

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 8/2013 OF 8TH FEBRUARY, 2013

BETWEEN

THE ADVERTISING COMPANYAPPLICANT

AND

KENYA POST OFFICE SAVING BANK

.....PROCURING ENTITY

Review against the decision of the Kenya Post Office Saving Bank dated 19th December, 2012 in the matter of Tender No. KPOSB/065/2012 for Provision of Marketing and Advertising /Communication Agency Service.

BOARD MEMBERS PRESENT

Mr. Joshua Wambua	-	Member Chairing
Ms. Judy Guserwa	-	Member
Mrs. Loise Ruhiu	-	Member
Mr. Akich Okola	-	Member
Amb. Charles Amira	-	Member

IN ATTENDANCE

Mr. Philemon Chemoiywo - Holding Brief for the Secretary
Ms. Judith Maina - Secretariat

PRESENT BY INVITATION:

Applicant - The Advertising Company

Mr. William Kabaiku - Advocate

Procuring Entity - Kenya Post Office Saving Bank

Mr. Daniel Njoroge - Advocate

Mr. Daniel Kimani - Lawyer

Mr. Cosmas Korir - Procurement Officer

Mr.C.M Karani - Manager Procurement

Interested Parties

Mr. Omino Franklin - Advocate, Nuturn ltd

Mr. M .S. Dhariwal - CEO, Express DDB

BOARD'S DECISION

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

BACKGROUND OF AWARD

INTRODUCTION

In the last few years, the bank has been using the services of an advertising agency for the purpose of executing its marketing/communication plans. In this regard, the bank was able to maintain harmony and consistency of its marketing communications and corporate brand to a large extent.

Since the implementation of the new business model in 2008, the bank has dedicated a lot of resources towards its corporate brand towards competing effectively in the highly crowded market.

In this regard, we need to maintain the momentum going forward by ensuring the effective execution of our marketing and communication strategies.

BACKGROUND AND COMMUNICATION OBJECTIVES

In 2008, the bank ran a corporate advertising communication campaign which also came up with a strap/tag line "Your banking made easier" that was used during the migration exercise and later adopted for all other products and services offered by the bank.

In 2009, the bank continued with its corporate advertising communication campaign and focused on creating awareness of the fully automated service which had reduced the transaction time, queues, and improved customer service among others.

In the past 3 years, Post bank embarked on aggressive marketing initiatives that have seen the banks' image evolve from its previous perception of being an old man's bank to one that is progressive, innovative with a mandate of inculcating a savings culture.

The bank rolled out a corporate campaign dubbed Mimi Na Believe in 2010 which generated brand awareness and recognition amongst the target audience as well as changed public perceptions.

SCOPE OF THE WORK

Postbank sought to source a marketing and advertising/communications agency to be responsible for providing integrated marketing communications/advertising services encompassing strategic planning, creative development, production, media planning, media buying, and other related services such as sales promotions, design, and branding, etc.

The scope of the work to be undertaken by the Agency will include, but will not be limited to the following assignments:

1. For the various bank products and services (new and existing), the agency shall develop and execute the complete strategy and the creative for all mass media, viz: television, radio, print etc.
2. Concept design and production of TV commercials (60/45/30/10seconds).

3. Concept design and production of radio commercials and jingles (60/45/30/10seconds).
4. Concept design and production of print adverts of various sizes (Newspaper: full size, ½ page, ¼ page strip ads etc, portrait, landscape, Magazine adverts etc) to be placed in selected newspapers and magazines (Daily Nation, EA Standard, Parents, Drum, Taifa Leo, True Love etc).
5. Concept design and production of other outdoor and indoor campaign adverts: sub-urban signs, street lighting signage (e.g. adopt-a-light), mileage signs, billboards and digital video screens at strategic locations etc.
6. Concept design and production of various below the line promotional items including fliers, posters, banners, brochures, stickers, flags etc.
7. Concept design and production of TV documentaries.
8. Concept design and production of Internet/Web advertising and Direct Marketing campaigns.
9. Concept design, production and execution of sales promotions and customer loyalty reward programs.
10. Concept design and production of various corporate promotional items including caps, t-shirts, shirts, pens, key holders, umbrellas, corporate brochures, corporate folders, staff lanyards, staff identity card pockets, calendars, gift bags, branded paper bags,

diaries, Christmas cards, greeting cards, other corporate cards, in-house magazine, press supplements.

11. Concept design and production of various point of purchase/sale branding and branding materials including full branch branding (windows, doors, walls, counters, ceiling, lighting, internal and external signages etc), show stands and other exhibition brandings, fascia boards (branches and agent outlets), under canopy signages (for branches and agent outlets), brochure holders and other promotional/merchandising material displays (e.g. Snapper frames, wall clocks, electronic time and date displays, queue management tools, product/service displays), directional signage's (branches and agent outlets), agent outlet branding (signage's, stickers, banners, posters etc).
12. The agency will be required to undertake media planning and buying/placements for all the concepts developed and produced. These will include, but not limited, to the TV, Print, Radio and outdoor adverts.
13. The agency may also be required to undertake the printing, production and/or delivery of agreed quantities of various finished products as agreed with the bank such as fliers, posters, banners, brochures,

stickers, flags caps, t-shirts, shirts, pens, key holders, umbrellas, corporate brochures, corporate folders, staff lanyards, staff identity card pockets, calendars, gift bags, branded paper bags, diaries, christmas cards, greeting cards, other corporate cards, in-house magazine, press supplements, billboard flexis etc.

DURATION OF THE CONTRACT

The selected agency is expected to offer services to the bank for a period of 2 years, which at the discretion of the bank may be extended for a further period of up to 2 years (i) at the agreement of both parties (ii) depending on satisfactory performance.

EVALUATION

Tender Document with all the requirements and specifications was prepared and invitations to tender were made through advertisements in the national press. The tender was advertised alongside other tenders by the bank.

The bid document comprised of three major areas; a technical proposal section, a financial proposal section and a Bid Bond which were to be submitted in three separate envelopes. The three separate envelopes were then supposed to be sealed into one single envelop.

CLOSING/OPENING:

Tender opened on the closing date, 11 October 2012.

The financial bids were opened on 8th November 2012 upon the completion of the technical evaluation.

The following five (5) firms submitted their bids:

- i. Express DDB Kenya Ltd
- ii. The Advertising Company (TAC) Ltd
- iii. Nuturn Ltd
- iv. Media Edge Interactive Ltd
- v. Spread Marketing Ltd.

PRELIMINARY AND TECHNICAL EVALUTION

One of the 5 bidders above, **Nuturn Ltd** was disqualified from proceeding to the evaluation stage because a Bid Bond was not submitted as stipulated in the tender document. Therefore the firms below proceeded to the technical evaluation.

- a. Express DDB Ltd
- b. The Advertising Company Ltd
- c. Spread Marketing Ltd
- d. Media Edge Interactive Ltd

In accordance with the tender document, the analysis of the tenders was in two parts viz, technical analysis and financial analysis. The analysis was

carried out against a pre-determined evaluation criteria and template (technical evaluation criteria and financial evaluation criteria).

a. The following headlines and weightings comprised the key sections of the evaluation:

Assessment Parameter/Category	Weighting	Weighting
Technical Proposals	70%	
Tender Form		1%
Tender Security Form		0%
Technical Bid - Section B: Qualification Criteria		5%
Technical Bid - Section C: Experience/Capability		20%
Technical Bid - Section G: Demos & Presentation (Previous Campaigns)		
Technical Bid - Section D: Work/Process Management		5%
Technical Bid - Section E: Submission & Company Overview		4%
Technical Bid - Section F: Demos & Presentations - Assignment		35%
Sub-Total for Technical Scores		70%
Financial Proposals	30%	30%
TOTAL	100%	100%

The split between the technical and the financial scores was premised on the fact that the advertising outputs are primarily driven by the technical capability of a firm whereas the financial quotes tend to be mostly standard across agencies.

The technical evaluation had several stages.

- i. A Preliminary evaluation of the submitted bid documents against which scores were assigned.
- ii. Presentation and demonstration by bidders. For the purpose of establishing the bidder's qualification to perform, a fully documented practical demonstration of executing a marketing campaign was required. In this regard, a corporate campaign brief was provided by the bank.
 - i. The agency was required to prepare a submission (A PowerPoint presentation in both soft and hard copies) to include at least the following: Campaign Strategy, Creative and the Media Strategy/Plan.
 - ii. Each agency was then invited to make their presentation to the technical evaluation team. The presentations were held between 23rd and 24th October 2012.

Compilation of the overall technical scores was done after the presentations and demonstrations. During this stage, evaluators consolidated the scores to determine if bidders achieved the

minimum 60% of the technical marks required to progress to the next stage, namely the opening of financial bids.

- b. The financial evaluation was the last stage in the total evaluation. In this stage, the financial bids were analysed in accordance with the set evaluation criteria.

FINANCIAL EVALUATION

During the demonstrations, all the four agencies presented their credentials that covered the following aspects;

- i. Agenda Item No One**

- a) Company Overview

- b) Experience

- i. Experience and Reference – Above the Line

- ii. Experience and Reference – Below the line

- iii. Banking experience

- iv. Public Relations and Events

- ii. Agenda Item No Two**

- a) Understanding of the given Corporate Campaign Brief covering the Strategy, Creative and Media Strategy and Plan

iii. Agenda Item No Three

- a) Work/Process Management covering the description of the end-to-end process for the development of various creative from the time a brief is received from the client up to the final delivery of the completed output at execution.

iv. Agenda Item No Four

- a. Budget Utilisation based on KSh 40 Million provided for this reference.
- i. The technical scores after the presentations and demonstrations were as summarized in **table 1 below**. The full details of the technical evaluation are here below:-

Assessment Parameter	Max. Weights	BIDDER'S TECHNICAL SCORES					
		EXPRESS DDB	TAC	SPREAD MARKETING	MEDIA EDGE		
Technical Proposals	70%						
Tender Form	1.0%	1.0%	1.0%	1.0%	1.0%	1.0%	
Tender Security Form	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	
Section B: Qualification Criteria	5.0%	3.4%	4.9%	2.8%	3.8%		
Section C & Section G : Experience/Capability & Demos & Presentation (Previous Campaigns)	20.0%	15.0%	18.4%	8.2%	12.7%		
Section D: Work/Process Management	5.0%	3.5%	4.8%	1.3%	3.5%		
Section E: Submission & Company Overview	4.0%	2.7%	3.7%	1.4%	2.3%		
Section F: Demos & Presentations - Assignment	35.0%	17.4%	29.6%	12.5%	19.0%		
Sub-Total for Technical Scores	70.0%	43.0%	62.4%	27.2%	42.3%		
% Score to 70%		61.4	89.1	38.9	60.43		

- ii. Out of the four bidders, three met the set minimum performance of 60% to proceed to Financial Evaluation / Price Analysis stage. One bidder, **Spread Marketing Ltd** did not qualify to proceed to the Financial Evaluation stage.

FINANCIAL / PRICING ANALYSIS

- iii. The financial proposal had requested the agencies to submit cost estimates under the following headings:
 - i. TV commercials - Agency Costs
 - ii. Radio Adverts - Agency Costs
 - iii. Documentary - Agency Costs
 - iv. Press Adverts - Agency Costs
 - v. Outdoor Adverts - Agency Costs
 - vi. Web Banner Adverts-Agency Costs
 - vii. Below the Line 1 Items - Agency Costs
 - viii. Below the Line 2 Items - Agency Costs
 - ix. Below the Line 3 Items - Agency Costs

Nb. The items referred to as Below the Line 1, 2 and 3 are not different only that due to the large number of items, they were separated to fit into different pages 1,2 & 3 for the easier management by the bidders. The below-the-line materials 1, 2 and 3 are represented in detail in the table below from item 7 to 79.

- iv. The different price analysis is as **table 1**.
- v. The agency costs covered the costs that would be incurred in the design of the various creative and communications required by the bank. Current costs as well as the projected costs over the next 3 year period had been sought.
- vi. The summarized price analysis scores are as shown in the **Table II** below :

Assessment Parameter	Max. Weights	TAC	EXPRESS DDB	MEDIA EDGE
TV Commercials	0.38	0.38	0.19	0.10
Radio Adverts	0.38	0.38	0.22	0.06
Documentary	0.38	0.38	0.29	0.12
Press Adverts	0.38	0.38	0.26	0.11
Outdoor Adverts	0.38	0.07	0.38	0.15
Web Banners	0.38	0.35	0.38	0.08
Below the Line(BTL) Items	27.72	24.02	24.86	5.66
Sub Total Financial Scores	30	26.06	26.56	6.38

- vii. As provided for in the evaluation criteria, 30% was distributed equally to the 79 elements in this section. The parameter with the

lowest cost was allocated the maximum score and the scores for the rest of the bidders were calculated (inversely) proportionately.

14. COMBINED TECHNICAL AND FINANCIAL SCORES AND RANKING

- a. As provided for in the tender document *"The successful bidder shall be the responsive proposal with the highest score determined by combining, for each proposal, in accordance with the evaluation procedures and criteria, the scores assigned to the technical and the financial proposals and the results of any other additional evaluation prescribed by the purchaser."*
- b. The technical and the financial scores were therefore combined to give the ranking (by scores) of the bidders. The detailed combined scores are and summarized as shown below:-

Table III

Ref	Assessment Parameter	Weight	TAC	EXPRESS DDB	MEDIA EDGE
1	Technical Proposals	70	62.4	43	42.3
2	Financial Proposals	30	26.06	26.56	6.38
	Total Score	100	88.46	69.56	48.68
	RANKING		1	2	3

- c. From the above summary analysis, The Advertising Company Ltd (TAC) ranked the best with a score of 88.46%, DDB scored 69.56% in

second position while Media Edge scored 48.68% in third position. Postbank has had an opportunity to work with all the agencies.

15. POST QUALIFICATION

The evaluation committee did Post evaluation based on the bid document section 17.8.4 and as per Regulation 52 on Post qualification criteria on the Public Procurement Regulation that reads as follows:

(1) 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.

(2) Where so indicated in the tender documents, if the lowest evaluated tenderer is determined under paragraph (1) not to be qualified in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer who submitted the next lowest evaluated responsive bid.

Post Qualification results are as follows:

I. *Professional and technical capability and experience required;*

All the three firms met the required technical ability.

II. *Managerial ability (competence);*

This was analysed during the presentation. Refer to **table IV** below

III. *Financial strength;*

Financial strength is analysed as below:

FINANCIAL						
FIRM	TESTABLE FINANCIAL PARAMETERS	2011 YR	2010 YR	2009 YR		
DDB	CA/CL : LIQUIDITY RATIO	2.92:1	2.03:1	1.84:1	PASS	
	ACID TEST : LIQUITY RATIO	2.59:1	1.76:1	1.51:1		
	DEBT EQUITY RATIO	52%	97%	119%		
	CASH /BANK POSITION	14,956,806.00	17,066,596.00	10,963,293.00		
	CASH FLOW POSITION	14,956,806.00	17,066,596.00	10,963,293.00		
	ASSETS BASE	4,839,630.00	5,778,219.00	6,810,265.00		
	CA/CL :	0.95 :1	0.95 :1	0.86:1		
TAC	ACID TEST	0.96 :1	0.91:1	0.82 :1	FAIL	
	DEBT EQUITY RATIO	1,049%	2,286%	8,904%		
	CASH /BANK POSITION	1,720,232.00	2,166.00	3,213,736.00		
	CASH FLOW POSITION	(0,021,318.00)	(3,764,456.00)	(7,193,595.00)		
	ASSETS	5,723,380.00	5,453,715.00	6,142,545.00		
	Going concern principle is questioned by auditor's report, very weak financial ratio, Poor cash flow					

position - negatives for all years,

2011 YR 2010 YR 2009 YR

MEDIA EDGE	CA/CL:	1.62 :1	1.28:1	1.02 :1	PASS
	ACID TEST	1.62 :1	1.28 :1	1.02 :1	
	DEBT EQUITY RATIO	312%	357%	447%	
	CASH /BANK POSITION	5,560,343.00	11,325,779.00	7,491,183.00	
	CASH FLOW POSITION	5,560,343.00	11,325,779.00	6,850,980.00	
	ASSET	8,127,763.00	8,137,704.00	8,146,102.00	

Going concern principle clean audit report, strong positive ratios ,improved financial position

The firm is deemed to be stable if the ratio of its current assets to current liabilities is at a ratio of at least 1:1

IV. *Track record of bidder;*

The bank has worked with all the three firms in the past.

V. *Continuity of the bidder in that line of business.*

Judging from the going concern principle from the audited accounts, all the firms except TAC met the requirement.

16. BUDGET

- a. Services will be procured from the agency based on approved marketing activities and within the terms of the contract with the agency (upon which LPOs will be issued).

17. RECOMMENDATIONS

- a. Based on the scoring and post qualification analysis the evaluation committee recommends that the tender for the provision of marketing and advertising/communications agency services be awarded to **Express DDB Kenya Limited**.
- b. In line with table 7.2.2, the evaluation committee recommends that the rates for agency costs as provided by the above winning firm be approved.
- c. That in line with the tender document, the agency is appointed to offer services to the bank for a period of 2 years, with a provision to extend

- the contract for up to 24 months depending on satisfactory performance of the agency.
- d. That upon the appointment a contract for the provision of marketing and advertising/communications agency services is entered into between the bank and the agency. The contract will be in accordance to the design costs quoted by the agency.
 - e. Services will be procured from the agency based on approved marketing activities and within the terms of the contract with the agency (upon which LPOs will be issued).

18. APPROVAL

The Tender Committee is invited to deliberate on this matter and if in order, **APPROVE** the recommendations as stated above.

THE TENDER COMMITTEE DECISION

The Tender Committee in its meeting held on 24th January, 2013 deliberated on the recommendations of the Evaluation Committee on the and recommended that **M/s EXPRESS DDDDB ltd** as per the price schedule and at a total cost of Ksh.14, 726,182 VAT inclusive for a contract period of two (2) years with the provision for extension by a further two years based on satisfactory performance.

Bidders were notified the outcome of the tender vide letters dated 30th January, 2013.

THE REVIEW

The Applicant, M/s The Advertising Company Ltd lodged this Request for Review on 8th February, 2013 against the decision of Kenya Post Office Saving Bank in the matter of Provision of Marketing and Advertising/Communication Agency Services, referenced as Tender No. KPOSB/065/2012.

The Applicant was represented by Mr. William Kabaiku ,Advocate, while the Procuring Entity was represented by Mr. Daniel Njoroge, Advocate while the interested party was represented by Mr. Omino Franklin , lawyer Nurturn ltd and Mr. M.S Dhariwal ,CEO Express DDB

The Applicant requests the Board for the following orders:-

- 1. The Decision of the Respondent awarding Tender No.KPOSB/065/2012 for the provision of Marketing and Advertising/Communications Agency Services to the successful bidder be nullified or annulled.*
- 2. That the Board substitute the decision of the Respondent awarding the Tender to the successful bidder and award the said Tender to the Applicant or the lowest evaluated Tenderer.*
- 3. That in the alternative and without prejudice to the foregoing, that the Board do cancel and nullify the award of Tender No.KPOSB/065/2012 to the successful bidder and direct the*

Respondent to re-evaluate the Tender in accordance with the law, the Tender requirements and the relevant procurement procedures.

4. *Further in the alternative, that the Review Board pursuant to Section 98 (a) and (b) of the Public Procurement and Disposal Act, 2005 annul the procurement proceedings in their entirety and do direct the Respondent to re-tender using the same Tender requirements and specifications and invite all the bidders including the Applicant.*

THE PRELIMINARY ISSUE

At the commencement of the hearing the Board enquired from the Procuring Entity as to the validity of the subject tender

The Board specifically required that the parties address it with regard to the tender expiry date, extension of tender validity if any and the provisions of clause 17.6.7 of the tender document, Section 67 of the Act and Regulation 42.

On its part, the Procuring Entity submitted that the subject tender which had a tender validity of 90 days was advertised on 20th September 2012 and that it closed/opened on 11th October, 2012. It further submitted that the tender was a two envelope system whereby the technical bids were opened on 11th October, 2012, while the financial bids were opened on 8th November, 2012. It averred that the subject tender had therefore two opening dates, 11th October and 8th November, 2012 respectively and that

in such a case; the latter of the two dates would apply for the purpose of computing the tender validity expiry date.

The Procuring Entity stated that assuming a tender opening date of 8th November, 2012 was considered, then the 90 days tender validity expired on 8th February 2013 which was after the tender award had been made and therefore the Procuring Entity had complied with Section 67 of the Act. In conclusion, the Procuring Entity confirmed that it had not extended the tender validity period.

In response, the Applicant submitted that in its understanding of the provisions of Section 67, read together with Regulations 42 and a plain reading of the tender document, it was unambiguous as to when the tender validity period would expire.

It further submitted that the closing date of 11th October, 2012 was also the legitimate opening date and that counting 90 calendar days, then the expiry of the tender would have been the 11th Jan 2013. It stated that the distinction between when the financial and technical bids were opened was irrelevant as far as the opening date is concerned. The Applicant referred the Board to the tender advertisement which clearly stated that the tender opening date would follow immediately after the closure of the submission of the tenders on 11th October, 2012.

The Applicant further referred the Board to the tender opening minutes which were dated 11th October 2012. It argued that if the tender opening date was not 11th October, 2012 then the said minutes were invalid and could therefore not be relied upon. It further argued that if the tender

closing date had been extended from 11th October, 2012 to 8th November, 2012, then all bidders ought to have been notified.

In conclusion, the Applicant stated that it had been notified that its bid was not successful on 28th January, 2013. It argued that based on Section 67 of the Act then this was the date that all other bidders, including the Successful Bidder were notified. In that regard, it argued that at the time that the Successful Bidder was notified on 28th January, 2013 there was nothing worth of notifying as the tender validity had already expired on 11th January, 2013.

An interested bidder, M/s Express DDB said it had no comments to make and that it had not prepared any written submissions.

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

Based on the foregoing, the questions for determination by the Board are as follows:

1. What is the legitimate tender opening date?
2. When did the tender validity expire and could the Procuring Entity award a tender after the tender validity had already expired?

In dealing with the first question, the Board notes the provision of Regulation 42 and Clause 17.6.7 of the Tender Documents as follows.

Regulation 42

"The period of validity of a tender shall be stated in calendar days from the date of opening of the tender"

Clause 17.6.7

"Bids shall remain valid for a period of ninety (90) days after the bid opening date prescribed by the purchaser.

A bid, which is valid for a shorter period, shall be rejected by the purchaser as non-responsive"

The Board also takes note of Regulations 47, 49 and 50 which provide how the various stages of evaluation, namely Preliminary, Technical and Financial follow each other. It is clear that each of these stages are merely parts of the same tendering process, the tender having been opened once at the tender opening date. Even in the case of a two envelope system. The closing/opening of the financial bids does not connote a new tender opening date but is just a continuation of the tender evaluation process which is deemed to begin upon completion of the technical evaluation stage.

The Board notes the Procuring Entity's minutes which were headed as follows:

"Minutes for Tender Opening Held on 11th October, 2012 at The Conference Room Starting at 11:00 Am".

The Board further notes that the said minutes which were signed on 11th October, 2012 include a list of Bidders representatives who attended the meeting and that both the Applicant and successful bidder are on that list. It is clear from the minutes that the tender opening did indeed take place on 11th October, 2012.

Clause 17.6.7 of the Tender Document clearly refers to a prescribed opening date and does not give room for multiple opening dates as argued by the Procuring Entity.

Section 42 of the Act also makes it clear that there is only a single tender opening date for each tender.

Taking into account the foregoing, the Board finds that the opening date for the subject tender was indeed 11th October, 2012.

In dealing with the second question, the Board notes the following dates/ periods which are not disputed by either party:

Advertising date	20 th September, 2012
Closing date	11 th October, 2012
Validity period	90 days
Technical Bids opened on	11 th October, 2012
Financial Bids opened on	8 th November, 2012
Tender Award	24 th January, 2013
Notification of Tender Award letter dated	28 th January, 2013

The Board also takes note of the provisions Section 67 of the Act as follows:

(1) Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.

(2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.

(3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security.

As already held, the tender opening date was 11th October, 2012 and consequently the 90 days tender validity period started running from 12th October, 2012 and expired on 11th January 2013.

The Board notes the Procuring Entity's submission to the effect that the tender validity period was never extended.

The Board also notes that Section 67 of the Act is framed in mandatory terms and clearly stipulates that a procuring entity can only notify the successful bidder that its bid was successful prior to the expiry of the tender validity period. Further it is the requirement of the Act that Communication to all the candidates on the award has to be done within the period during which the tenders must remain valid.

The Board notes that the successful bidder, M/s Express DDB (K) Ltd was awarded the tender on the 24th January, 2013 and that all the bidders were notified of the outcome of their bids on the 28th January, 2013.

Accordingly, the Board finds that the tender award and respective tender notification was done outside the tender validity period which is in contravention of Section 67 of the Act.

The Board has in the past ruled that an award that is made outside the tender validity period is a nullity In *Application no 68/2007, De La Rue International ltd vs. Kenya Revenue Authority*; the Board held that a

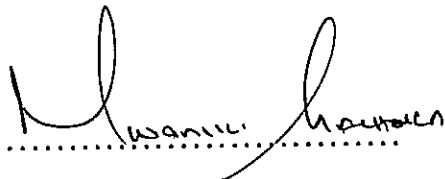
tender whose validity has expired cannot be resuscitated by extension or otherwise.

Section 61 of the Act gives the Procuring Entity power to extend the tender validity period. However this can only be done before the expiry date and the notice of such extension has to be given to each bidder who submitted a tender. As already noted the Procuring Entity did not extend the tender validity period and therefore the tender had suffered a natural death, so to speak, by the time the award was being made. This is a serious flaw that goes to the root of the entire tender process.

Taking all the above matters into consideration, the Preliminary issue on the tender validity succeeds.

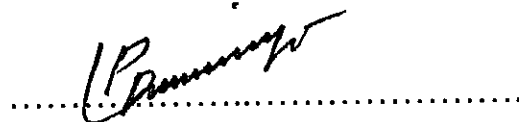
Accordingly, the purported award of the tender to M/s Express DDB (K) Ltd is hereby annulled. The Procuring Entity May re-tender.

Dated at Nairobi on this 1st day of March, 2013



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**CHAIRMAN
PPARB**



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**Ag. SECRETARY
PPARB**