

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 54/2012 OF 24<sup>TH</sup> OCTOBER, 2012**

**BETWEEN**

**BAGS & BALERS MANUFACTURERS (K) LTD.....APPLICANT**

**AND**

**KENYA SEED COMPANY LTD.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Kenya Seed Company Limited in the matter of Tender No. KSC/P/T-(11) 2012/2013/2014 for supply of Printed Paper Packaging Material.

**BOARD MEMBERS PRESENT**

|                    |   |          |
|--------------------|---|----------|
| Mr. P.M. Gachoka   | - | Chairman |
| Mr. Sospeter Kioko | - | Member   |
| Ms. Judith Guserwa | - | Member   |
| Mr. Akich Okola    | - | Member   |
| Mrs. Loise Ruhiu   | - | Member   |

**IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

**Applicant – M/s Bags & Balers Manufacturers (K) Ltd**

Mr. Vilen Joshi                      - General Manager

**Procuring Entity – Kenya Seed Company Limited**

Ms. Millicent Ng’etich        - Legal Officer

Mr. Lucas O. Nyangweso - Head of Procurement

**Interested Candidate – Bag & Envelope Converters Ltd**

Ms. Maryanne Murimi        - Advocate, Ashfords & Co. Advocates

Mr. Gurpreet Singh            - General Manager

### **Other Interested Candidates:**

Mr. Vijay Chandaria            - Director, Dune Packaging Ltd

Mr. Stephen Kithengi            - Sales department, Dune Packaging Ltd

## **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**

### **Invitation to tender**

The Procuring Entity invited prequalified bidders to participate in the Tender No. KSC/P/T – (11) 2012/2013/2014 for supply of printed paper packaging material on 24<sup>th</sup> August, 2012 with the closing date given as 29<sup>th</sup> August, 2012.

### **Closing/Opening:**

At the time of tender closing, the following five firms had submitted their bids:

1. Dune Packaging Ltd
2. Bag & Envelope Converters
3. Polythene Industries Ltd
4. Bags & Bales Manufacturers (K) Ltd
5. Raiply Woods Ltd

Out of the five tenderers, the first four bidders quoted for Printed Paper Packaging while the fifth one M/s Raiply Woods is the only bidder that quoted for Printed Polybags.

## **EVALUATION**

The evaluation was carried out by an Evaluation Committee of three members under the chairmanship of Mr. Sila Yego. The evaluation was undertaken in three stages namely; Preliminary, Technical and Financial evaluation.

## PRELIMINARY EVALUATION

Tenderers were examined on the following mandatory parameters to determine their responsiveness;

1. Bid Bonds 2%
2. Sample.
3. Colour reflecting Our colour
4. Proof of Machinery
5. Proof of dedication of a single line for processing our materials.
6. Confirm that prices will be valid for two years

The results of the Preliminary examination are shown in table 1.

**Table 1: Preliminary Examination Results**

| Preliminary Requirement                                            | suppliers                                |                                 |                        |                                                                                 |
|--------------------------------------------------------------------|------------------------------------------|---------------------------------|------------------------|---------------------------------------------------------------------------------|
|                                                                    | Bags & envelop                           | Dune packaging                  | Bags & Balers          | Polythene industries                                                            |
| Bid bond 2%                                                        | √                                        | √                               | √                      | √                                                                               |
| Sample                                                             | √                                        | √                               | √                      | Samples provided is clear polythene bales and do not conform to our requirement |
| Colour reflecting Our colour                                       | √                                        | √                               | √                      | ×                                                                               |
| Proof of Machinery                                                 | √                                        | Subcontracts to Bags and balers | √                      | ×                                                                               |
| Proof of dedication of a single line for processing our materials. | Has provided two lines for our materials | ×                               | Provided only one line | ×                                                                               |
| Confirm that prices will be valid for two years                    | √                                        | √                               | √                      | ×                                                                               |
| Remarks                                                            | Responsive                               | Not Responsive                  | Responsive             | Not Responsive                                                                  |

## **Observations**

After further scrutiny as indicated in table 1, the following firms listed were not responsive and were therefore disqualified.

### **Dune packaging**

- Sub contracts its works to Bags and balers, it's evident from the orders issued to bags and balers attached. Sub contracting is a process not allowed for these products due to security requirements. Consequently they were disqualified because they can't be held accountable and liable for any misdeeds.

### **Polythene Industries**

- Samples provided is clear polythene bales and do not conform to our requirement, this is evident from the samples provided that the company only deals with polythene products but not printed paper.
- They didn't provide proof for machinery and dedication of single line for processing our materials. They were not responsive of the requirements and were therefore disqualified

The following two firms were found to be responsive hence qualified for technical evaluation;

1. Bag & Envelop Converters
2. Bags and Balers Ltd

## TECHNICAL EVALUATION

At this stage, the Evaluation Committee discussed and agreed to attach a weighted score of 80% and 20% to technical and financial evaluation respectively.

The evaluation criteria was extracted from the mandatory requirement and added security and flexibility aspects as set out in the tender document and members agreed to use scoring method for evaluation and allocated points to each criterion as summarized and results shown in table 2 below.

**Table 2. Technical Evaluation Results Printed paper packaging materials**

| Technical ✓<br>Specification                                   | Weighted<br>Points<br>(Max ) | Suppliers & scores                                                                                                                                                                           |                                                                                                                          | Remarks                                                                                                                           |
|----------------------------------------------------------------|------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------|
|                                                                |                              | Bags & envelop                                                                                                                                                                               | Bags & Balers                                                                                                            |                                                                                                                                   |
| Paper duplex<br>and colour                                     | 15                           | 15<br>(Printed sample<br>provided)                                                                                                                                                           | 10<br>(Plain sample<br>provided)                                                                                         |                                                                                                                                   |
| Weights and<br>Grammage                                        | 15                           | 15                                                                                                                                                                                           | 15                                                                                                                       |                                                                                                                                   |
| Dimensions in<br>terms of length,<br>width and height          | 10                           | 10                                                                                                                                                                                           | 10                                                                                                                       |                                                                                                                                   |
| Flexibility to<br>change varieties<br>in production<br>process | 20                           | 20<br>Has two standing<br>production lines for the<br>company and has<br>enormous experience<br>and efficiency in<br>flexibility to any<br>emergency urgent<br>changes                       | 15<br>Needs to be advised<br>in good time to<br>change of urgent<br>requirement and<br>their flexibility is not<br>known | It's<br>important<br>consideratio<br>n since the<br>marketing<br>orders arise<br>and<br>flexibility to<br>change is of<br>essence |
| Security features<br>on materials                              | 20                           | 20<br>Has incorporated<br>security features such as<br>bar codes to the<br>packaging and therefore<br>is a measure of<br>protection against<br>faking of seed through<br>packaging materials | 10<br>No detail information<br>provided<br>On security features<br>and security of<br>stencils                           | A<br>requirement<br>to guard<br>against fake<br>seeds<br>packaging                                                                |
| <b>TOTAL</b>                                                   | <b>80</b>                    | <b>80</b>                                                                                                                                                                                    | <b>60</b>                                                                                                                |                                                                                                                                   |

### Observation

The committee noted that both the suppliers scored above average and hence proceed to financial evaluation.

## FINANCIAL EVALUATION

Financial evaluation was performed using the formula

$$SF = \frac{20 \times FM}{F}$$

Where SF = Financial score

FM = Lowest Bid

F = Supplier's quote

The 20 % financial weight was applied. The weighted technical and financial scores were summarized and ranked as shown in table 3.

Table 3: Combined Technical and Financial scores

| TENDERER                      | QUOTED PRICE<br>KSHS | WEIGHTED<br>TECHNICAL<br>SCORE | WEIGHTED<br>FINANCIAL<br>SCORE | TOTAL | RANK | REMARKS |
|-------------------------------|----------------------|--------------------------------|--------------------------------|-------|------|---------|
| Bags & Balers                 | 30,689,888.00        | 60                             | 20                             | 80    | 2    |         |
| Bags & envelope<br>Converters | 34,341,292.50        | 80                             | 17.87                          | 97.87 | 1    |         |

## **Printed Polybags**

The committee noted that there was only one bidder for the supply & delivery of printed polypropylene woven bags and plain polybags.

The bidder is the previous supplier of the same material M/s Rai ply Wood Ltd

M/s Rai ply Wood Ltd met all the requirements including technical requirements having provided samples for the following varieties for:-

- |                  |           |
|------------------|-----------|
| 1. H 6213 X10Kgs | 2 Samples |
| 2. H 629 X10Kgs  | 2 Samples |
| 3. H614D X10Kgs  | 2 Samples |
| 4. H625 X10Kgs   | 2 Samples |
| 5. H614D X25Kgs  | 2 Samples |
| 6. H 6218 X25Kgs | 2 Samples |
| 7. H 629 X25Kgs  | 2 Samples |
| 8. H 6213 X25Kgs | 2 Samples |

The samples specification, colour, printed graphics, dimensions and barcodes met the specifications required

## **RECOMMENDATIONS**

The committee recommendations are tabulated in table 4 below:-

**Table 4: Recommendations**

| TENDER<br>ER<br>AWARD<br>ED | ITEMS<br>DESCRIPTION                     | UNIT<br>COST<br>INCLUSIV<br>E OF VAT<br>(Kshs) | PRICE<br>VALIDITY                                                                                                                  | TERMS OF<br>PAYMENT                           | REASONS FOR AWARD                                                                                                                                                                                                                                                                                                                                                   |
|-----------------------------|------------------------------------------|------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Bags and<br>Envelope        | 12x2kgs Balers                           | 24.07                                          | Valid for the next<br>2yrs                                                                                                         | 30 days<br>from the<br>date of the<br>invoice | *Lowest evaluated<br>* Has incorporated security<br>features such as bar codes to the<br>packaging and therefore is a<br>measure of protection against<br>faking of seed through packaging<br>materials<br>*Has two standing production<br>lines for the company and has<br>enormous experience and<br>efficiency in flexibility to any<br>emergency urgent changes |
|                             | 2kgs duplex<br>packets                   | 4.93                                           |                                                                                                                                    |                                               |                                                                                                                                                                                                                                                                                                                                                                     |
|                             | 24x2kgs Balers                           | 24.07                                          |                                                                                                                                    |                                               |                                                                                                                                                                                                                                                                                                                                                                     |
|                             | 1kgs duplex<br>packets                   | 4.93                                           |                                                                                                                                    |                                               |                                                                                                                                                                                                                                                                                                                                                                     |
| Rai Ply<br>Wood (K)<br>Ltd  | 50cm x 80cm<br>25kgs printed<br>polybags | 23.37                                          | Subject to subject<br>to negotiation in<br>case of escalation<br>of raw materials<br>prices ,fuel costs<br>and production<br>costs | 30 days<br>from the<br>date of the<br>invoice | *The sole bidder<br>* The previous suppliers<br>* Samples provided meets the<br>specifications required                                                                                                                                                                                                                                                             |
|                             | 40cm x 60cm<br>25kgs printed<br>polybags | 15.10                                          |                                                                                                                                    |                                               |                                                                                                                                                                                                                                                                                                                                                                     |

**Note:**

M/s Bag and Envelop Converters has to confirm whether the prices quoted are inclusive of transport cost as they did not specify in their tender documents.

**TENDER COMMITTEE DECISION**

The Tender Committee in its 3<sup>rd</sup> 2012/2013 Meeting held on 25<sup>th</sup> September, 2012 adopted the Evaluation Committee's recommendations and approved award as follows:

### Paper Seed packaging materials

| No | Item                       | Quantity Required    | Recommended Supplier      | Unit Price |
|----|----------------------------|----------------------|---------------------------|------------|
| 1. | 12 x 2 kgs paper Balers    | As and when required | Bag & Envelope converters | 24.07      |
| 2. | 24 x 1 kgs paper Balers    | “                    | Bag & Envelope converters | 24.07      |
| 3. | 2 kgs Duplex paper packets | “                    | Bag & Envelope Converters | 4.93       |
| 4. | 1kg Duplex paper packets   | “                    | Bag & Envelope Converters | 4.93       |

### Polybags packaging materials

| No | Item                                    | Quantity Required    | Recommended Supplier | Unit Price |
|----|-----------------------------------------|----------------------|----------------------|------------|
| 1. | Printed polybags 50 cm x 80 cm x 25 kgs | As and when required | Rai Plywoods Ltd     | 23.37      |
| 2. | Printed Polybags 40 cm x 60 cm x 10 kgs | “                    | Rai Plywoods Ltd     | 15.10      |

### THE REVIEW

The Request for Review was lodged on 24<sup>th</sup> October, 2012 against the decision of Kenya Seed Company Limited dated 25<sup>th</sup> September, 2012 in the matter of Tender No. KSC/P/T – (11)2012/2013/2014 for supply of Printed Paper Packaging Material.

The Applicant was represented by Mr. Vilen Joshi, General Manager while the Procuring Entity was represented by Ms. Millicent Ng’etich, Legal Officer. The Interested Candidates present were M/s Bag & Envelope Converters Ltd represented by Ms. Maryann Murimi, Advocate and M/s Dune Packaging Ltd represented by Mr. Vijay Chandaria.

The Applicant requested the Board for the following orders:

- 1. That this tender be awarded to us, because we are the cheapest in price.*
- 2. The evaluation of the tender was not done in accordance with the criteria set out in the tender document. If the criteria were applied by the Procuring Company, the applicant would have been declared the lowest evaluated bidder as it met all the tender conditions and offered the lowest price. Therefore the procuring entity breached Section 2 and 66 of the Act.*

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

#### **GROUND 1 & 2: Breach of Sections 2 and 66 of the Act**

The two grounds have been consolidated since they both relate to the evaluation process and award of the tender.

The Applicant averred that since there was a prequalification in April 2012, as a result of which it was invited to participate in Tender No. KSC/P/T-(11) 2012/2013/2014 in August 2012, the only criteria for award should have been the price. It stated that the tender document was delivered to it on 25th August, 2012 although it later admitted it received the documents on 21<sup>st</sup> August, 2012, and upon opening it, noticed that the deadline for submission was 29th August, 2012. The Applicant further stated that after noticing that one of the requirements

set out in the tender document was that a bidder had to produce printed samples of the bags, it called the Procuring Entity's offices in Kitale to inquire about the colours needed by the Procuring Entity on the bags, and was told to go to Kitale to see the samples of the colours. It averred that in light of the short period provided by the Procuring Entity for submission of the tenders, it was not feasible for it to travel to Kitale. The Applicant further stated that it asked for the colour code with a view to determining whether it could produce the bags, but was told by the Procuring Entity that it should just produce the bags according to the specification, and accordingly did its best to comply with this requirement by submitting plain samples which it thought were responsive to the Procuring Entity's needs.

It argued that regarding the other requirement in the tender document that a bidder needed to indicate a dedicated production line for the bags, it wrote to the Procuring Entity and informed it that, they were prepared to comply with this requirement, and invited the Procuring Entity to visit its factory to confirm this.

The Applicant stated that notwithstanding the time constraint for submission of the tenders, which was only four days, it nevertheless submitted its tender, and upon it being opened on the tender closing/opening date, its tender was the lowest-priced, and therefore, it should have won. On this premise, the Applicant prayed to the Board to order that the tenders be properly evaluated.

In response, the Procuring Entity submitted that in its pre-qualification tender document Ref. KSC/P/PREQ/P/2012/2013 - there was no listing of the requirements. It stated that all the five companies that applied for pre-qualification were all shortlisted based on the evaluation criteria as contained in the pre-qualification document which included: -

- i) List of services/items that the company deals in.
- ii) Company profile.
- iii) Copy of business registration certificate.
- iv) Copy of business PIN.
- v) Reference.
- vi) Letter from ones bankers confirming liquidity.
- vii) Valid tax compliance certificate.
- viii) Physical address/location.
- ix) Three (3) years audited accounts.

The Procuring Entity further submitted that the Invitation to Tender for this procurement Ref. KSC/P/T - (11) 2012/2013/2014 was issued out to all the five pre-qualified companies namely; Dune Packaging Limited, Bag & Envelope Converters, Bags & Balers Manufacturers Ltd, Lino Typesetters (K) Ltd and Ramco Printing Works Ltd.

It averred that in light of the importance of supplying farmers with genuine seeds for the purpose of ensuring food security in the country, it was imperative that the packaging for the seeds comply with its specifications. It stated that it was for this reason that it made the

attachment of samples, which complied with its colours, an evaluation criteria.

The Procuring Entity stated that it relied on the provisions of Section 31(1)(a), 31 (2) and 31(3) and (4) of the Public Procurement and Disposal Act 2005 (hereinafter referred to as “the Act”) in determining whether a person is qualified using the criteria and requirements set out in the tender document. It further stated that the criteria for evaluation as was specified in the tender document included the following: -

- i) Attach sample material for each item after reviewing our materials.
- ii) Colour reflecting our materials.
- iii) Proof of machineries.
- iv) Proof of security arrangements (delivery, handling of plates etc.).
- v) Proof for dedication of a single line for processing our materials.
- vi) Confirm that prices shall be valid for 2 years contract period.

In support of this claim, the Procuring Entity made reference to Clause 12 in the tender document on Tenderers eligibility and qualifications which states that tenderers shall provide documentary evidence of the tenders qualifications to perform the contract if his tender is accepted to the company's satisfaction. It also referred to Clause 23.3 which states that the company's evaluation of tender will take into account, in addition to the tender price, technical specifications.

It submitted that the Public Procurement and Disposal Regulations 2006 (hereinafter referred to as "the Regulations"), Regulation 49 (1) states that upon completion of the preliminary evaluation under Regulation 47, the Evaluation Committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document. It further stated that prequalification does not preclude Technical Evaluation and that price is the last consideration in an evaluation process.

It pointed out that the evaluation of the tender was based on the criteria as set out in the tender document page 35 of 36 where, amongst other criteria, tenderers were required to attach sample material for each of the items after reviewing the Procuring Entity's materials and that the sample material should reflect colour of its material. It argued that this condition was not met by the Applicant and that, therefore technically Bags and Balers Manufacturers (K) Limited were not responsive.

The Procuring Entity further stated that the other evaluation criterion was the requirement that a bidder should provide proof of availability of machinery with sufficient security features to ensure that the bags could not be forged. It argued that the Applicant did not meet these requirements, which was the reason for its disqualification.

Regarding the claim by the Applicant that bidders were given only four days within which to prepare and submit their bids, the Procuring Entity denied the claim and instead stated that the period given to bidders was fourteen days.

The Procuring Entity further submitted that the Applicant wrote to it on 8<sup>th</sup> October, 2012 before the conclusion of the tender process as by that time no official communication had been dispatched to the tenderer indicating whether one was successful or not. It argued that this contravenes Section 38 of the Act which states in subsection (1) (a), that no person who submitted a tender, proposal or quotation shall make any unsolicited communication to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders, proposals or quotations. It stated that this is also reinforced by clause 24.1 and 24.2 of the tender document.

An Interested Candidate M/s Bags & Envelopes Converters Limited, which was the Successful Bidder in this tender, and who is also the current supplier, submitted an affidavit dated 13<sup>th</sup> November, 2012 in opposition to the Request for Review. It supported the Procuring Entity and submitted that the procurement in question complied in every respect with the enabling provisions of the Act. It stated that pursuant to clause 25.2 of the Tender Document, the Procuring Entity takes into account not only the financial capability of the bidders, but also their technical capabilities and performance in determining the Successful Bidder. It further stated that a technical evaluation must be conducted on all the tenders submitted and that the price factor is the last consideration in awarding of tender. It submitted that it believes the technical and financial evaluations undertaken by the Procuring Entity ensured that it attained the best possible quality of goods as well as value for money. It urged the Board to take note that the Interested

Candidate was the immediate present provider of the said goods being procured to the Procuring Entity.

Another Interested Candidate M/s Dune Packaging Ltd in its written submission stated that part of the evaluation criteria was to attach sample material and colour reflecting each item after reviewing their materials. It stated that when it requested the Procurement office of the Procuring Entity to be provided with the same, its request was declined and was advised that their colour shades are blue and green. It submitted that despite the response it received, it still provided a sample bag with blue and green colour shades. It further submitted that the bidders were only given three days to prepare their tenders which included ensuring that all the documentation, samples, bank guarantee and other requirements are complied with. It stated that future tenders ought to provide bidders with adequate preparation time, samples and objective detailed evaluation criteria. It further stated that contrary to the claim by the Procuring Entity that it stated in its tender document that it would be sub-contracting to Bags & Bailers, there was no such statement in its tender document. It denied the claim by the Procuring Entity that bidders were given fourteen days to submit tenders and stated that in fact they were given only four days.

The Board has carefully listened to the submissions by the parties and considered the documents before it and makes the following decision

The Board notes that:-

1. The Procuring Entity advertised pre-qualification of tenderers for various categories including that of Printed Paper Packaging Materials (For Manufacturers only) and Polybags Plain and Printed which closed on 16<sup>th</sup> April, 2012.
2. The category for Printed Paper Packaging Materials attracted five bidders and all were prequalified namely; Dune Packaging Ltd, Bag & Envelope Converters, Bags and Balers Manufacturers (K) Ltd, Lino Typesetters Ltd and Ramco Printing Works Ltd.
3. In August, 2012, the Procuring Entity invited tenders from the pre-qualified tenderers under Tender No. KSC/P/T - (11) 2012/2013/2014 for Supply of Printed Paper Packaging Materials which closed and opened on 29<sup>th</sup> August, 2012. Five bidders that responded were; Dune Packaging Ltd, Bag & Envelope Converters, Polythene Industries Ltd, Bags and Balers Manufacturers (K) Ltd and Raiply Woods Ltd.
4. The received tenders were subjected to evaluation in three stages namely; Preliminary, Technical and Financial evaluation. Two bidders namely; Dune Packaging and Polythene Industries were disqualified at the Preliminary evaluation stage while Bags & Envelope Converters and Bags and Balers Manufacturers Ltd proceeded to Technical Evaluation. Raiply Woods Ltd is the only bidder that quoted for Supply of Printed Polypropolyne Woven bags and plain Polybags and met all the requirements.

5. At the Technical evaluation stage, the two bidders were awarded scores based on a criterion agreed upon by the Evaluation Committee and given a weighted score of 80% and both bidders qualified through to Financial Evaluation. The evaluation criteria used at this stage was extracted from the mandatory requirements and added security and flexibility aspects as set out in the tender document though this criteria was not explicitly provided in the tender document.
6. At the Financial Evaluation stage, the two bidders were evaluated and awarded scores with a weighted score of 20%. The bidder with the highest combined score was recommended and finally awarded the tender.
- 7 That the evaluation criteria provided in the tender document was as follows:
  - i) Attach sample material for each item after reviewing our materials.
  - ii) Colour reflecting our materials.
  - iii) Proof of machineries.
  - iv) Proof of security arrangements (delivery, handling of plates etc.).
  - v) Proof of dedication of a single line for processing our materials.
  - vi) Confirm that prices shall be valid for 2 years contract period.

Based on the foregoing, the matters for determination by the Board are:

1. Whether the specifications set out in the tender document were clear as required by Section 34 of the Act.
2. Whether the time for submission of tenders complied with the Act and the Regulations.
3. Whether the evaluation of the tenders was done in accordance with the criteria set out in the tender document.

Dealing with the first question framed above, namely, whether the specifications set forth in the tender document were clear, the Board notes that while the expressions "*Attach sample material for each item after reviewing our materials*" and "*Colour reflecting our materials*", might have been clear if in fact bidders were allowed to review the materials in question, and thus submit materials reflecting the colours required by the Procuring Entity, they became unclear in the circumstances of this case because, according to the evidence of the Applicant and that of one of the Interested Parties, that is, Dune Packaging, the opportunity to inspect the said materials was not availed to them by the Procuring Entity. This evidence has not been refuted by the Procuring Entity. Indeed, the only bidder who knew these colours was Bag & Envelop Converters, who testified that it knew the colours, which not a surprise given the fact that it was the current supplier. The other bidders were left to grope in the dark as to which shade of blue and/or green they should chose in order to satisfy this requirement by the Procuring Entity.

Section 34(1) of the Act is quite clear on what a procuring entity is supposed to do in this respect. It states that:-

*"The procuring entity shall prepare specific requirements relating to the goods, works, or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."*

The Board finds that the Procuring Entity breached the Section of the Act cited above by prescribing specifications which were vague to everybody, except to itself, and to the Successful Bidder, who enjoyed a privileged position by virtue of the fact that, unlike the other bidders, it was the current supplier and thus, privy to the colour scheme required by the Procuring Entity. This clearly resulted in a process in which competition was neither fair nor open as contemplated under Section 34(1) of the Act.

Regarding the question whether the Procuring Entity provided sufficient time to the bidders to put in their bids, the Board is satisfied that the Procuring Entity failed to comply with the statutory period set out in Section 55(1), and Regulation 54(5), respectively, which provide as follows:-

Section 55(1): *"The time allowed for the preparation of tenders must not be less than the minimum period of time prescribed for the purpose of this subsection"*.

Regulation 54 (5): *"The minimum time for the preparation of tenders for the purpose of section 73 of the Act shall be a period of fourteen days"*.

Although the Procuring Entity claimed during the hearing that it provided bidders with fourteen days within which to submit their bids, there was no documentary evidence to back this claim. To the contrary, the documentary evidence tendered by the Applicant and one of the Interested Parties, namely Dune Packaging contradicts this claim.

On the question of whether the Procuring Entity used the evaluation criteria set forth in the tender document, the Board on its own motion raised the issue with the Procuring Entity during the hearing of this Application. In particular, upon noting that the Procuring Entity had combined the technical scores with financial scores and awarded the tender to the bidder with the highest combined scores, the Board raised the issue with the Procuring Entity as to where in the tender document this formula was set out. The Procuring Entity was unable to provide a satisfactory answer. Upon examining the evaluation report, the Board determined that this formula was introduced by the evaluation committee during the technical and financial evaluation stages, and was not in the tender document. In the view of the Board, the use of the formula in evaluating the tenders amounted to introduction by the Procuring Entity of a new evaluation criterion in the evaluation process.

In view of the above, the Board finds that the Procuring Entity breached Section 66 (2) of the Act which states *"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used"*.

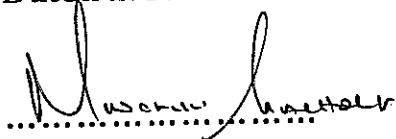
In view of the foregoing, the grounds of Review succeed.

Taking all the above matters into account, the Request for Review succeeds.

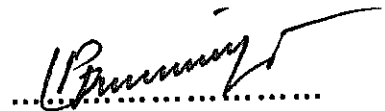
Accordingly, in exercise of the powers vested on it by Section 98(a) of the Act, the Board orders that the decision by the Procuring Entity awarding the tender to Bag & Envelope Converters be and is hereby annulled. The Procuring Entity may retender.

Each Party shall bear their own costs.

Dated at Nairobi on this 22<sup>nd</sup> day of November, 2012.



CHAIRMAN  
PPARB



AG SECRETARY  
PPARB