

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 39/2011 OF 31st OCTOBER, 2011

BETWEEN

IMPAX BUSINESS SOLUTIONS LTD.....APPLICANT

AND

KENYA PORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Ports Authority dated 17th October, 2011 in the matter of Tender No. KPA/176/2010-11/ME for Supply, Installation And Commissioning Of An Automated Fuel Management And Control System

BOARD MEMBERS PRESENT

Ms. J. A. Guserwa - Member , (in the Chair)
Ms. Loise Ruhiu - Member
Amb. C. M. Amira - Member
Mr. Sospeter Kioko - Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Mrs. Pamela K. Ouma - Secretariat
Ms. Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant, Impax Business Solutions Ltd

- Mr. Mwaniki Gachuba - Advocate
Mr. John Mwaura - Chief Executive Officer

Procuring Entity, Kenya Ports Authority

- Mr. Stephen Kyandih - Advocate
Mr. Johnson Gachanja - Principal Procurement Officer (CTC & T)

Interested Candidates

- Mr. Peter King'ara - Advocate, Velmart Engineering Consultants
Ms. Kiai Edith - Lawyer, Velmart Engineering Consultants
Mr. Joe Kigara - P. Manager, Velmart Engineering Consultants
Mr. Luke Ochola - General Manager, Fuel Save Technologies Ltd
Mr. Ignatius - Sales, Buma Fuel Management Solution
Mr. I Alibhai - Managing Director, Fuelomat(K) Ltd

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

Advertisement

The tender for Supply, Installation and Commissioning of an Automated Fuel Management and Control System was advertised in the Daily Nation and the Standard Newspapers of 10th May, 2011.

Closing/Opening:

The tenders closed/opened on 22nd June, 2011 in the presence of the bidders' representative who chose to attend. Eight (8) bids were submitted as tabulated:

No.	Name of Bidder	Tender Security of Kshs. 100,000.00	
		Name of Bank	Validity Period
a)	Buma Fuel Management Solution	Eco Bank	30 th October, 2011
b)	Perfect Infotech Solutions	Co operative Bank	19 th December, 2011
c)	Mantrad Enterprises Ltd	Equity Bank	22 nd November, 2011
d)	Africa Fleet Management Solution	Standard Chartered	19 th October, 2011
e)	Fuelomat (K) Ltd	Standard Chartered	30 th November, 2011
f)	Velmart Engineering Consultants	Equity Bank	11 th January, 2011
g)	Impax Business Solutions	Chess Bank	22 nd November, 2011
h)	Fuel Save Technologies Ltd	Eco Bank	23 rd July, 2011

The Tender Opening Committee noted that M/s Fuel Save Technologies Ltd submitted a bid bond from Eco Bank with a validity period of 32 days only while Fuelomat (K) Ltd submitted a banker's check of Security bond Kshs. 100,000.

EVALUATION

The Evaluation Committee was chaired by Eng. Rashid Salim, the Principal Marine Engineer.

Preliminary Evaluation:

The bids were evaluated in this stage to ascertain whether the bidders complied with the mandatory requirements as per the Instructions to Tenderers (ITT) Clause 12.1 (g) as listed:-

- a) Particulars of Tendering Company
- b) Tender Security of Kshs. 100,000 valid for 120 days from the closing date of the tender
- c) Confidential Business Questionnaire

- d) Anti-corruption Declaration Commitment
- e) Tenderer's Plant Survey Report
- f) Manufacturer's Authorization form
- g) Reference documents for the fuel, Product attribute sheets,
- h) Flow meter, specifications and information brochures, warranty statements, drawings
- i) Letter of authority to Kenya Ports Authority to contact the reference provided by the tenderer.
- j) ISO 9001 Certification for the manufacturing firm of each software/brand.
- k) Manufacturer's accreditation or membership to relevant regulatory body in fuel or transport industry
- l) Defects liability support plan
- m) Disclosure of the schedule of accreditation costs for patent or other rights and licences
- n) Documented fueling procedure-flow chart
- o) Specifications for the flow meter to be mounted at SOT complete with installation drawings
- p) Written undertaking for:
 - i. Appropriate employer liability insurance drawings
 - ii. Supply the system components and accessories throughout the contract period.
 - iii. Tenderer shall facilitate manufacturer's appointed engineer to provide minimum 4 months (120 days) on site technical support upon commissioning of the software and that the manufacturer's engineer shall be availed on site within 48 hours of notification.
 - iv. A 3 year renewable service and maintenance contract and that the same shall be conclusively discussed with the procuring entity and incorporated as an intergral part of the supply and installation

contract with software manufacturer (s) and that the quoted contract prices shall remain fixed for the entire contract duration.

- v. That any subcontracting to be engaged in by the tenderer has been fully disclosed in their submission (tenderer to refer to relevant sections herein) and acknowledgement that in this respect, tenderers shall retain sole and direct responsibility over the performance and fulfillment of all conditions.
- vi. That they shall comply with the General and Special Conditions of Contract.

Seven firms indicated below were disqualified at this stage due to the following reasons:-

1. Buma Fuel Management solutions

- ✓ No VAT Certificate;
- ✓ No Trade Licence;
- ✓ No manufacturer's accreditations or membership to relevant regulatory body in fuel or transport industry;
- ✓ No audited financial statement submitted. Company incorporated in July 2010

2. Perfect Infotech Solutions

- ✓ Included financial information in envelope "A" against Clause 12.1(g)
- ✓ No Customer Service Policy
- ✓ No Manufacturer's accreditations or membership to relevant regulatory body in fuel or transport industry
- ✓ No defect liability support plan
- ✓ No disclosure of the schedule of accreditation cost for patent or other rights and licenses
- ✓ No written undertaking on emergency response plan, corrections, replacements, improvements and reparations to be executed under the

related maintenance contract complete with envisaged obligations on the part of the procuring entity and the tenderer.

- ✓ No written undertaking on any subcontracting to be engaged in the tenderer.

3. Mantrad Enterprises Ltd

- ✓ Submitted expired ISO certificate from Triscan System Ltd
- ✓ Submitted expired membership Certificate from Chamber of Commerce East Lancashire
- ✓ Submitted expired Freight Transport Association
- ✓ No Manufacturer's accreditations or membership to relevant regulatory body in fuel or transport industry
- ✓ No defect liability support plan
- ✓ No customer Service Policy
- ✓ Submitted audited financial reports for 2010 only

4. Africa Fleet Mgt. Solution Ltd

- ✓ No tenderer's Plant Survey Report
- ✓ No ISO certificate
- ✓ No certificate from e-drive technology (manufacturer)
- ✓ No warranty statement
- ✓ No letter of authority to Kenya Ports Authority to contact the references provided by the tenderer
- ✓ No Manufacturer's accreditation or membership to relevant regulatory body in fuel or transport industry
- ✓ No defect liability support plan
- ✓ No disclosure of the schedule of accreditation costs for patent or other rights and licenses
- ✓ Missing statement of comprehensive income for 2009 in the financial statements

5. Fuelomat (K) Ltd

- ✓ ISO certificate submitted not for manufacturer (Securant) instead submitted for R.H Electronics Ltd.
- ✓ No organization chart
- ✓ No Manufacturer's accreditations or membership to relevant regulatory body in fuel or transport industry
- ✓ No defect liability support plan
- ✓ No disclosure of the schedule of accreditation costs for patent or other rights and licenses
- ✓ All three year financial reports not audited and certified
- ✓ No written undertakings on appropriate employer liability insurance covers
- ✓ No written undertaking on Emergency response plan, corrections, replacements, improvements and reparations to be executed under the related maintenance contract complete with envisaged obligations on the part of the procuring entity and the tenderer.
- ✓ No written undertaking on any subcontracting to be engaged in the tenderer.

6. Impax Business Solutions Ltd

- ✓ No Manufacturer's Authorization Form
- ✓ Has a teaming agreement with Aviation and General Security Consultants (against ITT Clause 3.1) which was dated 12th December, 2010 before the tender was advertised and expires on 12th December, 2011.
- ✓ No Manufacturer's accreditation or membership to relevant regulatory body in fuel or transport industry.

7. Fuel Save Technologies Ltd

- ✓ Included financial information in Envelope 'A' against Clause 12.1 (g)

- ✓ Tender Security of less than the required 120 days validity period.
Clause 12.1(g)
- ✓ No VAT Certificate
- ✓ No PIN Certificate
- ✓ No ISO 9001 Certification for the manufacturing firm of each software/brand.
- ✓ No Manufacturer's accreditation or membership to relevant regulatory body in fuel or transport industry

Only one firm namely Vemart Engineering Consultants Ltd passed at this stage and its bid was evaluated on technical parameters at the technical evaluation stage.

Technical Evaluation:-

M/s Vemart Engineering Consultants Bid was evaluated on the technical parameters as indicated in the Tender Data Sheet (TDS) Clause 30 and the Instruction to Tenderers Clause 29. The result was as tabulated below:-

PARAMETERS		MAX. SCORE	VEMART ENG. CONSULTANTS
System Conformity	Functional compliance statement forms	10	10
	Product Data Sheets and information brochures	5	5
	Country of origin for hardware and software items (Mandatory)	10	10
	Brand name & series (Mandatory)	5	5
Evidence on Key Features	Vehicle/equipment usage and misuse	3	3
	Vehicle/equipment fuel consumption	3	3
	Inventory reconciliation and management	2	2
	Odometer/engine hours-run readings for effective maintenance scheduling	2	2
Personnel Capability	CV's	6	6
	Experience of at least three technical staff that will provide product support & carry out system audit.	9	8
Similar	List and description of at least 5 corporate clients for	10	10

Experience	similar products last three years 2010, 2009 and 2008		
	Corporate clients contacts for the last three years 2010, 2009 and 2008	5	2
Financial Capability		10	8
Implementation Time Table	Implementation within 6 months or less	5	5
	Work plan for design, development, delivery, testing and commissioning in descriptive Microsoft Project or equivalent format clearly showing implementation of the works (Phase I to IV)	5	5
Training Proposal	Scope of coverage and capability of proposed training program to meet stated objectives	5	4
System Documentation	Completeness of the System Components documentation form	5	5
TOTAL MARKS		100	93

The firm then qualified to be evaluated at the Financial Evaluation stage. The Evaluation Committee recommended that M/s Vemart Engineering Consultants Ltd's envelope 'B' be opened. The committee further requested to carry out visits to the references provided by the firm to verify information as contained in its tender documents.

Site Visit

The Evaluation committee visited the reference sites provided by Vemart Engineering Consultants Ltd to verify information on proclaimed benefits and system functionality in the local operations. The committee visited John Lewic/Waitrose; Veolia Environmental Services Ltd; Simpltrak Ltd; and Portland Marina all sites situated in the United Kingdom.

The committee confirmed that the system of automated fuel management and control proposed by M/s Vemart Engineering Consultants Limited was viable and would lead to benefits envisaged in the tender documents.

Financial Evaluation

The financial bid opening was conducted on 1st September, 2011 the quoted prices per the phases were as follows:-

PHASE	SCOPE	USD	KSHS
I	Marine Craft (SOT and Dockyard Stations)	208,295.00	19,183,058.00
II	Mombasa vehicles, Conventional Cargo & Container Handling equipment (Main and Container Terminal Stations)	164,140.10	15,044,359.00
III	Large Stationary Equipment (RTG's and Mobile Harbor Cranes) - Mobile Bouser	21,351.60	1,956,993.00
IV	ICD Nairobi	22,164.00	2,031,454.00
V	ICD Kisumu & Generators	93,972.90	8,613,142.00
GRAND TOTAL (exc. VAT)		509,923.50	46,737,344.00

The exchange rate use was USD 1/Kshs. 91.6556 which was the Central Bank of Kenya(CBK) mean rate at 22nd June, 2011 the date of the tender opening in line with the tender requirements.

The committee then considered the proposed optional extras which the bidder considered would enhance utility derived from the system. This extra options included the following:-

- i) installation of a Closed Circuit Television (CCTV) - Kshs. 604,926.96
- ii) Spares- Kshs. 117,777.00
- iii) Fleet Management System- USD 340 per vehicle and USD 17 monthly subscription
- iv) Lone Worker Monitoring System- Kshs. 31, 162.90 unit cost
- v) Enterprise Resource Planning Solution (SAP) - Kshs 2, 859, 608.90

The evaluation Committee analyzed the options in the light of the site visit which confirmed the credibility, viability and durability of the bidder's proposed systems.

The Evaluation Committee then recommended the award of the tender No. KPA.176/2010-11/ME be made to M/s Vemart Engineering Consultants Limited to install and commission the Automated Fuel Management & Control System at USD 509,923.50 inclusive of a renewable three year maintenance contract, covering phases I, II, III, IV and V as per the delivery timetable specified in the Gantt chart contained in the technical submission.

THE TENDER COMMITTEE DECISION

The Corporation Tender Committee in its meeting No. 006/2011-12 held on 17th October, 2011 deliberated on the recommendation of the Evaluation Committee and approved the award of the tender to M/s Vermat Engineering Consultants Limited in the following phases:-

Phase	Scope	USD	Kshs.
I	Marine Craft (SOT and Dockyard Stations	208,295.00	19,183,058.00
II	Mombasa vehicles, Conventional Cargo & Container Handling equipment (Main and Container Terminal Stations)	164,140.10	15,044,359.00
III	Large Stationery Equipment(RTG's and Mobile harbor Cranes) - Mobile Bourser	21,351.60	1,956,993.00
IV	ICD Nairobi	22,164.00	2,031,454.00

The Tender Committee recommended that phase II and III should start and the rest could be implemented in future years depending on the budget. The bidders were notified vide letters dated 17th October, 2011.

THE REVIEW

The Applicant M/s Impax Business Solutions Limited lodged this Request for Review on 31st October, 2011 against the decision of the Kenya Ports Authority Tender Committee dated 17th October, 2011 in the matter of Tender No.

KPA/176/2010-11/ME for Supply, Installation and Commissioning of an Automated Fuel Management and Control System. The Applicant was represented by Mr. Mwaniki Gachuba, Advocate and the Procuring Entity was represented by Mr. Stephen Kyandih, Advocate. The Interested Candidates present included Velmart Engineering Consultants Ltd represented by Mr. Peter King'ara, Advocate; Fuelsave represented by Mr. Luke Ochola; Fuelmat represented by Mr. Nicholas Kimulu ; Africa Fleet represented by Mr. I Alibhai; and Buma represented by Mr. Ignatius.

The Applicant requested the Board for the following orders:-

1. *"Declaration that the Procuring Entity violated the Public Procurement and Disposal Act, 2009 and the Public Procurement and Disposal Regulations, 2006 (PPDR) by:*

(a) commencing Procurement process without sufficient funds

(b) using a tender document other than the prescribed tender document for supply, installation and commissioning

(c) appointing all tender opening committee members as members of tender evaluation committee

(d) conducting tender evaluation in excess of the prescribed periods

(e) not conducting a fair preliminary evaluation of the tender

(f) failing to first conduct tender evaluation independently

(g) not inviting 2 observers during the Tender Committee meeting

(h) corruptly and illegally reducing the 14 day no objection period to 5 days

- 2. The tendering process is illegal, incurably flawed, an abuse of public trust and therefore a nullity.*
- 3. The disqualification of the Applicant was fraudulent and abuse of office.*
- 4. The tender award be nullified and the tender cancelled and re-evaluated.*
- 5. In the alternative, the tender be awarded to the Applicant.*
- 6. That the Procuring Entity be compelled to pay costs of this suit.*
- 7. That the Procuring Entity be compelled to pay interest on 6 above.*
- 8. The Procuring Entity furnishes the Applicant with certified copies of all documents relating to this tender."*

The Applicant has raised Seventeen (17) grounds of appeal which the Board deals with as follows:-

Ground 1 - Breach of Section 26(b) of the Act and Regulations 20(1) and (2).

The Applicant alleged that the Procuring Entity breached Section 26(6) of the Public Procurement and Disposal Act, of 2005 (herein after referred to "the Act") and Regulations 20(1), (2) of the Public Procurement and Disposal

Regulations, 2006 (herein after "the Regulations") by embarking on a Procurement Process yet, it did not have sufficient funds budget to secure the system. The Applicant further submitted that the subject tender was to be implemented in six months and therefore because of this fixed time the Procuring Entity needed to have all the funds ready before starting the process.

In response, the Procuring Entity submitted that the subject tender was a multi-year project expected to be implemented in phases over three(3) years period as stipulated in the Tender Data Sheet (TDS) 12 and ITT Clause 12.1 (g) (iv) bullet 4. It further submitted that the Corporations Tender Committee had recommended the phasing, of the works and the funds over the three (3) years vide its decision of 6th April, 2011. It further stated that the Procuring Entity was to negotiate with the winning bidder as stipulated in Section VII Clause 7.7 and Schedule of requirement of Section VI.

The Procuring Entity also stated that the sum of Kshs. 18 million had been budgeted for of which Kshs. 10 million had been availed from the Energy Savings Project and another Kshs. 8 million set aside by the authority for purchasing of fuel dispensing trucks.

The Board has considered the Submissions of the parties and examined the documents submitted before it.

The Board notes that the TDS 1.1 stipulated that the subject tender would be implemented in five phases and separately priced. The Board also notes that the implementation Time Table as supplied to the bidders had been specified in the Tender documents at item 7.7 which stipulated that a tenderer shall propose

an implementation time table within 6 months (180 days) upon contract signing for commissioning of all objects in five independent phases.

The Board further notes that Kshs. 18 million had been allocated for the initial implementation as indicated in Estimate No. 10600356 certified by the Finance Controller and approved by the Managing Director. The Board further notes that the six months period referred to by the Applicant in his submissions refers to the period of delivery or supply of the equipment and not for the total execution of the tender.

The Board finds that, contrary to the claim by the Applicant, the Procuring Entity had set aside sufficient funds to procure the project. Accordingly, this ground of Appeal fails.

Ground 2- Breach of Section 29(4) of the Act, Regulation 29 and the 3rd Schedule of the Regulations.

The Applicant alleged that the Procuring Entity did not use the prescribed Standard Tender Document for Supply, Installation and Commissioning but instead used a Tender Document that is materially different from the prescribed one. It also alleged that the standard tender document provided for the tenders to be submitted in one envelope but the Procuring Entity required the bidders to submit their bids in two separate envelopes. The Applicant further alleged that the Procuring Entity violated Section 2(d) and (e) of the Act by failing to provide clear financial bid opening procedure.

In response, the Procuring Entity stated that the two envelope system was used to increase fairness in competition and transparency. It added that if the Applicant felt that the system was not appropriate, it ought to have raised the

issue at the time it became aware of it. The Procuring Entity further stated that the Applicant submitted its bid in two envelopes, hence the Applicant is enstopped from raising the issue when its bid was declared unsuccessful. The Procuring Entity submitted that it had adhered to the provisions of Section 2(d) and (e) of the Act. It added that the financial bid opening and evaluation procedure was stipulated in ITT Clause 30.8 and Section III TDS 31 of the Tender document.

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

The Board observes that the Procuring Entity did not use the Standard Tender Documents as set out in the Third Schedule to the Regulations for Supply, Installation and Commissioning of Plant and Equipment as provided for by the Public Procurement Oversight Authority. The Board notes that the Procuring Entity had indeed used the Standard Request for Proposal (RFP) document.

The Board notes that the Request for Proposal documents had clear specifications and evaluation criteria.

The Board therefore finds that although the Procuring Entity did not use the Standard Tender Documents for this method of procurement as issued by the Public Procurement Oversight Authority, this did not prejudice the tender process.

Ground 3-Breach of Section 60(1) of the Act.

The Applicant alleged that the Procuring Entity violated Section 60(1) of the Act by converting the entire Tender Opening Committee into the Tender Evaluation Committee.

In response, the Procuring Entity stated that it had not violated Section 60(1) of the Act as alleged by the Applicant. It contended that it had complied with the provisions of Section 60(1)(b) which requires that at least one of the members of the Tender opening Committee shall not be directly involved in the processing or evaluation of the tenders. It further contended that Ms. Hafswa Islam, a member of the Tender Opening Committee was not directly involved in the processing of the tender. It also stated that Mr. Mtalaki was not a member of the Tender Opening Committee but a member of the Technical Evaluation Committee.

The Board has examined the documents submitted before it and the parties' submissions.

The Board notes from the minutes of the Tender opening dated 22nd June, 2011, that Ms. Hafswa Islam was a member of the Tender opening Committee. The Board further notes from the minutes of the Technical Evaluation Committee dated 13th July, 2011 Ms. Hafswa Islam was also a member of the Technical Evaluation Committee. The Board also notes that Mr. Mtalaki was not a member of the Opening Committee but a member of the Technical Evaluation Committee

Indeed the Board observes that all the Tender Opening Committee members were also members of the Technical Evaluation committee. Section 60 (1) of the Act provides that;

"The Accounting Officer shall appoint a tender opening Committee specifically for the procurement in accordance with the following requirements and such other requirement as may be prescribed -

(a) the committee shall have at least three members; and

(b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders."

The Board notes that the inclusion of Mr. Mtalaki into the Technical Evaluation Committee gave it a different face from the Tender Opening Committee. Therefore this introduced adequate segregation and independence as envisaged by the Act.

Grounds 4, 5 and 6 - Breach of Section 66(b) and Regulation 16(6) and (7).

These grounds have been consolidated as they raise similar issues on evaluation of the bids.

The Applicant alleged that the Evaluation Committee breached Regulation 16(6) by failing to independently evaluate tenders prior to submitting a joint Evaluation Report of the analysis and ratings to the Tender Committee. The Applicant also alleged that the Evaluation Committee violated Section 66(6) read together with Regulation 46 by exceeding the prescribed evaluation period of thirty days from the tender opening date. It further alleged that the Evaluation Committee violated Regulation 16(7) by exceeding the prescribed financial evaluation period of five days from the date of Completion of the technical evaluation. It claimed that the Procuring Entity opened the financial bids on the 1st September, 2011 and finalized Financial Evaluation on 13th September, 2011.

In response, the Procuring Entity stated that its Evaluation Committee carried out an independent evaluation and ratings, and the technical evaluation was completed within the prescribed time frame as provided for in Section 66(6) of the Act. It averred that the technical evaluation was completed in twenty-one days and the report dated 13th July, 2011 was received by the management on

14th July, 2011. It stated that since only one bidder was successful at the Technical Evaluation stage, the Evaluation Committee requested and was granted permission to conduct a due diligence site visits to United Kingdom. The financial bids could not therefore be opened before the conclusion of the due diligence site visits. The Procuring Entity further stated that the site visits report was received on 22nd August, 2011 and the financial bid was opened on 1st September, 2011 and therefore the delay was justified.

The Procuring Entity acknowledged that the Financial Evaluation was finalized on 13th September, 2011, but that the Applicant was not prejudiced since its bid had been disqualified before the Financial Evaluation stage.

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

As regards the Applicant's allegation that the Evaluation Committee exceeded the prescribed tender evaluation period of thirty days from the opening date, the Board has carefully examined the evaluation process and notes the following:

- i. The Tenders were closed/opened on 22nd June, 2011.
- ii. The Technical Evaluation was carried out and completed on the 13th July, 2011.
- iii. The Technical Evaluation Report was signed on 13th July, 2011 and received by the Management on the 14th July, 2011 and not 26th September, 2011 as the Applicant alleged.
- iv. From the opening date 22nd June, 2011 to the completion of the Technical Evaluation on 14th July, 2011 is twenty-two days. One bidder was successful at the Technical evaluation stage necessitating the Evaluation Committee to request to conduct due diligence site visit to United Kingdom.
- v. After the due diligence site visit report, the financial bid was opened on 1st September, 2011. The Board also notes that the Tender document provided for Post Qualification to be carried out on the tenderer determined to be lowest evaluated tenderer.

The Board is alive to the provision of Regulation 52 (1) which provides as follows:-

"where so indicated in the tender documents, a Procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the lowest evaluated responsive tender, in order to

determine whether the tenderer is qualified to be awarded the contract in accordance with Section 31(1) of the Act"

The Board notes that Regulation 52 (1) requires that the post qualification of any bidder may be carried out on the bidder who has submitted the lowest evaluated responsive bid.

The Board notes that the technical evaluation was conducted within thirty days as envisaged by Section 66(6) and Regulation 46. The Board further notes that the financial evaluation ought to have been conducted within a period of five days from the time of completion of the technical evaluation as provided by Regulation 16(7) (b).

The Board acknowledges that the evaluation period of this tender exceeded the prescribed tender evaluation period of thirty days from the tender opening date. The Board is however persuaded by the reasons advanced by the Procuring Entity justifying the delay in the evaluation process which was caused by the carrying out of the due diligence site visit in the United Kingdom.

The Board also notes that there was only one bidder whose financial bid had to be evaluated. The evaluated price of one bidder would therefore spell no prejudice on bidders that did not qualify for financial evaluation. The period surpassing thirty days would therefore not prejudice them. The Board also notes that the delay in completing the evaluation process did not prejudice the Applicant since its bid had already been disqualified at the preliminary stage.

The Board had previously held in its decision No 24/2008 (De La Rue Currency and Security Printing Ltd and Kenya Revenue Authority) of 29th July, 2008 that the evaluation period beyond thirty days from the tender opening period was a breach of the Act. Nevertheless the High Court in its Miscellaneous Civil

Application No. 540 of 2008; ruled that *“the Board did not at all probe into why a longer period than that provided in the statute was necessary.....”* The court therefore overturned the Board’s decision on this matter.

As can be noted from the analysis herein above the Board has interrogated the circumstances that led to the delay and is satisfied that the reasons given are justified.

Therefore the Board finds these grounds of appeal fail.

Grounds 7,8,9,10,11,12,13,14 & 15 - Breach of Section 64(1), Regulation 47(1) and Clause 28 & 31 of the tender document.

These grounds have been consolidated as they raise similar issues on the disqualification of the Applicant at the Preliminary evaluation stage.

The Applicant alleged that the Procuring Entity violated Section 64(1) of the Act, Regulation 47(1) and Clause 28 of the tender document by disqualifying it without competently conducting a Preliminary Evaluation. The Applicant averred that it complied with the requirements of Section III Clause 12.1 (g) (ix) of the tender document as it had submitted a Manufacturers accreditation certificates. It further averred that it had complied with the requirements of Section III Clause 12.1 (g) (v) of the tender document when the E-Drive Technologies Limited directly sent to the Procuring Entity the Manufacturers Authorization letter and also submitted hard copies under Section 5 of its tender document

The Applicant stated that although the Manufacturers Authorization by E-Drive Technology limited did not bear its name, its intentions were clear that the said

letter was in its favour. The Applicant further stated that in addition to the E-Drive Technology limited Manufacturers Authorization, it had also submitted authorization letters from Alpeco Limited and Integrated Security solutions Limited.

The Applicant further stated that the Procuring Entity's assertion that it was disqualified for illegally entering into a joint venture with Aviation & General Security Consultants (AGSC) contrary to Clause 3.1 of the Tender Data Sheet was in Violation of Section 64(1) of the Act and Regulation 47 as the Procuring Entity did not conduct the preliminary evaluation competently. It further denied that its teaming agreement with AGSC was a joint venture. It averred that Section IV Clause 21.1 of the General Conditions of Contract allowed bidders to enter into sub-contracts and hence it lawfully notified the Procuring Entity of its exclusive supply agreement with AGSC. The Applicant finally stated that the Procuring Entity allowed other bidders to submit tenders in association with Manufacturers. The Applicant felt that it was therefore discriminated against.

In response, the Procuring Entity stated that it adhered to the provisions of Section 64(1) of the Act and Regulation 47(1). It also stated that under part 'C' of the TDS Clause 12, ITT Clause 12(g) (ix) bidders were required to show by way of evidence the Manufacturers or Dealers Accreditation or membership to the relevant regulatory body in fuel and transport industry. The Procuring Entity affirmed that the Applicant's bid did not have such evidence and hence its bid was declared non-responsive. It further stated that the documents annexed to the Applicant's bid did not qualify to be Accreditation of the Manufacturer of the goods to be supplied.

The Procuring Entity stated that the requirement of TDS Clause 12 and ITT Clause 12.1 (g) (v) was for that the Manufacturer to complete the Authorization form in the format provided in Section IX and send it directly to the Procuring Entity which the applicant did not comply with.

The Procuring Entity stated that it received a document marked 'IBS 4' EDT authorizing AGSC to submit a tender, but the document did not make any reference to the Applicant. Further, the Procuring Entity stated that there was no valid contract for Applicant to legally make a presentation that they were authorized to supply an automated fuel system manufactured by EDT. The authorization letter was for AGSC which had not bought the Tender Documents to qualify to participate in the tender.

The Procuring Entity stated that TDS 41 and ITT 3.1 prohibited Joint Venture Agreement/arrangements. It stated further that the Memorandum of understanding (MOU) between AGSC and EDT terminated on the 12th December, 2010 and therefore fell short of the required period. It further submitted that the agreements between AGSC and the Applicant, though expired, could not be considered as a substitute for Manufacturers Authorization or Accreditation as they did not conform to the wording of the specified documents. The Procuring Entity stated that although subcontracting/teaming agreements were allowed in the tender documents, such sub-contracts ought to have been formulated and executed in accordance with the requirements of the tender otherwise it could lead to back passing.

The Procuring Entity stated that the letter from Alpeco indicated that the company was a Manufacturer of liquid handling Equipment to the road tanker

and industrial petrochemical industry and not for Automated Fuel Management and Control Systems as required by the subject tender.

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

The Board notes that the tender documents Section III, clause 12.1 (g) (v) set out the requirements for the Manufacturer's Authorization letter as follows:-

"In the case of authorized agents a duly completed Manufacturers Authorization form in the format provided herein completed by the manufacturer sent directly to Kenya Ports Authority".

The Board also notes that the tender document at Section III, Clause 12.1 (g) (ix) required evidence of the manufacturers or dealers accreditation or membership to relevant regulatory body in fuel or transport industry

The Board has examined the Manufacturers Authorization submitted by the Applicant and finds that it was not in the format provided by the Procuring Entity. The Board has further examined the documents submitted by the Applicant marked "IBSL1", "IBSL 2", "IBSL 3", AND "IBSL 4" and notes that the documents on the Manufacturers Authorization and Accreditation membership to a Regulatory body were not clear or sufficient to meet the tender requirements.

The Board therefore finds that the documents submitted by the Applicant did not meet the requirements specified in the Tender document.

Accordingly, all these grounds of Appeal fail.

Ground 16-Breach of Regulation 12(8)

The Applicant alleged that the Procuring Entity's Tender Committee violated regulation 12(8) by failing to invite 2 observers to attend its meetings while deliberating the tenders.

At the hearing of this review, this ground was withdrawn by the Applicant.

Ground 17 -

The Applicant alleged that the Procuring Entity acted in bad faith by withholding its notice dated 17th October, 2011 which was dispatched to the Applicant on 24th October, 2011. It claimed that this action on the part of the Procuring Entity was meant to deny the Applicant its statutory benefit of the mandatory fourteen days appeal window. It further averred that the Procuring Entity should be stopped from executing any contract under this tender as it would amount to aiding it to benefit from an illegal conduct.

In response, the Procuring Entity stated that the letters of notification were sent via courier on 24th October, 2011. It produced before the Board copies of TNT Consignment Tracker details as proof of dispatch to all bidders.

On its part the Successful Bidder associated itself with the Procuring Entities arguments and submissions. It further submitted that the tender process the subject matter of these proceedings was fair and transparent and ought to be upheld.

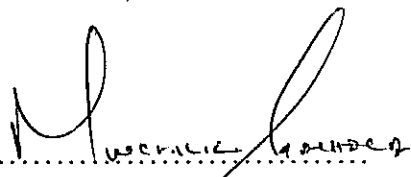
The Board has noted that the letters of notification were all dated 17th October, 2011 and dispatched on 24th October, 2011. The Board therefore finds that the

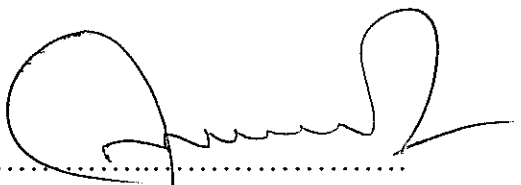
Applicant did not suffer any prejudice as it was able to file this request for review on time.

Accordingly, this ground of appeal also fails.

Taking into consideration all the above, the Request for Review fails and is hereby dismissed. The Board orders pursuant to Section 98 of the Act, that the procurement process may proceed. There will be no orders as to costs.

Dated at Nairobi on this 25th day of November, 2011


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CHAIRMAN
PPARB


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SECRETARY
PPARB

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