

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 27/2011 OF 30TH JUNE, 2011

BETWEEN

BEDROCK HOLDING LIMITED.....APPLICANT

AND

NEW KENYA CO-OPERATIVE CREAMERIES LIMITED....PROCURING
ENTITY

Review against the decision of the New Kenya Co-operative Creameries Limited in the matter of Tender No. NKCC/058/2010-11 for Provision of Security Guarding Services.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Joshua Wambua	-	Member
Ms. Loise Ruhiu	-	Member
Mr. Sospeter Kioko	-	Member
Amb. Charles Amira	-	Member

IN ATTENDANCE

- Mrs. P. K. Ouma - Holding brief for Secretary
Ms. S. Miano - Secretariat

PRESENT BY INVITATION

Applicant, Bedrock Holding Limited.

- Mr. Muthomi Thiankolu - Advocate
Mr. William Ololo - Director
Mr. Bernard Otieno - Manager
Mr. Isaiah Munje - Legal Pupil

Procuring Entity, New Kenya Co-operative Creameries Limited.

- Mr. Gathii Irungu - Advocate
Ms. J.M. Macusi - Advocate
Mr. P. K. Ombati - Legal Officer
Ms. Gillian Soi - Procurement Officer

Interested Candidates

- Mr. Githinji Mwangi - Advocate, Hatari Security Guards Ltd
Mr. Josphat Mwangi - Managing Director, Hatari Security
Guards Ltd
Mr. Josphat Kibet - Chief Manager Operations, Lavington
Security

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

The tender for Provision of Security Guarding Services Year 2011 - 2013 was advertised on 12th April, 2011 in the Daily Nation Newspaper. The tenders were to close on 3rd May, 2011.

Closing/Opening:

The tenders opened/closed on 3rd May, 2011 in the presence of bidders representatives who chose to attend. The bids opened and bid bonds submitted were read out as follows:

Bidder		Bid Amount	Bank
1. Bedrock Holdings Ltd	-	500,000	Eco Bank
2. Hatari Security	-	500,000	ABC Bank
3. Race Guards	-	500,000	ABC Bank
4. Bads Security Services	-	500,000	Equity Bank
5. Brinks Security	-	500,000	Equity Bank
6. Pada Security	-	500,000	ABC Bank
7. Gillys Security	-	500,000	ABC Bank
8. Lavington Security	-	500,000	Co-operative Bank
9. Red Mamba Agencies	-	500,000	Equity Bank
10. Cobra Security Company	-	500,000	Equity Bank
11. Bedrock Security	-	500,000	ABC Bank
12. Wells Fargo	-	500,000	NIC Bank

13. Gyto Success Co.	-	500,000	ABC Bank
14. Intersecurity Services	-	500,000	KCB Bank
15. Delta Guards Ltd	-	500,000	Equity Bank
16. Total Security	-	500,000	KCB Bank

EVALUATION

The Evaluation was carried out by a Committee chaired by Mr. Mugo Mutembei. The Evaluation Committee first ensured that all the bids met all the mandatory evaluation by carrying out Preliminary Evaluation based on the following parameters:

- a) Attach a bid bond valid for 120 days from 3rd May, 2011
- b) Copy of certificate of Incorporation
- c) Copy of PIN Certificate
- d) Tax Compliance Certificate
- e) List of directors
- f) Duly completed and signed quality declaration form in the format provided in NKCC3
- g) Audited Accounts for the last three financial years
- h) Copy of valid membership certificate in either Kenya Security Industry Association (KSIA) or Protective Security Industry Association (PSIA)
- i) Compliance certificate by the following statutory Bodies
 - N.S.S.F
 - N.H.I.F

Six bidders namely Babs Security Service, Red Mamba Agencies, Cobra Security Company, Bedrock Security, Wells Fargo and Delta Guard failed to

meet all the mandatory requirements and were disqualified at this stage of the evaluation. The bidders were disqualified for the following reasons:-

- Babs Security had provided audited accounts for only 2 years and failed to show evidence of NSSF and NHIF compliance;
- Red Mamba Agencies had provided accounts for the last 2 years and had no evidence of membership to PSIA or KSIA;
- Cobra Security provided a tender security that was less than the required 120 days as prescribed in the tender;
- Bedrock Security had not attached its audited accounts and had both its technical and financial bids in the same document;
- Wells Fargo had not attached its audited accounts; and
- Delta Guard had provided outdated NHIF and NSSF compliance certificates.

The ten remaining bidders were then subjected to the technical evaluation.

Technical Evaluation

The bids were evaluated on the following parameters

Past performance	-	30 marks
Personnel	-	30 marks
Relevant assets	-	30 marks
Financial Stability	-	10 marks
Total score	-	100 marks

The summary results of the evaluation was as tabulated

	Bidder	Past Performance and track records	Personnel resource	Relevant Assets	Financial stability	Total marks Out of 100	Technical Score out of 70
1.	Bedrock Holdings	30	30	30	10	100	70
2.	Hatari Security	30	18	27	10	85	60
3.	Race Guard Ltd	30	16	27	10	83	58
4.	Brinks Security	30	6	24	8	69	48
5.	Pada Security	27	4	24	8	63	44
6.	Gillys Security	27	13	24	10	74	52
7.	Lavington Security	30	10	30	10	80	56
8.	Gyto Success	30	12	16	6	64	45
9.	Inter Security Ltd	30	11	24	6	71	50
10.	Total Security	18	7	26	5	56	39

Bidders who attained a score of 75% or 52 points out of 70 or more of the technical score were declared responsive as per the requirements of the tender document. The following six bidders failed to attain the pass mark and were declared non responsive:- Gyto Success Co; Inter Security Ltd; Total Security; Brinks Security; Pada Security; and Gilly Security. Four bidders namely Bedrock Holdings, Hatari Security, Race Guards and Lavington Security attained the pass mark score and were declared responsive and recommended to proceed to the financial evaluation stage.

Financial Evaluation

The financial bids for the bidders who had passed the technical stage were opened on 27th May, 2011. The tender prices read out were as follows:-

Bidder	Tender Sum
1. Hatari Security	- 38,155,800
2. Bedrock Holdings Ltd	- 31,055,520.00
3. Lavington Security	- 39,060,000.00
4. Race Guards Security	- 30,702,648.00

The financial evaluation was undertaken based on the five regions as per the tender documents. The technical score was then combined with the financial score and the award recommended to the highest scoring bidder. The summary results for the top ranked bidder per region were as follows:

Bidder	Region	Number of guards	Cost per Guard/ Month (Kes)	Number of dogs & dog handlers/m onth (Kes)	Cost per dog & dog handler/month (Kes)	Value of contract per annum (Kes)
Bedrock Holding	Nairobi	54	15,080.00	3	34,800	11,024,640.00
	North Rift	62	12,760.00	Nil	Nil	9,493,440.00
	South Rift	70	12,760.00	Nil	Nil	10,718,400.00
Hatari Security	Coast	22	12,150	1	28,260	3,546,720.00
Race Guards	Central	41	10,382	Nil	Nil	5,107,944.00
Total value						39,891,144.00

The Evaluation Committee, based on the combined technical and financial evaluation, recommended the following bidders be awarded guarding services for financial years 2011 - 2013:-

1. Bedrock Holdings Ltd to provide guarding services to Nairobi region at Kshs. 15,080 per guard and 34,800 per dog and dog handler. South and North Rift regions at Kshs. 12,760 per guard.
2. Hatari Security to provide guarding services to Coast Region at Kshs. 12,150 per guard and 28,260.00 per dog per handler.
3. Race Guards to provide guarding service to Central Region at Kshs. 10,382.00 per guard.

THE TENDER COMMITTEE DECISION

The Ag. Procurement Manager in an email dated 21st May, 2011 wrote to the Chairman of the Evaluation Committee and noted several observations that were noted by the Tender committee and requested they be reviewed. The Evaluation Committee made clarifications on the issues raised on 24th May, 2011. The Procuring Entity's Tender Committee in its meeting held on 14th June, 2011 deliberated on the Evaluation Report and awarded the tender as recommended by the Evaluation Committee. The letters of notification to the bidders were dated 14th June, 2011

CANCELLATION OF THE TENDER

After bidders were notified on the outcome of the tender, some of them wrote to the Procuring Entity complaining on how the tendering process was carried out. The Tender Committee was then convened on 27th June, 2011 to deliberate on the issues raised by the security firms that participated in the tendering process.

The Tender Committee then reviewed the technical requirements in comparison with the evaluation report and made several observations. It then terminated the tender process and ordered a prompt notice on the termination to all the bidders.

THE REVIEW

The Request for Review was lodged by Bedrock Holdings Limited 30th June 2011 in the matter of Tender No. NKCC/058/2010-11 for Provision of Security Guarding Services - Year 2011 - 2013. The Applicant was represented by Mr. Muthomi Thiankolu, Advocate while the Procuring Entity was represented by Mr. Gathii Irungu, Advocate. An interested Candidate Hatari Security Guards Limited was represented by Mr. Githinji Mwangi, Advocate.

The Applicant requests the Board for the following orders:-

- (a) *"The Procuring Entity's Decision is hereby annulled;*
- (b) *The Procuring Entity is hereby directed to enter into a written contract with the Applicant as required and/or anticipated by the provisions of section 68 (1) of the Public Procurement and Disposal Act, 2005 and the Tender Documents;*
- (c) *Alternatively, and without prejudice to prayers (a) and (b) above, the Procuring Entity is hereby ordered to pay to the Applicant the sum of Kenya Shillings Sixty-Two Million, Four Hundred and Seventy Two Thousand, Nine Hundred and Sixty (Kshs.62,472,960.00), being the cumulative value of the contract envisioned by section 68 (1) of the Act as per the Procuring Entity's Notification Letter dated 14th June 2011;*

- (d) *The Procuring Entity is hereby ordered to pay to the Applicant the costs of and incidental to these proceedings; and*
- (e) *Such other or further orders and/or directions as the Honourable Board shall deem just and expedient."*

The Applicant raises four grounds of review which we deal with as follows:-

GROUND 1, 2 AND 3

These grounds have been combined as they all relate to the manner the Procuring Entity terminated the award of the tender to the Applicant.

The Applicant submitted that the proceedings arose from the decision by the Procuring Entity to withdraw an award of the tender for provision of Security Services for the period 1st July 2011 to 30th June 2013. The Applicant stated that the Procuring Entity invited tenders for the provisions of Security Services and that after the evaluation it was notified by a letter dated 14th June 2011 that it was the successful bidder. It further stated that on 16th June 2011 it accepted the award of the tender. However, on 27th June 2011 it received another letter from the Procuring Entity stating that the award had been withdrawn.

The Applicant contended that the decision by the Procuring Entity failed to meet the constitutional threshold of fairness and equity as outlined in Article 227 (1) of the Constitution of Kenya, 2010 that required public agencies to procure goods and services in a system that is fair, equitable, transparent, competitive and cost effective. The Applicant gave the

following reasons as to why the decision of the Procuring Entity failed to meet the constitutional threshold of fairness and equity;

- a) The Procuring Entity made an offer to the Applicant which the Applicant accepted;
- b) The Applicant in good faith and in consideration of the short time between the notification letter and the commencement of the envisioned contract, made contractual commitments which had huge financial implications to third parties and;
- c) The alleged anomalies in the evaluation of the tenders were wholly and exclusively attributed to the Procuring Entity and not to the Applicant or any other Bidder, and therefore it was unfair and inequitable to punish the Applicant for the alleged anomalies.

The Applicant further submitted that the decision to withdraw the award was done through a letter signed by the Acting Procurement Manager. It argued that since the letter was not supported by minutes of the Tender Committee approving the withdrawal of the award, the only irresistible conclusion was that the Acting Procurement Manager rather than the Tender Committee who interfered with the award.

In conclusion, the Applicant relied on the High Court Miscellaneous Application No. 1260 of 2007 Republic -vs. - Procurement Administration Review Board Experte Selex Systemi Integrati. It stated that in the Selex Case, the Kenya Civil Aviation Authority, just like the Procuring Entity in the instant case, purported to terminate a tender after the acceptance of the offer of award, citing Section 36 of the Act. It stated that the High Court held that once a tender award had been communicated and accepted the ouster clause under Section 36 (1) of the Act was not applicable. In view of

the said High Court decision, it urged the Board to annul the decision of the Procuring Entity.

In response, the Procuring Entity stated that the award of the tender was terminated because it was unfair to the losing bidders as there were many anomalies that were noted after the evaluation and award of the tender. The Procuring Entity submitted that its Evaluation Committee did not carry out a fair and objective evaluation. It stated that the evaluation was done in a very subjective manner and therefore a decision was made to terminate the tender and give all the bidders, including the Applicant, the opportunity to tender afresh.

It stated that after noting the anomalies in the tender evaluation the Acting Procurement Manager wrote a letter to the Evaluation Committee highlighting the anomalies. It submitted that thereafter the Evaluation Committee acknowledged that some anomalies had occurred. It further stated that after the clarification by the Evaluation Committee, the Tender Committee proceeded to award the tender. It further stated that after notification, some bidders complained to the Managing Director that the process was not conducted fairly. Consequently, the Tender Committee met and made a decision to withdraw the award. It informed the Board that the decision was made in good faith and to ensure that there was fairness in the tender process.

In Conclusion, the Procuring Entity argued that under Section 36 of the Act, it had power to terminate the contract before the signing of the Contract. It stated that the facts in the Selex case are different and distinguishable from the instant case.

On its part, an Interested Candidate, Hatari Security Limited supported the submission of the Procuring Entity. It stated that it had filed a Request for Review No. 26 of 2011 but it withdrew it upon notification by the Procuring Entity that the award of the tender had been terminated. It submitted that the termination of the award by the Procuring Entity was done in accordance with Section 36 and that this would ensure that there was fairness in the process.

The Board has carefully considered the submission by the parties and examined the documents that were presented before it.

The Board notes that the only issue that arises for determination is whether the decision to withdraw the award is tenable in law. The Board notes that the relevant provisions of the Act are Sections 36 and 68 which provide as follows;

Section 36

"36.(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

(3) On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.

(4) If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.

(5) The procuring entity shall not be liable to any person for a termination under this section.

(6) A termination under this section shall not be reviewed by the Review Board or a court.

(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.

(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due."

Section 68

"68.(1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.

(2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.

(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into."

It is also necessary to quote the letters dated 14th June 2011 by the Procuring Entity to the Applicant, 16th June 2011 from the Applicant to the Procuring Entity and 27th June 2011 from the Procuring Entity to the Applicant.

The said letters stated as follows;

"Our Ref: NKCC/058/2010-11/GCS/AG 14th June, 2011

*Managing Director
Bedrock Holdings Limited
P. O. Box1004
KISUMU*

Dear Sir,

*RE: TENDER NO. NKCC/058/2010-11: PROVISION OF SECURITY
GUARDING SERVICES*

We are pleased to inform you that your tender for provision of Security guarding services was successful.

You will be required to provide guarding services with effect from 1st July, 2011 to 30th June 2013 in Nairobi, North Rift a& South Rift Regions as follows:

<i>Region</i>	<i>No. Of Guards</i>	<i>Rate per guard per month (Kshs)</i>	<i>No. Of dogs & dog handler</i>	<i>Cost per dog & dog handler per month</i>	<i>Value of contract per annum (Kshs)</i>
<i>Nairobi</i>	<i>54</i>	<i>15,080</i>	<i>3</i>	<i>34,800</i>	<i>11,024,640</i>
<i>North Rift</i>	<i>62</i>	<i>12,760</i>	<i>Nil</i>	<i>Nil</i>	<i>9,493,440</i>
<i>South Rift</i>	<i>70</i>	<i>12,760</i>	<i>Nil</i>	<i>Nil</i>	<i>10,718,400</i>

Above prices are inclusive of taxes.

You are required to submit your written acceptance of this offer within 14 days to enable signing of the contract.

We thank you for showing interest in our organization and look forward to a good working relationship.

Yours Faithfully,

For: NEW KENYA CO-OPERATIVE CREAMERIES LTD

GILLIAN C. SOI

Ag. PROCUREMENT MANAGER"

"OUR REF: BHL/CLT/N-KCC/023/SOA

YOUR REF: NKCC/058/2010-11/GCS/AG

June 16, 2011

The Managing Director,

New Kenya Co-operative Creameries Ltd,

P. O. Box 30131 -00100

NAIROBI

Dear Sir,

REF: TENDER NO. NKCC/058/2010 -11 PROVISION OF
SECURITY GUARDING SERVICES

We acknowledge with thanks receipt of your letter dated June 14, 2011 regarding the above matter..

This is to confirm our acceptance of the tender award. We confirm that we are ready and shall take over the security services in all the three regions awarded i.e. Nairobi, North Rift and South Rift with effect from July 1, 2011.

We thank you for choosing to do business with us and look forward to a good working relationship.

Yours faithfully,

Stephen O. Ayugi
DIRECTOR"

"Our Ref: NKCC/058/2010-11/GCS/ag
27th June 2010

Managing Director
Bedrock Holdings Limited
P. O. Box 1004
KISUMU

Attention: Stephen O. Ayugi

Dear Sir

**RE: TENDER NO. NKCC/058/2010-11 - PROVISION OF SECURITY
GUARDING SERVICES - 1ST JULY 2011 - 30TH JUNE 2013**

We refer to the award letter re: NKCC/058/2010-11/GCS/ag and your subsequent letter of acceptance dated 16th June 2011.

We are sorry to inform you that we have since noted substantial anomalies in the evaluation and subsequent award which has substantial implication on the award decision.

In this regard please be advised that this award has been withdrawn forthwith.

We regret the inconvenience caused.

We thank you for showing interest in our organization.

Yours faithfully,

For: NEW KENYA CO-OPERATIVE CREAMERIES LTD

GILLIAN C. SOI

Ag. PROCUREMENT MANAGER"

At the outset, the Board notes that the letter dated 27th June 2011 did not invoke Section 36 of the Act. The letter did not state that the Procuring Entity had terminated the tender pursuant to the said Section. Instead, the

letter only stated the award to the Applicant had been withdrawn forthwith.

The Board notes that Section 36 gives the Procuring Entity power to terminate the tender before the signing of the contract. Under Section 36 (7) a Procuring Entity that has terminated a tender is required to write to the Public Procurement Oversight Authority and give reasons for such termination. The Procuring Entity admitted that it had not yet written to the Authority to give the reasons.

The Board has also noted that after notification of the award, three unsuccessful bidders namely Lavington Security Limited, Hatari Security Guards Limited and Race Guards Limited wrote letters dated 14th, 16th and 17th June 2011 respectively to the Managing Director of the Procuring Entity. In their letters the three Unsuccessful Bidders complained that the tender process was not conducted fairly and they therefore called for the intervention of the Managing Director. It is clear that these letters are the ones that triggered the process of withdrawal of the award.

The Board has further noted that the minutes of the Tender Committee that approved the withdrawal of the award are dated 27th June, 2011 and stated in part as follows:-

“Members are further notified that upon sending notification to the successful and unsuccessful bidders, some bidders sought to be furnished with reasons why they were unsuccessful and/or what criteria was used to award them as shown. Members were also notified that some bidders had indicated in their letters that they had noted that they were the lowest priced during the

financial opening in some regions and yet they were not awarded though they were technically responsive."

.....

RECOMMENDATIONS

the current contract be extended for a period of two (2months) to allow tendering process to be effected and completed.

The tender be terminated and prompt notice of termination given to the tenderers and the service be sought through open tender with clear and quantifiable specifications.

A report be furnished to PPOA informing them of the termination as required by the law."

The Board observes that the Act has clearly set out mechanism for bidders who are dissatisfied with a tender process to seek for administrative review of the tender process. Such a Request for Review has to be lodged with the Public Procurement Administrative Review Board which has the mandate pursuant to Section 93 of the Act to examine how a tender process has been conducted. As a matter of fact, the Act does not give the Chief Executive Officer or the Tender Committee of any Procuring Entity powers to review their own decision after an award.

Therefore, the aggrieved bidders in this tender ought to have filed a Request for Review with the Board. Indeed, Hatari Security Guards Limited filed Request for Review No.26/2011 of 27th June, 2011, but later withdrew. However, Lavington Security Limited and Race Guard Security Limited did not lodge any Request for Review with the Board but rather

chose to address their grievances with the Managing Director of the Procuring Entity.

In view of the foregoing facts it is clear to the Board that the Procuring Entity is purporting to withdraw the award of the tender it had made to the Applicant. The Board finds that the decision of the Procuring Entity to withdraw the award of the tender is irregular. The reasons given for the said withdrawal are not logical for the following reasons;

- (i) After the evaluation of the tender, the Evaluation Committee forwarded its recommendations to the Tender Committee;
- (ii) The Tender Committee, noted anomalies and an email was written to the Evaluation Committee on 21st May, 2011, which stated as follows;

"The Chairman - Evaluation Committee - TENDER NO. NKCC/058/2010 - 2011 - PROVISION OF SECURITY GUARDING SERVICES

The above tender was submitted to the Tender Committee and the following observations were made:-

- 1. There was inconsistency on awarding of marks*
- 2. Criteria used in evaluation the aspect of Log books is not adequate i.e. how many vehicles was deemed appropriate to have and why.*
- 3. Criteria used to qualify /disqualify and/or award marks on letter of reference is not clear especially on validity of the letters.*
- 4. Justify reasons of quantifying to award 3 mks and 6 mks on the same item*

5. *Cases where there was not certificate attached yet marks was awarded specifically Delta & Total security where Total had none yet award 1 mark*
6. *Clarify on why Total was award 2 marks yet they have failed to follow up their Ministry of Labour Certificate and there is no proof.*
7. *Justify the case of Delta who has 40 dogs and 1220 guards was awarded 6 mks while total who has 3612 guards with no specific no. of dogs yet each was awarded 6 & 5 marks respectively.*
8. *Bedrock was qualified yet on the evaluation table was termed as non-responsive.*
9. *Overall, the presentation of the report was not a friendly format.*

You are therefore asked to review your report and submit latest by close of business Monday 23rd May 2010 as the same shall be re-submitted to the tender committee on Tuesday 9.00 am. Note, contracts are expiry by 30th June 2010 hence we have no much time considering financial evaluation has not been done."

(iii) On 24th May, 2011 the Evaluation Committee replied as follows;

"...CLARIFICATIONS

1. *"there was no indication in the tender document as to how many vehicles or even frequencies the bidding firms had to own and therefore the evaluation team felt that it would be unfair to introduce this at the evaluation stage. However, it is noted that M/s Gyto Success were erroneously awarded 8 points instead of 12 points on vehicles (motor vehicles and motor cycles) and 3*

instead of 6 points on frequencies. Similarly Inter Security were awarded 3 points instead of 6 points on vehicles. All these have now been corrected in the new report.

- 2. The evaluation team considered only reference letters in the referees letterheads*
- 3. Where requirements were not fully met, the evaluation team awarded a percentage of the total possible points*
- 4. One point was awarded to Inter Security for attaching training manual but the 1 point awarded to Total erroneously*
- 5. The evaluation team awarded 2 out of 6 points to Total Security for presenting some evidence that at least they have in the past been complying with minimum wage guidelines*
- 6. Just as in 1 above the tender document did not guide the team on the number of dogs a bidder was required to own but Total Security was penalized 1 point for not declaring the number of their dogs.*
- 7. There were two firms using the name Bedrock i.e. Bedrock Holdings Limited who met New KCC 's requirements and Bedrock Security Services Limited who failed on the Mandatory requirements.*
- 8. The report format has been changed for easy reference"*

(iv) Upon receipt of the response by the Evaluation Committee the Tender Committee had power under Regulation 11 to either accept or reject the recommendations by the Evaluation Committee. The Tender Committee however considered the report by the Evaluation Committee and proceeded to make an award to the Applicant on 14th June 2011. The Board notes that if Tender Committee had any issues regarding the evaluation, it should have intervened at that point.

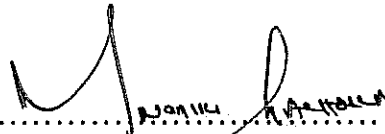
Therefore, one wonders why the Tender Committee would meet again on 27th June 2011 to withdraw the Award. The power to do so should have been exercised in accordance with Regulation 11 and having made the award there was no basis for the Tender Committee to sit again and reconsider its decision. As already stated, it is clear that the decision to withdraw the award was made after three Unsuccessful Bidders wrote to the Managing Director, complaining about the tender process. The mechanism for an aggrieved bidder to complain is clearly set out in the Act. Therefore the Board holds that the three aggrieved bidders who lodged their complaints with the Procuring Entity should have followed the right appeal mechanism, pursuant to Section 93 and Regulation 73. On its part the Procuring Entity should have advised the said aggrieved bidders to lodge their appeal for review by the Board in accordance with the law.

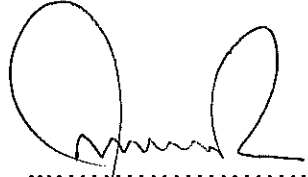
In view of the foregoing, the Board holds that the decision by the Procuring Entity to withdraw the award to the Applicant through its letter dated 27th June 2011 has no legal basis.

Accordingly these grounds of review succeed.

Consequently, the Request for Review succeeds and the Board directs that the Procuring Entity is bound by its decision made on 14th June, 2011.

Dated at Nairobi on this 1st day of August, 2011


.....
CHAIRMAN
PPARB


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SECRETARY
PPARB