

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO.7/2009 OF 23rd FEBRUARY

BETWEEN

M - TECH BUILDING WORKS LTD..... (APPLICANT)

AND

MINISTRY OF PUBLIC WORKS..... (PROCURING ENTITY)

Review against the decision of the Tender Committee of Ministry of Public Works dated the 3rd of February, 2009 in the matter of Tender No. WP ITEM NO. D59 CO/LMU 701 JOB NO. 5900J for Proposed Rehabilitation of the New Lamu Terminal Jetty - Lamu District.

BOARD MEMBERS PRESENT

| | | |
|-------------------|---|-----------------------|
| Mr. J. W. Wambua | - | Member (in the chair) |
| Ms. Loise Ruhu | - | Member |
| Eng. C. A. Ogut | - | Member |
| Mr. S. K. Munguti | - | Member |
| Mr. Akich Okola | - | Member |

IN ATTENDANCE

| | | |
|-----------------|---|-------------|
| Mr. C. R. Amoth | - | Secretary |
| Ms. P. K. Ouma | - | Secretariat |

PRESENT BY INVITATION

Applicant, M - Tech Building Works Ltd

Mr. Sanjeev Khagram - Advocate, A. B. Patel & Patel Advocates

Procuring Entity, Ministry of Public Works

Eng. Mbiyu Kimani - Chief Engineer
Eng. Samuel Charagu - Ag. Chief Supt. Engineer
Eng. Benjamin Mwangi - Ag. Chief Supt. Engineer
QS. E. W. Njoroge - Principal Supt. Quantity Surveyor
Mr. Oselu Walter - Chief Finance Officer
Eng. Lucas Musili - Snr. Supt. Engineer
Eng. G. N. Mutala - Snr. Supt. Engineer
Q.S.A Bernard W. Wanjala - Quantity Surveyor Assistant
Mrs. T. Icharia - Principal Procurement Officer
Mr. David Onyango - Procurement Officer

Interested Candidate, Comarco Construction Co. Ltd

Mr. Mathew Nyabena - Advocate, M. Nyabena & Co. Advocates
Mr. James Amwayi - Managing Director

BOARD'S DECISION

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

BACKGROUND

The Ministry of Public Works (MOPW) advertised the Tender for the Rehabilitation of the New Lamu Terminal Jetty in the daily newspapers on

13th and 20th November, 2008. The following six tenderers responded and bought the Tender documents:

1. Volcano Engineering Ltd.
2. Associated Construction Co. (K) Ltd
3. A. A. Bayusuf & Sons Ltd
4. M-Tech Building Works Ltd.
5. Comarco Construction Co Ltd.
6. Maru Piling Works.

● The Tenderers attended the mandatory Pre - tender site visit on 27th November 2008.

The Tenders were closed/opened on 9th December, 2008 at the Ministry of Public Works Headquarters. This was a two envelope tender and the Technical Documents were opened immediately in the presence of the representatives of the tenderers. Five (5) tenderers returned the documents. Maru Piling Works did not return their bid document.

● **EVALUATION**

The evaluation was carried out in the following stages:

Preliminary Evaluation:-

The Evaluation Committee evaluated the bids on responsiveness as provided for in Clause 4.4 of the Instructions to Tenderers. The results of the evaluation were as tabulated:-

| N o. | Requirement | Volcano Eng. Ltd | Associated Constructi on Co. Ltd | A.A. Bayusuf & Sons Ltd | M-Tech Building Works Ltd | Comarco Constructi on Co. Ltd |
|------|-----------------------------------------------------------------------------------------------------------------------------------------------|------------------|----------------------------------|-------------------------|---------------------------|-------------------------------|
| a. | Company dossier with proof of Incorporation | Yes | Yes | Yes | Yes | Yes |
| b. | List of similar marine works and their value undertaken in the last eight years. | No | Yes | Yes | Yes | Yes |
| c. | List of ongoing works | No | Yes | Yes | Yes | Yes |
| d. | List of plant and equipment owned by firm including registration numbers, year of manufacture and current condition. | Yes | Yes | Yes | Yes | Yes |
| e. | List of personnel proposed for execution of works and their detailed qualification and experience (attaché copies of CV's and Certificates) | Yes | Yes | Yes | Yes | Yes |
| f. | Reports on financial standing of the firm including profit and loss statements, balance sheets and Auditors reports for the last three years. | Yes | Yes | Yes | Yes | Yes |
| g. | Evidence of access to lines of credit and availability of other financial resources. | Yes | Yes | Yes | Yes | Yes |
| h. | Litigation history of the Company | Yes | Yes | Yes | Yes | Yes |
| i. | Form of authorization | Yes | Yes | Yes | Yes | Yes |
| j. | Confidential Business questionnaire | Yes | Yes | Yes | Yes | Yes |
| k. | Certificate of Tenderer's visit to site | Yes | Yes | Yes | Yes | Yes |
| l. | Certified copies of V.A.T. certificate and P.I.N. certificate | Yes | Yes | Yes | Yes | Yes |
| m. | Bid bond | Yes | Yes | Yes | Yes | Yes |
| | REMARKS (Responsive/ Non Responsive) | Responsive | Responsive | Responsive | Responsive | Responsive |

All the five tenderers were responsive.

Technical Evaluation

The bids were then awarded marks based on the pre-set Marking Scheme.

The summary results were as follows:

| ITEM | MAX. SCORE POSSIBLE | Volcano Engineering Ltd | Associated Construction Co. Ltd | A.A. Bayusuf & sons | M-Tech Building Works | Comarco Construction Co. Ltd |
|---------------------------------------|---------------------|-------------------------|---------------------------------|---------------------|-----------------------|------------------------------|
| REGISTRATION ISSUES. | Yes | Yes | Yes | Yes | Yes | Yes |
| EXPERIENCE IN CIVIL/ MARINE PROJECTS. | 15 | 1 | 15 | 8 | 15 | 11 |
| EQUIPMENT | 35 | 3 | 17 | 23 | 18 | 15.5 |
| KEY PERSONNEL | 20 | 5.5 | 7 | 8.5 | 7.75 | 9 |
| FINANCIAL STANDING | 25 | 9 | 25 | 16 | 25.5 | 25 |
| LITIGATION HISTORY | 5 | 5 | 5 | 5 | 5 | 5 |
| TOTAL MARKS | 100 | 23.5 | 69 | 60.5 | 70.75 | 65.5 |

All the tenderers except M/s Volcano Engineering Ltd scored above the minimum qualifying mark of 60% and hence met the criteria for technical qualification. The Evaluation Committee recommended the four qualified bidders to be invited to witness the opening of their financial bids.

Financial Evaluation

The Financial Proposals were opened on Friday, 19th December, 2008 in the presence of the representatives of the Tenderers. At the tender opening of the financial bids, the chairlady declined to read the tender documents submitted by M/s M-Tech Building as it was different from the tender documents sold to the firm by the Procuring Entity.

The representatives of A. A. Bayusuf & Sons Ltd and Comarco Construction Co. informed the Committee that their bid bonds were submitted attached to the technical tender document (Part 1).

The bids were read out and they had quoted as follows:-

| BIDDER NO. | NAME OF BIDDER | TENDER SUM (KSHS) |
|------------|-----------------------------------------|-------------------|
| 1. | M/S A. A. Bayusuf & Sons Ltd, | 222,776,562.80 |
| 2. | M/S Comarco Construction Co. Ltd, | 213,594,123.70 |
| 3. | M/S Associated Construction Co. (K) Ltd | 239,475,211.10 |
| 4. | M/S M-Tech Building Works Ltd | No tender |
| 5. | Engineers Estimate | 252,189,771.85 |

The Evaluation Committee carried out another preliminary evaluation to determine the bids responsiveness to the requirements as set out in the Tender Documents. The results were as follows:-

| Bidder No. | Name Of Bidder | Valid Bid Security | Form of Tender | Confidential Business Questionnaire | Tender Sums Kshs | Remarks |
|------------|----------------------------------|--------------------|----------------|-------------------------------------|------------------|-----------------|
| 1. | AA Bayusuf & Sons Ltd, | Yes | Yes | Yes | 222,776,562.80 | Responsive |
| 2. | Cormarco Construction Co. Ltd | Yes | Yes | Yes | 213,594,123.70 | Responsive |
| 3. | Associated Construction Co. Ltd, | Yes | Yes | Yes | 239,475,211.10 | Responsive |
| 4. | M-Tech Building works Ltd | Yes | Yes | No | - | Non -Responsive |

Arithmetical errors were checked for all the bidders and then corrected. In addition, the provision of Bid Securities was also checked. The tender amounts were checked and compared against the Engineer's Estimate. Out of the three (3) tenders evaluated, all of them were found to be responsive. M/s **Comarco Construction Co. (K) Ltd** was found to have offered the lowest evaluated tender and its bid was recommended for award at their tender sum of **Kshs. 213,594,123.70**

THE TENDER COMMITTEE'S DECISION

The Ministerial Tender Committee in its meeting No. MTC 13/2008 - 2009 deliberated on the matter and awarded the tender to M/s Comarco Construction Co. Ltd at their tender sum of Kshs. 213, 594,123.70. The bidders were notified vide letters dated 3rd February, 2009.

THE REQUEST FOR REVIEW

The Request for Review was lodged on 23rd February, 2009 by M-Tech Building Works Limited, against the decision of the Tender Committee of the Ministry of Public Works regarding the award of Tender No. WP ITEM NO. D59 CO/LMU 701 JOB NO. 5900J. The Applicant was represented by Mr. Sanjeev Khagram, Advocate, A. B. Patel & Patel Advocates. The Procuring Entity was represented by Eng. M. Kimani, the Chief Engineer and Q.S. E. W. Njoroge the Principal Supt. Quantity Surveyor. The Interested Candidate present, Comarco Construction Co. Ltd was represented by Mr. Mathew Nyabena, Advocate, M. Nyabena Co. Advocates.

The Applicant's prayers before the Board were as follows:

- i) The Procuring Entity's decision to disqualify it be set aside;
- ii) its bid be declared the lowest evaluated and be awarded the tender;
- iii) the Procuring Entity pays the cost of the Review
- iv) Any other relief that the Board may deem fit pursuant to Section 93 of the Act.

At the commencement of the hearing, the Board informed the parties that it had noted that there was a preliminary issue raised by the Procuring Entity

in its Response. After consultation, the Procuring Entity decided to argue the preliminary issue together with the substantive grounds.

The Board will address the Preliminary issue first.

The Procuring Entity argued that the review was out of time as it had been filed after the fourteen days appeal window. It stated that the notification letters were dated 3rd February, 2009 and a copy faxed to the Applicant on 9th February, 2009 “.....to avoid a scenario of claiming that the letters were not received at all from the Post office.....”. It averred that the Applicant had eight days to lodge its request for review from 9th February, 2009. It therefore stated that the appeal was null and void as it was filed on 23rd February, 2009 which was contrary to Section 68 (2) of the Public Procurement and Disposal Act, 2005 (hereinafter “the Act”) and Regulation 73 (2) (c) of the Public Procurement and Disposal Regulations (hereinafter “the Regulations”). On inquiry by the Board on when and how they posted the notification letters, the Procuring Entity stated that it posted the letters but did not adduce evidence to show when this was done.

The Applicant, in response stated that it received its notification vide a letter dated 3rd February, 2009 which was faxed to them on 9th February, 2009, informing them that they were unsuccessful in the tender. It submitted that the Board had ruled on various occasions that notification occurred when the communication was received by the party and not on the date of the letter. It supported its submissions with the Board’s rulings on **Application No. 18/2008 between Kobil Petroleum Ltd and The Kenya Ports Authority**, and **Application No. 40/2007 between Vestergaard Frandsen and The Procurement and Supply Chain Management Consortium**. It submitted that in both the Applications, the Board had

ruled that notification is done upon delivery and not merely on the basis of the date of the notification letter. It argued that, in this case the appeal window would therefore start running from 10th February, 2009 after notification took place on 9th February, 2009 to close on 23rd February, 2009.

The Applicant further submitted that in their affidavit, the Interested Candidate, M/s Comarco Construction Co. Ltd had stated that it had received its notification letter dated 3rd February, 2009 and had sent an acceptance letter dated 11th February, 2009. The Applicant argued that the notification letter was not attached to its affidavit filed before the Board and therefore it was difficult to verify when the Interested Candidate received it. The date of the acceptance letter showed that the party may have received the notification letter at the same time as the Applicant.

In conclusion, it stated that its Request for Review was therefore lodged on time.

The Board has examined the documents filed before it and considered the submissions of the parties on this issue:

The question that arises for determination by the Board is whether the Application was filed within the fourteen days period stipulated in Regulation 73 (c) and hence if the Board has jurisdiction to hear the matter.

The Board has noted that the Applicants' notification letter attached to the Request for Review was a fax letter dated 3rd February, 2009 and received on 9th February, 2009. This was affirmed by the Procuring Entity. The Board further observed that the Procuring Entity did not adduce any evidence on the posting of the notification letters. The Board finds that the notification

was effected vide the fax letter sent on 9th February, 2009. Counting from 10th February, 2009 the appeal window was to lapse on 23rd February, 2009 and the Request for Review was filed on that day.

Accordingly the Board finds that the Request for Review was filed on time and hence the Board has Jurisdiction to entertain the Request for Review.

The Request for Review is based on twelve (12) grounds, which the Board deals with as follows:-

Grounds 1 - 6

These grounds are statements on the background information on the Request for Review and are not supported by any breach of the Act or Regulations as required under Regulation 73(2) (a) of the Regulations. Indeed, the Applicant at the hearing affirmed that they were mere statements and therefore the Board need not make any findings on them.

Grounds 7 - 12, Breach of Section 2, 64, 66 (2) and (4) of the Act, Regulation 50 - 52 and Clause 27 of the tender document

These grounds have been combined since they raise similar issues.

The Applicant submitted that it had complied with all the mandatory requirements of the tender as set out in the Instructions to tenderers and in particular, Clause 2.2. It further submitted that it had been pre - qualified on the technical aspects and this was not disputed.

The Applicant stated that at the opening of the Financial Bids stage, it was informed by the Procuring Entity that its Bid would be disqualified because

it had failed to include certain documents with its bid document. It referred the Board to paragraph 3 of the Procuring Entity's response, where the Procuring Entity claimed that the Applicant was in breach of Clause 5 of the tender documents.

The Applicant submitted that Clause 5 of the tender document set out what the tender documents was to comprise of. It further stated that Clause 9 of the tender document on the other hand, specified the documents that were to be prepared by bidders and submitted to the Procuring Entity. It further submitted that it was not under any obligation to return the general conditions of the tender document and other documents that the Procuring Entity alleged were missing in its bid. In addition, it submitted that Clause 16.2 further indicated that ***"The copy of the tender and Bills of Quantities shall be typed or written in indelible ink....."*** arguing that this allowed the bidders to either type or write on the Bills of Quantities.

The Applicant further stated that, during the opening of the financial bids, it had been informed that its bid had been disqualified for not including in its bid document the Instruction to Tenderers, the Conditions of Contract Part II and the Special Specifications. It stated that it got this information at the financial tender opening and later vide an email message dated 22nd December, 2008. It therefore argued that the Procuring Entity wrongfully sought to impose an additional burden on the Applicant, contrary to the criteria set out in the tender document and section 66 (2) of the Act.

The Applicant further argued that by seeking to disqualify it on the basis of criteria not set out in the tender document, the Procurement Entity contravened section 2 of the Act on transparency and accountability. It added that the Procuring Entity's action was further in breach of Section 64

of the Act on minor deviations. It averred that it excluded the said documents from its bid as they were not necessarily required to be submitted as part of the tender as they merely contained information to tenderers setting out the requirements to be met pursuant to Section 52 of the Act.

The Applicant added that there was no requirement in the tender document for the bidders to return the whole tender document as purchased. The Applicant argued that the attempt to exclude it from the financial evaluation was therefore wrong. It further argued that its financial bid was actually opened and read out and therefore, it was inappropriate not to evaluate it. It averred that the Procuring Entity was not right in using Clause 20.5 to disqualify its bid since the Clause is on tenders which are submitted late and are therefore not opened but are returned unopened.

The Applicant submitted that it was the lowest evaluated bidder and that it ought to have been awarded the tender pursuant to Clause 27 of the Tender Document, Section 66 (4) of the Act and Regulations 50 - 52.

The Applicant argued that it was inconsequential for the successful candidate to argue that it had already given a performance bond to the Procuring Entity and that it stood to suffer great losses if the Award was withdrawn from it. It submitted that on the 23rd of February 2009, the Procuring Entity became aware that a Request for Review had been filed with the Public Procurement Administrative Review Board, challenging the Award, and hence the Procuring Entity had a duty not to accept any performance bond thereafter or take any further steps on the tender.

The Applicant referred the Board to paragraph 17 of the successful candidate's affidavit which reads as follows:

"that in the alternative, in the event that the Board finds that the tender was not properly awarded, the tender not automatically be awarded to the applicant on the basis of a lower tender bid. I do not believe that the Applicant, who possess neither any equipment required for marine civil construction, nor any experience of marine construction, is able to complete the project for the amount so tendered by the applicant."

The Applicant stated that this statement was made without any evidence and urged the Board to note the fact that the Applicant had successfully gone through the technical prequalification stage which meant that it was technically qualified.

The Applicant concluded its submissions by urging the Board to allow the Request for Review.

In response, the Procuring Entity stated that the Applicant's financial bid was disqualified after the Tender Opening Committee ruled that the bid document was not complete. It stated that the Applicant's bid document lacked the Instruction to Tenderers, Appendix to Instruction to Tenderers Conditions of Contract part II, Contract Forms which included the letter of acceptance, Form of Agreement, Form of Tender Security, Performance Bank Guarantee for advance payment, Tender Questionnaire and the Confidential Business Questionnaire. It argued that the Applicant had not submitted the complete tender document.

The Procuring Entity further added that the Applicant had not fully complied with Clause 9 of the tender document as it lacked all the requirements. It added that the said clause required the bidder to submit ***“the information on eligibility and qualification, and any other material required to be completed and submitted in accordance with the Instructions to Tenderers embodied in these tender documents...”***

It further added that the Applicant did not fully comply with the provision of Clause 9 as most of their documents lacked all the requirements by the Procuring Entity. With regard to the Applicant's allegations that its Tender was the lowest evaluated Tender, the Procuring Entity stated that Clause 20.5 stated that ***“...tenders not opened and read out at the Tender opening shall not be considered further for evaluation irrespective of the circumstances”***. It averred that the Applicant's Tender figure could not be the lowest evaluated as its tender price was not read out at the tender opening and hence no evaluation was conducted.

The Procuring Entity informed the Board that the form of Tender presented by the Applicant was not be related to the tender documents that the Applicant had bought. It was different as it was in the Applicant's letter head.

The Procuring Entity concluded by requesting the Board to uphold the disqualification of the Applicant and allow the procurement process to continue.

On its part, the Interested Candidate, Comarco Construction Ltd, submitted that the Application had no merit. It argued that the Application was based on correspondence which was exchanged between the Applicant and the

Procuring Entity. It further argued that the Applicant and all the other bidders who collected Tender Documents from the Procuring Entity were bound to return it in the same format as purchased. It further argued that all the bidders who submitted their bids should be treated equally and that no bidder should be allowed to submit its document without certain documents. In this respect it referred to Clause 9 of the Tender Document which provided that the forms as contained in the Tender Document, were to be used without exception.

It argued that it was wrong for the Applicant to claim that its bid was the lowest evaluated bid.

Finally, it argued that it had purchased the necessary performance bond and therefore it would suffer great financial loss if the tender was annulled.

The Board has considered the submissions of the parties and examined the documents presented before it.

The Board notes that Clause 5 of Part II of the financial tender document sets out the documents that comprise the tender. In addition, Clause 9 of the same documents provides the documents to be prepared by the tenderer. Clauses 5.1 and 9.1 state as follows:-

Clause 5.1:

“ The tender documents comprise the document listed here below and should be read together with any Addenda issued in accordance with Clause 7 of this instructions to tenderers.

- a. Form of Invitation for Tenderers*
- b. Instruction to Tenderers*
- c. Form of Tender*

- d. Appendix to Form of Tender*
- e. Form of Tender Surety*
- f. Statement of Foreign Currency Requirements*
- g. Tender and Confidential Business Questionnaires*
- h. Details of Sub contractors*
- i. Schedules of Supplementary Information*
- j. General Conditions of Contract Part I*
- k. Conditions of Particular Application – Part II*
- l. Specifications*
- m. Bills of Quantities*
- n. Drawings”*

Clause 9.1

“ The tender to be prepared by the tenderer shall comprise: the Form of Tender and Appendix thereto, a Tender Surety, the Priced Bills of Quantities and Schedules, the information on eligibility and qualification, and any other materials required to be completed and submitted in accordance with the Instructions to Tenderers embodied in these tender documents. The Forms, Bills of Quantities and Schedules provided in the tender documents shall be used without exception (subject to extensions of the scheduled in the same format and to the provisions of clause 13.2 regarding the alternative forms of Tender Surety)”

The Board finds that Clause 5 clearly sets out what actually constituted the tender document as purchased by the tenderer from the Procuring Entity. Further, Clause 9 provides the documents the bidders were required to complete and submit.

The Board further notes that the Applicant passed the technical evaluation and its financial bid was opened. The Applicant's Financial Tender document contained the Form of Tender, Appendix to Form of Tender, Schedule of Materials, Schedule of Labour, Bill of Quantities and Annex C which included the Project Vehicle, Equipment and Specifications and Brochures. This comprised the tender documents to be prepared by the tenderers as stipulated under Clause 9. The Board has noted that the Applicant did submit its bid in accordance with Clause 9.

On examining the Evaluation report in regard to the financial bids, the Board observes that the Applicant was disqualified for not being responsive at the preliminary stage. The Board notes that the parameters that were evaluated at this new "preliminary" stage were as follows:-

- the provision of a valid bid security,
- Form of Tender,
- Confidential Business Questionnaire and
- Tender sum.

The Applicant's bid was disqualified for lack of a Business Questionnaire. The Board however notes that the Applicant had included its Business Questionnaire in its technical bid document (Part 1). The Board further notes from the minutes of the financial bid opening that two other bidders M/s A. A. Bayusuf & Sons Ltd and M/s Comarco Construction Co. Ltd, informed the committee that their bid bonds were attached to their technical bids (Part 1, instead of being included in the Financial Bid. The two firms were evaluated and declared responsive while the Applicant's bid was declared non responsive. The Board finds the action of the Procuring Entity

to waive the requirement of a bid bond in the financial document for the two bidders and not do the same in regard to the Business Questionnaire for the Applicant amounted to discrimination. Further, the Board finds that it was not clear to the bidders which documents should be included in each envelope. It is the duty of the Procuring Entity to clearly set out in the tender documents which documents should be submitted in each envelope.

The Board further finds that the Preliminary Evaluation conducted at the financial evaluation stage was contrary to the provisions of Regulation 47 which requires that preliminary evaluation be done prior to the detailed technical evaluation. The parameters included in the determination of responsiveness in the technical evaluation included the provision of a bid bond and the Confidential Business Questionnaire. It is not clear why the Procuring Entity had to repeat the same parameters in the second determination at the financial stage.

The Board notes that the Minutes of the financial bid Opening Committee, indicate that the chairlady of that committee, declined to read the tender documents of the Applicant on the grounds that the document was different from the one sold by the Procuring Entity. The Board further notes that Section 60 of the Act stipulates the manner in which the tender opening should be carried out. Section 60 (4) and (5), sets out the functions of the Tender Opening Committee , which include, assigning an identification number to each tender, reading out aloud and recording in the tender opening register the name of the person submitting the tender, the total price of the tender including any modifications or discounts received and the tender security if applicable. The Board therefore finds that the tender Opening Committee did not discharge its mandate fully under section 60 of the Act.

As regards the Form of Tender submitted by the Applicant, the Board notes that it was in the same wording as the document included in the tender document that was sold to the Applicant. The only deviation was that it had been printed on the Applicant's letterhead. It is the Board's view that this is a minor deviation which ought to have been handled in line with section 64 (2) (a) as it does not materially depart from the requirements set out in the tender document.

The Board notes that the Applicant's financial bid was not evaluated as it was declared non-responsive after the second preliminary evaluation conducted at the financial stage. As stated in the earlier grounds, the Applicant's document, in part I, contained a business questionnaire but was disqualified at the financial stage, as the same document was missing in the part 2 documents. Regulations 50 - 52, stipulates how the financial evaluation is to be carried out. It is noted that the Procuring Entity carried out financial evaluation of the other bidders except for the Applicant and prepared a report. The Board finds the disqualification of the Applicant at this stage to be irregular as its financial bid was not considered even though it had already been declared responsive at the technical stage.

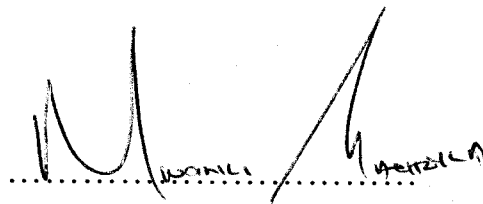
Taking into consideration all the foregoing matters, we find that the tender evaluation process was flawed and therefore these grounds succeed.

On the issue of the Performance Bond acquired by the successful bidder, the Board notes that Section 94 of the Act, read together with Regulation 74 (2) of the Regulations, stipulates that upon notification of the Filing of a Request for Review by the Secretary to the Board, the procurement proceedings are

immediately stopped. Therefore, the performance bond should not have been given until the determination of the Request for Review.

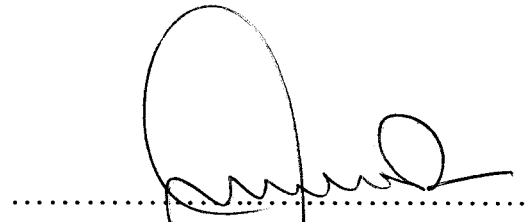
Consequently the Award to the successful tenderer is hereby annulled. The Board hereby orders the Procuring Entity to re-evaluate the Financial Bids, including the Applicant's financial bid, in accordance with the Act, the Regulations and the tender document.

Dated at Nairobi on this 24th day of March, 2009

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a diagonal stroke and a smaller signature element. The signature is written above a horizontal dotted line.

Signed Chairman

PPARB

A handwritten signature in black ink, featuring a large, circular loop at the top followed by a series of smaller, connected loops. The signature is written above a horizontal dotted line.

Signed Secretary

PPARB