheru	Chairman
Peter Ondieki	Member
Nelson Orgut	Member
Rosemary Gituma	Member
Gilda Odera	Member

IN ATTENDANCE

Philemon Kiprop	Secretariat
Shelmith Miano	Secretariat

APPLICANT : POLUCON SERVICES (K) LIMITED

Gladys Wamaitha	Advocate
Dominic Mathenge	Managing Director
Prasanjit Gnosh	Commercial Director, Cotecna
Nathan Kirui	Pupil

PROCURING ENTITY-KENYA BUREAU OF STANDARDS

Ashitiva Manadale	Advocate
Daniel Sitati	Advocate
Naomi mbithi	Pupil
Rhoda Kirui	Ag. Procurement Manager
Bernard Nguyo	Procurement Manager

INTERESTED PARTIES

Austin Ayisi	Advocate SGS Kenya Ltd
Eric Ondimu	File Analyst, SGS Kenya Ltd
Andrew Khakula	Legal Counsel, TUV Rheinland Middle East LLC
Wesley Aundo	BD Manager, TUV Rheinland Middle East LLC
Douglas Nyamori	Regional Manager, Intertek

BOARD'S DECISION

Upon hearing the representations of the 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

1.0 INTRODUCTION

The current contracts for provision of PVoC are scheduled to expire on 15/01/2015. The RFP method was used which was approved by the tender committee and was also provided for in the Approved Procurement Plan 2014-2015.

The RFP was advertised on 23rd October 2014 in two dailies (the East African Standard Newspaper and The Daily Nation Newspaper) and the Kenya Bureau of Standards website as per regulation 54 (2) of the PPDA.

Following the advertisement, prospective bidders sought clarification on the contents of the RFP. Three addenda were issued as follows:

- a) Addendum No.1 issued on 10th November 2014
- b) Addendum No. 2 issued on 13th November 2014
- c) Addendum No. 3 issued on 17th November 2014

The above addenda were communicated by email to the bidders and also posted on the KEBS website.

The tender opening committee was appointed by the Managing Director of the Procuring Entity on 19th November 2014 as per Regulation 60 (1) of the Regulations to open the RFP.

The RFP was opened on 24th November 2014 at KEBS headquarter block A (canteen) and attended by 25 representatives as per the attendance register.

Seven bids were received as per the opening register

The Tender Processing Committee was appointed by the Managing Director on 24th November 2014 to carry out evaluation in line with Regulations 16 (2) and Legal Notice number 106 of 18th June, 2013.

The assessment of qualification documents and the technical evaluation was conducted from 27th November to 3rd December 2014 as per the attendance register

2.0 THE EVALUATION

To evaluate the tenders, the committee agreed on the following evaluation criteria;

- Evaluation of Preliminary Requirements
- Evaluation of Technical Proposals as per tender documents
- Evaluation of Financial Proposals

The scoring criteria was developed and agreed on before the evaluation exercise.

2.1 Preliminary Evaluation

The Tender Processing Committee received a total of seven (7) bid documents namely from the firms of: TUV Rheinland, China certification & inspection group, Baltic controls, Bureau VERITAS, Polucon Services Kenya Ltd, SGS and Intertek International

The committee carried out a preliminary evaluation of the RFP

2.1.1 Notes on Preliminary Evaluation Criteria:

The bidders were required to give a copy of the certificate of registration for each country that had exported to Kenya as given in the description of service. If a bidder did not provide a certificate for any of the countries that had recorded exports in a particular region in the last three years, its bid was treated as non-responsive for the entire region.

- Absence of certificate of registration for countries which have not exported to Kenya in the last three years was treated as a minor non conformity and ignored in line with Instruction to Tenderers Clause 2.20.3 of the RFP.
- In region one (1) it was noted UK comprised of England, Wales, Scotland and North Ireland. Ireland is an independent country and registration of the companies in Ireland was required.
- Members resolved that the bidders for region 2 should not be disadvantaged if certificates for specific territories that may be currently having unresolved diplomatic issues with China with regards to their sovereignty were not provided. It was agreed that a registration certificate issued in China be accepted to cover region two in its entirety. However when it came to scoring for physical presence, the addresses were required for each country in the region.
- Members resolved that sworn statements signed by the chief executives of the bidding companies or other personnel with requisite powers of attorney be accepted.

2.1.2 Findings Specific to each bidder

2.1.2 (i) *Bidder 1*

The bidder did not provide a copy of tax compliance certificate. The

bid was therefore treated as non-responsive .

2.1.2 (ii) *Bidder 2*

The bidder met all the requirements for the preliminary for the regions bidden for namely region 2 - China and region 14 - UAE

2.1.2 (iii) *Bidder 3*

The bidder did not provide a copy of registration certificate for the following countries:

1. *Region 1* - Ireland.
2. *Region 7* - Canada.
3. *Region 8* - Estonia, Latvia Lithuania, Belarus, Ukraine, Georgia, Romania and Azerbaijan.
4. *Region 9* - Poland, Hungary Czech Republic & Romania.

The bid was therefore treated as non-responsive for those regions.

2.1.2 (iv) *Bidder 4*

The bidder did not provide a copy of registration certificate for the following countries:

1. *Region 16* - Ethiopia
2. *Region 19* - Zambia, Zimbabwe and Malawi
3. *Region 20* - Rwanda and Burundi

The bid was therefore treated as non-responsive for these regions

2.1.2 (v) *Bidder 5*

The bidder did not attach a copy of registration certificate for the following countries:

1. *Region 1* - Ireland.
2. *Region 2* - China (Document attached could not be identified or interpreted)
3. *Region 3* - Pakistan, Bangladesh & Sri Lanka
4. *Region 4* - Japan, Indonesia, Malaysia, Thailand & Vietnam
5. *Region 6* - Mexico, Colombia, Brazil, Ecuador, Peru, Uruguay, Argentina and Chile.
6. *Region 7* - No certificates attached
7. *Region 8* - Documents attached cannot be identified as they are written in foreign language
8. *Region 9* - Poland, Hungary Czech Republic & Romania.
9. *Region 10* - Turkey, Greece & Spain
10. *Region 11* - Italy, Switzerland, Belgium, Germany, Austria & Netherlands
11. *Region 13* - Iran , Oman, Jordan, Syria, Lebanon, Israel, Yemen, Bahrain, Qatar & Kuwait
12. *Region 16* - the Company the bidder intended to subcontract was not present in Ethiopia and intended to subcontract services in Ethiopia in turn to Saba international PLC.

The bid was therefore treated as non-responsive for these 12 regions

2.1.2 (vi) *Bidder 6*

The bidder did not attach a copy of registration certificate for the following countries

1. *Region 13* - Bahrain and Israel
2. *Region 20* - Uganda, Rwanda & Burundi

The bid was therefore treated as non-responsive for these 2 regions

2.1.2 (vii) Bidder 7

Documents provided were not in English and evaluators could neither identify them nor their issuing authority.

1. *Region 4*- Japan and Malaysia ,
2. *Region 8*- Russia ,Latvia & Ukraine
3. *Region 9* - Slovakia & Serbia
4. *Region 11* - Belgium Austria
5. *Region 15* - Morocco
6. *Region 17* - Cameroon

The bidder also did not provide a copy of registration certificate for the following countries

1. *Region 10* - Greece
2. *Region 13* - Iran ,Oman, Jordan, Syria, Lebanon, Israel and Yemen
3. *Region 16* - Egypt, Tunisia & Ethiopia
4. *Region 20* - Rwanda and Burundi

The bid was therefore treated as non-responsive for these 10 regions

Summary of Evaluation

Regions

Bidder No.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
2	-	√	-	-	-	-	-	-	-	-	-	-	-	√	-	-	-	-	-	-
3	-	√	√	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
4	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
5	-	-	-	-	-	-	-	-	-	-	-	-	-	√	-	-	-	-	-	√
6	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
7	√	√	√	-	√	√	√	-	-	-	-	√	-	√	-	-	√	√	-	-

2.1.4 Recommendations on Preliminary Evaluation

1. Bidder 1 did not meet the preliminary requirements for all the regions bid for and hence did not qualify for technical evaluation.
2. Bidders 2, 3, 4, 5, 6 and 7 met the preliminary requirements for as indicated in table 2 above and it is recommended that they proceed for technical evaluation for the regions they were responsive.

2.2 EVALUATION OF TECHNICAL PROPOSALS

2.2.1 General notes on the Criteria of Evaluation

1. For the following requirements, each region was evaluated separately and marks awarded based on information given for that region:

-
- a) Physical Presence (physical address, contact details for offices)
 - b) ISO 9001:2000 certification and ISO/IEC 17020 accreditation. The committee agreed that if a bidder has one ISO 9001:2008 certificate they would get one and a half marks and get three marks if the bidder provided ISO/IEC 17020 in addition.
 - c) Qualification, competence and experience of personnel assigned to perform conformity assessment tasks.
 - d) curriculum Vitae for management and supervisory staff
 - e) schedule of laboratories and evidence of accreditation

2. The following requirements were evaluated globally and equal marks awarded for all the regions that the bidder was responsive:

- a) Organization Chart
- b) Bidder's experience in providing similar verification activities and testimonials.
- c) Proposed methodology detailing conformity assessment services (Route A, B and C)
- d) Information Communication systems ,Risk management systems
- e) Training schedule for clients personnel

3. Members noted that the maximum total score for the technical proposal arrived at by adding the units scores is 71 and not 70 as given in the RFP. It was resolved that pursuant to the provision of clause 2.20.2 of Instruction to Tenderers, the total maximum score to be adopted as 71. The extra one mark would be deducted from the final score for the successful bidders per region.

2.2.2 Specific Notes on Technical Evaluation

2.2.2 (i) *Bidder 2*

The bidder was evaluated in Regions 2 and 14 and complied with the technical requirements

2.2.2 (ii) *Bidder 3*

The bidder was evaluated in Regions 2 and 3

1. Organization chart that was provided did not show how services under PVoC would be provided. Bidder could therefore not score full marks for the requirement
2. The bidder did not provide valid certificates of accreditation to ISO/IEC 17020 or ISO 9001:2008 certifications.
3. The bidder listed the contracts they are currently undertaking but did not give a description of the work done. The bidder also did not give any former contracts carried out by the company.
4. The bidder did not provide any testimonial
5. The bidder did not provide qualifications and competence of the people they are going to use in carrying out conformity assessment tasks.

6. The bidder did not provide information on how ICT would be used to handle customer enquiries and complaints
7. The bidder did not commit to seal the containers or provide a mechanism for traceability of certified consignments
- ~~8. the bidder did not provide methodology for surveillance under routes B and C~~

2.2.2 (iii) Bidder 4

1. The bidder did not commit to seal the containers or provide a mechanism for traceability of certified consignments.
2. The bidder did not provide qualifications, competence for inspectors and other personnel assigned tasks of conformity assessment.
3. The bidder provided a listing of some trainings to be considered but referred to the financial envelop for training proposal details

2.2.2 (iv) Bidder 5

1. The bidder provided evidence of presence in Region 20.
2. The bidder intends to sub-contract the service in regions 1, 2, 3, 4, 6, 7, 8, 10, 11, 13, 14, 15, 16, and 19.
3. The bidder did not commit to seal the containers or provide a mechanism for traceability of certified consignments under route A

2.2.2 (v) Bidder 6

1. The bidder did not provide a valid certificate of accreditation to ISO/IEC 17020.

2. The bidder did not include information on qualifications for inspectors in regions 7, 11, 17 and 18 although qualifications for other personnel were given.
3. The qualification of inspectors in Mauritius was deemed inadequate.
4. The bidder did not commit to seal the containers or provide a mechanism for traceability of inspected consignments.
5. The bidder did not provide a schedule of laboratories in regions 15, 16, 17 and 18 hence marks not earned for schedule of laboratories and adequacy of scope in these regions.
6. The bidder did not provide a letter of commitment from any accredited labs in the regions

2.2.2 (vi) *Bidder 7*

1. The bidder did not provide details for the offices in the countries in region 12. Addresses given were for Region 11.
2. The bidder did not provide a valid certificate of accreditation to ISO/IEC 17020 for regions 12, 17 and 18.
3. The bidder did not provide any CVs for management and supervisory staff in region 18.
4. The bidder did not commit to seal the containers or provide a mechanism for traceability of certified consignments under route A.
5. The bidder did not provide evidence of accreditation for laboratories in region 17 and 18.

COMBINED (Average) TECHNICAL SCORE

Bidder No.	Regions																			
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
2	-	71.0	-	-	-	-	-	-	-	-	-	-	71.0	-	-	-	-	-	-	-
3	-	31.0	33.0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
4	63.7	63.7	63.7	63.7	62.2	62.2	63.7	63.7	63.7	63.7	63.7	63.7	63.7	63.7	63.7	-	63.7	63.7	-	-
5	-	-	-	-	-	-	-	-	-	-	-	-	45.8	45.8	-	-	-	-	-	45.8
6	66.7	66.7	66.7	66.7	66.7	66.7	64.2	66.7	66.7	66.7	64.2	65.2	-	66.7	59.2	61.7	59.2	59.2	64.7	-
7	70.0	70.0	70.0	-	69.8	70.0	70.0	-	-	-	-	66.5	-	69.8	-	-	64.3	58.3	-	-

Key

Bidder No.	Name of bidders
2	China Certification & Inspection Group
4	Bureau Veritas Inspection Valuation A & C
6	SGS
7	Intertek International

2.2.4 Conclusions on Technical Evaluation

1. No bidder met the pass mark for technical Region 20 (East Africa).
2. Bidder number 3 and bidder number 5 did not attain the pass mark in any of the regions evaluated.
3. Bidder number 6 did not attain the pass mark for Regions 15, 17 and 18
4. Bidder number 7 did not attain the pass mark for Region 18.
5. Regions 13, 15, 16 and 19 only had one successful bidder each.

Recommendation on Technical Evaluation

The following bidders have met the criteria for technical evaluation as indicated in the table below and it is recommended that they proceed to financial evaluation.

Bidder No.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
2	X	71.0	x	x	x	x	x	x	x	x	x	x	x	71.0	x	x	x	x	x	x
4	63.7	63.7	63.7	63.7	62.2	62.2	63.7	63.7	63.7	63.7	63.7	63.7	63.7	63.7	63.7	x	63.7	63.7	x	x
6	66.7	66.7	66.7	66.7	66.7	66.7	64.2	66.7	66.7	66.7	64.2	65.2	x	66.7	x	61.7	x	x	64.7	x
7	70.0	70.0	70.0	x	69.8	70.0	70.0	x	x	x	x	66.5	x	69.8	x	x	64.3	x	x	x

Key

Bidder No.	Name of bidders
2	China Certification & Inspection Group
4	Bureau Veritas Inspection Valuation A & C
6	SGS
7	Interfek International

The following bidders did not qualify for financial evaluation and their financial proposals should not be opened:

Bidder No.	Name of Bidder
3	Baltic Controls
5	Polucon Services Kenya Ltd

2.3 Financial Evaluation

The bidders' representatives were invited for the opening of the financial bids on 3rd December 2014. The Financial Proposals were opened on 5th December 2014 at KEBS Headquarters (Main Boardroom)

The following are bidder whose financial proposal were opened are as below:-

China Certification & Inspection Group ,Bureau Veritas Inspection Valuation A & c,SGS and Intertek International

The following envelopes were not opened TUV Rheinland,Baltic Control And Polucon Services

2.3.1 Notes on criteria for financial evaluation:

a. Proposed inspection fees for routes A,B & C

- i. The Tender Processing Committee applied the weighted average formula below to get the weighted average cost of inspection per bidder:

weighted cost of inspection = $\frac{(0.5 * \text{Cost for route A}) + (0.3 * \text{Cost for route B}) + (0.2 * \text{Cost for route C})}{1}$

The lowest bidder got full marks (15 marks)

- ii. The relative scores for the other bidders were given by $\text{Score} = (f_x/f_y * 15)$
- iii. All bidders indicated that the inspection fee proposed applied across all the regions bid for.

b. Proposed Royalties

- i. The committee applied the following formula to arrive at the score for royalties $\text{Score} = (f_r/f_m * 15)$

2.3.2 Results of the evaluation

A) EVALUATION OF PROPOSED INSPECTION FEE

Bidder 2	Inspection Fee (%)	Weighted Score		FS
A	0.470	0.235		
B	0.400	0.120		
C	0.250	0.050		
	Average	0.135	100.00	15.00

Bidder 4	Inspection Fee (%)	Weighted Score		
A	0.500	0.250		
B	0.450	0.135		
C	0.250	0.050		
	Average	0.145	93.10	13.97

Bidder 6	Inspection Fee (%)	Weighted Score		
A	0.570	0.285		
B	0.490	0.147		
C	0.300	0.060		
	Average	0.164	82.32	12.35

Bidder 7	Inspection Fee (%)	Weighted Score		
A	0.480	0.240		
B	0.400	0.120		
C	0.250	0.050		
	Average	0.137	98.78	12.35

B) EVALUATION OF PROPOSED ROYALTY

Bidder No.	Proposed Royalty (fr)	fm	(fr/fm)x100	FS
2	27	28	96.43	14.46
4	25	28	89.29	13.39
6	25	28	89.29	13.39
7	28	28	100.00	15.00

C) TOTAL FINACIAL SCORE

Bidder No.	INSPECTION FEE	Royalty	FS
2	15.00	14.46	29.46
4	13.97	13.39	27.36
6	12.35	13.39	25.74
7	12.35	15.00	29.82

D) OVERALL SCORE (OS = TS + FS)

Bidder No.	FS	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
2	29.46		99.5												99.5						
4	27.36	90.0	90.0	90.0	90.0	88.5	88.5	90.0	90.0	90.0	90.0	90.0	90.0	90.0	90.0	90.0		90.0	90.0		
6	25.74	91.4	91.4	91.4	91.4	91.4	91.4	88.9	91.4	91.4	91.4	88.9	89.9		91.4		86.4			89.4	
7	29.82	98.8	98.8	98.8		98.7	98.8	98.8					95.3		98.6			93.2			

3.0 CONCLUSION

The following bidders 2, 4, 6 and 7 were established to have demonstrated their ability and capability to provide Pre- export verification of Conformity to Standards services to the Kenya Bureau of Standards. This is because their total final scores fall between 86.4% and 99.5%.

However it has was noted that there were two major issues encountered among the current providers as follows:

- i. The number, qualification and competences of inspectors being used are insufficient due to the high cases of customer complaints and nonconformities reported to KEBS
- ii. There are complaints from importers regarding the accredited laboratories listed by the current partners. This is because customers are not able to locate these said laboratories whenever they need to import from the regions.

Therefore despite the positive information for both personnel and accredited laboratories observed in the tender documents, it's the feeling of the TPC members that the above issues be addressed in the contracts and adequate sanctions be applied.

Tender Committee

The Tender Committee in its meeting No.08/2014/15 held on 4th December, 2014 approved award of the tender - KEBS/T056/2014-2015: Provision of Pre-Export Verification of Conformity (PVOC) Services to Bidders China Certification & Inspection Group, Bureau VERITAS Inspection Valuation A & C, SGS & Intertek International.

REQUEST FOR REVIEW

The Request for Review was lodged by M/s Polucon Services (K) Limited on 19th January, 2015 in the matter of the Provision of Pre-Export Verification of Conformity (PVOC) Services.

The Applicant was represented by Ms. Gladys Wamaita Advocate from the firm of M/s Kittony Maina Karanja Advocates while the Procuring Entity was represented by Mr. Mundale Ashitiva Advocate from the firm of M/s Nyachae & Ashitiva Advocates.

The following Interested Parties appeared before the Board at the hearing of the Request for Review SGS Kenya Limited (the 1st Interested Party) which was represented by Mr. Austin Ayisi Advocate and TUV Rheinland Ltd (the 2nd Interested Party) which was represented by Mr. Andre Khakula Advocate.

The Applicant requested the Board for the following orders:

- 1. The evaluation process be declared null and void until all the discriminatory clauses are removed to give a fair chance to local Kenyan Companies.*
- 2. Order another evaluation process that invites pre-qualified applicants to face the panel for questions and clarifications in person to avoid elimination of qualified firms on the basis of flimsy excuses such as documents not being attached but on basis of LACK OF THE DOCUMENTS or lack of CAPACITY.*

3. *Kenyan companies should be given priority in order to build capacity. Each Kenya Company should be evaluated without prejudice to proof its capacity.*
4. *A complete overhaul of the tender committee is done to expand it to give it capacity to be able to evaluate document presented. As it were a it is practically impossible for the committee to have read and evaluated each document presented within the period of which the results were given.*
5. *The whole process should be declared void because adequate evaluation was not carried out. Eg. We submitted registration certificates for entire East Africa region but nobody confirms this*

The Applicant set out a total of six grounds as the basis of its Request for Review and sought to nullify the procurement process herein. The Respondent however opposed the Request for Review and filed a notice of preliminary objection and a memorandum of Response to the Applicant's Request for Review on 23rd January 2015. The basis for the Respondent's Preliminary Objection was that the Applicant's Request for Review had been filed out of time and that there existed a contract signed between the Procuring Entity and the successful bidders and that in terms of Section 93(2)(c) of the Public Procurement and Disposal Act (2005) the Board did not have jurisdiction to hear and determine the Request for Review.

When the Applicant's Request for Review came up for hearing for the first time before the Board on 6th February 2015, the Board directed that the Preliminary Objection raised by the Respondent and the 1st Interested Party be argued as part of the substantive Request for Review owing to the fact that the Preliminary Objection was based on disputed facts which could only be dealt with during the substantive hearing of the Request for Review.

The Board has considered the documents which were placed before it and has also considered the submissions made before it by the parties and has framed the following issues for determination as the basis for its decision:-

- (i) Whether or not the Board has jurisdiction to hear and determine the Request for Review in the light of the Provisions of Regulation 73 (2) (c) (ii) of the Public Procurement and Disposal Regulations 2006 and Section 93 (2)(c) of the Public Procurement and Disposal Act (2005).
- (ii) Depending on the outcome of issue number (i) above, whether or not the evaluation process for this tender contravened the Provisions of Sections 2 and 66 of the Act and Article 227 of the Constitution.

ISSUE NO. 1

Whether or not the Board has jurisdiction to hear and determine the Request for Review in the light of the Provisions of Regulation 73 (2)

(c) (ii) of the Public Procurement and Disposal Regulations 2006 and Section 93 (2)(c) of the Public Procurement and Disposal Act (2005).

The first issue which the Board has framed for determination directly arose from the Respondent's notice of Preliminary Objection dated 23rd January 2015 which was lodged with the Board on the same day. It was the Respondent's case before the Board that the Applicant's Request for Review was time barred since in the Respondent's view, the Applicant was served with a notification that its tender was unsuccessful on 16th December 2014. The Respondent therefore submitted that on the basis of the Provisions of Regulation 73(2)(c)(ii) of the Regulations, the Applicant ought to have filed its Request for Review within a period of seven (7) days from the date of service of the notification on it. Counsel for the Respondent therefore prayed that the Applicant's Request for Review be struck out on that ground.

Counsel for the Applicant however resisted the Respondent's submissions. Counsel for the Applicant submitted that the burden of proving that the Applicant had been served with the notification that its tender was unsuccessful lay with the Respondent and not with the Applicant. The Applicant denied that the Respondent had served the notification on it on 16th December 2014 as alleged and stated that it acknowledged receipt of the notification on 13th January 2015. The Applicant further contended that it had filed its Request for Review within a period of six (6) days from the date of receipt of the notice and that its Request for Review was not therefore time barred as alleged by counsel for the Respondent.

Counsel for the Applicant relied on the Applicant's written submissions which were filed on 11th February 2015 in denying the issue of service of the notification and urged the Board to find that the Applicant was not served with a notification that its tender was unsuccessful on 16th December 2014.

On the issue of service of the notification, counsel for the Respondent faulted the Applicant's reliance on its submissions as the basis for disputing service and stated that it was improper for the Applicant to rely on its submissions in disputing the issue of service.

Mr. Ashitva on behalf of the Respondent submitted that when the parties in this Request for Review appeared before the Board on 6th February 2015, the Board granted the Applicant leave to file any further responses to the Response and the documents filed by the Respondent which ought to have been done by 9.20 a.m. on Tuesday 10th February, 2015.

The Respondent therefore submitted that the Applicant and the Interested parties were therefore at liberty to respond to the Respondent's response and the Preliminary Objection but instead of doing that, the Applicant chose to file submissions challenging the issue of service of the notification.

Counsel for the Respondent submitted that in the absence of a specific response denying service in the Applicant's pleadings the Board should find that the issue of service was not disputed.

On the issue of the existence of contracts, the Respondent submitted that pursuant to the notification to the successful bidders in this Request for Review, the Respondent entered into contracts with the four successful bidders which ran from pages 166 to 227 of the Respondent's response. The Respondent therefore submitted that it was too late in the day for the Applicant to challenge the Procurement process through the filing of the present Request for Review in view of the existence of the said contracts.

In answer to the issue of the existence of the contracts, the Applicant argued that the Board had jurisdiction to consider the matter particularly where the Respondent had failed to demonstrate that it had effected service of the notification on the Applicant. The Applicant further submitted that it was within its right to file a Request for Review and that the Board should not allow the Respondent to circumvent the Applicant's right to file a Request for Review by hiding behind the existence of contracts.

The 1st Interested Party associated itself with the submissions made by the Respondent and urged the Board to strike out the Applicant's Request for Review. The 1st Interested Party's responses to the twin issues of jurisdiction appear at paragraphs 2 to 6 of its memorandum of response.

The Board has carefully considered the submissions made by the parties to this Request for Review on the issue of service of the notification and

the existence of contracts entered into between the Respondent and the successful bidders.

The Board finds that both issues touching on the Board's jurisdiction were raised by the Respondent in the notice of preliminary objection dated 23rd June 2015. Having raised the twin issues therefore, the burden to laying the basis and proving non-compliance with the Provisions of Regulation 73(2)(c)(ii) and Section 93(2)(c) of the Act therefore lay with the Respondent and not with the Applicant.

The Respondent therefore ought to have annexed the notification and provided evidence of service of the notification upon the Applicant.

The Board has perused all the documents annexed to the Respondent's Preliminary Objection and the Response and finds that in the apparent appreciation of that burden, the Respondent produced and annexed contract agreements entered into between the Respondent and the successful bidders as part of it's response. The Respondent should by the same token have annexed the notification it had served on the Applicant together with the evidence of service in support of the position taken by it.

The Respondent's counsel submitted that the Applicant had not made a denial of service in any of it's responses and that based on the state of the pleadings, the Respondent was therefore within it's rights in deeming the issue of service as having been admitted. The Board has considered this line of argument and finds as earlier stated that this

issue only arose upon the filling of the notice of Preliminary Objection and the Respondent's response dated 23rd January 2015. The Applicant had by this time filed its Request for Review where the issue of service of the notification was not an issue at all. The Board wishes to observe that once the law places the burden of proving any issue upon a particular party, that party is under an obligation to prove the same on a balance of probabilities. The Board must in all instances base its decision on the facts placed before it.

Counsel for the Respondent further argued that it had a copy of the notification and the evidence that the Applicant had been served. The Respondent did not however produce the said notification and the evidence of service of the notification. By the time the dispute therefore came up for hearing before the Board, the Board was not seized of any evidence of the notification or the evidence of service of the same. The Board does not therefore have any other option but to hold on the basis of the evidence before it that the Respondent did not serve the Applicant with the notification that its tender was unsuccessful on 16th December, 2014 as contended.

The Board therefore gives the Applicant the benefit of doubt and will now proceed to consider the next limb of the Respondent's Preliminary Objection. In arriving at this decision, the Board is guided by the Provisions of Article 159 of the constitution which enjoins the Board to hear disputes expeditiously without giving undue regard to the issue of technicalities.

Turning to the existence of the contracts, the Board has already found that the Applicant's Request for Review was not time barred because the Respondent did not produce any evidence to back up the allegation that the Respondent served the Applicant with a notification in time. The Board wishes to further observe that in order for a party to invoke the Provisions of Section 93(2)(c) of the Act, the party relying on it must prove that the contracts relied upon were entered into in accordance with the Provisions of the Act and the Regulations made thereunder.

Sections 67 and 83 of the Act enjoin all Procuring entities to notify both the successful bidder and the unsuccessful bidders of the outcome of their tenders. The notification is meant to enable any of the said bidders to decide whether to challenge the outcome of the process or not.

A Procuring Entity which fails to serve a notification on a bidder therefore acts in contravention of the law and thereby denies the party entitled to be heard of its constitutional right to a fair hearing. The Board therefore holds, in the circumstances of this case that it would be unfair if the Applicant was to be denied its right to a fair hearing through the deliberate or inadvertent actions of the Procuring Entity.

One other factor that is peculiar to this tender is that though the successful bidders have executed contracts with the Procuring Entity, the Respondent/Procuring Entity did not award the tender for region 20 to any of the bidders. There is therefore no contract that has been signed by the Procuring Entity and any bidder in respect of region 20. The Provisions of Section 93 (2) (c) are not therefore applicable to the said

region. The Board further finds that the Procuring Entity awarded the tenders in respect of the other regions to more than one bidder in an attempt at creating competition. The Board therefore finds based on the above circumstances that the issue of the existence of contracts cannot preclude the Board from delving into the merits of the dispute. The Board will however take this issue into consideration in the event that it finds that the Applicant's case is merited.

ISSUE NO. 2

Whether or not the evaluation process for this tender contravened the Provisions of Sections 2 and 66 of the Act and Article 227 of the Constitution.

The Applicant argued in support of this issue that it is a Kenyan company which had participated in this tender together with a foreign company but was dissatisfied with the evaluation process which in its view was discriminatory towards the Applicant. The Applicant submitted that the Respondent just like other Procuring Entities was duty bound to promote local Enterprises as envisaged by the Provisions of Section 2 of the Act and that the Respondent was duty bound to promote competition and ensure all bidders were treated fairly in the tender process. The Applicant however submitted that the Procurement process in this case lacked fairness and integrity as envisaged by the Provisions of Section 2 of the Act and Article 227 of the Constitution.

The Applicant stated that upon submitting its tender, the Respondent took a total of five (5) days to evaluate the tenders submitted to the

Procuring Entity for consideration and that at the end of the entire exercise, the Applicant was informed that its tender was unsuccessful via a letter dated 16th December 2014 which the Applicant received on 13th January 2015.

According to this letter which the Applicant attached to its Request for Review, the Procuring Entity stated that the Applicant did not qualify at the Preliminary evaluation stage as it did not attach a copy of the Registration Certificates for the Countries/Regions it intended to provide the services in inaccordance with the Request for Proposals requirements. The Applicant however argued that the reasons for its disqualification were not correct since it later learnt that it had not been disqualified at the preliminary evaluation stage.

The Applicant further submitted that contrary to what was stated in the letter of notification, the Applicant had produced registration certificates for the Countries and Regions it intended to provide the services in and that the registration certificates formed part of the Applicant's original tender documents.

The Applicant further submitted that the subject tender allowed sub-contracting and that pursuant to the relevant provisions in the tender document, the Applicant teamed up with COTECNA which is a well known International Inspection Company for the purposes of establishing its presence in the Countries where the Applicant did not have presence. The Applicant additionally stated that towards this end, COTECNA provided a letter of intent dated November 20-2014 but that

inspite of the said letter, the Respondent did not evaluate the facilities of it's intended sub-contractor which was contrary to the Provisions of the tender document.

The Applicant stated that inspite of having bidded for several regions, the Respondent only evaluated it for regions number 14 and 20 but that region 20 was not awarded to it. The Applicant further stated that the Respondent based it's evaluation of region 14 on the documents supplied by COTECNA which was it's intended sub-contractor.

The Applicant reiterated that based on the evidence which was placed before the Board, the subject procurement had not been undertaken properly and contended that the evaluation had been carried out shoddily and instead of basing it on the evaluation criteria and the correct paremeters, the Respondent based it's decision on frivolous reasons which it used to disqualify the Applicant from the entire process. The Applicant wondered how the Procuring Entity was able to evaluate the tender documents which were bulky within a period of five (5) days.

The Applicant further submitted that the scoring of marks as relates to certain items was skewed and prayed that it's Request for Review be allowed.

The 2nd Interested Party supported the Applicant's Request for Review. Mr. Khakula learned counsel for the 2nd Interested Party concurred that the evaluation as respects the subject tender was not carried out in

accordance with the law. Counsel for the 2nd Interested Party cited his client's disqualification as one instance of how the Procuring Entity erred in the evaluation of his client's tender and stated that his client was disqualified at the Preliminary evaluation stage on the ground that it did not provide a copy of a tax compliance certificate when there was no such requirement in the United Arab Emirates where the 2nd Interested Party was based. Counsel for the 2nd Interested Party submitted that the United Arab Emirates was a tax free country and one could not therefore be issued with a tax Compliance Certificate in that Country. The 2nd Interested Party stated that in spite of having raised the issue, the Respondent did not take it into account or re-look at the evaluation on the basis of this complaint.

Counsel for the Respondent opposed the Applicant's application and submitted that the Respondent did not err in the evaluation of tenders the subject matter of this dispute. The Respondent argued that it took into account all the requirements that had been set out in the tender document before coming to its final decision. Counsel for the Respondent argued that the Applicant had applied for 14 regions and that just like all the other bidders, the Applicant was required to demonstrate its presence in all the regions that it had applied for. It was the Respondent's case that the Applicant failed to do so and only demonstrated partial presence in region number 20 which was the East African Region. The Respondent further argued that the Applicant failed to demonstrate presence in regions number 1, 2, 3, 4, 6, 8, 9, 10, 13, 16 and 18. The Respondent however conceded that the Applicant was evaluated in regions No.14 and 20 but stated that the Applicant only

achieved a passmark of 45.8 marks and not the required score of 60 marks.

On the sufficiency and the propriety of the notification send out to the Applicant, the Respondent submitted that there was nothing wrong in the notice since the notice generally indicated that the Applicant failed to meet the technical requirements in 98 to 99% of the regions that it had tendered for. Counsel for the Respondent therefore submitted that the reasons set out in the notification were correct. The Respondent further submitted that there was no prescribed format for notification and that the notification given by the Respondent was proper and accurate.

On the evaluation of regions 14 and 20, counsel for the Respondent conceded that the evaluation for region No.14 was done on the basis of COTECNA'S presence in the United Arab Emirates while the evaluation for region No.20 was done based on the Applicant's presence in the East African region.

The Board has read through the documents submitted to it and the evaluation reports and finds that contrary to what is stated in the notification to the Applicant, the Applicant passed the Preliminary evaluation stage and proceeded to the technical evaluation stage where it was disqualified for failing to meet the requirements on establishing presence in a number of regions where the services/PVOC were to be provided. The Board further finds that the Applicant was only evaluated in Region 14 (United Arab Emirates) and region 20 (The East African

Region) where the Applicant was favourably scored though it was alleged that the Applicant did not attain the requisite pass mark.

The Board has further read through the evaluation report and finds that though it was alleged that the Applicant failed to provide registration certificates for region 20, this was contrary to the specific notes at page 10 of 18 of the evaluation report where it was indicated that the Applicant being bidder No. 5 provided evidence of presence in region number 20 covering Burundi, Uganda, Tanzania and Rwanda.

On the issue of whether the Applicant could rely on its subcontractors presence, the Board has read the tender document and has established that the said document expressly envisaged sub-contracting.

Clause 2.1.1(i) & (ii) on eligibility to tendering provided as follows:-

- (i) The Tenderer must be established and have the physical and technical infrastructure and qualified personnel required perform the required service in the regions for which they propose.**
- (ii) In the event that the tenderer does not meet the requirements in (i) the tenderer shall demonstrate that the company/ies he intends to subcontract meet the requirement in (i).**

It was common ground during the hearing of this request for review that the Respondent took into account the presence of COTECNA inspection SA in evaluating the presence of the Applicant in Region 14. This was in tandem with the Provisions of Clause 2.1.1 (ii) of the tender document.

The Respondent should have applied the same criteria in evaluating the tenders for all the other regions where the Applicant had bid for. The Board has perused the Applicant's bid documents together with the documents annexed to the request for review and finds that the Applicant attached a letter of intent to sub-contract COTECNA which had presence in several regions. The Respondent's tender evaluation committee therefore acted in error by failing to consider COTECNA'S presence in the said regions. The Board therefore finds that the Applicant was discriminated against in so far as the Procuring Entity failed to consider the presence of COTECNA in the said regions.

Apart from the above shortcoming, the Board has considered various aspects of the tender document together with the evaluation report and finds that the Procuring Entity awarded the Applicant 45.8 marks which fell short of the pass mark of 60. The Board however found some glaring instances of where the Applicant was not fairly scored. The Board finds that the tender required bidders to provide evidence of ISO 9001:2008. The Applicant produced an ISO certificate issued by the Procuring Entity (KBS) which was valid upto 3rd April 2015 but in spite of producing the said document, the Applicant was scored zero out of the maximum score of three (3) marks.

The Board further finds that the Applicant was awarded zero marks in the item on qualification and competence of the staff to be assigned to perform the assessment task which carried 5 marks yet the Applicant had attached CV'S. The Board has perused each of the region's booklets

and finds that the Applicant attached the CV's of its staff in each of the regions.

No marks were also awarded for the schedule of laboratories (labs) yet the Applicant attached the schedule and even it's own (The Applicant's lab) which is accredited by the Kenya Accreditation service and which formed part of its tender document but which was not scored at all.

In view of all the above shortcomings in the evaluation process, the Board finds that the marks that were apportioned to each criteria were largely not based on the evidence submitted by the Applicant but on the convenience of the tender Processing Committee with the main aim of ensuring that the Applicant did not attain the Requisite Passmark. This action on the part of the Respondent undermined the objectives of the procurement law as set out in Section 2 of the Act and Article 227 of the Constitution.

The complaint put forward by the 2nd interested party further demonstrates the shortcomings in the evaluation process. It is evident on the basis of the evidence placed before the Board that the 2nd interested party was disqualified at the preliminary evaluation stage on the ground that the 2nd interested party did not produce a tax compliance certificate for the region it had bid for namely the United Arab Emirates (UAE). The 2nd interested party however submitted that the United Arab Emirates is a tax free country where the requirement for the Tax Compliance Certificate is not applicable. The Respondent's tender

processing committee however failed to establish this fact inspite of the complaint raised.

In view of all the above facts, the Board finds that this is a proper case for interference by the Board but as the Board observed while addressing the Respondent's preliminary objection, the Board will take into account the Public interest involved in this case inview of the fact that several contract agreements have been entered into between the procuring entity and the four successful bidders.

The Respondent further drew the Board's attention to the fact that the four successful bidders are already providing inspection services for goods pursuant to the contract agreements entered into between them and the Respondent/the procuring entity.

The Board therefore finds that the public interest in the circumstances of this case tilts towards allowing the continued provision of the services by the four successful bidders and also in upholding the law and the objectives of procurement as set out in section 2 of the Act and Article 227 of the constitution.

In the above circumstances and as a way of addressing the grievances presented to it by the Applicant and the 2nd interested party, the Board makes the following orders in this request for review.

- 1. That the Applicant's request for review is hereby allowed to the extent that the Procuring entity's decision**

disqualifying the Applicant at the Preliminary and the technical evaluation stage is hereby set aside.

2. That the Procuring entity/the Respondent is hereby directed to carryout a fresh evaluation of the Applicant's bid in accordance with the Board's findings in all the regions that it bid for.
3. That in carrying out the re-evaluation process, the Respondent shall take into account all the issues which have been addressed by the Board and shall evaluate the Applicant's bid in all the said regions and that the procuring entity shall base its decision on the presence of the Applicant and or that of its intended sub-contracter M/S Cotecna Inspection SA.
4. That the Respondent shall carryout and complete the re-evaluation and the entire Procurement process within Thirty (30) days from the date hereof.
5. The re-evaluation process shall not affect the contract agreements entered into between the Respondent and the successful bidders who have already entered into contracts pursuant to the award of tenders. For the avoidance of doubt, the successful bidders shall continue rendering services in the regions where they qualified.

6. In view of the fact that all the parties to this request for Review were partly successful, the Board directs that each party shall bear it's own costs for this Request for Review.

Dated at Nairobi on this 18th day of February, 2015


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CHAIRMAN
PPARB


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SECRETARY
PPARB

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