

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 37/2012 OF 24<sup>TH</sup> JULY, 2012 AND REVIEW NO. 38/2012  
OF 25<sup>TH</sup> JULY, 2012**

**BETWEEN**

**VALLEY AUCTIONERS.....APPLICANT**

**GALAXY AUCTIONEERS.....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/109/2011-2012/MD for Selection of Auctioneers for provision of auctioneering services for disposal of long stay containers.

**BOARD MEMBERS PRESENT**

Mr. Akich Okola	-	Member (Sitting in for Chairman)
Mr. Joshua W. Wambua	-	Member
Mrs. Loise Ruhiu	-	Member
Ms. Natasha Mutai	-	Member

### **IN ATTENDANCE**

Mr. Nathan Soita - Holding brief for Secretary  
Ms. Judy Maina - Secretariat.

### **PRESENT BY INVITATION**

#### **Applicant - M/s Valley Auctioneers**

Ms. Rose Mbanya - Advocate, R.W. Mbanya & Co, Advocates  
Mr. Samuel Gathogo - Auctioneer

#### **Applicant - M/s Galaxy Auctioneers**

Mr. Joseph Makumi - Advocate, J. Makumi & Co. Advocates  
Mr. S. T. Mugacha - Auctioneer

#### **Procuring Entity - Kenya Ports Authority**

Mr. Stephen Kyandih - Advocate, Muthoni Gatere Advocate  
Mr. Johnson Gachanja - Principal Procurement Officer  
Mr. Aza Dzengo - Senior Procurement Officer

#### **Interested Party - M/s Auckland Agencies**

Mr. P.W. Ndegwa - Advocate, Ndegwa & Associates  
Mr. Ben Gathuri - Auctioneer

#### **Other Interested Candidates:-**

Mr. George Manini - Auctioneer, Manini Auctioneers  
Mr. Titus Musya - Auctioneer, Makuri Enterprises  
Mr. Zachary M. - Auctioneer, Zackmak Auctioneers  
Mr. Jesse M. Gitau - C.E.O, Gallant Worldwide Investments

## **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**

### **Expression of Interest**

The Procuring Entity advertised the Expression of Interest for Selection of Auctioneer for Disposal of long stay containers in the Standard and the Daily Nation newspapers of 22<sup>nd</sup> February, 2012. The tender closed on 9<sup>th</sup> March, 2012 with twenty one (21) firms responding.

The shortlisting was undertaken using the criteria in the EOI notice alongside the scope of works requirement whereby the following fifteen (15) firms met the requirements and were shortlisted to proceed to the next stage of Request for Proposal (RFP):

1. Baseline Auctioneers
2. Igare Auctioneers
3. Valley Auctioneers
4. Mwara Auctioneers
5. Kinyua & Company Auctioneers
6. Wright Auctioneers
7. Nyaluoyo Auctioneers
8. Leakey's Auctioneers
9. Gallant Worldwide Investments
10. Garam Investments
11. Keysian Auctioneers

12. Makuri Enterprises
13. Manini Auctioneers & General Agencies
14. Galaxy Auctioneers
15. Auckland Agencies

### **Invitation of Request For Proposal**

The Procuring Entity invited the fifteen (15) shortlisted firms to participate in the Request for Proposal Tender No. KPA/109/2011-12/MD for Selection of Auctioneers for Disposal of long stay containers vide letters dated 17<sup>th</sup> May, 2012 with the closing date for submission of bids being 4<sup>th</sup> June, 2012.

### **Closing/Opening:**

The bids closed/opened on 4<sup>th</sup> June, 2012 with the following ten (10) firms responding:

1. Kinyua & Company Auctioneers
2. Auckland Agencies
3. Valley Auctioneers
4. Gallant Worldwide Investments
5. Makuri Enterprises
6. Galaxy Auctioneers
7. Mwaru Auctioneers
8. Igare Auctioneers
9. Manini Auctioneers & General Agencies
10. Garam Investments

## **EVALUATION**

Received tenders were evaluated by an Evaluation Committee chaired by Mr. Kenneth K. Kibwana, the Principal Billing & Customer Relations Officer. The evaluation was carried out in two stages namely Preliminary Evaluation and Technical Evaluation.

### **Preliminary Evaluation:**

The bids were evaluated to ascertain their responsiveness based on the following mandatory requirements:

- i) Particulars of Tendering Company to include Company background, Firm's Organization Structure, PIN Certificate, VAT Certificate and current Tax Compliance from KRA.
- ii) Duly filled and completed Confidential Business Questionnaire
- iii) Declaration Form

Three (3) firms namely; Kinyua & Co. Auctioneers, Gallant Worldwide Investments and Mwara Auctioneers did not provide declaration forms which were a mandatory requirement and thus disqualified at this stage. The remaining seven firms proceeded to detailed technical evaluation.

### **Technical Evaluation:**

The seven responsive bids were subjected to technical evaluation based on the criteria provided in table 1 below:

**Table 1: Technical evaluation criteria**

	TECHNICAL EVALUATION CRITERIA (Clause 2.22)	Total Weight
1	A brief description of the firm's organization and an outline of recent experience on assignments of a similar nature. For each assignment the outline should indicate <i>inter alia</i> , the profiles of the staff proposed, duration of the assignment, contract amount and firm's involvement.	20 marks
2	Any comments or suggestions on the Terms of Reference, a list of services and facilities to be provided by the client.	10 marks
3	Certified copies of Audited Financial reports for the last three years 2008, 2009 and 2012 (or 2011 where available).	20 marks
4	A description of the methodology and work plan for performing the assignment.	15 marks
5	The list of the proposed staff team by specialty, the tasks that would be assigned to each staff team member and their timing.	15 marks
6	CVs recently signed by the proposed professional staff and the authorized representative submitting the proposal. Key information should include number of years working for the firm/ entity and degree of responsibility held in various assignments during the last five (5) years	20 marks
7	Total	100 marks
	Candidates will require to score a minimum of 80% to be considered for contract award	

The bids were evaluated and allocated marks individually on areas under consideration as per the tender requirements. Table 2 below provides a summary of the technical scores and ranking.

**Table 2: Summary of Technical Evaluation results**

	<b>Firm</b>	<b>Scores</b>	<b>Ranking</b>
1	Auckland Agencies	92%	1
2	Galaxy Auctioneers	74%	2
3	Manini Auctioneers & General Agencies	63%	3
4	Valley Auctioneers	60.7%	4

5	Igare Auctioneers	56.7%	5
6	Garam Investments	55.3%	6
7	Makuri Enterprises	54.3%	7

### **RECOMMENDATIONS**

The Evaluation Committee recommended award of the tender to M/s Auckland Agencies for attaining 92% which was above the required passmark of 80%.

### **THE TENDER COMMITTEE DECISION**

The Corporation Tender Committee at meeting No. 001/2012-13 held on 12<sup>th</sup> July, 2012 awarded the tender in accordance to the Technical Evaluation Committee's recommendation to M/s Auckland Agencies to provide Auctioneering services as and when need arises for a period of two years subject to Contract renewal.

### **THE REVIEW**

The two Requests for Review were lodged on 24<sup>th</sup> and 25<sup>th</sup> July, 2012 respectively against the decision of Kenya Ports Authority dated 12<sup>th</sup> July, 2012 in the matter of Tender No: KPA/109/2011-12 for selection of auctioneers for provision of auctioneering services for disposal of long stay container.

### **REVIEW NO. 37/2012**

The Applicant was represented by Ms. Rose Mbaya, Advocate while the Procuring Entity was represented by Mr. Stephen Kyandih, Advocate.

The Interested Candidates present were M/s Auckland Agencies represented by Mr. P.W. Ndegwa, M/s Manini Auctioneers represented by Mr. George Manini, Auctioneer, M/s Makuri Enterprises represented by Mr. Titus Musya, Auctioneer and M/s Gallant Worldwide Investments represented by Mr. Jesse M. Gitau, Chief Executive Officer.

The Applicant requested the Board for the following orders:

1. *The entire tender be nullified*
2. *The tender be repeated again in a transparent manner.*
3. *That the tender be awarded to 10 or more Auctioneers.*

The Applicant raised three grounds of review which the Board deals with as follows:

### **Grounds 1, 2 and 3: Breach of Clause 2.24 of Tender Document**

The three grounds have been consolidated as they raise similar issues relating to the evaluation process.

The Applicant submitted that the tender was awarded to one bidder and not two bidders, as provided for on page 21 of 52 of the tender document. It stated that, this being a major tender with goods to be sold likely to fetch over one billion Kenya shillings, it would be unfair to award the tender to be executed by one or two Auctioneers. It stated that the tender should be fairly distributed to ten or more Auctioneers.

The Applicant further submitted that the tender process was discriminatory, as only members of one Association of the Auctioneers namely, National Association of Kenya Auctioneers (NAKA), were



invited to tender while there are two such registered Associations for Auctioneers in Kenya. It stated that this was discrimination against Auctioneers who are members of the other registered Association, namely Kenya National Society of Professional Auctioneers (KENSAP).

The Applicant submitted that it had written to the Procuring Entity's Head of Procurement on 18<sup>th</sup> July, 2012 and requested to be issued with a summary of the evaluation report but the Procuring Entity declined to do so. It stated that this was a breach of Section 57 of the Constitution of Kenya, 2010 and hence urged the Board to make a finding that the Tender Process was flawed.

An interested Candidate, M/s Kinyua & Co. Auctioneers, submitted that from the onset, the said tender was tailor made and advertised to suit one company through manipulation by the Procuring Entity. It stated that by zeroing in on one Auctioneer for the award, while the tender document categorically provided that the award was to be made to the first two bidders with the highest scores, was not only discriminatory but an abuse of the tendering process. It argued that, the manipulation started from the initial advertisement when the Procuring Entity indicated that for a candidate to be shortlisted to the next stage of the Request for Proposal (**RFP**), they ought to be members of the National Association of Kenya Auctioneers (**NAKA**), whereas the Auctioneering fraternity has two Associations duly licensed.

It stated that from the tender documents, the Procuring Entity failed to address severe issues namely; time specifications of a delivery period,

disclosure of the actual number of long stay containers, their cargo and the expected time of disposal.

The second Interested Candidate, M/s Mwara Auctioneers, submitted that there was discrimination since the Procuring Entity indicated that it required candidates to be members of the National Association of Kenya Auctioneers (NAKA), and that obviously closed off Auctioneers from other associations which are legally recognized by the Government of the Republic of Kenya. It further stated that it submitted all the documents as required in the first batch of the documents that included the compulsory declaration form.

The third Interested Candidate, M/s Makuri Enterprises, submitted that the tender was discriminative as it addressed one association when infact there were two associations of the same profession. It further submitted that the tender should have been awarded to two bidders as provided for in the Tender Document, considering that this is a major tender involving sales which may amount to more than one billion Kenya shillings and therefore it should be fairly distributed to ten or more auctioneers.

In response, the Procuring Entity submitted that its initial objective was to select two Auctioneers as per its tender document on the disposal of Long Stay Containers. It stated that, upon conclusion of the technical evaluation process only one bidder was responsive by attaining the 80% pass mark and therefore qualified to be awarded the tender. The Procuring Entity argued that, it had no option but to award the tender to

the only bidder who was responsive on the technical evaluation and also attained the requisite pass mark of 80%.

With regard to the issue of the membership to Auctioneers' Associations, the Procuring Entity submitted that prior to the opening of the Expression of Interest, it received a letter dated 1<sup>st</sup> March 2012 from the Kenya National Society of Professional Auctioneers (KENSAP), indicating that under the Eligibility part in subsection V of the Expression of Interest document, all the bidders should be considered as either being members of Kenya National Association of Kenya Auctioneers (NAKA) or Kenya National Society of Professional Auctioneers (KENSAP). The Procuring Entity stated that after receiving the said letter, it indeed considered the submissions of the Professional body and accepted the bidders on the basis of membership of any of the Associations.

On the issue of request for Evaluation Summary, the Procuring Entity stated that it responded to the Applicant's inquiry made vide its letter dated 18<sup>th</sup> July 2012. It stated that it responded to the said letter on 24<sup>th</sup> July 2012 and also sent an email to the Applicant on the 25<sup>th</sup> July 2012. The Procuring Entity argued that the request by the Applicant vide its letter of 18<sup>th</sup> July 2012 was in essence asking for a debriefing which would have amounted to giving information which is ordinarily confidential.

The Board has considered the submissions of the Parties and the documents presented before it. The issues for the Board to determine are:

- (i) Whether the tender process was flawed as a result of the Procuring Entity awarding the tender to one bidder instead of two, as provided in the Tender Document.
- (ii) Whether the Procuring Entity discriminated upon some of the bidders on the basis of Membership to Auctioneers' Associations.
- (iii) Whether the Procuring Entity failed to give a Summary of Report of Evaluation following a request.

The Board takes note of Clause 2.24 (Appendix) of the Tender Document which states as follows: ***"Award of Tender is to the first two bidders with the highest score"***.

The Board also takes note of the pass mark requirement provided under Clause 2.22 (Appendix) of the Tender Document which states ***"Candidates will require to score a minimum of 80% to be considered for contract award"***.

The Board further notes that the Procuring Entity used the Request for Proposal (RFP) method in procurement of the services under dispute. It is further noted that the Procuring Entity advertised the Expression of Interest for Selection of Auctioneers for disposal of Long Stay Containers on 22<sup>nd</sup> February, 2012 under Tender No. KPA/087/2011-12/MD out of which twenty one (21) bidders had responded by the time the Expression of Interest closed on 9<sup>th</sup> March, 2012. The Board notes that fifteen firms met the set requirements and were shortlisted to be issued

with the Request for Proposal, which was Tender No. KPA/109/2011-12/MD.

The Board further notes that out of the fifteen (15) shortlisted firms and invited to submit bids, only ten (10) submitted their bids by the closure of the tendering period on 4<sup>th</sup> June, 2012. The Board notes that the received bids were subjected to two stages of evaluation namely; Preliminary and Technical Evaluations. Three firms namely; Kinyua & Co. Auctioneers, Gallant Worldwide Investments and Mwara Auctioneers, were disqualified at the Preliminary Evaluation stage for failure to submit the Declaration Forms which was a mandatory requirement. The remaining seven firms proceeded to Technical Evaluation stage where they were subjected to the evaluation criteria provided on page 20 and 21 of the Tender Document and allocated marks. The pass mark required for a candidate to be considered for contract award was 80%. The Board notes that the scores of the bidders and ranking thereof were as follows:-

*Table 2: Summary of Technical Evaluation results*

	<b>Firm</b>	<b>Scores</b>	<b>Ranking</b>
1	Auckland Agencies	92%	1
2	Galaxy Auctioneers	74%	2
3	Manini Auctioneers & General Agencies	63%	3
4	Valley Auctioneers	60.7%	4
5	Igare Auctioneers	56.7%	5
6	Garam Investments	55.3%	6
7	Makuri Enterprises	54.3%	7

Based on the above tabulated results, the Board notes that out of the seven firms subjected to technical evaluation, only one firm Auckland Auctioneers met the required pass mark of 80% by scoring 92%. All the other bidders, including the Applicant who scored 60.7%, were all below the 80% passmark and were therefore disqualified from further consideration. In the given circumstances, the Board notes that although the Procuring Entity had the intention of awarding the contract to two Auctioneers, it had to award to only one Auctioneer who satisfied the passmark requirement provided in the bid document. On further scrutiny of the Evaluation Report, the Board finds that two Interested Candidates, Kinyua & Co. Auctioneers and Mwara Auctioneers, were disqualified at the Preliminary Evaluation stage for failure to submit the Declaration Forms. The Board upon further perusal through their original documents has confirmed that the said Declaration Forms were indeed not attached. The third Interested Candidate, Makuri Enterprises, scored 54.3% at the Technical Evaluation stage against the passmark of 80% and was ranked 7<sup>th</sup> and thus it could not be considered for the award.

In these circumstances, the Board finds that the Award to one bidder was done procedurally, as it was based on the passmark of 80% as provided for in the Tender document, and to this extent, this limb of the ground of appeal fails.

On the issue that the process was discriminatory as it required bidders registered with only one professional association, the Board notes that the Procuring Entity had set a requirement in the Expression of Interest

that interested firms were to submit current membership of National Association of Kenya Auctioneers (NAKA). The Board further notes that, by the letter dated 1<sup>st</sup> March, 2012, received by the Procuring Entity on 9<sup>th</sup> March, the National Chairman of Kenya National Society of Professional Auctioneers, advised the Procuring Entity to disregard that requirement appearing in the advertisement, since the Auctioneers Act had since been amended and there were two registered and recognized Auctioneers' Associations namely; National Association of Kenya Auctioneers (NAKA) and Kenya National Society of Professional Auctioneers (KENSAP). The Board has established that the Procuring Entity did not issue an addendum to that effect but from the Evaluation Report of the Expression of Interest signed on 23<sup>rd</sup> March, 2012, the Board notes that the Procuring Entity indeed considered bidders with membership from any of the two associations and no bidder was disqualified on that requirement except Kameta Enterprises, who did not submit any membership certificate.

The Board further finds that, this tender process was in two parts. The Expression of Interest under Tender No. KPA/087/2011-12/MD was advertised on 22<sup>nd</sup> February and closed on 9<sup>th</sup> March 2012, where 21 Auctioneers responded. The Board notes that, at this stage, none of the bidders or potential bidders raised the issue of the discriminatory provision through the membership requirement criteria. The Board further notes that upon receiving the Letter from **KENSAP**, the Procuring Entity in its evaluation process considered both the Associations for qualification purposes. Thereafter the Procuring Entity invited the shortlisted bidders under Tender No. KPA/109/2011-

12/MD for Request for Proposals. In this regard, the Board finds this issue as raised by the Applicant ought to have been raised as a request for review under the Expression of Interest since the time provided under Regulation 73 for filing a Request for Review has long lapsed. The Board finds that it has no jurisdiction to deal with this issue.

Regarding the Applicant's allegation that it wrote to the Procuring Entity on 18<sup>th</sup> July, 2012 requesting to be issued with a summary of the Evaluation Report, and the Procuring Entity declined to give the Report, the Board has established from the documents submitted that, the Procuring Entity received that letter on 20<sup>th</sup> July, 2012 and responded to it on 24<sup>th</sup> July 2012. The said response was communicated to the Applicant on the 25<sup>th</sup> July 2012 via email and it contained the Applicant's technical scores. This communication was made in accordance with Regulation 66(2) of the Public Procurement and Disposal Regulations, 2006, which requires the Procuring Entity to provide written response within fourteen days after the request. In this regard, the Board finds this ground unsustainable.

Taking into consideration all the above, the Board finds that Application No. 37/2012 has no merit and therefore fails.

### **REVIEW NO. 38/2012**

The Applicant was represented by Mr. Joseph Makumi, Advocate while the Procuring Entity was represented by Mr. Stephen Kyandih,



Advocate. The Interested Candidates present were M/s Auckland Agencies represented by Mr. P.W. Ndegwa, M/s Manini Auctioneers represented by Mr. George Manini, Auctioneer, M/s Makuri Enterprises represented by Mr. Titus Musya, Auctioneer and M/s Gallant Worldwide Investments represented by Mr. Jesse M. Gitau, Chief Executive Officer.

The Applicant requested the Board for the following orders:

1. *The procurement proceedings be annulled in their entirety.*
2. *The decision made by the Procuring Entity to award the contract to “the successful bidder” be annulled.*
3. *The Procuring Entity do commence the tender process afresh in accordance with the provisions of the Act and the Regulations.*
4. *Such further/other order(s)/direction(s) that this Honourable Board may deem just and expedient to grant.*
5. *The procuring entity does pay the Applicant the costs of these proceedings on full indemnity basis.*

The Applicant raised six grounds of review which the Board deals with as follows:

**Grounds 1 and 5: Breach of Sections 2 (b), (c), (d)& (e), 66 (2)& (3) and Regulation 23 (c) of the Act.**

The two grounds have been consolidated as they both raise issues relating to the evaluation process of the tender.

The Applicant submitted that the Procuring Entity failed to set an objective and quantifiable evaluation criteria in the tender documents as

required by the provisions of Section 66(2) and 66(3)(a) of the Act. The Applicant submitted that the Procuring Entity in its Tender Document referred to Clause 2:29 which was not in the Tender Document. It argued that, Clause 2.22 of the Instruction to Tenderers (ITT) entitled *'Evaluation and Comparison of Tenders'* did not set out either an objective or quantifiable criteria of evaluation. It submitted that since the Act requires in mandatory terms, that the evaluation criteria must be set out in the tender documents, the failure by the Procuring Entity to set out the said criteria rendered the entire tendering process fatally defective and flawed.

The Applicant submitted that the Procuring Entity neither disclosed the number of Long Stay Containers, their Cargo, their owners, reasons for None Collection nor indicated guidelines on when the same needed to be disposed off. It argued that failure by the Procuring Entity to give any guidelines on how the Long Stay Containers were to be disposed off left the bidders to guess and hence led to bidding on different assumptions. It submitted that failing to specify the delivery period in the tender document left the bidders with no timelines within which to achieve the scope of work tendered. It argued that the said tender document and the entire tendering process were therefore flawed and proceeded on a patently misleading and unrealistic basis. It stated that the procedure adopted by the Procuring Entity was in the premises unfair and unreasonable and therefore failed to achieve the objective of promoting fairness and increasing public confidence in the procurement procedures.

In response, the Procuring Entity stated that the tender document used was as the one recommended by the Public Procurement Oversight Authority (PPOA) for services posted in the PPOA website and did not contain clause 2.29. It argued that clause 2.25.2 of the Instructions to Tenderers did not prejudice any of the tenderers, and further none of the bidders requested for a clarification from the Procuring Entity before bidding. It argued that the claim by the Applicant was an afterthought and should be dismissed. The Procuring Entity stated that it complied with Regulation 23(2) of the Public Procurement and Disposal Regulations in so far as Pre-qualification of bidders is concerned.

The Procuring Entity submitted that the tender document used by the Procuring Entity set out the evaluation criteria in the Appendix to Instructions to Tenderers, under clause 2.22. It stated that contrary to the allegations by the Applicant, the criterion for evaluation was quantifiable, objective and fair.

The Procuring Entity further stated that under section V - Terms of Reference of the Tender Document, on Background Information at paragraph 3 it provided that the services would be for a period of two (2) years subject to renewal on "as and when need arises" basis. It added that, under Section V on the Scope of Work, the document provided that the successful candidate would upon consultation and approval by the Procuring Entity, lot containers as and when need arise. It therefore argued that there was no reason or justification to disclose the number of Long Stay Containers, their cargo, their owners, reasons for none collection, as the scope of work clearly indicated the procedure that

would be adopted and followed after entering into a contract with the successful tenderer. It submitted that this was a clear description of the scope of work to enable the tenderers to bid for the services sought. In conclusion the Procuring Entity submitted that the instructions and procedures adopted were objective, fair, reasonable and adequate and indeed promoted public confidence in the procurement process.

The Board has considered the submissions of the parties and also perused the documents presented before it. The Board has perused the Tender documents issued by the Procuring Entity to the bidders and notes that the document used for the tendering is the standard document issued by PPOA for procurement of services. The Board, upon further perusal notes that indeed, Clause 2.29 is not provided in the standard tender document even though it appears in the table of contents and is referred to in some other clauses of the tender document. On further scrutiny of the document, the Board has established that the said clause 2.29 in the table of contents is on the signing of contract, whose details appear under clause 2.26 of the document. In this regard, the Board finds that, although the said clause is missing, it relates to the signing of the contract after the evaluation and the award of the tender is done. This clause does not relate to the Evaluation of the tender, but would apply at the post award stage. In these circumstances, the Board finds no merit on the submissions that the missing clause affected the tender Evaluation process.

Regarding non-disclosure of the number of Long Stay Containers, their Cargo, their owners, reasons for none collection or guidelines on when

disposal would be done, the Board has checked and established that the Procuring Entity under section V – Terms of Reference of the Tender Document on Background Information at paragraph 3, provided that the services would be for a period of two (2) years subject to renewal on “as and when need arises” basis. The Board notes that, the Procuring Entity provided that the main objective of the project was to auction containers that have overstayed in the Port of Mombasa including KPA Inland Container Depots as and when need arises upon consultation with and approval by KPA. It provided the scope of work as including but not limited to lotting the containers and auctioning/disposing of containers.

The Board also notes that the above two issues relate to the provisions of the Tender Document where the Applicant had the liberty to seek for clarification in accordance with Clause 2.4 of the Tender document, but never did so.

With regard to the issue that the Evaluation criterion was not objective and quantifiable, the Board notes the Provisions of Section 66(2) and (3) (a) of the Act, which the Applicant alleges the Procuring Entity breached which states as follows:

66(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.”*

66(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”.....*

The Board notes that the Tender Documents under Clause 2.22 of the Appendix at pages 20 and 21 of 52 stipulated the evaluation criteria on which the Technical proposals were to be subjected, as follows:

**Table 3: Technical Evaluation Criteria**

	TECHNICAL EVALUATION CRITERIA (Clause 2.22)	Total Weight
1	A brief description of the firm's organization and an outline of recent experience on assignments of a similar nature. For each assignment the outline should indicate <i>inter alia</i> , the profiles of the staff proposed, duration of the assignment, contract amount and firm's involvement.	20 marks
2	Any comments or suggestions on the Terms of Reference, a list of services and facilities to be provided by the client.	10 marks
3	Certified copies of Audited Financial reports for the last three years 2008, 2009 and 2012 (or 2011 where available).	20 marks
4	A description of the methodology and work plan for performing the assignment.	15 marks
5	The list of the proposed staff team by specialty, the tasks that would be assigned to each staff team member and their timing.	15 marks
6	CVs recently signed by the proposed professional staff and the authorized representative submitting the proposal. Key information should include number of years working for the firm/entity and degree of responsibility held in various assignments during the last five (5) years	20 marks
7	Total	100 marks
	<b>Candidates will require to score a minimum of 80% to be considered for contract award</b>	

The Board has established that the above evaluation criteria as provided in the tender document is what was used in the evaluation of the bids. The Board notes that the Applicant in this case was disqualified for not meeting the set passmark by scoring 74% against the passmark of 80%.

In the circumstances, the Board finds no merit on the allegations that the criteria of Evaluation was not objective and quantifiable.

To the above end, these grounds of the Request for Review fail.

### **Ground 2: Breach of Section 67 of the Act**

The Applicant submitted that Clause 2.25.1 of the ITT stipulated that the Procuring Entity would notify the successful tenderer in writing that its tender had been accepted. It further alleged that Clause 2.25.2 of the ITT stipulated that the notification of the award would signify the formation of the contract subject to the signing of the contract between the tenderer and the Procuring Entity, pursuant to clause 2.29. It stated that the clause further provided that, simultaneously the other tenderers shall be notified that their tenders were not successful. It argued that, this meant that the notification to the unsuccessful tenderers would be issued after the formation of the contract which is a contravention of Section 67(2) of the Act, which requires that the notification to the unsuccessful tenderers must be sent at the same time as that to the successful tenderer. It argued that, the procedure adopted by the Procuring Entity therefore contravened the provisions of the Act and was invalid, null and void and of no legal effect. It further stated that the successful bidder, though based in Nairobi, collected its notification letter on 13<sup>th</sup> July 2012 while some of the unsuccessful bidders collected theirs on 16<sup>th</sup> July 2012 yet they are based in Mombasa. It argued that this was a manipulation by the Procuring Entity, to favour the successful bidder at the detriment of the other bidders. It argued that this rendered the

tender process flawed and therefore urged the Board to annul the tender.

In response, the Procuring Entity stated that pursuant to the provisions of the Act, it issued letters of notification to both the unsuccessful and successful tenderers simultaneously. It submitted that the meaning and import of clause 2.25.2 of the ITT was clear to the tenderers and further submitted that no request for clarification of the said clause was sought by any of the tenderers. It stated that all the notification letters were dated 12<sup>th</sup> July, 2012 and the bidders were telephoned on the same date to come and collect their respective Letters of Notification at the Procuring Entity's office. It submitted that the Successful Bidder collected its Letter on 13<sup>th</sup> July 2012, while some of the bidders collected their Letters on 16<sup>th</sup> July 2012. It averred that it carried out the Notification process in line with the requirements of Section 67 of the Act.

The Board has noted from the documents submitted that the award of the tender under dispute was made by the Procuring Entity during the Tender Committee meeting No. 001/2012-13 held on 12<sup>th</sup> July, 2012 and the letters of notification to both the successful and unsuccessful bidders all issued and dated 12<sup>th</sup> July, 2012. The Board notes that, the Applicant in its supporting statement at paragraph 11 acknowledges having received the notification letter dated 12<sup>th</sup> July, 2012 on 16<sup>th</sup> July, 2012, and it lodged this Request for Review on 25<sup>th</sup> July, 2012. The Board notes the Successful Bidder's submission that, it collected its Notification Letter through one of its officers based in Mombasa on 13<sup>th</sup> July 2012.



The Board further notes that the Successful Bidder collected its Notification letter on Friday 13<sup>th</sup> July 2012, while some of the bidders collected their letters on Monday 16<sup>th</sup> July 2012. The Board further notes that the Applicant in Request for Review No. 37/2012 filed its Request for Review on 24<sup>th</sup> July 2012, while the Request No. 38/2012 was filed on 25<sup>th</sup> July 2012. The Board finds that, both the Requests for Review were filed within the 14 days period stipulated under the Regulations. Accordingly, the Applicant suffered no prejudice as it was able to file its Request for Review, within the period set out under Regulation 73. In this regard, this ground also fails.

#### **Grounds 3 and 4: Breach of Sections 68 and 2(d) & (e) of the Act**

The two grounds have been consolidated as they both deal with signing of the contract.

The Applicant stated that Clause 2.25.3 of the Instruction to Tenderers stipulated that *"Upon the successful tenderer's furnishing of the performance security pursuant to paragraph 31, the procuring entity will promptly notify each unsuccessful tenderer and will discharge its tender security pursuant to paragraph 2.12."* It argued that this requirement contravened the provisions of Section 68 (2) of the Act which states that no contract can be entered into until after the lapse of fourteen (14) days from the date of giving notification. It stated that by abridging the time between notification and formation of the contract, the Procuring Entity breached the mandatory provisions of Section 68(2) of the Act and this rendered the said tender documents and the entire tendering process flawed.

The Applicant alleged that the procedure adopted by the Procuring Entity was designed to ensure that the contract was awarded to the "successful bidder" by fixing the date of notification as the date of formation of contract to deny the unsuccessful candidates the opportunity to challenge the award. It stated that the Procuring Entity had clearly and unfairly predisposed its mind in favour of the successful candidate and in the process contravened the objectives set out in Sections 2(d) and (e) of the Act, on promotion of integrity, fairness, transparency and accountability. It therefore urged the Board to nullify the tender.

In response, the Procuring Entity stated that notification letters were written in accordance with the provisions of Sections 67 & 68 of the Act. It stated that Clause 2.25.3 as appearing in the Tender Document is a replica of the standard tender document for services as issued by the PPOA. The Procuring Entity submitted that there is no provision for a tender security requirement in the tender document and that the notification letter to the successful tenderer provided for an appeals window period of fourteen (14) days, in line with the requirements of Section 67 and 68 of the Act. The Procuring Entity further stated that the tenderers never raised any request for clarification, meaning the tender document as was, was understood by the Applicant and all the other bidders in all respects.

The Procuring Entity submitted that it indeed afforded an opportunity for appeals by the unsuccessful bidders, by indicating in the letter of the

successful tenderer that the contract would not be signed until after expiry of fourteen (14) days.

The Successful Bidder, in its submission supported the decision of the Procuring Entity to award it the tender. It stated that none of the unsuccessful bidders including the Applicants in the two cases faulted its bid and therefore having met all the requirements of the tender was rightfully awarded the tender. It confirmed that it had not yet signed a contract with the Procuring Entity. In conclusion, it urged the Board to dismiss the Requests for Review.

The Board has considered the Submissions of the Parties and also perused the Tender documents and copies of the Letters of Notification to the bidders. The Board notes that Section 68 of the Act which the Applicant alleges the Procuring Entity breached deals with creation of contracts. From the documents submitted, the Board notes that the contract for this procurement is yet to be entered into. The Board also notes from the notification letter issued to the Successful Bidder that the Procuring Entity provided for the appeals window by stating as follows ***“The contract shall be signed by the parties within 30 days of the date of this letter but not earlier than 14 days from the date of the letter”***.

In the circumstances, the Board finds that, whereas the Tender documents issued by the Procuring Entity contained a provision which was inconsistent with the requirements of Section 68 of the Act, the Procuring Entity, nevertheless, acted within the Law by having not

signed the contract. Indeed it allowed the bidders an opportunity of 14 days to file their Requests for Review.

In this regard, the Board finds no fault in the manner in which the Procuring Entity notified the bidders and hence this ground also fails.

The Board observes that one of the Interested Candidates, Kinyua & Co. Auctioneers, attached copies of evaluation reports which it claimed to have obtained from some employees of the Procuring Entity. The Procuring Entity denied having issued the Report to the interested candidate. The Board finds that, Pursuant to Section 44 of the Act, the Procurement Process is a confidential process and any bidder who requires information of the tender process should apply to the Procuring Entity and be given a Summary of the Evaluation Report procedurally. In this regard, the Board faults the Procedure used by the Interested Party to obtain the documents and equally the Procuring Entity for failure to ensure that its employees comply with the requirement on confidentiality, pursuant to the Act.

#### **Ground 6: Loss**

The Applicant submitted that it had suffered loss in terms of the opportunity to supply the product required in the tender, profit that it would have earned if it had been awarded the contract and loss of business by reason of being unfairly denied the chance to compete in a fair tender process.

In response, the Procuring Entity denies that the Applicant suffered any loss.

The Board notes that the costs incurred by the tenderers at the time of tendering are commercial risks borne by people in business; this being an open tender where no bidder is guaranteed to be awarded the tender, the Applicant undertook the risk and each bidder carries its own costs.


Taking into account all the above, this Request for Review fails.

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

There are no orders as to costs.

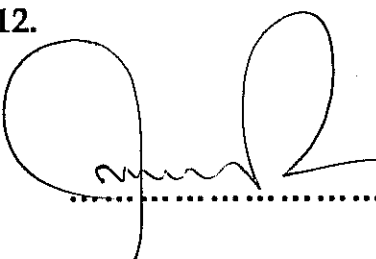
Noting that the initial objective of the Procuring Entity was to procure services of two Auctioneers, the Procuring Entity may consider procuring another Auctioneer.

**Dated at Nairobi on this 17<sup>th</sup> day of August, 2012.**



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**CHAIRMAN  
PPARB**



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**SECRETARY  
PPARB**

