

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 35/2012 OF 10TH JULY, 2012

BETWEEN

HOLIDAY CARS AND TOURS LTD.....APPLICANT

AND

KENYA PORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Ports Authority in the matter of Tender No. KPA/104/2011-2012/ADM for Provision of Commuter Bus Services for Mombasa, Nairobi and Kisumu.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Mrs. Loise Ruhiu	-	Member
Eng Christine Ogut	-	Member
Mr. Sospeter Kioko	-	Member.

IN ATTENDANCE

Ms. Pauline Opiyo	-	Holding brief for Secretary
Ms. Judy Maina	-	Secretariat.

PRESENT BY INVITATION

Applicant - M/s Holiday Cars and Tours Ltd

Mr. James Mang'erere - Advocate
Mr. James Mwaura - Director

Procuring Entity - Kenya Ports Authority

Mr. Stephen Kyandih - Advocate
Mr. Johnson Gachanja - Procurement Officer

Interested Party - M/s Royal Hisham Ltd

Mr. Salim Kitonda - Representative
Mr. James Okenye - Representative
Mr. Alex Ochieng' - Representative

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

The Kenya Ports Authority advertised Tender No. KPA/104/2011-12/ADM for Provision of Commuter Bus Services in The Standard and The Star newspapers of 26th March, 2012 and closed on 25th April 2012.

Closing/Opening

The tender closed on 25th April 2012 at 10.00 hours, with the following four (4) firms responding:

1. M/s Bizcam Transporters
2. M/s Holiday Cars Ltd
3. M/s Jihan Freighters Ltd
4. M/s Royal Hisham Ltd

TECHNICAL EVALUATION

The technical evaluation was conducted in two stages namely; preliminary evaluation and detailed technical evaluation.

Preliminary Evaluation

The bids were evaluated to determine responsiveness to the mandatory requirements of the tender as provided in the Appendix to Instructions to Bidders, Clause 2.11. The results of the Preliminary Evaluation were as shown in table 1.

Table 1 - Preliminary Evaluation

Clause	Description	Royal Hisham	Jihan Freighters	Bizcam	Holiday Cars & Tours
I	Particulars of Tendering Company to include company background, organization structure, PIN and VAT Certificates and Current Tax Compliance Certificate	√	√	√	√
II	Tender Security of Kshs 200,000 valid for 120 days in form of a bank guarantee or an insurance firm	√	√	√	√

	guarantee approved by Public Procurement Oversight Authority in the format provided in the tender document				
III	Duly completed Confidential Business Questionnaire and declaration form.	√	√	√	√
IV	Letter of Compliance issued by Ministry of Labour and showing compliance to labour requirements and in particular compliance to payment of minimum wage.	√	√	√	√
V	Proof of ownership of fleet of buses detailed in the description of services contained in the tender document to be used and statement of where the buses can be viewed to include: a) Year of manufacture b) Valid Road Licenses for buses c) Valid insurance Policy d) Valid Inspection Stickers e) Fitting with safety belts f) Must abide by TLB regulations including being fitted with appropriate and acceptable speed governors g) Capacity of at least 55 seated passengers with adequate spacing between seats, adjustable and comfortable, low stairs, spacious windows with adequate ventilation.	√ √ √ √ √ √ √ √	x x x x x x x	√ √ √ √ √ √ √	√ √ √ √ √ √
Results		Responsive	Non Responsive	Responsive	Responsive

Note: Jihan Freighters did not meet the mandatory requirement on proof of ownership of fleet of buses. In their submission, they attached a letter from Ryce Motors Ref. REAL/ MSA/S&M/W1/1145/12 of 20/04/2012 -agreement to sell 6 No Isuzu FRR bus 51 seater well fabricated and

ready for delivery at your yard pending registration, which the committee deems does not constitute proof of ownership as required in the tender document Clause 2.11(v).

Three firms, namely; M/s Royal Hisham Ltd, M/s Holiday Cars and Tours Ltd and M/s Bizcan Transporters were found to be responsive and progressed to the detailed technical evaluation stage.

Detailed Technical Evaluation

In the technical evaluation, bidders were required to score a minimum of 75% to proceed to the next stage of evaluation. A score sheet developed from the evaluation criteria set in the tender document was used to allocate marks to each firm as shown in table 2.

Table 2: Detailed Technical Evaluation Scores

Description	Royal Hisham	Holiday Cars & Tours	Bizcan
(a) Organization structure and CV of at least one key personnel with a minimum qualification of relevant diploma in related studies and a minimum of 3 years' experience. (15 marks)	13	15	15
(b) Certified copies of Audited Financial Reports for the last three years- 2008, 2009 and 2010 (or 2011 where available. (20 marks)	20	20	20
(c) Interested bidders to demonstrate that they have been in transport business for the past three years - 2009, 2010 and 2011. Copies of contract documents, agreements, service orders etc must be attached for each year of reference and names of contact persons. (35 marks)	35	35	20

(d) Method of work statement should include but not limited to: <ul style="list-style-type: none"> • Response to our schedule of work • Safety precautions • Other relevant information (15 marks)	15	10	9
(e) Evidence of office and garage where the maintenance schedules are carried out i.e. lease or service agreements, ownership etc. (15 marks)	15	15	15
Grand Total	98%	95%	79%

Remarks

Part (e) of the detailed technical evaluation criteria above which require bidders to show evidence of the office and garage where the maintenance schedules are carried out, lease or service agreements, ownership were scored after the site visit on the basis of the site visit report.

Recommendation

The committee recommended the three firms below to proceed to the next stage of financial evaluation - envelope B.

- 1) M/s Royal Hisham Ltd -----98%
- 2) M/s Holiday Cars and Tours Ltd-----95%
- 3) M/s Bizcan Transporters -----79%

Financial Evaluation

The opening of the financial bids of the above three firms was done on 6th June 2012. The Committee evaluated the bids as per clause 4.3 of the tender evaluation guidelines which states that tenders shall be ranked according to their evaluation price and the successful tender shall be the tender with the lowest evaluated price in accordance with Section 66(4)

of the Act. The prices quoted by each firm and the summary of prices were as tabulated herebelow.

Table 3A: Price Quoted – M/s Bizcan Transporters Ltd

Items	Description	Qty Trips No.	Trips No. Total	Duration	Unit Price (Kshs) V.A.T. Incl.	Total Kshs. V.A.T. Incl.
Bus No.1 Nairobi	ICD -Town	3	164	6.00a.m To 5.30pm monthly	2800	460,000
	Town-ICD	3				
	Saturday-Sunday	2				
	ICD-Town Town-ICD	2				
Bus No.2 Nairobi	ICD ICD-Embakasi	1 1	160	6.00am To 5.30PM Monthly	1800	108,000
BUS NO.3 Kisumu	Town -ICD ICD-Town	2 2	84	7.00a.m To 5.30PM Monthly	2350	198,000

Table 3B: Price Quoted for Mombasa - M/s Holiday Cars & Tours Ltd

Item	Capacity	Trips Per Day	Charges Per Trip	Charges Per Day	Total Per Month (31 Days)	16% VAT	Total Kshs. V.A.T
1	62	17	1100	18,700	579,700	92,752	672452
2	62	17	1000	17000	527,000	84320	611,320
3	62	16	800	12,800	396,800	63,488	460288
4	62	3	500	1,500	46,500	7,440	53,940
5	62	11	750	8,250	255,750	40,920	296,670
Total	310	64			1,805,750	288,920	2,094,670

Table 3C: Prices for Late Night Drop-off (Mombasa) - M/s Holiday Cars & Tours Ltd

Item	Capacity	Trips Per Day	Charges Per Trip	Charges Per Day	Total Per Month (31 Days)	16% VAT	Total Kshs. V.A.T
1	62	17	1100	18,700	579,700	92,752	672452
2	62	17	1000	17000	527,000	84320	611,320
3	62	16	800	12,800	396,800	63,488	460288
4	62	3	500	1,500	46,500	7,440	53,940
5	62	11	750	8,250	255,750	40,920	296,670
Total	310	64			1,805,750	288,920	2,094,670

Table 3C: Prices for Late Night Drop-off (Mombasa) - M/s Holiday Cars & Tours Ltd

Bus No	Routes	Capacity	Charges Per Night Kshs	Total Amount	VAT 16%	Total VAT Incl.
1	Likoni	66	4,000.00	124,000.00	18,840	143,840
2	Kiembeni	64	5,500.00	170,500.00	27,280	197,780
3	Miritini	64	6,000.00	186,000.00	29,760	215,760
			Total Monthly	480,500.00	76,880	557,380

Table 3D: Prices Quoted for Nairobi - M/s Holiday Cars & Tours Ltd

Bus No	Capacity	Trips Per Day	Charges Per Trip	Charges Per Day	Total Per Month (31 Days)	VAT 16%	Total VAT Incl.
1	51	6	1112	6,674	206,896	33,104	240,000
2	51	6	1112	6,674	206,896	33,104	240,000
Total		12			413,792	65,472	480,000

Table 3E: Prices Quoted for Kisumu - M/s Holiday Cars & Tours Ltd

Bus No	Capacity	Trips Per Day	Charges Per Trip	Charges Per Day	Total Per Month (23 Days)	VAT 16%	Total VAT
1	51	4	1875	7,500	172,500	27,600	200,100
Total		4			172,500	27,600	200,100

Table 3 F: Summary Total Costs - M/s Holiday Cars & Tours Ltd

Item	No. of Buses	Total Charges Per Month	16% VAT	Total Charges (VAT Incl.)
Mombasa Commuter (Day & Night Drop Off)	5	2,286,250	365,800	2,652,050
Nairobi Commuter	2	413,793	66,207	480,000
Kisumu Commuter	1	172,500	27,600	200,100
Total		2,872,543	459,607	3,332,150

Table 3G: Prices Quoted - Royal Hisham Ltd

1	2	3	4	5	6	7
Item	Description	Quantity & Quality	Duration	Unit Price	Total Price Excl.VAT	Unit Price Of Other Incidental Services Payable
Mombasa Day					1,714,824.00	
Mombasa Night					540,580.00	
Nairobi Week					523,103.00	
Nairobi Weekend					97,552.00	
Kisumu					250,000.00	
Total					3,126,059.00	
16% Vat					500170.00	
Total Amount					3,626,229.00	

The three bids were analyzed and the final financial evaluation results were as summarized in table 4 hereafter.

Table 4: Summary of Financial Evaluation Results

	Monthly Charges Inclusive of V.A.T.		
Station	M/s Bizcan	M/s Royal Hisham	M/s Holiday Cars & Tours
Mombasa	-	2,616,268.68	2,652,050.00
Nairobi	568,000.00	719,959.80	480,000.00
Kisumu	198,000.00	290,000.00	200,100.00
Total	766,000.00	3,626,299.00	3,332,150.00

REMARKS

M/s Bizcan Transporters

- The firm quoted for Nairobi and Kisumu. In Nairobi Bus No.1 and bus No. 2 quoted a total price of Kshs 568,000.00 VAT inclusive
- In Kisumu the firm quoted Kshs 198, 000.00 VAT Inclusive and it was the lowest quoted price.
- The firm did not quote for Mombasa.

M/s Royal Hisham

- The firm quoted all stations Mombasa, Nairobi and Kisumu
- The price quoted for Mombasa was Kshs 2,616,268.68 and the firm was the lowest.
- In Nairobi the price quoted was Kshs 719, 959.80, VAT inclusive and the firm was third lowest.
- In Kisumu the price quoted was 290.000.00 VAT inclusive and the firm was third lowest.

M/S Holiday Cars & Tours

- The firm quoted for all stations Mombasa, Nairobi and Kisumu
- The price quoted for Mombasa was 2,652,050.00 and the firm was the second lowest.
- In Nairobi the price quoted was kshs480, 000.00 Vat inclusive and the firm was the lowest.
- In Kisumu price quoted was 200,100.00 Vat inclusive, the firm was second lowest

RECOMMENDATION

Based on Financial ranking the Committee recommends the award of tender No. KPA/104/2011-12/ADM-Provision of Commuter Bus Services for Mombasa, Nairobi and Kisumu as follows:-

1. M/s Bizcan Transporters--- Kisumu @Kshs 198,000.00 per month
VAT incl.
2. M/s Royal Hisham Ltd --Mombasa @Kshs 2,616,268.68 per month
VAT incl.
3. M/s Holiday Cars & Tours---- Nairobi @Kshs 480,000.00 per month
VAT incl.

The Evaluation Report was presented to the Corporation Tender Committee for adjudication and contract award.

TENDER COMMITTEE DECISION

The Corporation Tender Committee at its Meeting No. 026/211-12 considered the report and upon deliberation, awarded the Contract for Provision of Commuter Bus Services as recommended above by the Evaluation Committee.

The successful and unsuccessful bidders were notified of the Tender Committee decision via letters dated 26th June, 2012.

THE REVIEW

The Applicant herein, M/s Holiday Cars and Tours Ltd, lodged this Request for Review on 10th July, 2012 against the decision of the Tender

Committee of Kenya Ports Authority in the matter of Tender No. KPA/104/2011-2012/ADM for Provision of Commuter Bus Services for Mombasa, Nairobi and Kisumu.

The Applicant was represented by Mr. James Mang'erere, Advocate while the Procuring Entity was represented by Mr. Stephen Kyandih, Advocate. The Interested Candidate present was M/s Royal Hisham Ltd represented by Mr. James Okenye.

The Applicant requested the Board for the following orders:

1. **That the Procuring Entity be ordered to re-evaluate the financial bids and to strictly adhere to the evaluation criteria set out in the tender document.**
2. **To set aside the award to the successful tenderers and award the tender to the Applicant**
3. **To direct the respondent to provide a summary of the evaluation and comparison of tenders to the Applicant as provided for under section 54(3) of the public procurement and disposal Act 2005 .**
4. **A declaration that the Procuring Entity violated the Public Procurement and Disposal Act and the Public Procurement and Disposal Regulations 2006 by conducting the technical and financial evaluation in excess of the prescribed period, introduced a wrong evaluation criteria and therefore the evaluation was not fair.**
5. **That the tendering process for Mombasa and Kisumu is illegal, incurably flawed, an abuse of the public trust and therefore a nullity.**

6. That the Procuring Entity be compelled to pay the costs of this application.

7. Any other relief that this board may deem fit to grant.

The Applicant raised six (6) grounds of review which the Board deals with as follows:-

Grounds 1, 2, 4 and 6 – Breach of Section 66 of the Act and Regulation 46.

These grounds have been consolidated since they raise similar issues relating to the evaluation of the tenders.

The Applicant stated that contrary to Regulation 46 and the provisions of Clause 2.22.5 of the Tender Document, the Procurement Entity exceeded the technical and financial evaluation period as provided for in the tender document, knowing very well that the Procuring Entity ought to have evaluated the tenders within a period of thirty days after the opening of the tender. It stated that the bids were opened on 25th of April 2012 and the award made on 26th, June 2012 after the period allowed for evaluation had expired. It argued that the Procuring Entity delayed the process in order to scheme on how to favour the successful bidder at the detriment of the Applicant and the other bidders.

The Applicant submitted that contrary to Section 66(3) (a) of the Act, one of the Tenderers, submitted a price schedule which was not responsive as it did not comply with Addendum 1. It stated that the bidder submitted a price schedule with only the total price column filled and all

the other columns blank and therefore the financial bid (form of tender) that was read out for that tenderer was not objective and quantifiable. It argued that the bid was not responsive and ought to have been rejected.

The Applicant stated that contrary to Section 66(2) of the Act, at the evaluation stage the Procuring Entity introduced an evaluation criterion that contravened the Act by introducing and using in the evaluation a document named "Tender Evaluation and Report Guidelines". It stated that, it got to know about the said Guidelines when it found a copy of the Guidelines in one of its buses which had been left behind by mistake by the evaluation team when it was inspecting the Applicant's buses.

The Applicant also alleged that on technical evaluation, during the site visits, the technical evaluation committee did not mention, record, take pictures or even inspect ownership of the motor vehicles as required under Clause 2.22 of the Instructions to Tenderers. It argued that the evaluation process was flawed. It therefore urged the Board to make a finding that the evaluation process was flawed.

The Applicant further averred that the Procuring Entity ought to be stopped from consummating contracts for Kisumu and Mombasa under this tender as it was flawed.

In response, the Procuring Entity stated that the tender was opened on the 25th April 2012 and the technical evaluation was completed on the 29th May 2012. It conceded that it concluded the technical evaluation three days outside the 30 days required by the Regulations. It submitted that, the delay was occasioned by the fact that there was a need for the

evaluation committee to visit the sites of the bidding companies and therefore the logistics for the site visits could not permit finalization of technical evaluation within the time prescribed by the Regulations. It further averred that the Applicant was not prejudiced in any way by the submission of the technical evaluation report outside the period provided by the said Regulations.

With regard to the issue of one bidder not having filled the price schedule fully, the Procuring Entity stated that it indeed complied with Section 66(3) (a) of the Act. It further argued that the Tender Document as well as the Addendum No. 1 did not provide a format for filling the schedule of prices.

The Procuring Entity stated that the Applicant's price schedule did not contain the price for the additional stand-by bus for the Mombasa zone as required by the tender. It further averred that Clause 2.24 of the Appendix to Instructions to Tenderers stated *inter alia* that; **"award of tender is to the lowest evaluated bidder and the contract may be awarded to one or more candidates,"** thus affirming the position that the award of contract would be considered per zone and a contract shall be awarded to the lowest bidder in each zone and not to the bidder with the lowest global figure.

The Procuring Entity submitted that the "Tender Evaluation Report Guidelines" is an internal document used to guide its evaluation committees on the provisions of the law regarding tender evaluation. It averred that the said document does not contain any criteria, instructions or directives for the evaluation committees. The Procuring

Entity requested the Board that the Applicant be put to task to explain how it acquired the said document. It urged the Board to dismiss the Applicant's Request for Review on this ground.

The Procuring Entity submitted that Clause 2.22 of the Appendix to Instructions to Tenderers mandated the Evaluation Committee to conduct site visits and inspect and confirm ownership of the buses proposed to be used in provision of the services. It stated that the question as to how ownership was to be determined was the Evaluation Committee's decision. It further submitted that nowhere in the aforementioned clause was the said committee obligated to take records or pictures.

One of the Interested parties namely Royal Hishan Ltd, submitted that prices were to be quoted per lot and that bidders were to be awarded on the basis of lowest evaluated per lot. It submitted that during the tender opening, the Procuring Entity read out the prices per lot. It stated that, it had been awarded the tender for Mombasa while the Applicant was awarded the tender for Nairobi. It urged the Board to find no fault with the tender process.

The Board has carefully considered the submissions by the Parties and the documents presented before it.

The issue for the Board to determine is whether the Procuring Entity evaluated the tenders in accordance with the evaluation criteria set out

in the Tender Document and in accordance with the provisions of Section 66 of the Act.

The Board is alive to Section 66 of the Act, Regulation 46 and Clause 2.22.5 of the Tender Documents which provide as follows;

Section 66:-

“(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).

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

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) –

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

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

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

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

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

Regulation 46:-

"A procuring entity shall, for purposes of Section 66 (6) of the Act, evaluate the tenders within a period of thirty days after the opening of the tender."

Clause 2.22.5:-

"The Tender Evaluation Committee shall evaluate the tender within 30 days from the date of opening the tender"

The Board has perused a copy of the Tender Document that was issued to the bidders as well as the evaluation report prepared by the Procuring Entity and observes that the Procuring Entity conducted the tender evaluation in two main stages namely technical and financial. The Board further notes that between 21st and 25th May 2012, the Evaluation Committee conducted site visits of the 3 firms that were responsive to the technical requirements and a report on the site visits prepared.

On the issue that the tender was evaluated outside the 30 days requirement in breach of the provisions of Regulation 46 and Clause 2.22.5 of the Tender Document, the Board notes the explanation provided by the Procuring Entity to the effect that it is the logistics of the site visits that contributed to the extension of the evaluation period. On the basis of that explanation, the Board is of the view that the extension of the evaluation period by 3 days beyond the 30 days was reasonable in the circumstances. The Board takes cognizance of the High Court judgment in Miscellaneous Civil Application No.540 of 2008 on the same subject, where 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 and the Judge 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. The Board further notes that, the Applicant has not demonstrated what loss it suffered or stands to suffer as a result of that extension.

On the allegation that one of the tenderers, submitted a price schedule which was not responsive as it did not comply with Addendum 1, the Board notes that the said addendum neither provided for additional information / details on the description of services and a tabulation of the specific time schedules for the provision of those services including the number of trips to be made per month. The Board notes that no price schedule format was provided in the said addendum neither was it a requirement to be complied with in respect of preparation of price schedule. The Board further notes that the financial bids submitted by all the three bidders that were considered in the financial evaluation had price schedules albeit in different formats. The Board notes that the financial bids were as follows:

M/s Holiday Cars and Tours (the Applicant)

The firm quoted a tender sum of **Kshs 3,332,150** in the Tender Form and attached price schedules as shown hereafter:

Table 5A: Price schedule - Mombasa Day Bus - Holiday Cars & Tours

Item	Capacity	Trips Per Day	Charges Per Trip	Charges Per Day	Total Per Month (31 Days)	16%VAT	Total Kshs. V.A.T
1	62	17	1100	18,700	579,700	92,752	672452
2	62	17	1000	17000	527,000	84320	611,320
3	62	16	800	12,800	396,800	63,488	460288
4	62	3	500	1,500	46,500	7,440	53,940
5	62	11	750	8,250	255,750	40,920	296,670
Total	310	64			1,805,750	288,920	2,094,670

Table 5B: Price Schedule - Late Night Drop-off Buses (Mombasa) - Holiday Cars & Tours

Bus No	Routes	Capacity	Charges Per Night Kshs	Total Amount	VAT 16%	Total VAT Incl.
1	Likoni	66	4,000.00	124,000.00	18,840	143,840
2	Kiembeni	64	5,500.00	170,500.00	27,280	197,780
3	Miritini	64	6,000.00	186,000.00	29,760	215,760
			Total Monthly	480,500.00	76,880	557,380

Table 5C: Price Schedule - Nairobi Buses - Holiday Cars & Tours

Bus No.	Capacity	Trips Per Day	Charges Per Trip	Charges Per Day	Total Per Month (31 Days)	VAT 16%	Total VAT Incl.
1	51	6	1112	6,674	206,896	33,104	240,000
2	51	6	1112	6,674	206,896	33,104	240,000
Total		12			413,792	65,472	480,000

Table 5D: Price Schedule - Kisumu Buses - Holiday Cars & Tours

Bus No	Capacity	Trips Per Day	Charges Per Trip	Charges Per Day	Total Month (Days)	Per (23)	VAT 16%	Total VAT
1	51	4	1875	7,500	172,500		27,600	200,100
Total		4			172,500		27,600	200,100

Table 5E: Total Charges - Holiday Cars & Tours

Item	No. of Buses	Total Charges Per Month	16% VAT	Total Charges (VAT Incl.)
Mombasa Commuter (Day & Night Drop Off)	5	2,286,250	365,800	2,652,050
Nairobi Commuter	2	413,793	66,207	480,000
Kisumu Commuter	1	172,500	27,600	200,100
Total		2,872,543	459,607	3,332,150

Table 6: Price Schedule - Royal Hisham Ltd

1	2	3	4	5	6	7
Item	Description	Quantity & Quality	Duration	Unit Price	Total Price	Unit Price Of Other Incidental Services Payable
Mombasa Day					1,714,824.00	
Mombasa Night					540,580.00	
Nairobi Week					523,103.00	
Nairobi Weekend					97,552.00	
Kisumu					250,000.00	
Total					3,126,059.00	
16% Vat					500170.00	
Total					3,626,229.00	

Table 7: Price Schedule - Bizcan Transporters Ltd

1	2	3	4	5	6	7	8
Items	Description	Qty Trips No.	Trips No. Total	Duration	Unit Price (Kshs) V.A.T. Incl.	Total Kshs. V.A.T. Incl.	Incidental Services Payable
Bus No.1 Nairobi	ICD -Town	3	164	6.00a.m To 5.30pm monthly	2800	460,000	Nil
	Town-ICD	3					
	Saturday- Sunday	2					
	ICD-Town Town-ICD	2					
Bus No.2 Nairobi	ICD ICD- Embakasi	1 1	160	6.00am To 5.30PM Monthly	1800	108,000	Nil
Bus No.3 Kisumu	Town -ICD ICD-Town	2 2	84	7.00a.m To 5.30PM Monthly	2350	198,000	Nil

Table 8: Summary of Financial Evaluation Results

Station	Monthly Charges Inclusive of V.A.T.		
	M/S Bizcan	M/S Royal Hisham	M/S Holiday Cars & Tours
Mombasa	-	2,616,268.68	2,652,050.00
Nairobi	568,000.00	719,959.80	480,000.00
Kisumu	198,000.00	290,000.00	200,100.00
Total	766,000.00	3,626,299.00	3,332,150.00

From the foregoing, the Board finds that despite the differences in formats of price schedules submitted by the various bidders, the Procuring Entity was able to objectively quantify, analyze and compare the prices quoted by the three bidders. The Board finds that even though

there was a format for price schedule on page 46 of the Tender Documents, none of the bidders, including the Applicant, strictly followed that format. In addition, the Board notes that the Applicant was not prejudiced in any way by the fact that the other bidders did not use a price schedule similar to its own. Subsequently the Board holds that, the allegation that the Procuring Entity breached Section 66 (3) of the Act is not sustainable.

The Board notes the allegation that the Procuring Entity contravened Section 66(2) of the Act by using a new evaluation criterion document named "Tender Evaluation and Report Guidelines". The Board after perusing the documents on this tender note that nowhere in the evaluation reports is there an evaluation criterion by the name "Tender Evaluation and Report Guidelines" against which the bidders were evaluated, and as such this allegation is misguided. The Board also notes the admission by the Procuring Entity that the Tender Evaluation and Report Guidelines was an internal document used by the Procuring Entity to guide its evaluation committees on the provisions of the law regarding tender evaluation and indeed upon perusal of the said guidelines, the Board finds that they are based on the Public Procurement & Disposal Act and the Regulations. The Board notes that the said guidelines were not dated and were not specifically for this tender but were standard operating procedures for the Procuring Entity's Evaluation Teams. The Board therefore finds that the internal document may have been misconstrued by the Applicant to be the same as an evaluation criterion which is not the case.

In this regard this limb of the ground also fails.

On the issue that the Technical Evaluation Committee did not mention, record, take pictures or even inspect ownership of the motor vehicles during the site visits as required under Clause 2.22 of the Appendix to the Instructions to Bidders, the Board notes the provisions of Clause 2.22 of the Appendix to the Instructions to Bidders which provides as follows;

“Technical proposals shall be subjected to the following evaluation criteria:

a).....

.....

.....

e) Evidence of the office and garage where the maintenance schedules are carried out i.e. lease / service agreements, ownership etc

.....

.....

.....

The next stage of evaluation:

As part of the evaluation exercise, the Authority shall reserve the right to conduct site visits to reference sites given, the candidate’s physical address and to inspect the buses under ownership.”

The Board notes that the site visit report shows that the Applicant and the other two bidders were visited by the Technical Evaluation Committee which recorded the information gathered during the visits with respect to the following:

- Evidence of office / the location / the physical address

- Service Agreement / ownership
- Garage for maintenance
- Safety precautions, speed governor.

The Board also notes that each of the three bidders scored 7.5 marks which was the highest possible score for the criterion. The Board further notes that there was no specific requirement under the said Clause 2.22 for records or pictures to be taken during the site visit. From the foregoing, the Board finds that the Procuring Entity did not breach the provision of Clause 2.22 as alleged by the Applicant.

Consequently, these grounds of review all fail.

Ground 3 - Breach of Section 60 of the Act

The Applicant stated that contrary to Section 60 of the Act, at the opening stage, one member of the financial evaluation committee proceeded to read out the tabulation of all the firms instead of opening and reading the prices on the form of tender only, an act which was supposed to be done during the evaluation stage to determine the lowest evaluated tender. It argued that this was a breach of Section 60 of the Act.

In response, the Procuring Entity submitted that it considered the import of the provisions of Section 60 of the Public Procurement and Disposal Act in reading out loudly the total price of the tender including any modifications or discounts.

The Procuring Entity stated that prices were read out in compliance with Clause 2.24 of the Appendix to Instructions to Tenderers which provided that prices be read out including the break-down of prices for each zone/station where the service shall be offered. It further submitted that any reading other than as demonstrated above would have lead to lack of transparency in the tender process.

The Board is alive to the provisions of Section 60 of the Act which provides as follows;

Section 60:-

*“(1)
.....
(5) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register-
(a) the name of the person submitting the tender;
(b) the total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and
.....”*

The Board also takes note of Regulation 45(1) which provides as follows;

*“Pursuant to Section 60(5) (b) of the Act, the total price of the tender -
(a) May not be read out where a tender consists of numerous items that are quoted for separately
(b)”*

The Board observes that the Tender Documents at Section V - Schedule of Requirements and Clause 2.24 of the Appendix to the Instructions to

Bidders indicate that the tender consists of provision of service in three different locations which were to be quoted for separately. Consequently, the Board finds that by reading the price breakdown for each zone/station, the Procuring Entity was not in breach of Section 60 of the Act but only exercised the exception provided for under Regulation 45(1) (a). To the above, the Board finds that this allegation cannot be sustained and therefore this ground also fails.

Ground 5- Breach of Section 43 of the Act

The Applicant stated that contrary to Section 43 of the Act, one of the committee members, Mr. Kiseru, who read out the financial evaluation report had been mentioned as a referee by one of the tenderers resulting in a conflict of interest. The Applicant explained that he overheard a conversation by the Procuring Entity's secretariat that one a Mr. Kiseru was a referee to one of the bidders. The Applicant explained that he overhead the said discussion as he waited for the tender opening and hence urged the Board to find the tender was flawed, owing to that conflict of interest.

In response, the Procuring Entity submitted that it did not breach the provisions of Section 43 of the Act as alleged. It stated that indeed one of the members of the Evaluation Committee had issued a letter of commendation to one of the bidders who had earlier provided services to it. It stated that the Officer acted in his capacity as a user of the services of the bidder. It averred that the act did not construe conflict of interest. It further averred that instances of conflict of interest would only occur if that member had shares in a company bidding for the

contract or if his/her relative is a shareholder or owner of the bidding company. It submitted that the Applicant should be asked to explain how it had got the information and if no satisfactory response is given, the Board should dismiss the Applicant's Request for Review.

The Procuring Entity submitted that it carried out the tendering process within the limits of the law governing public procurement and also adhered to the spirit of the Act. It prayed that the Board dismissed this Request for Review.

The Board is alive to the provisions of Section 43 of the Act which provides as follows;

Section 43:-

(1) An employee or agent of the Procuring Entity or a member of a board or committee of the Procuring Entity who has a conflict of interest with respect to a procurement –

(a) shall not take part in the procurement proceedings; and

(b) shall not, after a procurement contract has been entered into, take part in any decision relating to the procurement or contract.

(2) An employee, agent or member described in subsection (1) who refrains from doing anything prohibited under that subsection that, but for that subsection, would have been within his duties shall disclose the conflict of interest to the Procuring Entity.

(3) If a person contravenes subsection (1) with respect to a conflict of interest described in subsection (5)(a) and the contract is awarded to the person or his relative or to another person in whom one of them had a direct or indirect pecuniary interest, the contract shall be voidable at the option of the Procuring Entity.

(4) The voiding of a contract by the procuring entity under subsection (3) does not limit any other legal remedy the procuring entity may have.

(5) For the purpose of this section, a person has a conflict of interest with respect to a procurement if the person or a relative of the person –

(a) seeks, or has a direct or indirect pecuniary interest in another person who seeks, a contract for the procurement; or

(b) owns or has a right in any property or has a direct or indirect pecuniary interest that results in the private interest of the person conflicting with his duties with respect to the procurement.

.....

.....

(8) Any person who contravenes the provisions of this section shall be guilty of an offence."

The Board notes that one of the bidders, M/s Royal Hisham Ltd, actually attached a copy of a recommendation letter issued by Kenya Ports Authority. However, the Board notes that the said letter is dated 6th October 2010 and was issued in respect of Tender No. KAA/49/2010-2011 but not the tender that is the subject of this Appeal.

The issue for the Board to determine here therefore, is whether the fact that one bidder attached a reference letter that was given to it by the Procuring Entity in respect of a totally different tender constitutes a conflict of interest on the part of the officer who signed the said reference letter.

The Board notes that no evidence has been adduced by the Applicant to prove that *the member of staff who signed the recommendation letter in question or his relative seeks, or has a direct or indirect pecuniary interest in M/s Royal Hisham Ltd, or that he owns or has a right in any property or has a direct or indirect pecuniary interest that results in his private interest conflicting with his duties with respect to the procurement.* The Board further observes that there is no provision in the Act or the Regulations that bars a Procuring Entity from giving reference letters to bidders where the issuance of such letters does not result in a conflict of interest.

In this regard this ground of Review also fails.

Taking all the above into consideration, this request for Review fails and is hereby dismissed.

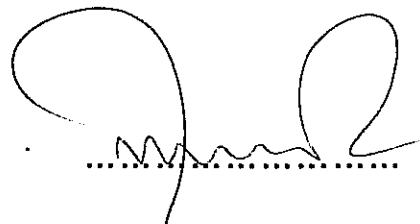
The Board orders, Pursuant to Section 98 (b) of the Act, that the Procurement Process may proceed.

There are no orders as to costs.

Dated at Nairobi on this 6th day of August, 2012.

A handwritten signature in black ink, appearing to read 'MARK MACHARIA', written over a horizontal dotted line.

**CHAIRMAN
PPARB**

A handwritten signature in black ink, written over a horizontal dotted line.

**SECRETARY
PPARB**

