

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 41/2012 OF 17<sup>TH</sup> AUGUST, 2012**

**BETWEEN**

**DEKINGS TRADERS LIMITED.....APPLICANT**

**AND**

**MINISTRY OF NAIROBI METROPOLITAN  
DEVELOPMENT.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Ministry of Nairobi Metropolitan Development in the matter of Tender No. MONMED/38/2011-2012 for Design/Build of a Partitioning Solution for Ministry of Nairobi Metropolitan Development Employees on the 19<sup>th</sup> and 20<sup>th</sup> Floor of Ambank House, Nairobi.

**BOARD MEMBERS PRESENT**

Mr. P.M. Gachoka	-	Chairman
Amb. Charles Amira	-	Member
Eng. Christine Ogut	-	Member
Mr. Sospeter Kioko	-	Member.

### **IN ATTENDANCE**

- Ms. Pauline Opiyo - Ag. Secretary  
Ms. Judy Maina - Secretariat.

### **PRESENT BY INVITATION**

#### **Applicant – M/s Dekings Traders Ltd**

- Mr. Isaac Owuor - Advocate  
Mr. Dedan Gichinga - Director

#### **Procuring Entity – Ministry of Nairobi Metropolitan Development**

- Ms. Naomi Githui - State Counsel  
Eng. John N. Maina - Secretary, Metropolitan Development  
Mr. James Kairu - ADSCM Services  
Mr. David Kinyae - SCM Officer  
Mr. W.K. Ndolo - Director of Administration

#### **Interested Parties**

- Ms. Hope Ochieng - Director, EASCO Africa Limited  
Mr. Simon Oguri - Designer, Bevaj Furniture Limited.

### **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

### **Advertisement**

Tender No. MONMED/38/2011-2012 for Design/Build of a Partitioning Solution for the Ministry of Nairobi Metropolitan Development employees on the 19<sup>th</sup> and 20<sup>th</sup> Floors of Ambank House was advertised in The Standard of April 25<sup>th</sup> 2012 and Daily Nation of April 30<sup>th</sup> 2012.

### **Closing/Opening**

The tender closed on 16<sup>th</sup> May, 2012 at 10.30 a.m. and the opening of Technical Bids was conducted at 11.15 a.m. The following five (5) firms had submitted their tenders as at the closing/ opening time:

1. M/s Dekings Traders Ltd
2. M/s Yellow House Limited
3. M/s Bevaj Furniture Limited
4. M/s Cementers Limited
5. M/s EASCO Africa Limited

## **EVALUATION**

The evaluation was conducted in three stages namely; preliminary evaluation, detailed technical evaluation and financial evaluation.

### **Preliminary Evaluation**

This was to determine bidders' compliance to the mandatory requirements of the tender as provided in the Appendix to Instructions to Bidders, Clause 2.7.1. The results of the Preliminary Evaluation were as shown in table 1.

**Table 1 - Preliminary Evaluation**

Preliminary Evaluation Results						
	Requirements	Bidders				
		1	2	3	4	5
1.	Certificate of Registration (or Incorporation)	P	P	P	P	P
2.	Registered place of business	P	P	P	P	P
3.	Office telephone	P	P	P	P	P
4.	V.A.T certificate	P	P	P	P	P
5.	P.I.N Certificate	P	P	P	P	P
6.	Provision of Bid Security	P	P		P	P
	Bid amount (KShs.1,000,000)	P	P	P	P	P
	Validity period (up to 13/09/2012 or 90 days from tender opening date.	P	P	P	P	P
	Remarks	C	C	C	C	C

**Key:**

P = Pass

F = Fail

C = Compliant

NC = Non-compliant

All the five (5) tenderers qualified for technical evaluation having met the preliminary requirements in the tender document.

**Detailed Technical Evaluation**

The tenders were evaluated against the criteria set in the Tender documents which were as indicated in table 2 hereafter.

**Table 2: Technical Evaluation criteria**

S/No.	Criteria	Max. Score	Min. Score
1	Design concept as it relates to efficiency, sustainability, energy saving	40	30
2	Bidders organization, Work plan, Innovation and Methodology to accomplish the objective	25	15
3	Bidders Technical Capability based on specific relevant experience related to the assignment and Qualifications and Competence of Key staff for the assignment	35	25
	<b>TOTAL SCORES (%)</b>	<b>100</b>	<b>70</b>

Only those technical bids meeting the minimum overall rating in addition to the minimum pass score on each criterion was to be shortlisted to have their financial proposal opened.

A score sheet for the detailed evaluation was developed from the above criteria as indicated in table 3.

Table 3: Detailed Technical Evaluation Score Sheet

CRITERIA	Max. Points	Min. to Pass 30	Bidders				
			1	2	3	4	5
<p><b>1. DESIGN CONCEPT AS IT RELATES TO EFFICIENCY, SUSTAINABILITY, ENERGY SAVING</b></p> <p><b>1.1 Comprehensibility of accommodation</b></p> <ul style="list-style-type: none"> <li>Specified offices are accommodate (5 marks – losing 0.5 marks for every office missed but not exceeding 2marks loss)</li> <li>Specified support/common rooms are accommodate(3 marks losing 0.5 marks for every support facility missed but not exceeding 1mark loss)</li> </ul>	8						
<p><b>1.2 Form and Function</b></p> <p><b>Theme:</b> Overriding theme in the entire design consistent with overall theme of the building, form and style of modern offices. (2 marks)</p> <p><b>Aesthetics:</b> State of the art solution with ultra modern look and fee. Effective use of desirable visual elements and creative use of internal finishes, fittings, fixtures and furniture. (3 marks)</p> <p><b>Style:</b> Appropriate form and style taking into account deployment of World class infrastructure and technological innovations. (2 marks)</p>	7						
<p><b>1.3 Function:</b></p> <p>Efficient layout and spatial resolution to enhance employee productivity and processes. (ratio of circulation/usable area &lt; 15%)</p>	5						
<p><b>1.4 Performance</b></p> <p>1.4.1 <b>Lighting &amp; ventilation system:</b> Meet/exceed standard requirements for visual, thermal and acoustic comfort (2 marks)</p> <p>1.4.2 <b>Energy saving system:</b> Meet/exceed standard requirement. Meet complex and diverse demands for lighting. (1 mark)</p> <p>1.4.3 <b>Natural lighting:</b> Meet the required day lighting levels and distribution on each workstation. (1 mark)</p> <p>1.4.4 <b>Indoor Air quality:</b> Deployment of strategies for indoor air quality, low VOC materials, use of live plants a carbon sinks, etc (1 mark)</p>	5						

<p><b>1.5 Sustainable Design Measures</b>  <b>1.5.1 Sustainable Measures:</b> Resource pooling, innovations in reuse, conservation and recycling of materials including; disposal mechanisms. (3 marks)  <b>1.5.2 Efficient use of Energy:</b> Utilization of energy efficient technologies. (2 marks)</p>	5					
<p><b>1.6 Compliance to</b></p> <ul style="list-style-type: none"> <li>• Government wide polities on office accommodation (2 marks – losing 0.5 marks of every office missed)</li> <li>• Officers’ grades of privacy specifications. (1 mark)</li> <li>• Space accessibility and connectivity requirements. (1 mark)</li> <li>• Security and safety requirements for employee, documents and installations? (1 mark).</li> </ul>	5					
<p><b>1.7 Structural Design</b>  <b>1.7.1 Innovativeness:</b> How creative are the proposed structural systems? (2 marks)  <b>1.7.2 Structural effectiveness:</b> Are the proposals structurally effective? (3 marks)  <i>Structural elements/use of existing structural system for optimal space use</i></p>	5					
<p><b>2. TECHNICAL EVALUATION CRITERIA: BIDDER'S ORGANIZATION, WORK PLAN, INNOVATION AND METHODOLOGY TO ACCOMPLISH THE PROJECT OBJECTIVE.</b></p>	Max. points 25					
<p><b>2.1 Bidder's overall organization</b> to carry out and deliver the works including organization and completeness of the management (4 marks – losing 0.5 marks for every office missed), design and site teams: Appropriate Organization structure: Functions and relationships.</p>	8					
<p><b>2.2 Work plan, task coverage</b> and resources allocation in Design, Construction and management (2 marks- is work plan realistic? (2 marks - Are all tasks considered? (1 mark -) Are adequate resources allocated for each task?</p>	5					
	Min. to Pass 15 points					

	<p><b>2.3 Innovations on</b></p> <ul style="list-style-type: none"> <li>▪ Resource utilization (1 mark - losing 0.5 marks for every office missed)</li> <li>▪ Implementation: Time reduction (2 marks - losing 0.5 marks for every office missed)</li> <li>▪ Technology, materials facilities and equipment (2 marks)</li> </ul>	5																														
	<p><b>2.4 Methodology for carrying out the works</b></p> <ul style="list-style-type: none"> <li>▪ Overview and understanding of the assignment (3 marks)</li> <li>▪ How much loss to employee work time (2 marks)</li> <li>▪ How much disruption to employee work environment (2 marks)</li> </ul>	7																														
	<p><b>3. TECHNICAL EVALUATION CRITERIA: FOR TECHNICAL CAPABILITY BASED ON SPECIFIC RELEVANT EXPERIENCE RELATED TO THE ASSIGNMENT AND QUALIFICATIONS AND COMPETENCE OF THE KEY STAFF FOR THE ASSIGNMENT</b></p>	Max. Points 35	Min. to Pass 25																													
	<p><b>Specific relevant experience</b></p> <p>5 points for every relevant project (design/build costing at least KShs.10 milling) undertaken by at least the bidder or a team leader in the last five years. Evidence of successful completion is a must</p>	15																														
	<p><b>Key personnel: Qualifications and competence</b></p>	5																														
	<p><b>1. Project Director/Team Leader:</b></p> <ul style="list-style-type: none"> <li>▪ Bachelors Degree in Civil/Structural Engineering or Architecture (2 marks)</li> <li>▪ Fifteen years experience in related assignments (3 marks)</li> </ul>																															
	<p><b>2. Lead consultant Design and Supervision Consultancy</b></p> <ul style="list-style-type: none"> <li>▪ Bachelors Degree in Civil/Structural Engineering or Architecture (2 marks)</li> <li>▪ Five years experience (1 mark)</li> </ul>	3																														



<b>3. Lead contractor/Construction Administration</b> <ul style="list-style-type: none"> <li>▪ Bachelors Degree in Civil/Structural Engineering or Architecture or Degree in Project/Construction Management (2 marks)</li> <li>▪ Five years experience (1 mark)</li> </ul>	3										
<b>4. Electronics/Communication Engineer</b> <ul style="list-style-type: none"> <li>▪ Bsc. in Electrical/Electronic Engineering (1 mark)</li> <li>▪ Five years experience in related assignments (1 mark)</li> </ul>	2										
<b>Building Services Engineer</b> <ul style="list-style-type: none"> <li>▪ Bsc. Electrical/Mechanical/Building Services Engineering (1 mark)</li> <li>▪ Five years experience in related assignments (1 mark)</li> </ul>	2										
<b>Quantity Surveyor/Cost Engineer</b> <ul style="list-style-type: none"> <li>▪ Bachelors Degree in Building Economic or Cost Engineering or Equivalent (1 mark)</li> <li>▪ Five years experience in related assignments (1 mark)</li> </ul>	2										
<b>Architect/Architectural/Interior Designer/Urban Designer</b> <ul style="list-style-type: none"> <li>▪ Degree in the specific area (2 marks)</li> <li>▪ Registered with a professional body with not less than five years experience in similar or relevant assignments (1 mark)</li> </ul>	3										

Based on the above score sheet, each tenderer was allocated points accordingly. The summary of the detailed technical evaluation scores were as indicated in table 4 hereafter.

**Table 4: Summary of Technical Scores**

	<b>Criteria Bidder</b>	<b>Max</b>	<b>Min. to pass</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
1	Design concept	40	30	30	31	*27	*26	33
2	Organization, Work plan, Innovation and Methodology	25	15	16	15	17	*14	18
3	Bidders Technical Capability based on specific experience related to the assignment and Qualifications and Competence of Key personnel	35	25	30	29	27	26	33
	<b>TOTAL SCORES (%)</b>	<b>100</b>	<b>70</b>	<b>76</b>	<b>75</b>	<b>*71</b>	<b>*66</b>	<b>84</b>

**Key:**

\* Failed to attain minimum required

**Conclusion**

Out of the five who qualified for technical evaluation, three were found to be responsive having attained the minimum pass mark of 70% and the minimum in each of the sub-criteria as per the tender documents.

**Recommendations**

Therefore, the evaluation committee recommended that the tenders from tenderers Nos.1, 2 and 5 i.e. Dekings Traders Ltd, Yellow House Ltd and EASCO Africa Ltd to proceed to the next step of financial evaluation.

**Opening of Financial Bids**

The Tender Committee during its Meeting No. 37/2011-2012 discussed and approved the opening of the financial proposals for Bidders No 1, 2 and 5 having

attained the 70% and above technical score in addition to meeting the minimum for each sub-criterion.

The opening of the financial bids of the three bidders was done on 13<sup>th</sup> June 2012 in the presence of their representatives. The bids were recorded as shown in the table hereafter:

**Table 5: Financial Bids**

Bidder No.	Name	Bid Amount (Kshs)
1.	Dekings Traders Limited, P.O. Box 67156- 00200, Nairobi	28,222,828.27
2.	Yellow House Limited, P. O. Box 4609-01002, Thika	55,004,310.00
5.	EASCO Africa Limited, P.O. Box 8746 - 00200, Nairobi	42, 916, 957.14

The financial bids were thereafter forwarded to the evaluation committee for action. The financial evaluation exercise was conducted between 14<sup>th</sup> and 22<sup>nd</sup> June, 2012.

## **Financial Evaluation**

### **General Observations:**

1. There was significant discrepancy on the items designed for and priced. It was noted that the three bidders all provided for and priced only two items: Builders' works and professional/consultancy fees. Further, only two bidders priced seven items i.e. Preliminaries, Air-conditioning, Firefighting, Electrical works, Furniture, Provisional sums and VAT. Only one bidder priced ICT work.
2. The range between the highest quoted price and the lowest was Kshs 26,386,015.50.

3. The tender documents allowed for a lot of flexibility in design and each price was evaluated for its relationship to the design proposal.

### Specific Observations:

#### Bidder 1

- Very elaborate in their documentation
- Propose to use hollow block walling for the partitions
- Has not provided for VAT but indicated that it is built in the rates
- Has an arithmetic error of Kshs **949,773.77** (3.37%) to their advantage having quoted Kshs 28,222,828.27 against the evaluated price of Kshs 27,273,054.50.

#### Bidder 2

- A lot of the items in the document were confusing, mixed up and misleading e.g a door description requiring a Kenya Airways logo on it.
- Professional fees is given as lumpsum and has no relationship to the tender sum
- Has not provided for VAT
- Has an arithmetic error of Kshs **1,345,240** (2.4%) to their advantage having quoted Kshs 55,004,310.00 against the evaluated price of Kshs 53,659,070.00.

#### Bidder 5

- Were very elaborate in their documentation, designed for and priced all the items
- Provided for A/C Unit and even videoconferencing facilities
- Had an arithmetic error of Kshs 522,510.45(1.2%) to their advantage having quoted Kshs 42,916,957.14 against the evaluated price of Kshs 42,394,432.55.

## Comparison and Ranking of Bids

It was apparently difficult to compare the bid in light of the observations above. For evaluation purposes and ease of comparison the evaluation team resolved to deal with the significant discrepancy as follows;

- For items where two bidders priced an item, the average of the two was fixed for the bidder that never priced
- For items where only one bidder quoted the item was omitted from that bidder.

Table 6 shows how the tenderers performed after the moderation to uniformity.

**Table 6: Financial Evaluation**

S/No	Item description	Bidder No. 1	Bidder No. 2	Bidder No. 5
1.	Preliminaries	*1,250,000.00	1,040,000.00	830,000.00 (*655,000.00)
2.	Builder's works(19 <sup>th</sup> and 20 <sup>th</sup> floor)	17,026,650.00 (*17,031,903.00)	41,544,590.00 (*47,890,030.00)	13,658,426.00 (*13,437,,426)
3.	Air conditioning	*1,976,000.00		*3,344,000.00
4.	Firefighting	*140,000.00	150,000.00	*160,000.00
5.	Electrical works/installations	4,307,400.00 (*5,494,600.00)	3,946,600.00	3,585,800.00 (*4,387,000.00)
6.	Provisional sums	*250,000.00	375,000.00	*500,000.00
7.	Consultancy/Professional fees	2,223,904.50( 9% of tender sum,*2,330,325.27)	7,114,280.00	2,222,448.41 (10.8% of tender sum (*3,515,587.85)

8.	SUBTOTAL	26,933,954.50	55,170,470.00	23,300,674.41
9.	VAT @ 16%	(4,351,288.50 all inclusive in rates above)	8,827,275.00	3,728,107.91 (*5,919,580.30)
10.	TOTALS	26,933,954.50	63,997,745.20	27,028,782.32
11.	Ranking	1	3	2

Key \* price as quoted by the bidder

#### Observations:

The range between the highest and lowest evaluated bids is Kshs 37,063,790.70.

The lowest and second lowest are quite competitive with a margin of Kshs 94,827.82

#### Conclusion

The tenderers' rates are reasonable, competitive and within the market rates. The Evaluation team therefore recommends the tenderer with the lowest evaluated bid on common items for negotiations and detail design which will include but not limited to: -

- i. A discussion of the design proposal
- ii. The proposed methodology (work plan), and
- iii. Any suggestions made by the tenderer to improve the Terms of Reference.

The agreed work plan and final design will then be approved and form part of the Contract.

#### Recommendation

From the above, the Evaluation Committee recommends for acceptance the bid from the lowest evaluated tenderer, M/S Dekings Ltd of P.O. Box 67156-00200

Nairobi, at the evaluated price of Kenya shillings twenty six million nine hundred and thirty three thousand nine hundred fifty four and fifty cents (Kshs 26,933,954.50) only.

#### **TENDER COMMITTEE DECISION**

The Ministerial Tender Committee at its Meeting No. 1/212-2013 held on 26<sup>th</sup> July, 2012 considered the evaluation report for Tender No MONMED/38/2011-2012 and upon deliberation, rejected the Evaluation Committee's recommendation that Bidder No. 1 (M/s Dekings Traders Limited) be awarded the contract because they did not provide an optimum solution as noted above. The Tender Committee observed that Bidder No. 5 (M/s EASCO Africa Limited) was the lowest evaluated bidder having offered an optimum solution to all requirements of the tender. Subsequently, the Tender Committee awarded the Tender to M/s EASCO Africa Limited, P.O. Box 8746- 00200, Nairobi, at a tender sum of Kshs 30,832,154.50, net of ICT Installation, Fire Fighting and Air Conditioning quotes.

The successful and unsuccessful bidders were notified of the Tender Committee decision via letters dated 3<sup>rd</sup> August, 2012.

## **THE REVIEW**

The Applicant, Dekings Traders Limited lodged this Request for Review on 17<sup>th</sup> August, 2012 against the decision of the Tender Committee of Ministry of Nairobi Metropolitan Development in the matter of Tender No. MONMED/38/2011-2012 for Design/ Build a partitioning solution for Ministry of Nairobi Metropolitan Development on the 19<sup>th</sup> and 20<sup>th</sup> Floor of Ambank House.

The Applicant was represented by Mr. Isaac Owuor, Advocate while the Procuring Entity was represented by Ms. Naomi Githua, State Counsel. The Interested Candidates present were M/s EASCO Africa Limited represented by Ms. Hope Ochieng and M/s Bevaj Furniture Limited represented by Mr. Simon Oguri.

The Applicant requested the Board for the following orders:

- 1. That the decision of the Procuring Entity is illegal and the same be annulled in whole.**
- 2. That the Board be pleased to award the contract to the Applicant**
- 3. That the Procuring Entity be condemned to pay costs of this Review to the Applicant.**

In its request for review, the Applicant has raised five (5) grounds of review which the Board deals with as follows:

**Ground 1- Allegations by the Applicant that its bid was accepted by the Procuring Entity.**

This is a general statement by the Applicant not supported by any breach of the Act, the Regulations or the Tender Document. The Board therefore need not make any findings or comments on it.



### **Grounds 2 and 3: Breach of Regulation 11(2) and Section 82(5) of the Act**

The above grounds have been consolidated as they raise similar issues regarding the tender evaluation process and the subsequent award of the contract.

The Applicant submitted that the Procuring Entity acted in breach of Regulation 11(2) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as “the Regulations”) by modifying submissions with respect to the recommendations by the Evaluation Committee that the tender be awarded to it. It stated that the Tender Committee rejected the recommendation of the Evaluation Committee without justifiable and objective reasons in contravention of Regulation 11(2) (b). It further submitted that the Tender Committee’s act of modifying the recommendation of the Evaluation Committee amounted to carrying out an evaluation which, under the Regulations, is not among the roles of the Tender Committee. In support of its contention, it referred the Board to its decision in *Application Number 41/2009* where the Board, faced with similar facts, ruled that the Tender Committee acted irregularly and contrary to the provisions of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as “the Act”) and the Regulations.

With regard to the breach of Section 82 (5) of the Act, the Applicant submitted that the Procuring Entity breached the stated provision of the Act by failing to award the contract to the responsive proposal with the highest score determined by the Procuring Entity by combining, for each proposal, the technical and financial scores in accordance with the procedures and criteria set out in the request for proposal under Sections 82(2) and 82(3) of the Act and the results of any additional methods of evaluation under Section 82(4) of the Act as read together with Clause 3.27 of the Tender Document. It stated that, as a consequence whereof, it unfairly lost the tender.

It urged the Board to find merit in its application, nullify the award to the Successful Bidder and substitute the decision of the Procuring Entity by awarding the contract to it.

In response, the Procuring Entity submitted that it relied entirely on its memorandum of response as filed with the Board on 27<sup>th</sup> August 2012.

The Procuring Entity submitted that it invited tenders for design/build of a partitioning solution for its employees on 19<sup>th</sup> and 20<sup>th</sup> Floor, Ambank House, Nairobi. The design brief in the Tender Document intended to realize an appropriate partitions and furniture solution that enhances productivity of individual officers.

The Procuring Entity submitted that the Applicants bid failed to offer complete office solution in that it had omitted key fundamental requirements of the tender such as furniture. It argued that it was therefore in order for the Tender Committee to reject the bid pursuant to the provisions of Regulation 10(2) (a) as one of the functions of the Tender Committee under the above Regulation is to *“review, verify and ascertain that all procurement and disposal has been undertaken in accordance with the Act, the Regulations and the terms set out in the tender documents”*.

Further, the Procuring Entity submitted that, in rejecting the Applicant’s bid, the Tender committee was guided by the provisions of Regulation 11(1) (b) which gives it powers to reject submissions with reasons.

The Procuring Entity averred that the Ministerial Tender Committee, guided by the provisions of Regulation 11 (1) (b), rejected the submitted evaluation report, recommending the award of the tender to the Applicant for the reason that the Applicant did not cost for the furniture solution in its financial proposal set out in the drawings as per the tender documents. It stated that the Tender

Committee, upon rejecting the submission as mentioned above, reported to the Accounting Officer vide the Minutes of Tender Committee Meeting No 1/2012-2013 as required under Regulation 11(3).

On the alleged breach of Section 82 (5) of the Act, the Procuring Entity submitted that the tender under review was an open tender guided by part V of the Act and not a Request for Proposal under which Section 82(5) applies. It therefore submitted that it was not possible to breach Section 82(5) under the circumstances. The Procuring Entity took issue with the Tender document filed by the Applicant in its request for review in that it differed from the one sold to the Applicant and which the Applicant had used in submitting its tender.

On its part, an interested party M/s EASCO Africa Ltd submitted that the tender was for a complete solution and therefore the Procuring Entity was right in awarding the tender to it having had the best design for the solution. It took issue with the Applicant's grounds on costs incurred and stated that all bidders incur costs in the course of looking for business without assurance of being successful.

The Board, after listening carefully to the submissions of the parties and having perused the documents presented before it, makes the following observations and findings:-

The Board notes that:

1. The tender was for design/build of a partitioning solution for the offices of the Procuring Entity.
2. A total of five (5) bidders submitted their bids.
3. The evaluation was carried out in 3 stages namely Preliminary, Technical and Financial stages.

4. At the technical evaluation stage, three bidders were found to be responsive having attained the minimum pass mark of 70%. Two bidders namely Bevaj Furniture and Cementers Ltd were knocked out at this stage for failure to meet the minimum pass mark score. The remaining three proceeded to the financial evaluation stage.
5. The details of the financial bids were as tabulated below:-

**Table 7: Details of Financial Bids**

S/No	Item description	Bidder No 1	Bidder No 2	Bidder No 5
1.	Preliminaries	1,250,000.000	-	830,000.00
2.	Builder's works(19 <sup>th</sup> and 20 <sup>th</sup> floor)	17,031,903.00	38,525,750.00	13,658,426,
3.	Air conditioning	1,308,000.00	-	3,344,000.00
4.	Mechanical installations	808,000.00	-	-
5.	Firefighting	4,307,400.00	-	160,000.00
6.	Electrical works/installations		-	3,585,800.00
7.	ICT Installations	-	-	8,110,163.00
8.	Furniture / fixture and fittings	-	8,476,830	2,796,200.00
9.	Provisional sums	250,000.00	-	500,000.00
10.	Consultancy/Professional fees	2,330,325.27	7,114,280.00	3,515,587.85
11.	VAT	(inclusive in rates)	Not indicated	*5,919,580.30
12.	TOTALS	27,273,054.5	54,116,860	42,419,757.15
13.	<b>Figure in the Form of Tender</b>	<b>*28,222,828.27</b>	<b>*55,004,310.00</b>	<b>*42,916,957.14</b>

**KEY:**

Bidder1- Dekings Traders Ltd

Bidder 2- Yellow House Limited

Bidder 5- EASCO Africa Ltd.

6. Some bidders had not quoted for some components as illustrated above. As a result, there was significant discrepancies on the items designed for and priced making it difficult for the Procuring entity to carry out evaluation on a like to like basis.
7. For evaluation purposes and ease of comparison the evaluation team resolved to deal with the significant discrepancies as follows;
  - For items where two bidders priced an item, the average of the two was fixed for the bidder that never priced
  - For items where only one bidder quoted the item was omitted from that bidder.
8. The following table shows how the tenderers performed after the moderation to uniformity.

**Table 8: Financial Evaluation**

S/No	Item description	Bidder No. 1	Bidder No. 2	Bidder No. 5
1.	Preliminaries	*1,250,000.00	1,040,000.00	830,000.00 (*655,000.00)
2.	Builder's works(19 <sup>th</sup> and 20 <sup>th</sup> floor)	17,026,650.00 (*17,031,903.00)	41,544,590.00 (*47,890,030.00)	13,658,426.00 (*13,437,,426)
3.	Air conditioning	*1,976,000.00		*3,344,000.00
4.	Firefighting	*140,000.00	150,000.00	*160,000.00
5.	Electrical works/installations	4,307,400.00 (*5,494,600.00)	3,946,600.00	3,585,800.00 (*4,387,000.00)
6.	Provisional sums	*250,000.00	375,000.00	*500,000.00
7.	Consultancy/Professional fees	2,223,904.50( 9% of tender sum,*2,330,325.27)	7,114,280.00	2,222,448.41 (10.8% of tender sum (*3,515,587.85)

8.	Subtotal	26,933,954.50	55,170,470.00	23,300,674.41
9.	VAT @ 16%	(4,351,288.50 all inclusive in rates above)	8,827,275.00	3,728,107.91 (*5,919,580.30)
10.	Totals	26,933,954.50	63,997,745.20	27,028,782.32
11.	Ranking	1	3	2

Key \* price as quoted by the bidder

The Evaluation Committee then recommended the award of the contract to the Applicant M/s Dekings Traders Ltd at the evaluated price of Kshs 26,933,954.50 being the lowest evaluated bidder.

9. In its meeting no. 1/2012-2013 held on 26<sup>th</sup> July 2012, the Ministerial Tender Committee rejected the Evaluation Committee's recommendation for award of the contract to the Applicant for reason that the Applicant had not provided the optimum office solution.

10. The Tender committee then awarded the tender to bidder number 5 - M/s EASCO Africa Ltd at the moderated sum of Kshs 30,832,154.50.

From the foregoing, the question which arises for the Board's determination is whether the evaluation process was objective and if the same was carried out in accordance with the law. The second issue is to determine whether the actions of the evaluation committee and the tender committee were in compliance with their respective roles as set out in the Act and the Regulations.

Firstly, it is clear to the Board that from the way the Tender Documents were formulated, the specifications and evaluation criteria, particularly the financial evaluation criteria were not clear and therefore could not lead to an objective evaluation. The Board notes that, to cure the anomaly, the Procuring Entity resorted to a strange method of moderating the offers submitted by the bidders.

This rendered the financial proposals submitted by the bidder superfluous leading to award of the tender at prices different to what the bidders had offered. This in itself rendered the whole process fundamentally flawed.

With regard to the action by the Tender Committee in rejecting the submission of the Evaluation Committee, the Board takes cognizance of the provisions of Regulation 11 which provides as follows;

Regulation 11:-

*“(1) In considering submissions made by the procurement unit or evaluation committees, the tender committee may-*

*(a) approve a submission ;or*

*(b) reject a submission with reasons; or*

*(c) approve a submission, subject to minor clarifications by the procurement unit or evaluation committee.*

*(2) The tender committee shall not-*

*(a) modify any submission with respect to the recommendations for a contract award or in any other respect;*

*(b) reject any submission without justifiable and objective reasons;*

*(3) where the tender committee rejects the recommendation of the evaluation committee, the decision shall be reported to the head of the procuring entity or to the accounting officer.*

*(4) .....*”

In this case, the Tender Committee, in rejecting the recommendations of the Evaluation Committee did not follow the above provisions of the Act. The Tender Committee ought to have sent back the recommendations of the Evaluation Committee with remarks for the action of the Evaluation Committee as required by Regulation 11. As already pointed out, the Evaluation Committee had recommended the Applicant for award of the tender. However, the Tender

Committee engaged in an exercise that amounted to evaluation of the tender which is not one of its roles as set out in the Regulations. To this end, the Board holds that the Tender Committee, by recommending Bidder No. 5 for the award of contract, acted in breach of Regulation 11(2) (b).

Consequently, this limb of the appeal succeeds.

Turning to the alleged breach of Section 82(5) of the Act, the Board finds that the tender under review was carried out as an open tender under Part V of the Act and not as a Request for Proposals under Sections 76-86 of the Act.

Consequently, the Board holds that that the allegation that the Procuring Entity breached Section 82(5) of the Act is misplaced and hence not sustainable.

#### **Grounds 4 and 5 – Statement of Loss**

These grounds have been consolidated as they raise similar issues related to losses allegedly suffered / to be suffered by the Applicant.

The Applicant submitted that as a result of the Procuring Entity's actions, it stood to suffer severe loss and damage as follows:-

- a. Loss of earnings and profit it would have made from the tender;
- b. It has been unfairly denied an opportunity of undertaking the contract and hence has lost goodwill;
- c. It is exposed to the risk of claims arising from potential breaches of other contracts it has entered into with its workers and other suppliers in anticipation of the tender; and
- d. It has expended considerable amounts of money towards preparing and making itself ready for the entire tender process.



The Applicant further stated that by reason of the Procuring Entity's actions, the public in general and the Procuring Entity in particular stands to suffer severe loss and damage as follows:

- a) Loss of benefit of savings arising from the Applicant's cheap services; and
- b) Loss of benefit of the Applicant's vast experience

In response, the Procuring Entity submitted that the allegations of the Applicant suffering severe loss and damage are baseless in that:-

- a) The tendering process was a competition, where the lowest evaluated bidder was to be awarded the tender,
- b) Not unless the Applicant had prior information that he would be awarded the tender, the issue of anticipation of winning the tender should not arise,
- c) The Applicant did not meet the term set out in the tender documents mentioned in paragraph 1 above.
- d) The Applicant under Regulation 39 (1) had to pay for the tender documents and prepare the tender documents for submission.

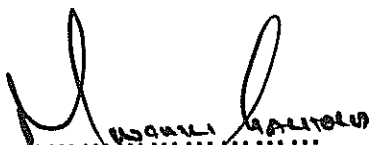
With regard to the issue of costs borne by bidders in the course of tendering, the Board has held severally that tendering costs are commercial business risks borne by parties in the course of doing business. As such, each party should bear its own costs.

Taking all the above into consideration, the Board finds that the evaluation process and particularly the financial evaluation were fundamentally flawed. The Request for Review succeeds and the Board orders, pursuant to Section 98 of the Act that:-

1. The award of contract to the successful bidder be and is hereby annulled
2. The Procuring Entity may retender.

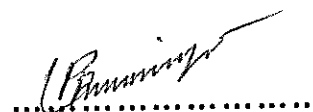
There are no orders as to costs.

Dated at Nairobi on this 14<sup>th</sup> day of September, 2012.



CHAIRMAN

PPARB



AG. SECRETARY

PPARB