

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 53/2010 OF 23<sup>rd</sup> SEPTEMBER, 2010**

**BETWEEN**

**SOLUCIONES ENERGETICAS (SOLENER, SA) .....APPLICANT**

**AND**

**MINISTRY OF ENERGY.....PROCURING ENTITY**

Review against the decision of the Tender Committee of the Ministry of Energy dated 2<sup>nd</sup> September, 2010 in the matter of Tender No. MOE/OIT/13/2009 -2010 for the Design, Supply, Installation, Testing and Commissioning of Solar PV Systems to 380 No. Schools, Dispensaries and Health Centres in Asal Districts.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Amb. C. M. Amira	-	Member
Mr. Sospeter Kioko	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Secretary
Ms. Kerina A. Rota	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Soluciones Energeticas (Solener,SA)**

Mr. Muturi S. K. - Advocate  
Mr. Moses Mwangi - Representative

### **Procuring Entity, Ministry of Energy**

Eng. R. M. Khazenzi - Ag. Director Renewable Energy  
Eng. Samson M. Kasanga - Assistant Director, Renewable Energy  
Mr. J. K. K. Gichuru - Principle State Counsel  
Mr. Kioko Kakyema - Chief Supply Chain Management Officer

## **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**

The tender for Design, Supply, Installation, Testing and Commissioning of Solar PV Systems to 380 NO. Schools, Dispensaries and Health Centers in Asal Districts was advertised in the Standard Newspaper and the media in Spain on 22<sup>nd</sup> February, 2010. A pre-bid meeting was held on 24<sup>th</sup> March, 2010.

### **Closing/Opening:**

The tender was to close on 23<sup>rd</sup> April 2010 but was extended to 7<sup>th</sup> May 2010 due to the volcanic ash related air travel disruptions. Ten (10) firms submitted their bids on the closing date as follows:

S/NO.	FIRM'S NAME & ADDRESS	TENDER SUM
1.	Cymi SA/Makiber SA	9,998,542,.00 €
2.	Eurener - Anbelo Solar	9,575,268 €
3.	Sistemas Ingenieria Renovables Sa & Auditel Ingenieria Y Servicios S.L.	9,699,900.32 €
4.	Defex S.A	9,693,168.04 €
5.	Eduinter Fluitecnik	9,927,625.07 €
6.	Atersa Electricidad Solar	9,299,313.83 €
7.	Semi S.A & Inge Consult	9,750,000.00 €
8.	Sol De Albesa S.L & Ingenieria Y Asistencia Eurriopea S.L.	22,812,912.00 €
9.	Soluciones Energeticas (Solener), S.A	8,994,915.65 €
10.	Riogersa S.A	18,360,104.71 €

## EVALUATION

The evaluation was carried out in three stages namely Preliminary, Technical and Financial.

### Preliminary Evaluation

The bids were evaluated to determine responsiveness to the tender requirements on the following parameters

1. Letter of Bid
2. Bid Security
3. Priced Bills of Quantities
4. Power of Attorney
5. Bidders Eligibility- Spanish firms
6. Eligible origin of works
7. Constitution and legal status
8. Declaration of no enforced settlement bankruptcy or liquidation proceedings against the company.
9. Declaration of eligibility
10. Certification of Compliance to Spanish Tax and social security obligations

11.ISO 9001:2000 Quantity Certification

12.Manufacturer's Authorization (for non self manufactured products)

13.Evidence the work conforms to technical specifications

14.bidder's qualification to bid

15.Technical

The result of the Preliminary Evaluation was as tabulated.

CRITERIA	BIDDERS									
	1	2	3	4	5	6	7	8	9	10
Letter of Bid	✓	✓	✓	✓	✓	✓	✓	X	✓	✓
Bid Security										
a) Amount-Euro 50,000 or Kshs. 5M	✓	X	✓	✓	✓	✓	✓	X	✓	✓
b) Validity up to 02/10/2010	✓	X	X	✓	✓	✓	✓	✓	✓	✓
c) Local correspondent financial Institution	✓	X	X	X	✓	X	X	✓	X	✓
Priced Bills of Quantities	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Power of Attorney	✓	X	✓	✓	✓	✓	✓	X	✓	✓
Bidders Eligibility-Spanish firms	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Eligible origin of works-Origin declaration Section IV	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Constitution and Legal status	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Declaration of no enforced settlement bankruptcy or liquidation proceedings against the company	✓	✓	✓	✓	✓	✓	✓	X	✓	✓
Declaration of Illegibility	✓	✓	✓	✓	✓	✓	✓	X	✓	✓
Certification of compliance to Spanish Tax and social security obligations	✓	✓	✓	✓	✓	✓	✓	X	✓	✓
ISO 9001:2000 Quality Certification	✓	✓	✓	✓	✓	✓	✓	X	X	✓
Manufacturer's Authorization (for non self manufactured products)	✓	✓	✓	✓	✓	✓	✓	X	✓	✓
Evidence that works conform to technical specifications	✓	✓	✓	✓	✓	✓	✓	X	✓	✓
Bidder's qualification to bid										
<b>i. Economic and Financial</b>	✓	✓	Not indicated	✓	✓	✓	X	Not indicated	✓	✓
a) Minimum average annual turnover of 50% of bid sum.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
b) Positive cash flow	✓	✓	✓	✓	✓	✓	✓	Not indicated	✓	✓
c) Positive net assets	✓	✓	✓	✓	✓	✓	✓	Not indicated	✓	✓
d) Combined liquidity position and line of credit -at least 25% of the bid sum	✓	✓	Not indicated	✓	✓	✓	X	Not indicated	X	✓
<b>ii. Experience</b>	✓	✓	✓	✓	✓	✓	✓	X	✓	✓
a) At least 3 years experience as a contractor	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
b) Two contracts of similar nature for the past 5 years with total value of 5 Million Euros.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
<b>iii. Personnel</b> (project manager-1, Supervisor 4, Engineer-2)	✓	✓	✓	✓	✓	✓	✓	X	✓	✓
<b>iv. Equipment</b> (4x4 Wd off-road vehicle-4, Electrician's tool kit- 20 Testing equipment kit- 4)	✓	✓	✓	✓	✓	Not indicated	✓	X	✓	✓
Technical Proposal	✓	✓	✓	✓	✓	✓	✓	X	✓	✓

The Applicant was declared non-responsive at this stage for providing a bid bond from Banco Gallego S.A without a correspondent financial institution in Kenya to make it locally enforceable; the ISO certificate was not from the company; the power of Attorney was not submitted; and its combined liquidity position and line of credit was 7.86% of the bid sum as opposed to the required 25%. Three bidders namely Cymi SA/Makiba SA; Eduinter Fluitecnik; Riogersa S.A were found to be responsive to the requirements of the tender and were recommended for the technical evaluation stage.

### **TECHNICAL EVALUATION**

The Evaluation Committee evaluated the three bids using the following parameters to determine responsiveness to the technical requirements;

1. Sound appreciation of tasks and robust methodology
2. Clear description of procurement, storage, insurances and distribution procedures including local transportation
3. Methodology to ensure quality assurance and control
4. Works program – Adequacy
5. Efficiency of the design
6. Sustainability of the design
7. Flexibility of the design
8. Value engineering improvements
9. Redundancy in critical areas (health facilities)
10. Life cycle cost

The summary result of the evaluation was as tabulated;

<b>Method statement and works program</b>	<b>Bidder No.1</b>	<b>Bidder No.5</b>	<b>Bidder No.10</b>
Sound appreciation of task and robust methodology	70	88	57.25
Clear description of procurement, storage, insurance and distribution procedures including local transportation	28.75	43.75	12.25
Methodology to ensure quality assurance and control	38.75	48	17.25
Works programme adequacy	38.75	44	21
<b>Preliminary project design</b>			
Efficiency of the design	19.5	34	20.25
Sustainability of the design	20.75	38.25	24.5
Flexibility of the design	18	22.75	20.75
Value engineering improvements	16.25	20.75	13.25
Redundancy in critical areas (health facilities)	2.75	4.5	2.75
Life cycle cost	2.75	4.75	3
<b>TOTALS</b>	<b>256</b>	<b>348.75</b>	<b>192.25</b>

The Evaluation Committee noted that bidders no. 1 and 10 had not indicate the warranty period for the lighting fixtures and decided to evaluate the two bidders further in the financial stage with a recommendation that should they be successful they will be required to confirm the warranty period of the lighting fixtures. The three bids were then recommended for evaluation of their financial bids.

### **FINANCIAL EVALUATION**

The Evaluation Committee checked for the arithmetic errors and corrected them. It then awarded points as per the evaluation criteria in section III of the tender document as follows:

<b>NO.</b>	<b>Description</b>	<b>Bidder 1</b>	<b>Bidder 5</b>	<b>Bidder 10</b>
1.	Bid Price	9,993,542	9,927,625.07	18,360,104.71
2.	Arithmetic Error	1,292.18	NONE	NONE
3.	Corrected Bid Price	9,994,834.18	N/A	N/A
4.	<b>Points</b>	<b>596</b>	<b>600</b>	<b>324</b>

The total evaluated bid score for the three (3) bidders was tabulated below:

<b>NO.</b>	<b>Description</b>	<b>Bidder 1</b>	<b>Bidder 5</b>	<b>Bidder 10</b>
1.	Technical Proposal Score	256	348.75	192.25
2.	Financial Proposal Score	596	600	324
3.	Combined Bid Score	852	948.75	516.25

The Evaluation Committee then recommended bidder No. 5 M/s Eduinter Fluitecnik at the tender sum of Euro 9,927,625.07 for being the highest combined score.

### **TENDER COMMITTEE DECISION**

The Ministerial Tender Committee in its meeting No.03/2010-2011 held on 31<sup>st</sup> August, 2010 deliberated on the recommendation of the Evaluation Committee and approved the award of the tender to M/s Eduinter Fluitecnik at a tender sum of Euros 9,927, 625.07.

### **THE REVIEW**

The Applicant lodged the Request for Review on 23<sup>rd</sup> September, 2010 against the decision of the Ministry of Energy in tender No. MOE/OIT/13/2009-2010 for the Design, Supply, Installation, Testing and Commissioning of Solar PV Systems to 380 No. Schools Dispensary and Health Centers in Asal Districts.



At the hearing, the Applicant was represented by Mr. Muturi S. K. Advocate while the Procuring Entity was represented by Mr. Kioko Kakyema, Chief Supplies Chain Management Officer.

The Applicant has raised nine grounds of appeal and prayed that the Board:

***(a) "Revise the unlawful decision of the tender committee of the Procuring Entity and award the Applicant the tender.***

***(b) Condemn the Procuring Entity to meet the cost of this review."***

### **PRELIMINARY OBJECTION**

The Procuring Entity raised a Preliminary Objection dated 15th October, 2010, against the hearing of this Request for Review. It stated that the tender under review was donor funded and that under the negotiated loan agreement only Spanish companies were eligible to bid. This, it added, was in tandem with the provisions of Sections 6 (1) and 7 (1) of the Act. The Procuring Entity further stated that the Spanish Government had carried out a parallel evaluation. It explained that it had sent its recommendation of award to the Spanish Government and that it had requested for a "No Objection" in accordance with the provisions of the loan agreement. The Procuring Entity stated that it notified the successful and unsuccessful bidders of the award only after it had received a "No Objection" from the Spanish Government.

In response, the Applicant submitted that the Preliminary Objection did not raise any question of law but rather factored issues which could only be determined on merit.

The Board has considered this issue and notes that though this tender is donor funded, Clause 2.3 of the Bilateral Financial Cooperation Agreement between the Ministry of Finance of the Republic of Kenya and the Ministry of Industry, Tourism and Trade of the Kingdom of Spain states as follows:

*“Tenders Regulations. Tenders will be carried out in Kenya by the authorities of the Republic of Kenya and in accordance with the Kenyan Law. Nevertheless, the Spanish authorities will make sure that, in relation to the use of these facilities, the awarding process respects the rights of the participating Spanish companies at all time. The conditions of the public limited tenders will be simultaneously published in Kenya and in Spain.”*

It is clear that the tender was carried out in accordance with the Kenyan Law and therefore the Board has jurisdiction.

Accordingly, the Board holds that the Preliminary Objection has no merit and will proceed to hear the Request for Review on its merit.

The Board deals with the nine grounds of review as follows:

**Grounds 1, 4 and 5 - Breach of Section 66 and Regulations 49, 50,  
51 & 56**

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

The Applicant submitted that the whole procurement process was irregular and that it breached Section 66 of the Public Procurement and Disposal Act,

2005 (herein referred to as the Act) in that it failed to declare the Applicant as the successful tenderer with the lowest evaluated price.

The Applicant averred that the Procuring Entity breached Regulations 49 and 50(1), (2) for failing to award the tender to it, though it had submitted the most responsive bid and was therefore the lowest evaluated of the bidders. The Applicant further averred that the Procuring Entity breached Regulations 51 and 56 when it proceeded to unfairly dismiss its tender by applying the wrong criteria without taking into consideration the price, quality and service proposed by it.

It further submitted that the evaluation criteria as included in Part III of the Bidding Document was not valid since it offends section 66 of the Act in that the same is neither quantifiable, nor objective and that it is generally open to abuse. The Applicant stated that the Procuring Entity breached Regulation 45 when it opened the bids and read out aloud the prices during the tender opening meeting. It averred that where a tender called for numerous items to be supplied, the prices could only be read out aloud once a technical evaluation for each and every separate item had been carried out.

The Applicant submitted that it had provided a Bid Bond by a Bank called SANTAGA S.A. and not one by the BANCO GALLEGO S.A as claimed by the Procuring Entity. It further submitted that this was one of the reasons given by the Procuring Entity as justification for having disqualified the Applicant. It argued that this was a clear indication that the Procuring Entity never carried out a preliminary enquiry, otherwise it would have noted that the Applicant did not submit a Bid Bond by BANCO GALLEGO S.A. but by SANTAGA

S.A. It further argued that it had provided a Bank guarantee as its tender security which did not require to be guaranteed by a correspondent financial institution in Kenya. It added that this was in line with Article 22.2 of the tender documents. It therefore stated that it was wrong for the Procuring Entity to disqualify it on this ground.

The Applicant admitted that it had not submitted the Power of Attorney but argued that this was a minor omission and could therefore not be used as a basis for disqualifying it. Further, the Applicant claimed that the ISO certificate it had provided should have been accepted since it was from the manufacturer of the solar modules which form the major component of the entire project. It therefore argued that this was a minor deviation which was unfairly used against it.

The Applicant submitted that it was also disqualified on the grounds that its liquidity position and line of credit was 7.86% of the bid sum as opposed to the required 25%. It argued that this was against the provisions of Regulation 41 which call for a security not exceeding 2% of the bid sum. It further argued it had adequate funds of its own and therefore did not need to borrow any funds to enable it carry out this project. In any event, it stated that the Procuring Entity would be adequately compensated by the guarantee in case of non performance.

In response, the Procuring Entity submitted that the tender was based on a loan by the Spanish Government and that the donor conditionalities had to be strictly adhered to in line with section 6 & 7 of the Act. It further submitted

that any special conditions in the tender document were put in by the Government of Spain and the Ministry of Energy had to comply.

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The Procuring Entity stated that the evaluation criteria had been clearly set out in the tender document and that the tender document had stated that any bidder who was unclear on any of the tender requirements was free to make enquiries with the Ministry. Further a mandatory pre-tender meeting had been held on 24<sup>th</sup> March 2010 but the Applicant had not raised any of the issues.

As to the issue of reading the prices aloud, then followed by preliminary and technical evaluation, the Procuring Entity stated that this was the correct procedure for open tenders.

In conclusion, the Procuring Entity argued that the Applicant failed at the Preliminary Evaluation stage as it did not meet the special requirements that had been set out by the Donor. Further, the Donor did a parallel evaluation and was satisfied that the evaluation process was carried out in accordance with the Tender Documents.

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

The Board notes that the tender was founded on a Bilateral Financial Co-operation Agreement between the Ministry of Finance of the Republic of Kenya and the Ministry of Industry, Tourism and Trade of the Kingdom of Spain.

The Board further notes the following clauses of the Financial Agreement.

*“Clause 1.1 – standard concessional facilities – up to 140 million Euros will be made available from the Spanish “Fondo de Ayuda al Desarrollo” (hereinafter FAD), in the form of concessional credits to finance the supply of Spanish goods and services for public projects implemented in Kenya by Spanish firms. These credits will have a concessionality element of at least 35%, calculated according to the OECD arrangement on Officially Supported Export Credits (hereinafter, OECD Arrangement).*

*Clause 1.2 – grant facilities – up to 10 million Euros in the form of grants, made available from the Spanish fund “Fondo de Estudios de Viabilidad”(hereinafter FEV), to finance feasibility studies implemented by Spanish companies for public projects and programs agreed upon by both parties.*

*Clause 2.1 – eligible projects – the concessional facilities of article 1.1 will finance public projects of mutual interest agreed on by both parties and carried out in the Republic of Kenya by Spanish companies. The projects will be implemented preferably in the following sectors:*

- *Water*
- *New and renewable energies*
- *Energy and electricity*
- *Transport and infrastructure*
- *Communication and information technologies*
- *Solid waste treatment.*

*Projects in other sectors could be considered and agreed upon by both parties.*

*Clause 2.3 – Tender Regulations –*

*Tenders will be carried out in Kenya by the authorities of the republic of Kenya and in accordance with the Kenyan law. Nevertheless, the Spanish authorities will make sure that, in relation to the use of these facilities, the awarding process respects the rights of participating Spanish companies at all times. The conditions of the public limited tenders will be simultaneously published in Kenya and in Spain.*

*Clause 8.2 – Content of Technical assistance*

*The technical assistance may include project definition, appraisal, bidding preparation and evaluation, implementation, supervision and ex-post evaluation of projects and feasibility studies.*

The Board also takes note of the following sections of the Act which deal with Donor funded projects.

*“Section 6(1) –*

*Where any provision of this act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans.*

*Section 7(1) –*

*If there is a conflict between this act, the regulations or any directions of the authority and a condition imposed by the donor of funds, the*

***condition shall prevail with respect to a procurement that uses those funds and no others."***

From above extracts the Board notes as follows:

- 1) The tender is based on loans/grants received from the Spanish Government and therefore Sections 6(1) and 7(1) as quoted above are applicable.
- 2) The funds are to be utilized on public projects in Kenya as agreed upon by both parties to the agreement.
- 3) The contracts in regard to the above projects were to be awarded to Spanish companies only.
- 4) Though Kenyan Procurement law is to be applicable, the Spanish Government would still control the awarding process to safeguard the rights of the participating Spanish Companies at all times.
- 5) The technical support from the Government of Spain was to include in part, the preparation of bidding documents and the evaluation of tenders.

The Board has noted that evaluation was carried out in three stages namely preliminary, technical and financial evaluation stages.

The Board also notes that the Spanish Government through their local representative did indeed carry out a parallel evaluation of all the bids.



The Board notes that prior to notification of the intended contract award to the Successful Bidder, the Procuring Entity was obligated to notify the Spanish Economic and Commercial Office in Nairobi in order to obtain a “no-objection” of the Secretary of State (Cabinet Minister) for Trade of Spanish Ministry of Industry, Tourism and Trade in line with Clause 42 of the Instruction to Bidders (ITB )of the tender document and the terms of the loan agreement.

The Board further notes that the approval to award the contract was granted by the Spanish Minister vide his letter dated 4<sup>th</sup> August, 2010 and that it was after receipt of this approval that the Procuring Entity notified the successful and unsuccessful bidders of the contract award as required under the Act and Clause 42 of the ITB.

From the Evaluation report the Board notes that the Applicant was disqualified together with six other bidders at the preliminary evaluation stage.

The Board notes that the Applicant was disqualified at the preliminary stage due to the following:

- a) The bid bond submitted was issued by BANCO GALLEGO S.A. without a correspondent financial institution in Kenya to make it locally enforceable;
- b) The submitted ISO certificate was not from the Company;
- c) The power of attorney was not submitted; and

- d) The combined liquidity position and line of credit was 7.86% of the bid sum as opposed to the required 25%

The Board has established that all the requirements for which the Applicant was disqualified had been clearly set out under section III of the tender document. The Board has further established that a mandatory pre-tender meeting was held on 24<sup>th</sup> March, 2010 and that the Applicant, Solener SA had sent a representative to that meeting. On perusal of the pre-tender meeting minutes, the Board notes that neither the Applicant nor any other bidder raised any question in regard to the evaluation criteria or the documents which bidders were supposed to present in order to be deemed responsive.

The Board finds that the preliminary requirements set out under section III of the Tender Document are in line with the procurement law as set out in Section 64, and Regulations 47 and 48.

The Board notes that the Applicant has admitted that it did not provide the power of Attorney and also the ISO Certificate and that it did not meet the required liquidity margin. The Applicant's argument that these requirements were minor cannot hold water since the Donor deemed them to be important to the extent of making them mandatory.

This being a Donor funded project the Board finds that the donor requirements had to be complied with and that only the Donor could waive any of the requirements. The Board is aware that the Donor carried out a parallel evaluation and still found the Applicant's bid to be unresponsive.

It is clear then to the Board that the Applicant did not meet all the laid down requirements. The Board therefore finds that the Applicant's bid was properly deemed unresponsive and subsequently rejected in line with Regulation 48.

As to the argument that the Applicant's price was the lowest, the Board notes that Section 66 (4) stipulates that the successful tender shall be the tender with the lowest evaluated price.

Having established that the Applicant was rightly eliminated at the Preliminary Evaluation stage, the Board finds that the Applicant's tender could not have subsequently been declared the lowest evaluated tender.

With regard to the argument that the Procuring Entity erred in reading out the prices aloud at the tender opening, the Board notes that this was an open tender. The Board further notes that Regulation 45 (1) (a) which the Applicant claims to have been breached should be read together with Section 60 (5) (b).

The said provisions provide as follows:

**Section 60 (5) (b)**

*"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) .....*

*(b) the total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; ...."*

**Regulation 45 (1) (a)**

*"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; "***

Under Section 60 (5) (b) it is clear that the prices should be read out loud at the opening in case of open tenders. Under Regulation 45 (1) (a) the Procuring Entity has an option to either read out the prices aloud or not.

The Board further notes that in carrying out the financial evaluation the evaluated price for each bid shall be determined by the bid price as read out at the bid opening as set out in Regulation 50 (2) (a).

Consequently, these grounds of the request for review fail.

#### **Ground 7 - Breach of Section 66 (5), Clause 42.3 of the ITB**

In this ground the Applicant alleged that the Procuring Entity had not provided it with the summary evaluation report as required under Section 66 (5) and Clause 42.3 of the Instruction to Bidders document (herein after referred to as "ITB").

The Procuring Entity in response submitted that the Applicant had written to it on 21<sup>st</sup> September, 2010 seeking to know the reason as to why its bid had been unsuccessful. It further submitted that it had supplied the required reasons to the Applicant vide a letter dated 30<sup>th</sup> September, 2010 but by that time the Applicant had already filed this Request for Review on 23<sup>rd</sup> September, 2010. The Procuring Entity argued that the Applicant's action in requesting for review was rather pre-mature since had it waited it would have realized that it had been properly disqualified.

The Board notes that Section 66 (5) stipulates that the Procuring Entity should prepare an evaluation report containing a summary of the comparison of tenders. The Board further notes that Clause 42.4 of the ITB indicated that the employer shall promptly respond in writing to an unsuccessful bidder who requests for the reasons for its bid being unsuccessful. The Board also notes that the Applicant wrote to the Procuring Entity through their lawyers in a letter dated 21<sup>st</sup> September, 2010 requesting for the reasons of its bid being unsuccessful and that the Request for Review was filed on 23<sup>rd</sup> September, 2010 while the Procuring Entity replied on 30<sup>th</sup> September, 2010. The Board therefore finds that the Procuring Entity responded to the Applicant's request within the fourteen days as stipulated under Regulation 66(2).

Accordingly, this ground of review fails.

### **Grounds 2, 3, 6 and 8**

These are not grounds of review but statements that are not supported by any breaches of the Act or the Regulations as stipulated in Regulation 73 (2) (a) and therefore the Board need not make any findings on them.

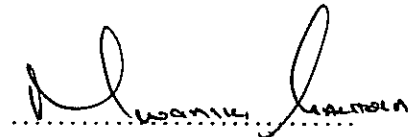
### **Ground 9**

This is not a ground but the Applicant's statement of Loss.

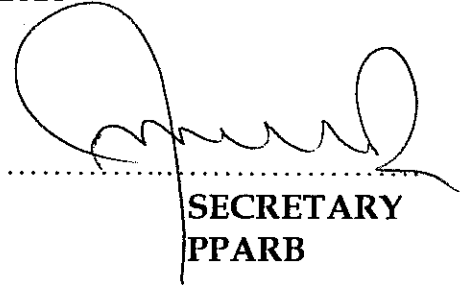
The Board has, on several occasions, held that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business and therefore each bidder carries its own costs.

In view of all the above, this Request for Review fails and is hereby dismissed. The Board orders, pursuant to Section 98 of the Act, that the procurement process may continue.

**Dated at Nairobi on this 21<sup>st</sup> day of October, 2010**

A handwritten signature in black ink, appearing to be 'Wanjiku Lalmola', written over a horizontal dotted line.

**CHAIRMAN  
PPARB**

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

**SECRETARY  
PPARB**