

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 11/2010 OF 25TH FEBRUARY, 2010

BETWEEN

MFI OFFICE SOLUTIONS LTD.....APPLICANT

AND

TEACHERS SERVICE COMMISSION..... PROCURING ENTITY

Review against the decision of the Tender Committee of the Teachers Service Commission dated 11th February 2010 in the matter of tender No.TSC/PFMR/40/2009-2010 for Procurement of Server, Heavy Duty Colour Printers, Medium Duty Printers and Uninterruptable Power Supply (UPS)

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka - Chairman
Mrs. Loise Ruhiu - Member
Ms. Natasha Mutai - Member

IN ATTENDANCE

Mr. P. M. Wangai - Holding Brief for Secretary
Ms. Kerina A. Rota - Secretariat

PRESENT BY INVITATION

Applicant, MFI Office Solutions Ltd

Ms. Kethi Kilonzo	-	Kilonzo & Co. Advocates
Ms. Wambui Chege	-	Kilonzo & Co. Advocates
Mr. Sajith Shankark	-	General Manager
Mr. G. Narendar	-	Business Manager

Procuring Entity, Teachers Service Commission

Ms. Stella Ruttoh	-	Senior Legal Officer
Mr. S. M. Kavisi	-	Senior Deputy Secretary/Chairman, Tender Committee
Mr. S. Motuka	-	Senior Deputy Secretary
Mr. Austin Mlawi	-	Deputy Secretary, Procurement
Mr. Hezbon Oyugi	-	Deputy Assistant Secretary
Ms. Eva Msagha	-	Assistant Deputy Secretary, ICT
Mr. J. D. Obaje	-	Assistant Deputy Secretary

Interested Candidates

Ms. Marysheila O. Oduor	-	Advocate for the Copy Cat Ltd
Mr. Wycliffe Kihima	-	Account Manager, the Copy Cat Ltd
Mr. Peter Omondi	-	Manager
Mr. Jonathan Nzioka	-	Sales & Marketing Manager, Circuit Business Systems (K) Ltd

Mr. Edward Musau	-	Supplies Manager, Access Alliance Ltd
Mr. Fredrick Shamalla	-	Sales Executive, MIBM Ltd
Mr. Anthony Ndirangu	-	Business Development Manager, Belcom CT Ltd.
Mr. Dennis Jawuor	-	Sales Executive, Wincomp Services Ltd.

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

This tender was advertised by the Procuring Entity in the Daily Nation Newspaper on 15th October, 2009. The tender was for Procurement of Server, Heavy Duty Colour Printers, Medium Heavy Duty Printers and Uninterrupted Power Supply (UPS). The tender closed/opened on 13th November, 2009 in the presence of bidders' representatives. Tenders were received from the following firms:

1. Voipro K. Ltd
2. Symphony Place
3. Belcom C. T. Ltd
4. Daventronic Co. Ltd
5. Access Alliance 3E Ltd

6. Rasley Construction & Investment Ltd
7. Image Office Supplies
8. Wincomp Services Limited
9. Steam Electronics
10. Power Ware Systems Ltd
11. Datawise Technologies (EA) Ltd
12. Compuswift Business Equipment
13. Dolphine Stationers Ltd
14. MFI Office Solutions Ltd
15. Marc Technology Systems
16. EASCO Africa Ltd
17. Specicom Technologies Ltd
18. Josh an sen and Soehne EA Ltd
19. Telenotech Agencies Ltd
20. Cellnet Ltd
21. Star Sourcing Suppliers
22. XRX Technologies Ltd
23. Munshram International Business Machine Ltd (MIBM Ltd)
24. Circuit Business Systems
25. Computerways Ltd
26. Mustek East Africa Ltd
27. Technovy Systems Ltd
28. Branded World Computer Systems
29. Next Technologies Ltd
30. Copy Cat Ltd

31.Computenx Ltd

32.Waterwood Management EA Ltd

Preliminary Evaluation

Evaluation was conducted by a committee chaired by a Mr. J. D. Obafe. A summary of the preliminary evaluation was as follows:

Bidder Number	Bidder	Verification -Signatory of authority - Manufacturer' authorization on item-by-item basis	Eligibility -Conflict of interest -Alternative bids - non-debarred companies as per PPOA - If Government owned enterprises; with proof of legal & financial autonomy	Bid Security -Bid bond of 200,000/= -Original bid bond -Correct format (Sec IV) - Valid for 120 days -(letter of intent of the J.V)	Completeness of Bid -Bid submission form - Bid security -Price schedule	Substantial Responsiveness - Conformity to all terms, conditions & specification of bidding document	Acceptance for Detailed Examination
	(a)	(b)	(c)	(d)	(e)	(f)	(g)
1.	VOIP PRO(lt) LTD	No	Yes	Yes	No	No	N
2.	SYMPHONY	No	Yes	Yes	No	No	N
3.	BELCOM CTLTD	No	Yes	Yes	No	No	N
4.	DAVETRONIC CO.LTD	Yes	Yes	Yes	Yes	Yes	Y
5.	ACCESS ALLIANCE LTD	No	Yes	Yes	No	No	N
6.	RASALEY INVESMENT & CONSTRUCTION LTD	No	Yes	Yes	No	No	N
7.	IMAGE OFFICE SUPPLIES LTD	Yes	Yes	Yes	Yes	Yes	Y
8.	WINCOMP SERVICES LTD	No	Yes	Yes	No	No	N
9.	STEAM ELECTRONICS LTD	No	Yes	Yes	Yes	No	N
10.	POWERWARE SYSTEMS LTD	Yes	Yes	Yes	No	No	N
	(a)	(b)	(c)	(d)	(e)	(f)	(g)
11.	DATAWISE TECHNOLOGIES EA LTD	Yes	Yes	No	No	No	N.
12.	COMPUSWIFT BUSINESS EQUIPMENT	Yes	Yes	Yes	Yes	Yes	Y
13.	DOLPHIN STATIONERS LTD	Yes	Yes	Yes	Yes	Yes	Y
14.	MFI	Yes	Yes	Yes	Yes	Yes	Y
15.	MERC TECHNOLOGIES SYSTEMS	Yes	Yes	Yes	No	No	N

16.	EASCO EAST AFRICA LTD	Yes	Yes	Yes	Yes	Yes	Y
17.	SPECICOM TECHNOLOGIES LTD	Yes	Yes	Yes	Yes	Yes	Y
18.	JOS.HANSEN E.A LTD	Yes	Yes	Yes	Yes	Yes	Y
19.	TECHNODECH AGENCIES LTD	Yes	Yes	Yes	Yes	Yes	Y
20.	CELLNET	Yes	Yes	Yes	Yes	Yes	Y
21.	STAR SOURCING & SUPPLIES LTD	Yes	Yes	Yes	No	No	N
22.	XRX TECHNOLOGIES	Yes	Yes	Yes	No	No	N
23.	MIBM	Yes	Yes	Yes	Yes	Yes	Y
24.	CIRCUIT BUSINESS SYSTEMS LTD	Yes	Yes	Yes	Yes	Yes	Y
25.	COMPUTERWAY S LTD	Yes	Yes	Yes	No	No	N
		(b)	(c)	(d)	(e)	(f)	(g)
26.	MUSTEK E.A.LTD	Yes	Yes	Yes	Yes	Yes	Y
27.	TECHNOVY SYSTEMS LTD	Yes	Yes	Yes	No	No	N
28.	BRANDED WORLD	Yes	Yes	No	Yes	No	N
29.	NEXT TECHNOLOGIES LTD	Yes	Yes	Yes	No	No	N
30.	THE COPY CAT LTD	Yes	Yes	Yes	Yes	Yes	Y
31.	COMPUTECH LTD	Yes	Yes	Yes	No	No	N
32.	WESTWOOD MANAGEMENT LTD	Yes	Yes	No	No	No	N

In view of the above information, eighteen bidders were disqualified for failing to comply with some of the mandatory requirements. The other fourteen bidders were found responsive and hence they proceeded to the technical evaluation stage.

Technical Evaluation

The technical evaluation was conducted for each item separately. The technical evaluation for Server was based on the following criteria:

1. Rack mount
2. Processor
3. Memory
4. Storage
5. Networking
6. Expansion
7. Expansion connectivity
8. System management
9. Power
10. User applications
11. Licensed OS and Office suite

Only one bidder, Specicom Technologies Ltd, was found responsive to all technical specifications. Its tender was recommended by the evaluation committee for commercial evaluation committee.

Heavy Duty Printer

The technical evaluation for Heavy Duty Colour Printers was based on the following parameters:

- a) All in one function
- b) Print speed (black/color)
- c) Print resolution (1200dpi)
- d) Capacity (input & output std)
- e) Document finishing
- f) Media size (A3,A4)

- g) Memory (1Gb)
- h) Hard disk (10 Gb)
- i) Copy reduce/enlarge 25-400% (Copier)
- j) Automatic document feeder (scanner)
- k) Fax speed (Fax)
- l) Cables
- m) 1-yr warranty
- n) Software

Two bidders namely, MIBM and Copy Cat Ltd were found responsive to all the technical specifications. Hence they qualified for commercial evaluation.

Medium Duty Black/White Printer

The technical evaluation for medium duty black/white printers was based on the following parameters:

- (a) Print speed (35ppm)
- (b) Print resolution (1200dpi)
- (c) Processor
- (d) Monthly cycle
- (e) Duplex printing
- (f) Memory (std, max)
- (g) Cables
- (h) Warranty
- (i) Software

Four bidders namely MFI Office Solutions Ltd, Spacicom Technologies Ltd, MIBM Ltd and Copy Cat Ltd were found responsive to the technical specifications and hence they were recommended for the commercial evaluation.

Uninterruptable Power Supply (UPS)

The technical evaluation for Uninterruptable Power Supply (UPS) was based on the following parameters:-

- (a) Load Capacity
- (b) Battery reserve
- (c) Protection

Three bidders namely Specicom Technologies Ltd, Telenotech Agencies Ltd and Mustek East Africa Ltd were found responsive to the technical specifications and thus they qualified for commercial evaluation.

Commercial Evaluation

Commercial evaluation was based on the following parameters:

1. Financial capability
 - a) Audited accounts (2007, 2008, 2009)
 - b) Bank Statements (July-October, 2009)
2. Experience and technical capacity
 - a) Evidence from 3 major clients within the last two years
(letter of recommendation/LPO)

- b) Technical qualification of key IT staff
 - c) Manufacturers authorization and brochures
3. Statutory documents
- (a) tax compliance certificate
 - (b) certificate of registration/incorporation
 - (c) VAT
 - (d) trade license

After evaluation, the evaluation committee made its recommendation as follows:

S/No.	Bidder	Item Recommended for Award
1.	Specicom Technologies Ltd	Server
2.	MIBM Ltd	Heavy Duty Color Printers
		Medium Duty Black/White Printers
3.	Mustek East Africa Ltd	Uninterruptable Power Supply (UPS)

In its meeting held on 10th February, 2010, the tender committee made the award of the tender as follows:

1. The tender committee concurred with the recommendation of the evaluation committee and awarded the tender for supply of Sever to Specicom Technologies Ltd at Kshs. 2, 161, 000.00
2. The tender committee differed with the recommendation of the evaluation committee to award the tender for supply of Heavy

Duty Colour Printer (six pieces) to MIBM. The tender committee noted MIBM had a bad record in the previous contract and hence declined to award it the tender. It awarded the tender to Copy Cat Ltd at a total cost of Kshs. 14, 319, 120.00.

3. The tender committee also differed with the recommendation of the evaluation committee to award the tender for supply of Medium Duty Black and White Printers (Five Pieces) to MIBM. It noted that Kyocera Brands are expensive to maintain and therefore declined to award the tender as recommended by the evaluation committee. Instead, it awarded the tender to Copy Cat Ltd at a total cost of Kshs. 8, 983, 250.00.
4. The tender committee differed with recommendation of the evaluation committee to award the tender for supply of 50 pieces of UPS to Mustek East Africa Ltd and awarded it to Specicom Technologies Ltd at a total cost of Kshs.1, 170, 000.00.

Letters of notification to the successful and unsuccessful bidders are dated 11th February, 2010.

THE REVIEW

This Request for Review was lodged by MFI Office Solutions Ltd on 25th February, 2010 against the decision of the Tender Committee of the

Teachers Service Commission dated 11th February 2010 in the matter of Tender No. TSC /PFMR/40/2009/2010 for Procurement of Server, Heavy Duty Colour Printers, Medium Duty Black and White Printers and Uninterruptable Power Supply (UPS). The Applicant was represented by Ms. Kethi Kilonzo, Advocate while the Procuring Entity was represented by Ms. Stella Ruttoh, Senior Legal Officer. Copy Cat Ltd and Circuit Business Ltd, Interested Candidates, were represented by Ms. Marysheilla Onyango Oduor, Advocate and Mr. Anthony Ndirangu, Business Development Manager respectively.

PRELIMINARY OBJECTION

At the commencement of the hearing, the Applicant indicated that it had filed a notice of Preliminary Objection on 17th March, 2010. It opted to argue the Preliminary Objection together with the grounds of the Request for Review.

The grounds of the Preliminary Objection are as follows

- “1.THAT the respondent was notified by the Public Procurement Administrative Review Board of the Request for Review on 25th February 2010.***
- 2. THAT the Respondent ought to have lodged its response to the Request for Review within 7 days, that is, on or before 5th March 2010.***

3. *THAT the Respondent lodged its response on 8th March 2010.*
4. *THAT the Public Procurement Administrative Review Board has no Jurisdiction to admit or consider the Response by the Respondent or to extend time within which it ought to have been made.*
5. *THAT the Request for Review ought to be allowed as prayed”.*

The Applicant submitted that the Procuring Entity had breached Regulation 74(3) by failing to file its Memorandum of Response to the Request for Review within the stipulated seven days. It further submitted that the Board had no jurisdiction to admit the Procuring Entity's Response as it had been filed out of time. It stated that the Board had in the past been strict with regard to adherence to the time deadlines for filing Request for Reviews as required by the Act and the Regulations. It argued that the Board should not allow the Procuring Entity to breach time deadlines. It requested the Board to reject the Procuring Entity's response and allow its Request for Review as prayed.

In response, the Procuring Entity submitted that the Board is an Administrative Board and therefore could not be expected to adhere to strict rules of procedure. It argued that the Applicant had not suffered any prejudice as a result of late filing of the Memorandum of Response. It urged the Board to overrule the Preliminary Objection and accept its Memorandum of Response.

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

The Board notes that the Applicant has rightly observed that it takes the requirement for adherence to strict time deadlines seriously as stipulated in the Act and the Regulations. As the Board has stated in the past decisions, a procurement process has a limited scheduled timelines and that is why the Act and the Regulation have set strict time deadlines.

The Board notes that the Procuring Entity was served with the notice of the Request for Review on 25th February, 2010. The Board also notes there is no dispute that the Memorandum of Response by the Procuring Entity was filed on 8th March, 2010 which was outside the stipulated seven days. In Addition, the Board notes that the Applicant filed a reply to the Memorandum of Response on 17th March, 2010.

The Board holds that the rules of natural justice require that all parties be given a hearing unless such a hearing would lead to the other party suffering prejudice. In this case the Applicant has not suffered any prejudice as it was served with the Memorandum of Response in good time and filed a response. In any case, the Board notes that the Preliminary Objection was only filed a day before the hearing date which was contrary to the provision of Regulation 77 and that notwithstanding the Preliminary Objection was accepted by the Board.

The Board notes that Regulation 76 entitles all parties to a Request for Review to be represented at the hearing. The Preliminary Objections therefore fails and the Board now proceeds to determine the Request for Review on merits.

The Applicant has raised eighteen grounds of appeal and urged the Board to make the following orders:

- “1. To annul, cancel or set aside the Award of the tender to the successful tenderer and award the tender to the Applicant.
2. In the alternative the Procurement proceedings be annulled in their entirety.
3. To direct the Respondent to provide a summary of the evaluation and comparison of tenders to the Applicant forthwith as required under Section 45(3) of the Act.
4. Costs of the Request for Review”.

The Board deals with the grounds raised by the Applicant as follows:

Grounds 1 - 7

These are general statements of facts and not grounds of appeal and the Board need not comment on them.

Grounds 8 - 18: Breach of Sections 45(3) and 66(4) of the Act

These grounds have been consolidated as they raise similar issues.

The Applicant submitted that the Procuring Entity breached Section 66(4) of the Public Procurement and Disposal Act, 2005. (Hereinafter referred to as "the Act") by failing to award the tender to it. It further submitted that its representative witnessed the tender opening on 13th November 2009, where prices were read out loudly in accordance with the Act. It stated that from the prices as read out, its bid was the lowest.

The Applicant claimed that it had offered to supply Heavy Duty Colour Printers with a print resolution of 9600 dpi which was superior to a resolution of 1200 x 1200 and 4800 dpi as requested by the Procuring Entity. It claimed that it was wrong for the Procuring Entity to declare its tender non-responsive on the ground that it did not meet the criteria on print resolution. However, the Applicant later admitted that it had indeed tendered to supply Heavy Duty Colour Printers with a 600 x 600 resolution which was inferior to the tender requirement on print resolution of 1200 x 1200 dpi. It urged the Board to check the documents submitted by the Successful Bidder and establish whether it had complied with all the technical specifications and to ensure that the evaluation criteria were applied consistently. It stated that if these criteria were applied consistently, Copy Cat Ltd should also have been disqualified.

The Applicant submitted that the Procuring Entity had breached the provision of Section 45(3) of the Act and Clause 42.3 of the Tender Document by failing to furnish it with a summary of the evaluation and comparison of tenders despite a written request dated 18th February, 2010. It further submitted that it had been unfairly treated and that the evaluation process had not been transparent, fair and accountable as required by Section 2 of the Act.

In response, the Procuring Entity submitted that it did not breach Section 66(4) of the Act since it had awarded the Tender to Copy Cat Ltd whose bid had the lowest evaluated price for Heavy Duty Colour Printers and Medium Duty Black and White Printers. It claimed that the only reason why the Applicant's bid appeared to be the lowest priced at the tender opening was that the Applicant had tendered for only Heavy and Medium Duty Printers whereas Copy Cat Ltd had also tendered for a Server and Uninterruptable Power Supply (UPS).

The Procuring Entity further submitted that the Applicant's tender for Heavy Duty Colour Printers was not responsive to criteria on print resolution of 1200 x 1200 dpi. It argued that though the Applicant had proposed a resolution of 9600 by 600 dpi in its brochure, the Procuring Entity had subsequently confirmed from the manufacturer's website (www.kyocerametre.com) that the proposed series of printers (Taskalfa 400ci) had a maximum resolution of 600x600 dpi which was half of what it required and therefore the Applicant's tender was non-responsive.

The Procuring Entity conceded that Copy Cat Ltd, the Successful Candidate had not met the print resolution criteria of 1200 x 1200 dpi. It explained that the reason why the Applicant, and not Copy Cat, had been disqualified on that criterion was that the Applicant's bid amounted to a misrepresentation in that it purported to offer a product with a more superior resolution whereas its product was only half of what had been requested for by the Procuring Entity.

The Procuring Entity further submitted that it complied with Section 45(3) of the Act by availing the reasons for rejection of the Applicant's tender through a letter dated 24th February, 2010. It claimed that it could not provide a summary of the evaluation and comparison of tenders as this would amount to breach of confidentiality in contravention of Section 44(1) (c) of the Act.

The Procuring Entity acknowledged that its tender document at Clause 42.3 of the Instructions to Bidders had required it to provide a summary of evaluation to bidders. However, it argued that to provide such a summary would be a contravention of the Act and Regulations whose provisions supersede those of the tender document.

It informed the Board that the Evaluation Committee had recommended the award of the tender for the Heavy Duty Colour Printers and that for the Medium duty Black and White Printers to be awarded to MIBM Ltd. However, it explained, the tender committee had awarded the tender for

the two categories to Copy Cat Ltd since MIBM Ltd had a bad record in a previous contract on the supply of desktop computers and that the Brand of Medium Duty Black and White Printers that were being offered by MIBM were too expensive to maintain.

The Successful Candidate, Copy Cat Ltd, associated itself with the submissions of the Procuring Entity and also relied on its written submission.

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

The Board notes that the tender was for supply of four items namely:

1. Server
2. Heavy Duty Color Printers
3. Medium Duty Black and White Printers
4. Uninterruptable Power Supply (UPS) units.

The Board notes that the Applicant had only tendered for two of the items namely Heavy Duty Colour Printers and Medium Duty Black and White Printers though this Request for Review was for the whole tender. The Board further notes that all the submissions by the parties are in regard to Heavy Duty Colour Printers and Medium Duty Black and White Printers and no issues have been raised in regard to the server and the UPS units. Accordingly, the Board holds that this Request for Review only relates to

the supply of Heavy Duty Colour Printers and Medium Duty Black and White Printers.

With regard to the evaluation, the Board notes that the evaluation was conducted in three stages namely Preliminary Examination; Technical Evaluation; and Commercial Evaluation. Eighteen bidders were disqualified at the preliminary evaluation stage for failing to comply with some of the requirements of the tender. The tenders submitted by the remaining fourteen bidders were subjected to the technical evaluation to determine their responsiveness to the technical specifications set out in the tender documents.

Upon perusal of the evaluation report, the Board notes that the Applicant's tender for supply of Heavy Duty Colour Printers was disqualified for the following reasons:

- a) Proposed a processor speed of 750 Mhz instead of 1.4 GHz
- b) Proposed a Monthly duty cycle of 150,000 pages instead of 250,000 pages.
- c) Monthly print volume of 10,000 pages instead of 50,000
- d) Applicant had offered a resolution of 9600 by 600dpi instead of 1200 by 1200 and 4800 dpi color.

The Board has perused the documents submitted by the Applicant and noted that the Equipment it offered had a resolution of 600 by 600 dpi. The Board has also noted that Copy Cat Ltd, the Successful Bidder, had also

offered a Heavy Duty Colour Printer of a similar resolution with that of the Applicant. Indeed, the evaluation committee had given the Successful Bidder a "No" against this parameter which was an indication that it was also non-responsive against this parameter.

The Board has also noted that two bidders, MIBM Ltd and Copy Cat Ltd qualified for commercial evaluation after which the Evaluation Committee recommended the award of the tender for supply of Heavy Duty Colour Printers to MIBM Ltd, being the lowest evaluated bidder. This recommendation was presented to the Tender Committee in its meeting held on 10th February, 2010. However, the Tender Committee rejected this recommendation noting that MIBM Ltd had a bad record in a previous contract with the Procuring Entity. The Board notes that subsequently, the tender committee awarded the tender to Copy Cat Ltd. at Kshs 14,319,120 which was higher than the price of Kshs. 8,331,000 quoted by MIBM Ltd.

Further, the Board notes that the Evaluation Committee had also recommended the award of the tender for Medium Duty Black and White printers to MIBM Ltd. The Board notes that the Tender Committee rejected the Evaluation Committee's decision and awarded the tender to Copy Cat Ltd citing the high maintenance costs related to the brand that was being offered by MIBM Ltd.

The Board notes that the initial technical evaluation criteria to which the bidders were subjected to had comprised of numerous technical

specifications and that none of the bidders had met all the specifications. Subsequently, the Evaluation Committee had developed a shorter list of specifications which they referred to as "technical specifications which are critical to optimal performance of the printer". A separate list of specifications was made for the Heavy Duty Printers and another for the Medium Duty Printers. It was as a result of evaluation based on these shorter lists of specifications that the Evaluation Committee recommended MIBM Ltd for award of the two categories of Printers.

The Board finds that the Evaluation Committee rightly disqualified the Applicant for offering a heavy duty color printer which had an inferior resolution of 600x 600 dpi instead of 1200 x1200 dpi as specified in the tender document. As the Board has already noted the Successful Bidder, Copy Cat Ltd had also offered Heavy Duty Colour Printers with a resolution of 600x600 dpi which was also not compliant with the requirements of the tender. Therefore, the Successful Bidder, Copy Cat Ltd, should also have been disqualified for failing to meet this criteria. The Board holds that the Procuring Entity failed to do a fair evaluation of the tenders in accordance with Section 66(4) which provides as follows:

"The successful tender shall be the tender with the lowest evaluated price".

The Board also finds that the Procuring Entity was wrong for changing the evaluation criteria by introducing what it called "technical specifications

which were critical to optimal performance of the printer". In addition the Board also notes that the tender committee introduced new criteria of past performance and maintenance costs as a basis for eliminating MIBM Ltd and awarding the tender of the two items, Heavy Duty Colour Printers and Medium Duty Black and White Printers to Copy Cat Ltd. The Board holds that this amounted to introduction of new criteria contrary to Section 66(2) which provides as follows:

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

The Board further finds that the action of the tender committee to reject the recommendations of the evaluation committee was contrary to Regulation 11(2) (a), (b) and (3) which provides as follows:

(2) The Tender committee shall not:

a) Modify any submission with respect to the recommendations for a contract award or in any other respect:

b) Reject any submission without justifiable and objective reasons;

(3) Where the tender committee rejects the recommendation of the evaluation committee, the decision shall be reported to the head of the procuring entity or to the accounting officer.

It is therefore clear that the duties of the tender committee do not include evaluation of tenders. The Board therefore finds that this action by the tender committee to conduct an evaluation was irregular.

With regard the issue of the summary of evaluation report, the Board notes that Section 44(2) (c) of the Act provides as follows:

(2) This section does not prevent the disclosure of information if any of the following apply:

a)

b)

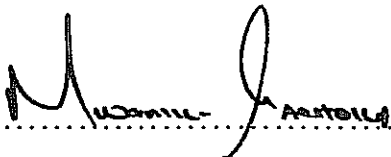
c) The disclosure is for purposes of a review under Part VII or an investigation under Part VIII or as required under section 105; (Part VII above refers to the Administrative review process.)

The Board notes that Sections 44(2) and 45 of Act set out the circumstances under which the Procuring Entity is to provide a summary of evaluation to any bidder who required it. In this case, the Board finds that the Procuring Entity cannot use the issue of confidentiality as an excuse to refuse to supply the Applicant with a summary of the evaluation report.

Taking into account all the foregoing matters, it is clear that the evaluation process was flawed and therefore these grounds of the Review succeed. In view of the foregoing the Request for Review succeeds and the Board directs as follows:-

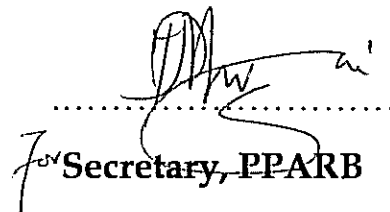
- i) That pursuant to Section 98 (a) of the Act, the tender for the two categories: Heavy Duty Colour Printers and Medium Duty Black and White Printers to Copy Cat Ltd be and is hereby annulled;
- ii) That pursuant to Section 98(b) of the Act, the Procuring Entity may re-tender for the two categories of printers that are subject of this Request for Review with clear technical specifications and evaluation criteria in the tender document.

Dated at Nairobi on this 24th March, 2010



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Chairman, PPARB



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For Secretary, PPARB

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