

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD

APPLICATION NO. 08/2016 OF 12TH FEBRUARY, 2016

BETWEEN

SAMEER AFRICA LIMITED(Applicant)

AND

MINISTRY OF DEFENCE.....(Procuring Entity)

Review against the Decision of the Ministry of Defence in the matter of
Tender No. MOD/423 (01103) 2015-2016 for the Supply and Delivery of
Tyres and Tubes of Various Sizes to the Kenya Defence Forces

BOARD MEMBERS PRESENT

- | | |
|--------------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Gilda Odera | - Member |
| 3. Rosemary Gituma | - Member |
| 4. Eng. Weche Okubo, OGW | - Member |
| 5. Nelson Orgut | - Member |

IN ATTENDANCE

Philip Okumu - Secretariat

Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant - Sameer Africa Limited

1. Alex Thangei - Advocate

2. Edgar Imbamba - Company Secretary

3. Joseph Mukunya - Pupil

Procuring Entity - Ministry of State for Defence

1. Simon Yator - Major

2. Z. G Ogendi -AD/SCM

3. Vitalis Lumbasi - Major

THE BOARD'S DECISION

Upon hearing presentations from the parties and upon considering the information in the documents before it, the Board decides as follows:

BACKGROUND OF AWARD

The Ministry of Defence intended to procure tyres and tubes of various sizes through a Restricted tender from the following firms which were approved by its Ministerial Tender Committee:-

1. M/s Sameer Africa Ltd
2. M/s Good Year Kenya Ltd
3. M/s Autoxpress Limited

4. M/s Pirelli Tyre (Europe) SA
5. M/s Major Motors Ltd
6. M/s Westlands Highway Services Station Ltd
7. M/s Maeji Kaiho International Ltd
8. M/s Transallied Ltd
9. M/s Game Changers Ventures Ltd
10. M/s Mustral General Traders
11. M/s Finken Holdings Ltd
12. M/s Haji Motors Ltd

Closing/Opening:-

The tenders were closed/opened on 10th September, 2015. As at the date of closing/opening of the tenders, the following six (6) firms had responded to the invitation:-

- 1) M/s Autoexpress Limited
- 2) M/s Major Motors Ltd
- 3) M/s Sameer Africa Ltd
- 4) M/s Maeji Kaiho International Ltd
- 5) M/s Finken Holdings Ltd
- 6) M/s Haji Motors Ltd

The Tender Opening Committee made the following observations:-

- a. Three (3) bidders, namely M/s Maeji Kaiho International Ltd, M/s Finken Holdings Ltd, and M/s Haji Motors Ltd, attached all the required documents.
- b. The other three bidders did not attach all the required documents as indicated against each bidder:-

- i. M/s Autoxpress Limited did not attach a CR12 from the Registrar of Companies.
- ii. M/s Major Motors Ltd had an expired Tax Compliance Certificate and did not attach a CR12 from the Registrar of Companies.
- iii. M/s Sameer Africa Ltd had an expired Tax Compliance Certificate and did not attach CR12 from the Registrar of Companies.

EVALUATION AND RECOMMENDATIONS

The Evaluation Committee, referred to as “the Branch” in the Evaluation Report submitted by the Procuring Entity, first submitted a report dated 13th October, 2015 to the Ministerial Tender Committee in which it made the following comments:-

1. The tyres are specified in terms of sizes, the vehicles or equipment they are fitted in, as well as their brand names and countries of origin;
2. The Branch was of the opinion that the responsive firms be prequalified to supply the various tyres and tubes at their quoted prices. This was because the items are mutually exclusive in terms of brands;
3. Funds were available to enable the procuring entity procure the goods;
4. In cases where two or more firms had quoted for the same brand, the Branch recommended the firm that quoted the lowest price be awarded the tender.
5. M/s Autoxpress Ltd duplicated the original contractual price schedule “stamped and signed” at pages 29 to 34 of the original

tender document thus creating a different tender document for comparison with other bidders. Consequently the firm was deemed non-responsive on technical and legal grounds.

The Evaluation Committee recommended the award of the tender for the procurement of tyres and tubes of various sizes to various firms, based on the brand, the prices quoted and country of origin,

- a. M/s Maeji Kaiho International Ltd
- b. M/s Finken Holdings Ltd
- c. M/s Haji Motors Ltd
- d. M/s Sameer Africa Ltd
- e. M/s Major Motors Ltd

The reasons for the recommendations was to award the tender to the lowest responsive bidder in each specific item.

Upon submission of the recommendation to the Tender Committee for approval, the Tender Committee in its meeting No. 13/15/16 held on 23rd October, 2015 discussed the submission and rejected it and directed for a re-evaluation. The Tender Committee noted that some of the firms which had been recommended for award were not responsive to the tender conditions specified under the general Appendix to Instructions to Tenderers at clause 2.2 as they did not provide a Tax Compliance Certificate and did not provide a CR12 from the Registrar of Companies.

The tender was subjected to re-evaluation by the Evaluation Committee which then re-submitted the Evaluation Report to the tender committee on 4th November, 2015. The Evaluation Committee (the Branch) reported

that it re-evaluated the subject tender by omitting the two (2) non-responsive bidders, and that the following three bidders were found responsive to the tender:-

- a. M/s Maeji Kaiho International Ltd
 - b. M/s Finken Holdings Ltd
 - c. M/s Haji Motors Ltd
-

The Evaluation Committee recommended that an award be made to the above three tenderers based on brand, the prices quoted and the country of origin.

THE TENDER COMMITTEE'S DECISION

The Procuring Entity's Tender Committee met and sat on 6th November, 2015 at its Meeting No. 15/15/16 and discussed and approved the award of the tender for the supply of tyres and tubes of various sizes to the following three firms:-

- i) M/s Maeji Kaiho International Ltd
 - ii) M/s Finken Holdings Ltd
 - iii) M/s Haji Motors Ltd
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The awards were for various quantities on an as and when required basis, from 6th November, 2015 to 5th November, 2016.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Sameer Africa Limited, the above named Applicant, whose address for the purposes of this request for review proceedings is care of Waruhiu K'owade & Ng'ang'a

Advocates of Post Office Box 47122-00100, Nairobi on 12th February, 2016 in the matter of the supply and delivery of tyres and tubes of various sizes to the Kenya Defence Forces.

The Applicant sought for the following orders:-

- 1. The award committee's decisions be reversed and the awards made be nullified forthwith under Section 173 of the Act.**
- 2. The Tenders be evaluated afresh on both the Technical and Financial proposals and fresh awards be made in the strict compliance with the Tender documents, the Act and the Regulations therein.**

During the hearing of the Request for Review, the Applicant was represented by Mr. Alex Thangei Advocate while the procuring entity was represented by Mr. Simon Yator.

Before the commencement of the hearing of the request for review and owing to the some provisions of fact that the Public Procurement and Asset Disposal Act No. 33 of 2015 had come into force, Counsel for the Applicant sought for the Board's leave to amend it's Request for Review by deleting any reference to Section 98 of the Public Procurement and Disposal Act and by substituting therewith reference to the Provisions of Section 173 of the new Act a prayer that was allowed as it was not opposed. All the other interested parties did not appear at the hearing of the request for review though the evidence on record shows that they were served.

The Applicant's case

It was the Applicant's case based on the Request for Review, the statement in support of the Request and the submissions made by Mr. Thangei on behalf of the Applicant that following the invitation to tender by the procuring entity, the Applicant among other bidders their submitted tender to the procuring entity. The Applicant stated that upon submitting the said documents the Applicant did not hear from the procuring entity and stated it made several efforts to establish the status of it's tender from the procuring entity by writing several letters to it inquiring about the status of it's tender.

Towards this end, the procuring entity produced a letter dated 12th January, 2016 addressed by it to the procuring entity and which it annexed at page 105 of the Applicant's Request for Review and contended that the Applicant did not respond to the said first letter forcing it to write another letter on 4th February, 2016 through it's advocate on record which it produced and annexed at page 106 of the Request for Review.

The Applicant submitted that one of the procuring entity's officers who did not identify himself called the Applicant's offices on 9th February, 2016 and requested the Applicant to collect send one of it's officers to collect send one of it's officers to collect the letter of notification which it did on the same day.

The Applicant stated that though the letter of notification was dated 17th November, 2015 the procuring entity did not make any effort to send it to the Applicant as required by law was being called to collect the letter well over three (3) months from the date of the letter. The Applicant

produced a copy of the letter of notification at pages 107 to 108 of the Request for Review.

The Applicant while referring to the reasons given by the procuring entity for it's being declared unsuccessful stated that the reason why it was declared was because it had not provided a CR12 from the Registrar of Companies and had also not attached a current Tax Compliance Certificate to it's tender document.

Counsel for the Applicant admitted that the Applicant had indeed not attached the two documents to it's tender document but argued that such a failure was not sufficient to have it disqualified from the process as it had provided annual returns for several years which showed who the Company's directors shareholders and the Secretaries were at the relevant period. He stated that a CR12 would have contained the same information as that set out in the Annual Returns which was in the Applicant's view sufficient.

In addition to the Applicant's counsel's submissions on the issue of the CR12, Counsel for the Applicant stated that it had applied and paid for the said document and produced a receipt from the Registrar of Companies to show that it had infact applied and paid for the CR12 which it annexed at page 12 of the Request for Review.

As far as the Tax Compliance certificate was concerned, Counsel for the Applicant submitted that the Applicant supplied a Tax Compliance certificate but it was not the current Tax Compliance Certificate as required by the tender document since it had not obtained the current copy of the Certificate for the previous year.

He further stated that the omission of the CR12 and the current Tax Compliance Certificate were errors and omissions which fall under the Provisions of Section 62(b) of the Act as read together with Clause 2.20.3 of the tender document which allowed the procuring entity to waive any minor infirmity or non-conformity or irregularity in a tender which did not materially affect the substance of the tender.

Mr. Thangei stated that based on the information that the Applicant had provided to the procuring entity it was also under an obligation to verify any missing information such as the particulars of the Directors of the Applicant.

Counsel for the Applicant additionally submitted that the Applicant had worked with the procuring entity over a long period of time and that if the Applicant had wanted to verify any fact then it was not difficult for the procuring entity to verify any such fact.

Counsel for the Applicant additionally submitted that the procuring entity also ought to have considered that the Applicant was the only manufacturer of tyres and tubes in East and Central Africa and that by failing to consider the Applicant's bid, the procuring entity failed to get the benefit of a bidder with the cheapest price and also failed to promote local industry which was contrary to the Provisions of Section 2 of the Act.

On the issue of the breach of Section 67 of the Act and Regulation 66 of the Regulations Mr. Thangei stated that the Applicant had not been notified of the outcome of its tender and that the Applicant only

received the letter of notification on 9th February, 2016 when it's employee was called by phone to collect same.

Counsel for the Applicant stated that where the issue of lacks of service of a notification is raised, the burden to prove that service of a notification had been effected lies with the procuring entity which did not produce a certificate of posting or a delivery book to show that a notification was personally served on the Applicant. He urged the Board to find that the failure by the procuring entity to serve a notification in time amounts to concealment and that this fact alone would be a ground for ordering a fresh tender process.

On the issue of preference, Counsel for the Applicant submitted that under the Provisions of Section 2(f) and 3a(f) as read together with the Provisions of Regulation 28 of the Regulations, the Applicant was entitled to enjoy preference. Counsel for the Applicant stated that the procuring entity had expressly provided that preference would be applicable at page 60 of the tender document but stated that the procuring entity had not considered the Applicant's entitlement to preference when evaluating the tender.

Counsel for the Applicant relied on the decision in the case of **Republic -vs- Kenya Revenue Authority (Misc. Application No. 540 of 2008)** where the High Court held that the margin of preference consideration was a statutory one and that it was therefore mandatory for a procuring entity to consider the issue of the margin of preference whether or not the tender document had provided for it or not since this was a matter of substantive law.

Counsel for the Applicant also referred the Board to the decision in the case of **Tropical Technology Ltd -vs- The Ministry of Co-ordination of National Government (PPRBA 28 of 2015)** where the Board similarly stated that a procuring entity was under an obligation to consider the margin of preference while evaluating tenders.

Finally counsel for the Applicant faulted the Procuring Entity's decision on the ground that procuring entity did not comply with the award criteria set out in the tender document in awarding this tender. Counsel for the Applicant stated that under the award criteria provided for at Clause 2.25 of the tender document, the procuring entity was required to award the tender to the lowest evaluated bidder.

The Applicant however stated that contrary to the Provisions of Clause 2.25 of the tender document, the procuring entity had split the tender and awarded it to three different entities namely; Maeji Ltd, Finken Ltd and Haji Motors Ltd. Counsel for the Applicant submitted that this tender was advertised as one and did not provide for lots or the splitting of the tender and the decision by the Procuring Entity to award the tender to three (3) different bidders therefore contravened the provisions of Section 66(2) of the Act since the Applicant had in effect introduced a new award criteria which was not provided for in the tender document.

Counsel for the Applicant therefore urged the Board to Order for a retender and relied on the Board's decision in the case of **Auto Express Limited =vs= Kenya Ports Authority PPRBA No.61 of 2015** where the Board held that where a tender was advertised as one and the tender document provided for the award of the tender to one bidder, then it

was improper for a procuring entity to split the tender and award it to several bidders.

The Applicant therefore prayed that it's request for review be allowed with costs.

The procuring entity's case

Mr. Simon Yator who appeared in this matter on behalf of the procuring entity opposed the Applicant's request for review and relied on the procuring entity's memorandum of response and the documents filed on 26th February 2016.

Mr. Yator stated that the Applicant was rightfully declared as non responsive because it did not provide a valid tax compliance certificate and a CR 12. He stated that these were a mandatory requirements in this tender and the procuring entity could not therefore treat them as minor deviations.

The procuring entity submitted that the Applicant had not provided any evidence that it had applied for the said documents or whether it had obtained them.

Mr. Yator stated that the two missing documents were critical in the evaluation of tenders and a Tax Compliance Certificate shows whether a bidder was paying tax. Counsel for the procuring entity stated that other bidders had been disqualified on the basis of lack of the said documents and the Applicant's case could not therefore be treated as a special one.

The procuring entity disputed that the Applicant was the only manufacturer of tyres and tubes in East and Central Africa and stated that the Applicant had not produced any evidence to support this allegation.

On the issue of notification, the procuring entity stated that it had notified both the successful and the unsuccessful bidders of the outcome of their tenders and that it had dispatched letters of notification to all bidders including the Applicant on 17th November 2015. Counsel for the procuring entity however conceded that the Applicant was not in possession of any certificates of posting or a delivery book to show that the individual bidders had personally collected the letters of notification from the procuring entity.

On the issue of the Applicant's allegation that the procuring entity withheld to serve the Applicant with a notification of the outcome of its tender out of malice and bad faith counsel for the procuring entity submitted that it was not the procuring entity's duty to engage in such conduct.

On the issue of preference, counsel for the procuring entity submitted that the Applicant in this case was disqualified at the preliminary evaluation stage and was not therefore entitled to be accorded preference. He further submitted that the applicant had not given evidence that it was entitled to preference under the Act or the regulations.

On the issue of the award of the tender being given to three bidders when the tender had been advertised as one, counsel for the procuring entity submitted that the tender involved various categories of tyres and tubes which were being procured by the procuring entity and that a single company or tenderer could not supply all those items.

He submitted that the tender involved the supply of three categories of materials which could not be supplied by one company and so each item was awarded to the lowest evaluated bidder in each category.

Counsel for the procuring entity however conceded that the tender was not advertised in lots or categories and the tender document did not contain categories and provide for the award of the tender per lot, category or in regions.

He also conceded that most of the forms of tender were blank while others were incomplete.

Mr. Yator therefore urged the Board to dismiss the request for review with costs.

Mr. Thangei in a short response to the procuring entity's submissions stated that the mere admission by the Procuring entity that it had made awards to more than one bidder without a provision for lots, categories or regions where the tender document only allowed for an award to only one bidder was sufficient basis to order for a fresh tender and that the Applicant's request for review ought to have been allowed on that ground alone without more.

THE BOARD'S DECISION

The Board has perused all the documents submitted to it and has considered all the arguments made before it by the parties. The Board has come up with the following issues for determination:-

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- 1. Whether the Applicant was duly served with a notification as provided for by Section 67 of the repealed Public Procurement and Disposal Act 2015.**
 - 2. Whether the Applicant's bid was responsive in terms of the mandatory requirements contained in the tender document.**
 - 3. Whether the Procuring Entity evaluated the tender in accordance with the evaluation and the award criteria set out in the tender document.**

The Board will now examine each issue and make its finding on it:-

ISSUE NO. 1

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- 1. Whether the Applicant was duly served with a notification as provided for by Section 67 of the repealed Public Procurement and Disposal Act 2015.**

The Board has considered the correspondences exchanged between the Applicant and the Procuring Entity vide the two letters from the Applicant to the Procuring Entity dated 12th January 2016 and 4th

February 2016, the second from their lawyers, respectively where the Applicant was enquiring about the outcome of the evaluation process as well as demanding a formal notification of the outcome of the said process. The Procuring Entity's response was a call to the Applicant inviting its employee to collect the notification letter dated 17th November 2015 which the Applicant collected on 9th February 2016.

Section 65 of the Act, states as follows:-

"65. If the procuring entity determines that none of the submitted tenders is responsive, the procuring entity shall notify each person who submitted a tender."

While Section 67 of the Act states as follows:-

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

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

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

The Board finds that nearest attempt by the procuring entity to prove service was through the production of a document titled "Post Mail - Registered & Unregistered Letter" which indicates the Branch, the file reference, the date of the letter, the subject, addressee, and remarks. The Board further notes that the entries in the said document correspond to the date of the letter, namely 17th November, 2015 as the entry date.

The procuring entity did not however produce any evidence by way of registered post or personal service of the notification on the Applicant.

As the Board has severally held, the burden of proof where service is contested lies with the Procuring Entity, the Board finds that that the Applicant was not notified in accordance with Section 67. This ground of review ground therefore succeeds.

ISSUE NO. 2

2. Whether the Applicant's bid was responsive in terms of the mandatory requirements set out in the tender document.

The Board finds from the Applicant's own admission that the Applicant did not submit a current (up to date) Tax Compliance Certificate or the document referred to as the "CR12" in its tender document arguing that the procuring entity and the Board should have treated the omissions as minor deviations. The Board has however considered the issue and particularly Section III paragraph 2 (c) and (e) of the Procuring Entity's tender document and finds that the two were listed as mandatory requirements which all bidders were aware of before the closing date.

Section 64 (2) of the PPDA Act states as follows on minor divisions:-

*"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 documents; or*

(b) errors or oversights that can be corrected without affecting the substance of the tender."

The Board further finds that Clause 2.20.3 (Section III) of the Tender Document, states as follows:-

"2.20.3 The Procuring 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 affect the relative ranking of any tenderer."

As indicated above, the omission of such crucial documents that are mandatory requirements in a tender document cannot be treated as minor deviation. As Mr. Yator rightly submitted these requirements are not only statutory and go into the evaluation of tenders. How would a procuring entity for example determine the issue of preference without knowing who the Directors and shareholders of a company are. A mandatory requirement cannot at any rate be treated as a minor deviation. The Board therefore finds that the Applicant's bid was rightly declared as no responsive and hence this ground fails.

ISSUE NO. 3

3. Whether the Procuring Entity evaluated the Applicant's tender in accordance with the evaluation and the award criteria set out in the tender document.

By its own submission, the Applicant did not submit a CR12 indicating the shareholding of the Applicant company which would entitle it to the 15% preference it sought.

Clause 2.4.3 of the Tender Document relating to preference states as follows:-

"2.4.3 Preference where allowed in the evaluation of tenders shall not exceed 15%"

Section 39(8) of the Act states as follows:-

"39(8) In applying the preferences and reservations under this section -

(a) exclusive preference shall be given to citizens of Kenya where -

(i) the funding is 100% from the Government of Kenya or a Kenyan body; and

(ii) the amounts are below the prescribed threshold.

(b) A prescribed margin of preference may be given -

(i) in the evaluation of bids to candidates offering goods manufactured, mined, extracted and grown in Kenya; or

(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed."

Regulation 28 of the Regulations states as follows:-

"28. (1) For the purposes of section 39(8) of the Act, the threshold below which exclusive preference shall be given to citizens of Kenya, shall be the sum of -

(a) fifty million shillings for procurements in respect of goods or services;

(b) two hundred million shillings for procurements in respect of works.

(2) The margin of preference-

(a) for the purposes of section 39(8) (b) (i) of the Act, shall be fifteen percent of the evaluated price of the tender;

(b) for the purposes of section 39(8) (b) (ii) of the Act, shall be-

(i) six percent of the evaluated price of the tender where the percentage of shareholding of the locals is less than twenty percent; and

(ii) eight percent of the evaluated price of the tender where the percentage of shareholding of the locals is less than fifty one percent but above twenty percent”

The Board has not come across any document in the Applicant's Tender Document on the basis of which preference would be allowed and finds that the Applicant did not submit any evidence that would entitle it to preference as per Section 39. It ought to have included such a document in its tender document.

On the issue of the award criteria used by the Procuring Entity, the tender document stipulates in Clause 2.25.1 as follows:-

“2.25 Award Criteria

2.25.1 Subject to paragraph 2.29 the Procuring Entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been

determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily.

Counsel for the Applicant argued that due to the nature of the different specifications of the items being procured, it was not possible to award one bidder all the items listed in the tender document. The Board finds that way the tender document was structured did not lend itself to any meaningful evaluation in terms of identifying an overall winning bidder for all items. This is evidenced by the fact that the quotes from different bidders contain blanks and only one bidder namely Haji Motors Limited quoted a bid price of Kshs.8, 581, 164.10/= for items that they were prepared to supply. The rest of the bidders opted to leave their forms of tender blank. The Procuring Entity admitted that it awarded the tender to three bidders instead of one as per the tender document. The three bidders awarded the tender were M/s Maeji Kaiho International Ltd, M/s Finken Holdings Ltd and M/s Haji Motors Ltd. The Board further notes that there was no criteria for awarding the tender to more than one bidder.

Section 66 of the Public Procurement and Disposal Act states as follows:

- "66. (1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).*
- (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.*
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) –*

(a) the criteria must, to the extent possible, be objective and quantifiable; and

(b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.

(4) The successful tender shall be the tender with the lowest evaluated price.

(5) The procuring entity shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders.

(6) The evaluation shall be carried out within such period as may be prescribed."

The Board therefore finds that the Procuring Entity acted in breach of section 66(2) above as well as its own tender document, having not followed its own evaluation criteria on the award of the tender. This ground of review therefore succeeds.

The Board considered a similar issue in the case of Auto Express Ltd vs Kenya Ports Authority Ltd (PPRAB APPL. NO.61 OF 2015) where the Board held as follows at page 42 and 46 of its decision:-

"The financial evaluation committee's report and decision appearing at pages 144 to 152 of the procuring entity's memorandum of response however shows that the tender evaluation committee instead of proceeding to evaluate the tender as one decided to subject each item to be supplied under the tender and subject it to financial evaluation based on technical reasons/considerations for the rejection and/or non-

qualification of each item thereby awarding the tender which was advertised as one to three different bidders."

"The Board finds that this process of evaluation was in contravention of the Provisions of Regulation 50 of the Public Procurement and Disposal Regulations 2006 which governs the financial evaluation of tenders. Regulation 50 of Regulations stipulates as follows concerning what factors should be taken into account in carrying out financial evaluation:-

"The Board has carefully has looked at the tender document and wishes to observe that the tender document did not contemplate the award of the tender in lots or per item and the clause which stipulates that the procuring entity could award the contract in whole or in part did not remove the obligation on the part of the procuring entity to comply with the Provisions of S.66(4) of the Act and Regulation 50 of the Regulations."

The same situation is the case in the review now before the Board.

This ground of review therefore succeeds and is allowed.

FINAL ORDERS OF THE BOARD

In the exercise of the powers conferred upon the Board by the Provisions of S.173 the Public Procurement and Asset Disposal Act, the Board therefore makes the following orders on this Request for Review:

1. The Request for Review dated 12th February 2016 and which was filed by the Applicant herein on the same day is hereby allowed.
2. The Awards made Maeji Kaiho International Ltd, M/s Finken Holdings Limited and M/s Haji Motors Ltd as contained in the letters dated 17th November 2015 be and are hereby annulled.
3. In view of the breach of the Provisions of Clause 2.25.1 on page 13 of the Tender Document and Section 66 of the Public Procurement Disposal Act, the Board hereby orders the Procuring Entity to amend the Tender Document, and obtain approval from the Public Procurement Oversight Authority and to allow for lots, categories or a regional supply of tyres and tubes or advertise and award the tender as one if it elects to maintain the same award criteria.
4. Once the Tender Document has been amended and approved by PPOA, the Procuring Entity is ordered to re-advertise the tender afresh and invite bids for evaluation and complete the entire process within 30 days, from the date of this decision.
5. On the issue of costs, as each party has been party successful in this request for review each party shall bear it's own costs.

Dated at Nairobi on this 4th day of March, 2016.

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CHAIRMAN
PPARB

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SECRETARY
PPARB

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2. The Awards made Maeji Kaiho International Ltd, M/s Finken Holdings Limited and M/s Haji Motors Ltd as contained in the letters dated 17th November 2015 be and are hereby annulled.
3. In view of the breach of the Provisions of Clause 2.25.1 on page 13 of the Tender Document and Section 66 of the Public Procurement Disposal Act, the Board hereby orders the Procuring Entity to amend the Tender Document, and obtain approval from the Public Procurement Oversight Authority and to allow for lots, categories or a regional supply of tyres and tubes or advertise and award the tender as one if it elects to maintain the same award criteria.
4. Once the Tender Document has been amended and approved by PPOA, the Procuring Entity is ordered to re-advertise the tender afresh and invite bids for evaluation and complete the entire process within 30 days, from the date of this decision.
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