

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD

APPLICATION NO. 46/2015 OF 9TH SEPTEMBER, 2015

BETWEEN

TROPICAL TECHNOLOGY LIMITED APPLICANT

AND

MINISTRY OF INTERIOR &
CO-ORDINATION OF
NATIONAL GOVERNMENTPROCURING ENTITY

Review against the decision of the Ministry of Interior & National Coordination dated 3rd September, 2015 in the matter of Tender No. KPS/T/10/2015-2016 for Supply & Delivery of Motorized Vehicle Number Plate Blanks and Tender No. KPS/T/11/2015-2016 for Supply & Delivery of Motorized Vehicle Number Plate Hot Stamping Foil.

BOARD MEMBERS PRESENT

- | | | |
|------------------------------|---|----------|
| 1. Mr. Paul Gicheru | - | Chairman |
| 2. Mr. Peter B. Ondieki, MBS | - | Member |
| 3. Mr. Paul Ngotho | - | Member |
| 4. Mr. Hussein Were | - | Member |
| 5. Mrs. Rosemary K. Gituma | - | Member |

IN ATTENDANCE

1. Mr. Philip Okumu - Holding Brief for Secretary
 2. Ms. Shelmith Miano - Secretariat
-

PRESENT BY INVITATION

Applicant - Tropical Technology Limited

1. Alex Thangei - Advocate
2. Sarah Muturi - Lawyer
3. E. Wangari - Agent
4. P. Kabui - Agent
5. Quinto Shikuku - Agent

Procuring Entity - Ministry of Interior & National Coordination

1. Patrick Kariri - Director, Prisons
2. H. O. Wandera - D.S - Prisons
3. Maureen Mukula - CIP Prisons
4. Isaac Omogi - AD/SCM Prisons
5. Josphat Ituka - ACGP, Prisons
6. Ala Joyce - PSCMO, Ministry of Interior

Interested Parties

1. Albert Mumma - Advocate, EHA Hoffmann
2. Charles Agwara - Advocate, EHA Hoffmann
3. Justus Omollo - Advocate, EHA Hoffmann
4. Mbuthia Kinyanjui - Advocate, MIG International

5. Nelson Memma - Advocate, MIG International
6. Mugabe - Director, MIG International
7. Meshack Odera - Consultant, Manchester Outfitters
8. John Wanjohi - Manager, Safenet Technologies
9. Diana Sang' - Legal Assistant, Kipsang & Mutai Advocates (Observing)

BOARD'S DECISION

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

BACKGROUND

The Ministry of Interior and Coordination of National Government through the Kenya Prisons Service advertised the above tenders in both National and International media.

Advertisement

The tenders were advertised in the *Daily Nation* newspaper on 30th January 2015 and the *East African* news magazine of 31st January - 6th February 2015. The tenders were also uploaded in the Kenya Prisons Service website www.prison.go.ke and the Public Procurement Oversight Authority website.

Bidders were invited for a pre-bid conference which was held on 17th February, 2015 at Kenya Prisons Headquarters, Magereza House Amphitheatre, and was attended by 17 prospective bidders.

To mitigate some of the issues raised during the Pre-bid conference, an addendum copy was circulated to the public by advertisement on the *Daily Nation* newspaper on 20th February, 2015 and the *East African* news magazine of February 21st – 27th, 2015 and uploaded in the Kenya Prisons Service Website www.prison.go.ke

Closing/Opening:

The Tenders were closed and opened on 3rd March, 2015 at 10.00 a.m. at Kenya Prisons Service Amphitheatre and the closing was attended by representatives from participating firms. Thirteen (13) sets of both Technical and Financial tender documents for Tender No. KPS/T/10/2015-2016 (Number plate blanks) and 12 sets for Tender No. KPS/T/11/2015-2016 (Hot Stamping foils) were received. Only the Technical bids were opened as per the requirements of the tender document.

Request for Review No. 28/2015 of 25th June, 2015

Following notifications by the Procuring Entity vide its letters dated 11th June 2015 that the Applicant's bids in the above tenders were unsuccessful, the Applicant filed a Request for Review on 25th June 2015 which was later amended on 13th July 2015 being Application No: 28 of 2015 (Tropical

Technology Ltd. vs. Ministry of Interior and Co-ordination of National Government).

The Request for Review was heard by the Public Procurement Administrative Review Board and its decision delivered on 17th July 2015, the Board allowed the Applicant's Request for Review and directed the Procuring Entity to carry out a fresh re-evaluation of both tenders in strict compliance with the evaluation and award criteria set out in the tender documents. The Board further ordered the Procuring Entity to strictly comply with the Act and the Regulations made thereunder in re-evaluating the tenders.

The Evaluation, Negotiation, Inspection & Acceptance Committee was appointed by the Accounting Officer on 20th February, 2015. The committee comprised of officers from the Kenya Prisons Service, State Department for Co-ordination of National Government and National Transport & Safety Authority.

Preliminary Evaluation was carried out by the evaluation committee sitting at the Kenya Prisons Headquarters and it involved confirmation of mandatory requirements and coding of samples for forwarding to the Kenya Bureau of Standards (KEBS) for material testing. Seven (7) firms in Tender No. KPS/T/10/2015-2016 and 12 firms in Tender No. KPS/T/11/2015-2016 qualified past the preliminary evaluation stage and their samples taken to KEBS for testing.

The samples presented to KEBS in coded labels were tested and graded in accordance with the evaluation criteria set out in the tender document. Test results were communicated by KEBS in coded form. Six out of seven samples for Tender No. KPS/T/10/2015-2016 and all samples for Tender No. KPS/T/11/2015-2016 passed the minimum pass mark. Decoding of the samples was done by the evaluation committee and performance of each sample calculated in accordance with the weights given in the evaluation criteria. Qualifying firms were carried forward to the Financial Evaluation stage.

The financial bids opening conference was held on 15th April, 2015 at Kenya Prisons Headquarters Amphitheatre. It was attended by representatives of the 6 firms tendering for Tender No. KPS/T/10/2015-2016 (Number plate blanks) and the 12 firms tendering for Tender No. KPS/T/11/2015-2016 (hot stamping foils). During the conference, results for the technical performance and the prices quoted in the financial bids for these bidders were read out.

RE-EVALUATION

TENDER NO. KPS/ICB/10/2014-2017

SUPPLY AND DELIVERY OF MOTORIZED VEHICLE NUMBER
PLATE BLANKS

Bidder No	Bidder's Name	Bid Bond Amount US\$/Kshs.	Bank
1.	M/s Manchester Outfitters Ltd	US\$50,000	Diamond Trust Bank
2.	M/s MIG International Ltd	US\$50,000	Equity Bank
3.	M/s EHA Hoffmann International GmbH	US\$50,000	Standard Chartered Bank
4.	M/s Equip Agencies Ltd	Ksh.5,000,000	Rafiki Microfinance Bank
5.	M/s Kiwaka General Merchants Ltd	Kshs.5,000,000	Equity Bank
6.	M/s Tonnes C.A.R.D International GmbH	US\$50,000	Deutsche Bank Correspondence Bank CFC Stanbic
7.	M/s UTAL sp. z 0.0	US\$50,000	Dubai Bank
8.	M/s Tropical Technology Ltd	US\$50,000	NIC Bank
9.	M/s Colney Holding Ltd	Kshs.4,550,000	Tausi Assurance Co. Ltd
10.	M/s J. Knieriembv	US\$50,000	Chase Bank
11.	M/s Motonguvu EA Ltd	US\$50,000	Giro Bank
12.	M/s Epinician Ltd	US\$50,000	Family Bank
13.	M/s Abcos Industrial Ltd	US\$50,000	Fidelity Bank

EVALUATION CRITERIA

(a) The Preliminaries

- i) Submission of Tender Documents: Two envelopes
- ii) Power of Attorney
- iii) Valid Bid Security
- iv) Manufacturer's Authorization: Confirmation from the manufacturer that the samples meet the specifications for the standards
- v) ISO 7591 - 1982: Compliance Certificate

- vi) Company Profile: Attach copy of Registration of Business/Certificate of Incorporation
- vii) Confidential Business Questionnaire duly signed and stamped
- viii) Managerial and Key Personnel Competency Profiles: Attach Curriculum Vitae of requisite key personnel;
- ix) Physical Address: State if owned or leased and attach copy of title or lease documents or latest utility bill
- x) Experience: Proof of satisfactory service contract of similar or higher value
- xi) Reputation: Submit details of clients, summary of services rendered, value of contracts
- xii) Social obligations: Submit certificate of compliance for the following:
 - Tax compliance from relevant country or any relevant body
- xiii) Sworn Anti-corruption Affidavit

xiv) Three (3) samples of blank plates for each in the specified colour

The evaluation at this stage was on a YES or NO basis. Bidders who complied with all mandatory requirements as stated above proceeded to the Technical Evaluation Stage.

The following six (6 No.) firms did not meet the requirements for the preliminary stage;

Bidder No.	Name of Bidder	Reason for Disqualification
1.	M/s Manchester Outfitters Ltd	- Did not provide a valid Power of Attorney
2.	M/s MIG International Ltd	- No proof of testing certificate and ISO Compliance Certificate
4.	M/s Equip agencies Ltd	- Did not provide samples as specified in the tender document
5.	M/s Kiwaka General Merchants Ltd	<ul style="list-style-type: none"> ➤ Invalid Power of Attorney ➤ Samples did not meet the specified requirement ➤ Did not attach Manufacturer's Authorization
9.	M/s Colney Holding Ltd	<ul style="list-style-type: none"> Samples t did not conform to the visual tests Did not provide bid security from the bank
12.	M/s Epinician Ltd	Did not provide documentary proof of experience

The following seven (7No.) firms were recommended for further technical evaluation

S/No	Name of Bidder	Nationality
1.	M/s Tonjees CARD International GmbH	German
2.	M/s Utalsp.z 0.0	Poland
3.	M/s Tropical Technology Ltd	Kenyan
4.	M/s EHA Hoffman International GmbH	German
5.	M/s Knieuriunbv	Netherlands
6.	M/s Motonguvu EA Ltd	Kenyan
7.	M/s Abcos Industries Ltd	Kenyan

STAGE II: TECHNICAL EVALUATION

3.1 STEP 1: Visual conformance

During this stage, the samples were subjected to visual conformance with the tender technical specification as provided in the tender documents. The following features were visually analyzed for conformity and scored as per the Criteria set out on Table 2:

Bidders Score card on Page 43-44 of the Tender Document.

TABLE 4: Summary of the results for visual conformity

No	Criteria	Max Score	BIDDERS						
			3	6	7	8	10	11	13
1	Dimensions	5	5	5	5	5	5	5	5
2	Materials	6	6	6	6	6	6	6	6
3	Graphic Design	6	6	6	6	6	6	6	6
4	Directional Water marks	6	6	6	6	6	6	6	6
5	Holographic OVD Square Mark	7	7	7	7	7	7	7	7
Total		30	30	30	30	30	30	30	30

TABLE 6: Summary of the test results score for durability test for license plates

No	Criteria	KEBS Min Standards	Max Score	BIDDERS SAMPLE CODE						
				2170	2120	2180	2140	2130	2150	2160
1	Photometric properties	White-70 Blue-5 Yellow-50 Red-15	5	5	5	5	5	5	5	0
2	Colorimetric properties	White-70 Blue-5 Yellow-50 Red-15	5	5	5	5	5	5	5	0
3	Temperature resistance	Comply	5	5	5	5	5	5	5	5
4	Adhesion to the substrate	Not Tested	5	5	5	5	5	5	5	5
5	Impact resistance	Not Tested	5	5	5	5	5	5	5	5
6	Bending resistance	Comply	5	5	5	5	5	5	5	5
7	Water resistance	Comply	5	5	5	5	5	5	5	5

8	Cleanability	Comply	5	5	5	5	5	5	5	5
9	Resistance to fuel	Comply	5	5	5	5	5	5	5	5
10	Resistance to saline mist	Not Tested	5	5	5	5	5	5	5	5
	TOTAL		50	50	50	50	50	50	50	40
Remark			P	P	P	P	P	P	P	F

3.4 Combined Summary of the Technical Evaluation Report.

TABLE 7: Combined Summary of the Technical Evaluation Report.

No	Criteria	Max Score	BIDDERS CODES.					
			2170	2120	2180	2140	2130	2150
1	Visual Conformance	30	30	30	30	30	30	30
2	Durability Tests	50	50	50	50	50	50	50
Total		80	80	80	80	80	80	80

All the six bidders met the minimum cut off of 65 point score out of 80 point score as provided under clause 2.27.4 of the Tender Document on page 17.

STAGE 3: FINANCIAL EVALUATION

TABLE 8: Prices as Read out during the Financial bid opening

B/No	Bidders Name	GRAND TOTAL PRICE (3 YEARS) IN U.S DOLLAR
3	M/S EHA Hoffman International GmbH	6,953,700.00
7	M/S Utalsp.z 0.0	10,576,335.90
8	M/S Tropical Technology Limited	10,050,850.00
10	M/S J.Knieriemby	13,799,559.00
11	M/S Motonguvu EA Limited	20,549,250.00
13	M/S Abcos Industrial Limited	20,502,000.00

TABLE 9: FINANCIAL SCORE

S/NO	BID NAME	GRAND TOTAL PRICE (3 YEARS) IN U.S DOLLAR	Financial Score $fs \equiv \frac{C_{low}}{C} \times 20$
		10,576,335.90	13.15
1.	M/s Utalsp.z 0.0	20,549,250.00	6.77
2.	M/s Motonguvu EA Limited	13,799,559.00	10.08
3.	M/s J.Knieriemby	20,502,000.00	6.78
4.	M/s Abcos Industrial Limited	6,953,700.00	20.00
5.	M/s EHA Hoffman International GmbH	10,050,850.00	13.84
6.	M/s Tropical Technology Limited		

None of the above bidders qualified for preference and reservations as provided under the relevant procurement provisions.

TABLE 11: COMBINED TECHNICAL AND FINANCIAL SCORE AND RANKING

S/NO	BID NAME	GRAND TOTAL PRICE (3 YEARS) IN U.S DOLLAR	Financial Score $fs \equiv \frac{C_{low}}{C} \times 20$	Technical score	Total Score	Ranking
1.	M/s Utalsp.z	10,576,335.90	13.15	80.00	93.15	3
2.	M/s Motonguvu EA Limited	20,549,250.00	6.77	80.00	86.77	6
3.	M/s J.Knieriemby	13,799,559.00	10.08	80.00	90.08	4
4.	M/s Abcos Industrial Limited	20,502,000.00	6.78	80.00	86.78	5
5.	M/s EHA Hoffman International GmbH	6,953,700.00	20.00	80.00	100.00	1
6.	M/s Tropical Technology Limited	10,050,850.00	13.84	80.00	93.84	2

COMMITTEE'S RECOMMENDATION

On the basis of the above Re-evaluation carried out in accordance with the criteria outlined in the tender document, The Tender Evaluation, Negotiation and Inspection & Acceptance Committee recommends that the tender for Supply and Delivery of Motorized Vehicle Number Plate Blanks be awarded to M/S EHA Hoffmann International GmbH at its three year contract price of USD 6,953,700.00 being the lowest evaluated bidder.

II. TENDER RE-EVALUATION

Supply and Delivery of Motorized Vehicle Number Plate Hot Stamping Foil

TENDER NO.KPS/T/ICB/11/2014-2017

Mandatory Evaluation Requirements

During this preliminary stage, no scores were awarded to bidders as the evaluation criteria was on a YES or NO basis. Bidders who complied with all mandatory requirements as stated above proceeded to the technical Evaluation stage.

	Description of Criteria	1	2	3	4	5	6	7	8
(i)	Submission of Tender Documents Two Envelopes - Bid	√	√	√	√	√	√	√	√
(ii)	Power of Attorney	√	X	√	√	√	√	√	√
(iii)	Valid Tender/Bid Security	√	√	√	√	√	√	√	X
(iv)	Manufacturer's Authorization/confirmation from the manufacturer that the samples meet the specifications for the standards	√	X	√	√	√	√	√	√
(v)	ISO 7591-1982 compliance certificates	√	√	√	√	√	√	√	√
(vi)	Company Profile Attach copy of Registration of Business/Certificate of Incorporation	√	√	√	√	√	√	√	√
(vii)	Confidential Business Questionnaire duly signed and stamped	√	√	√	√	√	√	√	√
(viii)	Managerial and Key Personnel Competency Profiles Attach: Curriculum Vitae of requisite key personnel	√	√	√	√	√	√	√	√

(ix)	Physical Address: State if owned or leased and attach copy of title or lease documents or latest utility bill	✓	✓	✓	✓	✓	✓	✓	✓
(xii)	Experience Proof of satisfactory service contract of similar or higher value	✓	X	✓	✓	✓	✓	✓	✓
(xiii)	Reputation Submit details of clients, summary of service rendered value of contracts and contracts	✓	✓	✓	✓	✓	✓	✓	✓
(xiv)	Social Obligations Submit certificate of compliance for the following; Tax compliance from relevant country or any relevant body	✓	✓	✓	✓	✓	✓	✓	✓
(xv)	Samples of Hot Stamping Foils three (3) for each in the specified colour	✓	X	✓	✓	✓	✓	✓	✓

(i) Bidders No.2 did not provide samples for size 120mm x 305m and consequently was non – responsive and did not proceed to the technical evaluation stage.

(ii) Bidder 8 did not provide a valid tender/bid security and therefore did not proceed to the technical evaluation stage.

(iii) All bidders did not provide samples for size 220 mm x 305 m Hot Stamping Foil as provided for in the tender document. However the committee resolved to proceed with the evaluation based on the samples submitted for size 120 mm x 305 m because size was not a mandatory requirement and this did not prejudice any of the bidders.

3.0 STAGE 2: TECHNICAL EVALAUTION

3.1 STEP 1: Conformity Evaluation

TABLE 4: Sample Conformity Evaluation

S/N o	Item	Description 120 mm x 305m/220 mm x305m	Bidders										
			1	3	4	5	6	7	9	10	11	12	
1	Black foil Heat Range 110-200 c	Polyester film, Black pigment lacquer coated, Hot stamping foil	√	√	√	√	√	√	√	√	√	√	√
2	Green Foil Heat Range 110-200 c	Polyester film, Green pigment lacquer coated, Hot stamping foil	√	√	√	√	√	√	√	√	√	√	√
3	Red Foil Heat Range 110-200 c	Polyester film, Red pigment lacquer coated, Hot stamping foil	√	√	√	√	√	√	√	√	√	√	√
4	Blue Foil Heat Range 110-200 c	Polyester film, Blue pigment lacquer coated, Hot stamping foil	√	√	√	√	√	√	√	√	√	√	√
5	White Foil Heat Range 110-200 c	Polyester film, White pigment lacquer coated, Hot stamping foil	√	√	√	√	√	√	√	√	√	√	√

During this stage, the samples were subjected to film, pigment and coating conformity as provided for in the tender documents on page 30. The features were analyzed and scored on YES or NO basis.

TABLE 6: Test score

BIDDERS CODE			1100	1101	1110	1120	1130	1140	1150	1160	1170	1180
S/N	Parameter	Max score										
1	Carrier film	10	0	0	0	0	0	0	0	0	0	0
2	Abrasion and smudge resistance	10	10	10	10	10	10	10	10	10	10	10
3	Non-toxicity	10	10	10	10	10	10	10	10	10	10	10
4	Foil storage conditions	10	10	10	10	10	10	10	10	10	10	10
5	Oxidation and corrosion	10	10	10	10	10	10	10	10	10	10	10
6	Water resistance	10	10	10	10	10	10	10	10	10	10	10
7	Oil grease and fuel resistance	10	10	10	10	10	10	10	10	10	10	10
8	Resistance to saline mist	10	10	10	10	10	10	10	10	10	10	10
Total		80	70	70	70	70	70	70	70	70	70	70

The committee observed that all the samples failed on criteria (1) on carrier film. they however met the minimum requirement of 65 out 80 marks as required in the tender document.

STAGE 3: FINANCIAL EVALUATION

The ten (10) bidders that met the required minimum score of 65 out of 80 marks were subjected to financial evaluation.

- i) Rate of conversion as at 3rd March 2015 (The opening date of the tender as provided for in the document). 1. Euro = U.S dollar 1.118
- ii) Conversion into quantities per piece was done for bidders who quoted per M²
- iii) Quantities were used as provided in the tender document

4.3 TABLE FOR FINANCIAL SCORE SIZE 120MM X 305M

TABLE 9: Financial score size 120mm x 305m

S/NO	BIDDER NAME	GRAND TOTAL PRICE (3 YEARS) IN U.S DOLLAR	Financial Score $fs \equiv \frac{C_{low}}{C} \times 20$
1.	M/s Tonnjes C.A.R.D International GmbH	9,119,861.40	3.11
2	M/s Tropical Technology Ltd	17,406,350.00	1.63
3.	M/s Equip Agencies Ltd	40,824,000.00	0.07
4.	M/s MIG International Ltd	1,418,842.00	20.00
5.	M/s UTAL e.p.z 0.0	14,067,883.40	2.02
6.	M/s Motonguvu EA Ltd	47,160,300.00	0.60
7	M/s Epinician Ltd	130,416,000.00	0.22

8	M/s Abcos Industrial Ltd	45,105,600.00	0.63
9	M/s EHA Hoffmann International GmbH	11,921,250.00	2.38
10	M/s J. KnieriemBv	30,983,812.02	0.92

4.4 FINANCIAL SCORE SIZE 220MM X 305M

TABLE 10: Financial score size 220mm x 305m

S/NO	BIDDER NAME	GRAND TOTAL PRICE (3 YEARS) IN U.S DOLLAR	Financial Score $fs \equiv \frac{C_{low}}{C} \times 20$
1.	M/s Tonnjes C.A.R.D International GmbH	16,721,467.00	20.00
2	M/s Tropical Technology Ltd	31,918,330.00	10.48
3	M/s Motonguvu EA Ltd	118,503,000.00	2.82
4	M/s Abcos Industrial Ltd	113,328,000.00	2.96
5	M/s EHA Hoffmann International GmbH	20,797,500.00	16.08
6	M/s UTAL e.p.z 0.0	24,078,600.00	13.89
7	M/s J. KnieriemBv	34,943,400.00	9.57

None of the above bidders qualified for preference and reservations as provided under the relevant procurement provisions.

TABLE 12: Combined technical and financial score and ranking for size 120mm x 305m

S/NO	BID NAME	GRAND TOTAL PRICE (3 YEARS) IN U.S DOLLAR	Financial Score	Technical score	Total Score	Ranking
1.	M/s Tonnjes C.A.R.D International GmbH	9,119,861.40	3.11	70.00	73.11	2
2	M/s Tropical Technology Ltd	17,406,350.00	1.63	70.00	71.63	5
3.	M/s Equip Agencies Ltd	40,824,000.00	0.07	70.00	70.07	10
4.	M/s MIG International Ltd	1,418,842.00 (Equivalent to Euros.1,269089.45)	20.00	70.00	90.00	1
5.	M/s UTAL e.p.z	14,067,883.40	2.02	70.00	72.00	4

	0.0					
6.	M/s Motonguvu FA Ltd	47,160,300.00	0.60	70.00	70.60	7
7	M/s Epinician Ltd	130,416,000.00	0.22	70.00	70.22	9
8	M/s Abcos Industrial Ltd	45,105,600.00	0.63	70.00	70.63	6
9	M/s EHA Hoffmann International GmbH	11,921,250.00	2.38	70.00	72.38	3
10	M/s J. KnieriemBv	30,983,812.02	0.92	70.00	70.92	8

4.7 COMBINED TECHNICAL AND FINANCIAL SCORE AND RANKING FOR FOIL SIZE

220MM X 305M

TABLE 13: Combined technical and financial score and ranking for foil size 220mm x 305m

S/NO	BID NAME	GRAND TOTAL PRICE (3 YEARS) IN U.S DOLLAR	Financial Score	Technical score	Total Score	Ranki
1.	M/s Tonnjes C.A.R.D International GmbH	16,721,467.00	20.00	70.00	90.00	1
2	M/s Tropical Technology Ltd	31,918,330.00	10.48	70.00	80.48	4
3	M/s Motonguvu EA Ltd	118,503,000.00	2.82	70.00	72.82	7
4	M/s Abcos Industrial Ltd	113,328,000.00	2.96	70.00	72.96	6
5	M/s EHA Hoffmann International GmbH	20,797,500.00	16.08	70.00	86.08	2
6	M/s UTAL e.p.z 0.0	14,067,883.40	13.89	70.00	83.89	3
7	M/s J. KnieriemBv	30,983,812.02	9.57	70.00	79.57	5

COMMITTEE'S RECOMMENDATION

On the basis of the above Re-evaluation carried out in accordance with the criteria outlined in the tender document, The Tender Evaluation,

Negotiation and Inspection & Acceptance Committee recommends that the tender for Supply and Delivery of Motorized Vehicle Number Plate Hot Stamping Foil be awarded to M/s MIG International Ltd at its bid price of Euros.1,269,089.45 (Equivalent to USD.1,418,842.00) being the lowest evaluated bidder for Hot stamping foil size 120mm x 305m for a period of three years and M/s EHA Hoffmann International GmbH at a cost of USD.20,797,500.00 being the lowest evaluated bidder for Hot stamping foil size 220mm x 305m for a period of three years.

THE TENDER COMMITTEE DECISION

The Ministerial Tender Committee adjudicated the tenders and awarded them to the lowest evaluated responsive bidders in each case as recommended by the evaluation committee as follows;

- i) Supply and Delivery of Motorized Number Plate Blanks. The lowest evaluated responsive bidder M/s EHA Hoffmann International GMBH at a grand total price of USD 6,953,700.00(Six Million Nine Hundred Fifty Three Thousands and Seven Hundred Only).
- ii) Supply and Delivery of Motorized Number Plate Hot Stamping Foils. The lowest Evaluated responsive bidders were; MIG International Ltd at its bid price of Euros.1,269,089.45 (Equivalent to USD.1,418,842.00) being the lowest evaluated bidder for Hot stamping foil size 120mm x 305m for a period of three years

- iii) For foil size 220mm X 305m award to **M/S EHA Hoffmann International GmbH** at a grand total bid price of USD 20,797,500.00 (Twenty million, seven hundred and ninety seven thousand, five hundred) for a period of three years was found to be highly priced. The Tender Committee therefore upheld the recommendation of the re-evaluation committee that this item be re-advertised.

REQUEST FOR REVIEW

The Request for Review was been filed by M/s Tropical Technology Limited of P.O. Box 490 – 00606, Nairobi, which was represented by the firm of Waruhiu K’owade & Ng’ang’a Advocates in the matter of Tender No. KPS/T/10/2015-2016 for Supply & Delivery of Motorized Vehicle Number Plate Blanks; and Tender No. KPS/T/11/2015-2016 for Supply & Delivery of Motorized Vehicle Number Plate Hot Stamping Foil.

The Applicant was represented by Mr. Alex Thangei, Advocate, while the Procuring Entity was represented by Mr. Patrick Kariri. The Interested Parties (Successful Bidders) and who shall hereinafter be referred to as the 1st and the 2nd Interested Party were represented by Prof. Albert Mumma, Advocate, for M/s EHA Hoffmann International GMBH and Mr. Mbuthia Kinyanjui, Advocate, for M/s MIG International Ltd.

The Applicant requested the Board for the following orders:-

1. *The Award Committee's decisions be reversed and the awards be nullified forthwith under Section 98 (a) of the Act.*
 2. *The Tenders be awarded to the Applicant as provided for under Section 98 (c) of the Act.*
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3. *Costs be awarded to the Applicant.*

The Applicant M/s Tropical Technology Limited filed this Request for Review challenging the decision of the Procuring Entity declaring its tenders for the supply and delivery of motorized vehicle number plates, blanks in the matter of Tender NO. KPS/T/ICB/10/2015 - 2016 and the tender for the supply and delivery of motorized number plates hot stamping foils in the matter of Tender No. KPS/T/ICB/11/2015-2016 as being unsuccessful.

This Request for Review arose from the Board's earlier decision in Application No. 28 of 2015 = Tropical Technology Ltd =vs= the Ministry of Interior and Co-ordination of National Government which arose from the same tenders.

In its decision delivered on 17th July, 2015 and which was not challenged by any of the parties to the Request for Review before the High Court, the Board nullified the award of the two tenders to the successful bidders and directed a fresh re-evaluation of the subject tenders and made the following orders:-

- a) **The award of the tender for the supply and delivery of motorized vehicle number plates blanks in the matter of Tender No. KPS/T/10/2015-2016 and the award of the tender for the supply and**

delivery of motorized vehicle number plates hot stamping foils in the matter of tender No. KPS/T/11/2015-2016 made to M/s EHA Hoffman International GMBH, M/s Tonnjes C.A.R.D International GMBH respectively be and are hereby annulled.

- b) The Procuring Entity is directed to carry out a fresh re-evaluation of the tenders submitted to it in respect of the two tenders and complete the entire exercise including the making of awards of the tenders within thirty (30) days from today's date.
- c) That in carrying out the Re-evaluation, the Procuring Entity shall take into account the following factors:-
 - i) The scoring criteria set out in the tender document on technical evaluation as far as the criteria on responsiveness is concerned and use the sample results from the Kenya Bureau of Standards already in its possession on the component on the test results.
 - ii) The financial evaluation and award criteria.
 - iii) The Procuring Entity shall consider and determine whether any preferences are applicable to any bidder under the Provisions of the Public Procurement and Disposal Act (Preference and Reservations) Regulations 2011 as amended via L. N. No. 114 of 18th June, 2013.
 - iv) The tender evaluation committee shall use the award criteria set out in the tender documents while making the eventual tender awards recommendations to the tender committee.

- v) The Procuring Entity shall generally comply with all the criteria set out in the tender documents, the Act and the Regulations made thereunder in re-evaluating the tenders.
- vi) The Procuring Entity shall take steps to extend the tender validity period and the bid bonds for such period of time as will enable it complete the re-evaluation of the tenders as ordered above.
- d) In view of the order on fresh re-evaluation and the fact that the Procuring Entity and the 1st Interested Party were partly successful in the last ground of review, the Board directs that each party shall bear its own costs of this Request for Review.

It was common ground during the hearing of this Request for Review that the Procuring Entity in an attempt at complying with the orders and the directions issued by the Board carried out a fresh re-evaluation exercise and by two letters both dated 3rd September, 2015 and which were produced by the Applicant, the Applicant was notified that its bid in the two tenders had not been successful because according to the Procuring Entity, the Applicant was not the lowest evaluated bidder in any of the two tenders.

PRELIMINARY OBJECTIONS

During the course of the hearing of the Request for Review before the Board, Professor Mumma and Mr. Kinyanjui for the successful bidders raised Preliminary Objections in ground 1 of the 1st Interested Party's

Memorandum of response dated 28th September, 2015 and in the notice of Preliminary Objection dated 1st October, 2015.

The Board has examined the issues raised in the Preliminary Objection and finds that the objections raised can be crystallised into two issues namely:-

- i) Whether the Applicant's Request for Review was filed out of time contrary to the Provisions of Regulation 73 of the Public Procurement and Disposal (Amendment) Regulations 2013.
- ii) Whether the 2nd Interested Party M/s MIG International Limited ought to have been joined as a party to the Request for Review and whether the failure to join it as a party renders the Request for Review as incompetent.

Since the two issues and more particularly the first issue goes into the issue of the Board's jurisdiction to hear the instant Request for Review, the Board will address the two issues first before delving into any other matters addressed by the parties in the Request for Review in the event that the Board finds that it has jurisdiction to hear and determine the matter.

PRELIMINARY OBJECTION NO. 1

Whether the Applicant's Request for Review was filed out of time contrary to the Provisions of Regulation 73 of the Public Procurement and Disposal (Amendment) Regulations 2013.

It was the 1st Interested Party's case in support of this ground of Preliminary Objection that the Applicant's Request for Review was filed

out of the prescribed period of Seven (7) days from the date of notification of the Applicant that its tenders were unsuccessful contrary to the Provisions of Regulation 73 (2) (c) of the Public Procurement and Disposal Regulations 2006 as amended by Legal Notice No. 106 of 2013.

Mr. Thangei acting on behalf of the Applicant however countered this submission and stated on the basis of the letters of notification dated 3rd September, 2015 and which were produced at pages 84 and 85 of the Request for Review that the Applicant was notified that its tender was unsuccessful on 3rd September, 2015 and that it received the letters of notification on 4th September, 2015 as evidenced by the receiving stamp on the two letters and that having therefore filed the Request for Review on 9th September, 2015, the Request for Review had been filed within time and that the same was thereof competently before the Board.

The Board has considered the arguments made by the parties in support and in opposition to this ground of Preliminary Objection and has examined the two letters of notification appearing at pages 84 and 85 of the Request for Review and finds that the two letters are dated 3rd September, 2015 and the receiving stamp appended to them shows that they were received on 4th September, 2015. The Board has also examined the receiving stamp indicating when this application was filed on 9th September, 2015.

It is obvious that counting the number of days either from the date when the letters of notification were written or when they were received that the

Request for Review was filed on the 5th and 6th day from the date of the letter and the date when letters were received respectively.

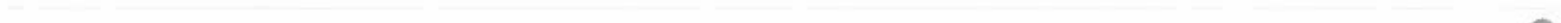
The Board further finds that though the Applicant stated that it received the letter of notification on 4th September, 2015, this statement was not challenged by both the Counsel for the Procuring Entity and the Counsel for the 1st Interested Party who did not produce any evidence in the nature of a personal delivery book or a certificate of posting to controvert that position and in the absence of such evidence, the Board has no option but to accept the position put forward by the Applicant.

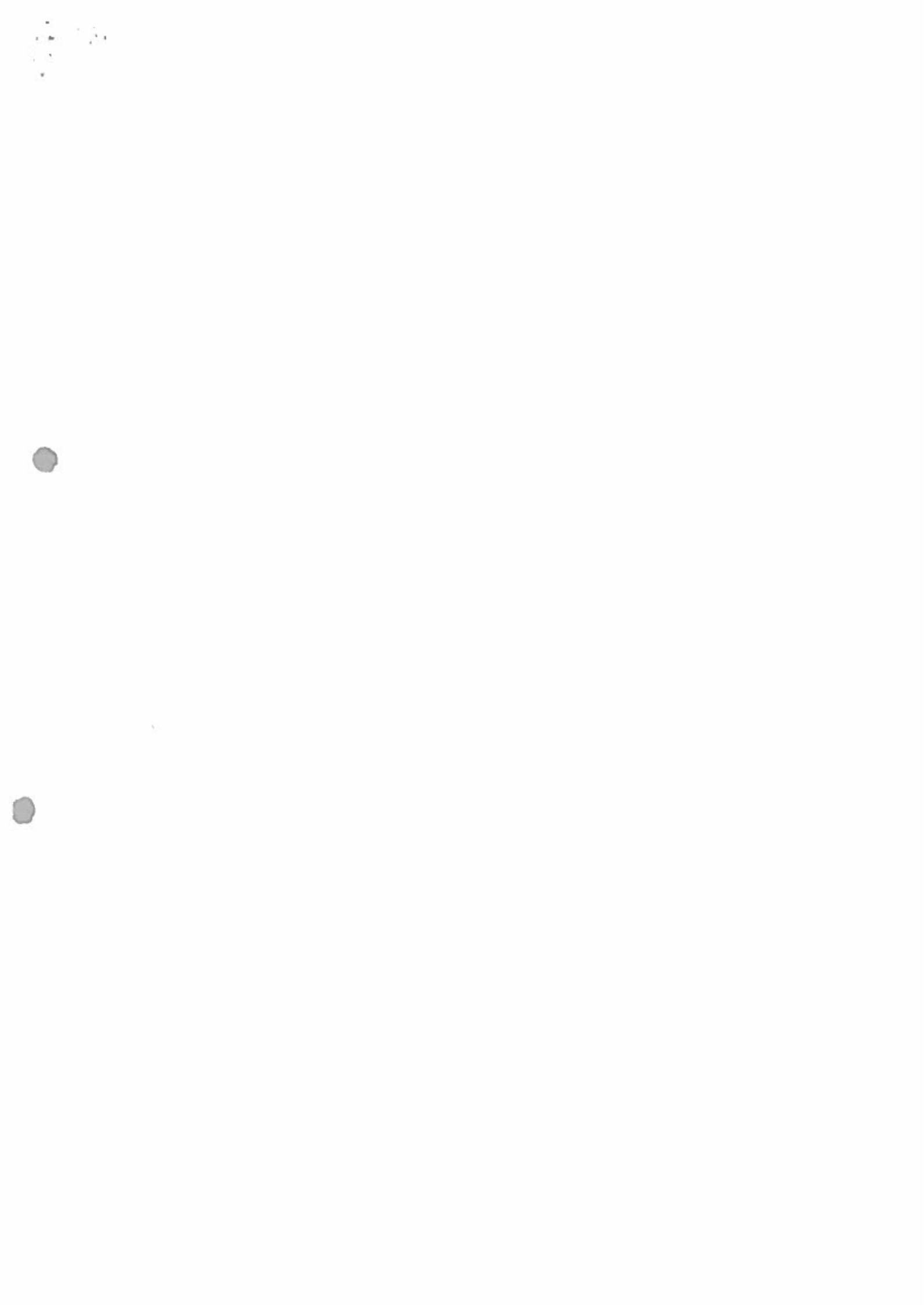
In view of the above findings therefore the Board finds that the 1st Interested Party's Preliminary Objection that the Applicant's Request for Review was filed out of time therefore lacks merit and is accordingly dismissed.

PRELIMINARY OBJECTION NO. 2

Whether the 2nd Interested Party M/s MIG International Limited ought to have been joined a party to the Request for Review and whether the failure to join it as a party renders the Request for Review incompetent.

It was contended by Mr. Kinyanjui on behalf of the 2nd Interested Party that the Applicant's Request for Review was incompetent and was filed in contravention of the Provisions of Section 96(c) of the Public Procurement and Disposal Act 2005 in that the 2nd Interested Party was not joined either as a Respondent or an Interested Party to the Request for Review as required by that Provisions of the law. It was Mr. Kinyanjui's further submission that his client the 2nd Interested Party had not been supplied





with all the documents that the Applicant had filed with the review Board and that the only documents that the 2nd Interested Party had been supplied with was the Request for Review and the statement in support of the Request for Review without the annextures.

It was Mr. Kinyanjui's argument that the 2nd Interested Party's right to participate in the proceedings had therefore been greatly compromised and that it had been prevented from effectively participating in the proceedings.

On the issue of Section 96(c) of the Act, Mr. Kinyanjui submitted that the Provisions of the said Section of the Act were mandatory and required that any successful bidder in a tender process ought to be joined as a party to the proceedings before the Board failing which the Request for Review was rendered incompetent and therefore liable to be struck out. He further submitted that where a successful bidder had not been joined into the proceedings, any award of a tender made on it's behalf cannot be nullified and that by the same token, the award made to M/s MIG International Limited could not be nullified as prayed in the Request for Review.

Counsel for the Applicant in a short response to the submissions made by Counsel for the second Interested Party, Counsel for the Applicant submitted that it was both factually and legally untenable to join all the bidders including the successful bidders who had participated in a tender into a Request for Review under the Provisions of Section 96 of the Act because at the time an Applicant files a Request for Review before the Board, the Applicant would not reasonably be expected to know which

bidders had participated in a tender process nor which bidder or bidders had been successful or unsuccessful. Counsel for the Applicant submitted that the duty to notify bidders who had participated in a tender that a Request for Review had been filed with the Board lay with the secretary of the Board who was under an obligation to issue a letter of notification to the respective bidders informing them that a Request for Review had been filed with the Board and each Interested Party would then be at liberty to collect a copy from the secretariat upon paying the requisite fees.

Counsel for the Applicant submitted that the 2nd Interested Party in this case was duly notified of the proceedings and that it had appeared and participated in the proceedings before the Board and that the 2nd Interested Party's rights under the rules of natural justice had not therefore been prejudiced as it had been accorded the opportunity to be heard in the proceedings before the Board.

The Board wishes to note at the onset that the complaint by the 2nd Interested Party allegedly not having been supplied with a complete set of the Request for Review was raised when Counsel for the 2nd Interested Party was invited to make submissions on behalf of his client by the Board after Counsel for the Applicant, the Procuring Entity and Counsel for the 1st Interested Party had already concluded making their submissions before the Board. The Board finds that if indeed Counsel for the 2nd Interested Party had not been served with a complete set of documents, then he ought to have taken up this objection in the first instance before the arguments commenced in which event the Board would have heard and considered

whether the reasons given were valid and the Board would have not had any difficulty whatsoever in allowing him more time to study and respond to the Request for Review.

~~The Board further notes that upon receiving the notification of the filing of~~ the Request for Review by the Applicant, Counsel for the 2nd Interested Party prepared a notice of Preliminary Objection dated 1st October, 2015 in answer to the Request for Review which he filed with the Board on the same day. Counsel for the Second Interested Party also fully participated in the proceedings and was afforded an opportunity to be heard where he made substantial representations on behalf of his client which the Board will consider while dealing with the substantive issues relating to this Request for Review.

On the issue of Section 96 of the Act, the said Provision of the law stipulates as follows:-

Section 96: Parties to a review shall be

- a) the person who requested for the review,*
- b) the Procuring Entity,*
- c) if the Procuring Entity has notified a person that the person's tender, proposal or quotation was successful, that person, and*
- d) such other person as the Review Board may determine.*

The Board has considered the wording of Section 96 and has not been able to come across any Provision in that Section which states that an Interested Party must be joined as party to the proceedings before the Board.

A reading of Section 96(c) of the Act infact shows that the onus to notify a person that the person's tender, proposal or quotation was successful lies with the Procuring Entity which is the Party seized with that information at that point in time. It would not therefore be feasible for an applicant to know who was successful or unsuccessful in a tender at that stage. Such information is only in the domain of the Procuring Entity and it would therefore be onnerous to expect an applicant to join parties that he does not know in a Request for Review.

The Board further wishes to observe that the Regulations made under the Act have addressed this eventuality in full appreciation of the fact that it is not reasonably possible for an Applicant to know who may be the successful bidder at the time of the filling of a Request for Review until such information is availed to the Board at the time that the Procuring Entity supplies documents to the Board pursuant to a request by the secretary of the Board under the Provisions of Regulation 74(3) of the Public Procurement and Disposal Regulations 2006.

Regulation 74(4) of the Regulations in appreciation of the fact that an applicant may not be in a position to know who the successful or the other bidders are in a tender processe provides as follows:-

Section 74(4): The Secretary shall, within Fourteen (14) days of the filling of the request, notify all other parties to the review of the

filling and such parties may at their own expense obtain copies of the Request for Review.

This requirement in the regulations enables the Board to invite Interested Parties to appear and be heard during the proceedings before the Board in the exercise of their rights under the Rules of natural justice and there is therefore no obligation that any of them be joined into the application. The Regulation also places the onus on the party notified to at his own cost obtain copies of the Request for Review from the secretary of the Board which the Second Interested Party did not demonstrate that he did.

Finally the well established practice of the Board over time that a cause of action lies against the Procuring Entity and it is the Procuring Entity that is made a Respondent in the proceedings before the Board. All candidates who participated in the tender are thereafter allowed by law to appear before the Board at their own option once notified and are entitled to participate in the proceedings before the Board without necessarily being joined as parties.

The 2nd Respondent did not state that it was denied the right to participate in the proceedings he was infact represented by Counsel who was given the fullest opportunity to address the Board.

The objection by the 2nd Interested Party therefore lacks merit and is hereby disallowed and the Board will therefore proceed and determine this Request for Review on it's merits.

As has already been stated in the proceeding parts of this decision, this Request for Review arose from the Board's decision in Review number 28

of 2015 between Tropical Technical Technology Limited =vs = The Ministry of Interior and Co-ordination of National Government in which the Board nullified the award of the two tenders that had been awarded to the successful bidders then. In it's decision delivered on 17th July, 2015, the Board issued a number of orders and directions the most important of which was that the Board directed that the Procuring Entity to carry out a fresh re-evaluation of the tenders submitted to it in respect of the two tenders and complete the entire exercise including the making of the award of the tenders within a period of Thirty (30) days from the date of the Board's decision but the Board extended this period by a further period of Fifteen (15) days at the request of the Procuring Entity. The Board in giving it's decision also gave a raft of directions which the Procuring Entity was required to comply with one of which was that in carrying out the re-evaluation process, the Procuring Entity was also to comply with all the criteria set out in tender documents, the Act and the Regulations made thereunder in re-evaluating the tenders.

In a nutshell what the Board therefore required the Procuring Entity to do was to start the entire evaluation process a fresh and carry it out in accordance with provisions of the tender document and the Provisions of the Act and the Regulations made thereunder and arrive at a decision that was in compliance with the said requirements.

It was however the Applicant's case before the Board that the Procuring Entity did not comply with the decision of the Board given on 17th July, 2015 but instead acted contrary to the said decision.

The Applicant set out a total of 11 grounds in support of the Request for Review most of which were a recap of what happened and the remainder went into demonstrating how the Procuring Entity failed to comply with the Board's order given on 17th July, 2015.

The Board has examined all the eleven grounds of review raised by the Applicant and finds that all the grounds address the central issue of non-compliance with the Board's earlier decision in several respects. These grounds can however be consolidated into two broad grounds namely:-

1. Ground No. 7 - Whether or not the Procuring Entity failed to give preference or at all to local entities who include the Applicant as envisaged by Section 39 (7) of the Act as read together with Section 2(f) of the Act and as directed by the Review Board.
2. Grounds No. 1, 2, 3, 4, 5, 6 and 8 - Whether the Procuring Entity failed to apply the financial evaluation and award criteria set out in the tender documents and failed to ensure that the mandatory requirements of Tax Compliance, pricing and other responsive requirements were complied with by all bidders particularly the successful bidders as set out in the tender documents, the Act and the Regulations and as directed by the Review Board.

GROUND 1

Ground No. 7 - Whether or not the Procuring Entity failed to give preference or at all to local entities who include the Applicant as envisaged by Section 39 (7) of the Act as read together with Section 2(f) of the Act and as directed by the Review Board.

On the issue of preference Counsel for the Applicant submitted based on ground 7 of the Request for Review that the Procuring Entity disregarded the Board's order by failing to give the Applicant preference as engaged by the Provisions of Section 39(7) of the Act as read together with Section 2(f) of the Act and as directed by the review Board. He submitted that based on the response filed by the Procuring Entity, it was plain that the Procuring Entity did not give the Applicant which is a local company preference as required by the law.

Mr. Kariri on behalf of the Procuring Entity on the other hand submitted that what the Board had directed in order No. c (iii) of its decision given on 17th July, 2015 was that the Procuring Entity was to consider and determine whether any preferences were applicable to any bidder under the Provisions of the Public Procurement and Disposal Act (Preference and Reservations) Regulations 2011 as amended via L. N. No. 114 of 18th June, 2013 and did not direct that the Applicant be automatically granted preference since it was a local Company.

Mr. Kariri additionally submitted that the Procuring Entity considered the issue of preference and established that the Applicant though a local company was not entitled to be awarded preference since it did not qualify to such an award under the preference and Reservation Regulations.

Professor Mumma on behalf of the 1st Interested Party supported the position taken by Mr. Kariri and submitted that the goods to be supplied in this tender fell way above the value of the goods entitled to be accorded preference and that the Applicant was not therefore entitled to preference.

He submitted that the Procuring Entity had therefore properly exercised its discretion by refusing to award the Applicant preference.

The Board has considered the tender document in its totality and particularly ~~Clause 2.25 which provided that the Procuring Entity was to~~ give preference where allowed in the evaluation of tenders which shall not exceed 15% as per the Act and the Procurement Regulations.

The Board has also perused the Certificate of Incorporation of the Applicant and finds that the Applicant is a Company Registered in Kenya. The confidential business questionnaire which forms part of the tender documents submitted by the Applicant shows that the Applicant is a fully owned Kenyan company.

The only question that therefore remains to be answered by the Board is whether the Procuring Entity considered whether the Applicant was entitled to be granted preference and whether any decision arrived at by the Procuring Entity was supported by the law. The Board has perused the evaluation reports for tenders numbers 10 and 11 and has established that the Procuring Entity indeed considered the issue of whether the Applicant was entitled to preference and came to the conclusion that it was not though the Procuring Entity did not state the reasons why this was so.

Regulations 12 and 13 of the Public Procurement and Disposal Regulations Act made pursuant to Legal Notice NO. 114 of 18th June, 2013 provide as follows in so far as the issue of preference in concerned.

12. For purposes of Section 39(4) (d) of the Act, public entities shall grant exclusive preference to local contractors offering:-

- a) *Motor vehicles, plant and equipment that are assembled in Kenya;*
- b) *Construction material and other material used in the transmission and conduction of electricity of which such material is made in Kenya;*

13. *For the purposes of Section 39(8) (a) (ii) of the Act, the threshold below which exclusive preference shall be given to citizen contractors shall be the sum of:-*

- a) *One Billion Shillings for Procurement in respect of road works, construction materials and other materials used in transmission and conduction of electricity of which the material is made in Kenya;*
- b) *Five Hundred Million shillings for procurements in respect of other works;*
- c) *One Hundred Million Shillings for procurements in respect of goods; and*
- d) *Fifty Million Shillings for procurements in respect of services.*

In view of the above Provisions of the Act and particularly owing to the fact that the value of the goods to be supplied fell outside the threshold of the goods stipulated by the Act and were not locally manufactured goods, the decision by the Procuring Entity cannot be faulted and the Board therefore finds that the Procuring Entity complied with its orders and directions on the issue of preference.

GROUND 2

Grounds No. 1, 2, 3, 4, 5, 6 and 8- Whether the Procuring Entity failed to apply the financial evaluation and award criteria set out in the tender documents and failed to ensure that the mandatory requirements of Tax Compliance, pricing and other responsive requirements were complied with by all bidders particularly the successful bidders as set out in the tender documents, the Act and the Regulations and as directed by the Review Board.

On the second issue framed for determination, Counsel for the Applicant submitted that upon being declared unsuccessful, Counsel for the Applicant wrote to the Procuring Entity seeking to know why its tender had been declared unsuccessful in both tender number 10 and tender number 11.

Counsel for the Applicant stated that pursuant to the letter of inquiry dated 8th September, 2015 and which the Applicant produced at page 86 of the Request for Review, the Procuring Entity wrote a letter dated 10th September, 2015 to the Applicant which was signed by Josephine O. Mukobe (M/s) the Permanent Secretary coordination informing the Applicant that for tender number 11, the grand total price that the Procuring Entity had used in re-evaluating the Applicant's tender was the sum of USD 17,406,350.00.

The Applicant however submitted that this figure was unknown to it and while referring the Board to the form of tender appearing at the hand written page 11 of the Request for Review and its price schedule which ran

from pages 12 to page 14 the Applicant submitted that at no point had the Applicant given a figure of USD 17,406,350 as it's price in the tender and the figure that it had quoted was the figure of USD 4856.2 for the three years which had been broken down to the sums of USD 1541.7, USD 1618.7 and 1615.8 USD for the three years. The Applicant submitted that it is these figures that had been read out at the financial opening and the Applicant could not therefore comprehend how the Procuring Entity had obtained and evaluated it's bid on the basis of the sum of USD 17,406,305.00 which was a figure that the Applicant had not tendered for and which was not contained in it's form or the price schedule of tender. The Applicant submitted that the Procuring Entity had deliberately used this figure which translated into 3,584 times higher than what the Applicant had submitted in order to ensure that the Applicant did not succeed in this tender and that this fact alone demonstrated the extent to which the Procuring Entity was prepared to go in order to ensure that the Applicant was not awarded the tender for the services that the Procuring Entity was seeking to procure. The Applicant submitted that the Request for Review ought to succeed on this ground alone without more.

Turning to the prices quoted by the successful bidders in tender numbers 10 and tender number 11, Counsel for the Applicant submitted that it's representative attended the financial opening of the financial bids and that the price that was read out as having been offered by the 1st Interested Party M/s EHA Hoffman International GMBH for tender number 10 was the sum of USD 2,317,900 while that for the 2nd Interested Party M/s MIG International Limited was the sum of 363,437.50 Euros. The Applicant

submitted that it was therefore surprised by the Procuring Entity's response that the first Interested Party was awarded tender number 10 at the cost of USD 6,953,700 while the 2nd Interested Party which had tendered for the sums of 363,437 Euros was awarded tender number 11 at the sum of 1,269,089 Euros which was three times the amount it had tendered for and the figure which was read out at the financial opening.

Counsel for the Applicant finally submitted that those alterations were made unilaterally without regard to the procedure to be applied under the tender document for the correction of errors and that what had happened in this case could not be described as a correction of an error but a unilateral alteration of prices that would cost the tax payers Billions of Shillings if allowed to stand.

Owing to the serious and gravity of this issue, Mr. Thangei for the Applicant urged the Board to look at the soft copy, PDF electronic and the CD that had been submitted under clause 2.16.1 by the successful bidders and verify what figures the successful bidders had tendered for in the forms of tender and that if the Board found that the figures were different from the figures in the eventual award, then the Board should declare the successful bidders' tenders as non-responsive and award the tenders to the Applicant which was the only entity that had properly priced its form of tender in conformity with the law.

In answer to the submissions made by Mr. Thangei, Mr. Kariri on behalf of the Procuring Entity conceded that the Procuring Entity had evaluated the Applicants tender number 11 on the basis of the sum of USD 17,406,350.

He also admitted that according to the form of tender submitted by the Applicant, the Applicant had quoted a total unit price of USD 4,856.2 and not the figure of USD 17,406,350 which was eventually used. He however explained that the figure which the Applicant had put in it's form of tender had an arithmetical error which in his own words the Applicant had not known and that this led the evaluation committee to correct the error leading upto the new price of 17,406,305 USD which the Procuring Entity used in evaluating and ranking the Applicant.

On the issue of the correction of errors, Mr. Kariri admitted that under the Provisions of the tender document, the Procuring Entity's role was limited to correcting arithmetical errors and where this was done, the Procuring Entity was bound to notify the bidder who was in turn bound to signify his acceptance of the correction in order for it to be bidding on the bidder. Mr. Kariri stated that in this particular instance, the Applicant was not notified that there was an error in it's tender sum and was not therefore asked to accept or reject the correction.

As to the prices submitted by the two successful bidders, the Procuring Entity did not at the time of the hearing submit the original financial proposals for the two successful bidders to enable the Board ascertain which prices the two bidders had stated in their forms of tender but this was eventually done upon insistence from the Board. Mr. Kariri however acknowledged based on the evidence at page 15 and 16(a) of the Applicant's Request for Review that M/s EHA Hoffman International GMBH had quoted a price of USD 2,317,900 at tender opening which was

read out at tender opening while the successful bidder in tender number 11 had quoted a price of 363,437.50.

Mr. Kariri however explained that these figures were for one year and that the Procuring Entity had multiplied the figures by 3 in order to achieve the total price for the three year duration of the tenders and that is why they made tender awards in the sums of USD 6,953,700 and 1,269,089 Euros.

Mr. Kariri therefore urged the Board to find that the awards made to the successful bidders were proper and therefore allow them to stand.

Prof. Mumma who appeared on behalf of the 1st successful bidder associated himself with the submissions made by Mr. Kariri and submitted that the Board could not make a direct award of the subject tenders to the Applicant because they had given to the Procuring Entity wrong information regarding who their manufacturer was and had therefore contravened the Provisions of Section 41(2) of the Act which prohibited a tenderer from giving wrong or misleading information. He submitted that based on this ground alone the Applicant was not entitled to the relief sought and additionally stated that a look at the signatures contained in the Power of Attorney contained in the tender document, the form of tender, the tender document generally and the Request for Review, the signatures, were different and could not be attributed to Mr. Abraham Kamunya Wahome who had purportedly signed the said document Prof. Mumma therefore urged the Board to find that the Applicant had further violated the Provisions of Section 41 of the Act on account of what he saw as the different signatures.

Turning to the contents of the Request for Review and the statement in support of the Request for Review, it was Professor Mumma's submissions that the Request for Review as framed lacked sufficient particulars and that the Applicant had largely based its submissions in this Request for Review on the response filed before the Board by the Procuring Entity. He contended that an applicant filing a Request for Review should particularize his claim with certainty and should not introduce new grounds.

On the issue of the financial discrepancies which were pointed out by Counsel for the Applicant, Counsel for the 1st interested Party complained that by failing to particularize the complaints in the Request for Review, the Applicant had put the 1st successful bidder in difficulty because it could not effectively respond to the issues raised in the absence of those particulars.

Counsel for the 1st Interested Party finally submitted that the issues raised by the Applicant were the same issues that had been raised in the earlier application and they were therefore *res-judicata* and ought not to have been re-visited in the second application.

He therefore prayed that the Applicant's Request for Review be dismissed with costs to the 1st Interested Party.

Mr. Kinyanjui for the 2nd Interested Party fully associated himself with the submissions made by Mr. Kariri and Professor Mumma on this issue. On the issue of figures Mr. Kinyanjui conceded that the figures quoted by his client in the form of tender namely the sum of Kshs. 363,437 was a figure

for one year and that this is the figure that was read out at his client's financial bid. Mr. Kinyanjui however submitted that this figure was for one year but the figure was multiplied by the Procuring Entity by three years giving rise to the cumulative figure of 1,269,049 Euros.

He therefore urged the Board to dismiss the Applicant's Request as lacking merit.

In answer to the submissions made by Mr. Kariri, Professor Mumma and Mr. Kinyanjui, Mr. Thangei reiterated that every bidder was required to quote and include in the form of tender the price for three years. He stated that it was clear from the form of tender which was in simple English that a bidder had to indicate the price for the 1st, 2nd and 3rd year and where this was not done by that bidder the bidder ought to have been declared as non-responsive and the Procuring Entity ought not to have accepted the bid.

Counsel for the Applicant disputed that there was an error in the Applicant's bid for tender No. 11 and reiterated that the total figure given was USD 4,856 and that the Applicant did not understand where the Procuring Entity had come up with the figure of USD 17,406,305.

Counsel for the Applicant submitted that even if there was an error as alleged by Mr. Kariri, then clause 2.22.2 of the tender document made it mandatory for the Applicant to be informed of the error which it had to accept and it was not therefore not open for the Procuring Entity to alter and base its evaluation on a figure not tendered for.

On the submission that the Applicant had provided misleading information on its manufacturer Counsel for the Applicant referred the Board to the letter dated 4th August, 2015 from its manufacturer and submitted that this allegation was not accurate and that this ground was an afterthought.

Before turning to the substantive issues raised in this grounds consolidated, the Board will first deal with the Procuring Entity's and Counsel for the 1st Interested Party's submission that the Applicant acted in contravention of the Provisions of Section 41 of the Act by providing false information regarding its manufacturer. Counsel for the 1st Interested Party further submitted that the signature appended by the Applicant on the Request for Review was different from the signature of the power of Attorney and the signatures on the tender document.

Counsel for the Applicant countered this submission by referring to the letter dated 4th August, 2015 which formed part of the Applicant's further list of documents which indicated that the Applicant had provided the correct particulars for its manufacturer. The Board has perused the said letter and finds that the submissions by the Procuring Entity and Counsel for the 1st Interested Party was not entirely correct. The letter dated 4th August, 2015 clearly indicated that the production site referred to by the Applicant was M/s Muschard and all that the letter did on its body was to indicate the address where the production site and place of meeting was located.

The Board further finds that the said argument was an afterthought because if the Applicant had indeed given false information as alleged then the only option which was open to the Procuring Entity has to disqualify it from the tender process but what the Procuring Entity instead did was to evaluate it and rank it.

On the issue of the signatures on the Request for Review and the Power of Attorney, the Board finds that the objection taken on this point has no basis what Counsel for the 1st Interested Party was in essence asking the Board to find is that the Applicant had committed what amounts to a criminal offence of forgery. Such a serious allegation ought to have been supported either by a conviction, a criminal record or at the very least by expert evidence to show that the signature on the said documents did not belong to one and the same person. In the absence of such evidence the Board is unable to accept evidence from the bar to support such a serious allegation.

The Board further finds that it is not unusual for one individual to have more than one signature and unless acceptable evidence is placed before the Board to show the contrary, the Board will give the Applicant the benefit of doubt and consider this dispute on merits.

The Board has considered the arguments made before it by the parties and has considered all the documents plead before it by the parties regarding the consolidated issues and upon a consideration of all the above information considers that the issues raised in this consolidated grounds of review raised very serious issues that will eventually determine the outcome of this Request Review because they revolve around the allegation

that the Procuring Entity either altered and or evaluated the Applicant's tender on the basis of a price that was not tendered for or it made an award of tenders to the successful bidders on the basis of prices that were not contained in their form of tender.

The Act and the various decisions made by this Board have extensively dealt with the issue of the primacy of the form of tender and the need to evaluate and award tenders on the basis of the prices set out in the form of tender.

Regulation 47(1) of the Public Procurement and Disposal Regulations 2006 stipulates as follows in so far as the evaluation of Tenders is concerned:-

Upon opening of tenders under Section 60 of the Act, the Evaluation Committee shall first conduct a preliminary evaluation to determine whether:-

- a) The tender has been submitted in the required format;*
- b)*
- c) The tender has been signed by the person lawfully authorised to do so;*
- d)*
- e)*
- f) All required documents and information have been submitted and;*
- g)*

In the case of Alfatech Contractors Limited -vs- Kenya National Highways Authority PPRB no. 38 of 2009 the Board made the following

observation on the importance and the primacy of the form of tender in any tender process:-

"The Board has examined the form of tender submitted by the Applicant. The Board notes that the Applicant partly filled the Form of Tender, making the offer to undertake the works at Kshs. 36,717,315.00. However the Board notes that the Applicant's form of tender did not have details of the addressee, the addressor and was not dated. The Board further notes that the instruction to tenderers required bidders to fill in all details. The Board holds that the form of tender is the document through which the offer is communicated to specified employer. It is the offer that the Procuring Entity would consider and either accept or reject. The Board finds that the form of Tender is a very vital document which communicates every essential information, based on which a contract is created. In this case the Applicant did not fill in the Form of Tender the name of the Procuring Entity, its name as the addressee nor did it fill in the date. Consequential the Board finds that these omissions were serious and hence the Procuring Entity was right in disqualifying the Applicant at the Preliminary Evaluation stage".

Still on the issue of price the Board held as follows at page 11 in the case of Arpland Architects -vs- Ministry of Housing (Review No. 4 of 2010.

"The Board finds that the submission of the financial proposal in accordance with forms iv and vii was a mandatory requirement. Accordingly, the Board finds that the Procuring Entity should have disqualified the successful bidder at that stage and awarding the

tender to the Applicant who would have emerged with the highest combined technical and financial score. The Board also finds that the Procuring Entity's decision to request the three technically responsive bidders to review and furnish a breakdown of their financial proposal strictly in accordance with form iv to vii of the Tender document as per its letter dated 4th December, 2009 was irregular as it was done after the deadline for submission of tenders. The Board further finds that the letter dated 4th December, 2009 amounted to a request for bidders to do fresh financial proposals which changed the substance of the tender. As the Board has already noted any bidder who did not comply with Clause Section 2.2 of the terms of reference should have been disqualified".

The effect of all the above statutory Provisions and case law is that where a tender document provides for the particulars to be provided by a bidder, in the form of tender, a bidder who fails to provide such information must be considered as non-responsive. It is also not permissible under the Provisions of the Act to alter the substance of a tender after the deadline for the submission of tenders or to unilaterally fill in gaps or change the prices indicated by bidders in their form of tenders.

The Board has perused the original tender document for the two tenders namely tender no. 10 and tender no. 11 and finds that the tenders were for three years and bidders were required to indicate the price that they were

offering to supply the goods sought to the Procuring Entity for the said three years.

The Board has perused the form of tender for the successful bidder in tender number ~~10 M/s EHA Hoffman International GMBH~~ which is dated 26th February, 2015 and which was signed by Mr. Waldemar Ginter together with the attached price schedule which was signed on the same day and finds that the price indicated in the form of tender is the sum USD 2,317,900. The form of tender clearly indicates that the tender was for the years 2014 - 2017 and there is not the slightest mention in the form of tender that the price offered was for one year.

Contrary to the form of tender which speaks for itself and without any prompting whatsoever, the Procuring Entity decided to multiply this price by 3 and awarded the tender to **M/s EHA Hoffman International Ltd** at the price of USD 6,953,700 which was not set out in the form of tender thereby altering the substance of the tender as submitted by the bidder which was contrary to the law.

Turning to the successful bidder in **Tender 11 M/s MIG International Limited**, the Board has perused the form of tender dated 28th February, 2015 and finds that the piece quoted by the bidder was the sum of 363,437 Euros for the years 2015 - 2017. There is again no indication that this price was for one year but instead of awarding the tender at the amount indicated in the form of tender, the Procuring Entity again without any basis awarded the tender to the said bidder at the sum of 1,269,089.45

Euros which was equivalent to USD 1,418,842.00 for the Hot Stamping foil size 120mm x 305m for a period of three years.

One feature that is noteworthy from the two forms of tender is that the bidders did not set out the respective prices per year for the three years as required by the tender document and their forms of tender were not therefore in the format prescribed for in the tender document and their bids ought to have been declared as non-responsive.

The Board has anxiously considered the complaint raised by the Applicant regarding how the tender evaluation committee evaluated the Applicant's tender no. 11 for the delivery of motorized vehicle number plate hot foils. The Board has perused the original financial bid the form of tender and the price schedule and finds that the Procuring Entity unlike in tender no. 10 did not provide the quantity of pieces against which prices were to be quoted. The Board has also perused the financial proposal submitted by the Applicant as set out in the form of tender and in the price schedule of goods which was in the format set out in the tender document.

It is clear from these two documents that the Applicant gave a total unit price for the supply of foils at the price of USD 4,856.20 which was broken down into the sum of USD 1541.7 USD 1618.7 and USD 1695.8 per year for the 1st, 2nd and the 3rd years as required by the tender document.

The evaluation report for tender no. 11 however shows that instead of using the prices set out in the form of tender and the price schedule the Procuring Entity went ahead to evaluate the Applicant's financial proposal using the piece of USD 17,406,350 which the Applicant did not tender for.

The Board finds such an action to be improper, total uncalled for and amounts to what the Board would respectfully term as an abuse of the powers of an evaluation committee which is required to exercise the public duty imposed on it fairly, in accordance with the law and in a manner that is not capricious. During the course of his submissions, Mr. Thangei informed the Board that the figure which was used in evaluating his client's amounted to 3,584 higher than the figure set out in the form of tender. It is the Board's respectful view that such a discrepancy is so disproportionate and cannot avoid coming to the conclusion that this was solely meant for the purpose of ensuring that the Applicant did not have a fair evaluation of it's tender contrary to the express letter and the spirit of Article 227 of the Constitution and the objectives set out in Section 2 of the Public Procurement and Disposal Act 2005 both of which require that bidders be treated fairly.

This action on the part of the Procuring Entity was also contrary to the Act and Clause 2.22.2 of the tender document since it did not amount to the correction of an arithmetical error which the Procuring Entity was at any rate not able to point out. The action by the Procuring Entity amounted to a substantive alteration of price and no consent or approval was sought from the Applicant. The action was therefore outrightly illegal and the Board is unable to accept Mr. Kariri's explanation that what the Procuring Entity did amounted to a correction of an error.

Before arriving at it's final decision in this matter, the Board was informed that the Procuring Entity did not award the tender for foil size 220mm x

305m to any bidder because M/s EHA Hoffman International GMBH's offer USD 20,797,500 for a period of three years was found to have been overpriced and the tender evaluation committee and the tender committee therefore decided that the tender for this item be re-advertised. The Board has considered this reason and is unable to accept it because according to the decision given by the Board on 17th July, 2015 and which was binding on the Procuring Entity under the Provisions of Section 100 of the Act, the Board directed the Procuring Entity to carry out a fresh re-evaluation of all items falling under tenders number 10 and 11 and award them in accordance with the criteria set out in the tender document and it was not therefore open for the Procuring Entity to waive any item. The Board further wishes to observe that apart from M/s EHA Hoffaman International GMBH several other bidders including the Applicant bid for the same item and if the evaluation or the tender committee found the successful bidders price to be overpriced, there was no reason whatsoever why the Procuring Entity should not have considered the bids submitted by the other bidders to determine whether any of them merited to be awarded the tender for this particular item.

The Board has further looked at the original financial proposal submitted by the 1st Interested Party in respect of tender number 11 for the supply and delivery of motorized vehicle number plates Hot stamping foils. The financial proposal discloses glaring errors. The first and most fundamental error that emerges from the financial proposal is that the bidder did not include the form of tender in it's financial proposal. The bidder instead attached a price schedule which was not in the form prescribed in the

tender document and contrary to the Procuring Entity's assertion that the bidder offered a figure of USD 20,797,500.00 for the Hot stamping foils, the price schedule signed on 2nd March, 2015 headed the price table for the Hot stamping foil Roll size 220mm x 350m shows that the grand total price offered and which was not supported by any form of tender was the sum of USD 6,932,500 and the Board wonders where the Procuring Entity got the sum of USD 20,797,500 as the price of the Hot foils.

On the issue of *Res-judicata* the Board has considered the arguments made by Counsel for the 1st Interested Party, the Pleadings and the decision given on 17th July, 2015 in case No. 28 of 2015 and the issues in this review and finds that the issues that the issues herein arose from the re-evaluation process. The issue of the glaring price discrepancies on re-evaluation of the tender arose from the fresh re-evaluation and not from the first Request for Review. The Board could not therefore make a decision on this fundamental issue in the first review and the issue having not been raised in the earlier application the issue and any other arising from the fresh re-evaluation cannot be *res-judicata*.

Turning to the orders sought, the Board has perused the Request for Review and the Orders sought by the Applicant.

The Applicant in prayers 1 and 2 sought that the award of the tenders made by the Procuring Entity to the successful bidders be annulled pursuant to the Provisions of Section 98(a) of the Act and that the subject tenders be awarded to the Applicant under the Provisions of Section 98(c) of the Act.

In arriving at its final decision on the nature of the orders the Board has already made the following pertinent findings in this Request for Review, namely:-

- i) The Procuring Entity established through technical evaluation that all the bidders who proceeded to the financial evaluation stage were technically qualified to provide the services tendered for.
- ii) The successful bidders who were awarded the tenders were not financially responsive and that awards made to them ought not to have been made.

In view of the above findings the only issue which the Board needs to deal with is whether this is a proper case for the Board to make a direct award of the subject tenders or any of them to the Applicant.

It is now well settled following the Court of Appeal decision in the case of **Kenya Pipeline Company Limited =vs= Hyosung Ebara Co. Ltd & 2 others (Civil Appeal No. 145 of 2011)** that the Board while considering a Request for Review brought before it has wide powers. These powers include the power to annul, give directions and even substitute the decision of the Procuring Entity with a decision of the Board awarding a tender to an Applicant where the circumstances of a particular case so dictate especially where it is clear from all the available evidence that a Procuring Entity is either acting contrary to the provisions of the law and the tender document or where it is clear that a Procuring Entity is

exercising the power conferred upon it without regard to the obvious facts placed before it.

The Board's power to substitute its decision in the place of that of the Procuring Entity has been recognised by the High Court in several decisions such as in the case of the Republic -vs- Central Bank of Kenya & Another *exparte* Horse bridge Network Systems (F.A) Limited JR Misc. Appl. No. 87 of 2014 where the Honourable Justice Weldon Korir recognized that the Board has such power.

The Board has considered all the circumstances of this case and more particularly the fact that it gave the Procuring Entity a second opportunity to re-look at this matter but instead of complying with the Board's orders, the Procuring Entity proceeded to re-evaluate the tender and particularly the financial proposals submitted to it in a manner that was contrary to the law. The Procuring Entity in what the Board considers to be a case that can only be termed as a casual treatment of the process of evaluation altered figures for bidders based its evaluation on figures other than those submitted and even acted on financial proposals which were not supported by any form of tender. There was a clear effort on the part of the evaluation committee to exaggerate figures with the sole aim of ensuring that the Applicant did not get its fair day in the evaluation process.

This Board as the custodian of public good is duly bound to ensure that the law has been complied with and will not hesitate to exercise the wide

powers conferred upon it under Section 98(c) of the Act and finds that this is a proper case where the Board should do so.

One further factor that has influenced the Board's decision in this matter is that this Procurement relates to the rolling out of the new generation number plates a process that is long overdue. It is the position of this Board that Public Procurement processes must never be left to hang in abeyance indefinitely especially when entrusted on officers who ought to exercise due diligence in undertaking the exercise. The Board is therefore of the view that time has now come to bring this process to an end in order to enable the public enjoy the benefits that accrue with the introduction of the new generation number plates and other related services.

The Board wishes to note that when this matter came up for hearing there was a concerted effort by the Procuring Entity to keep away the financial proposals submitted by the successful bidders from the Board and when these documents were finally submitted to the Board, it became obvious that there were glaring errors some of which bordered on fraud in the manner the financial proposals were altered and different set of figures used in carrying out the financial evaluation.

The Board has finally perused the financial proposals submitted by the Applicant for tenders number 10 and 11 finds that unlike the successful bidders in this case, the Applicant submitted the forms of tender and the price schedules in the form prescribed in the tender document and

provided the year by year quotation of price for each of the three years together with the totals.

FINAL ORDERS

In view of all the foregoing findings and in the exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Public Procurement and Disposal Act 2005 the Board makes the following orders on this Request for Review:-

- a) The Applicant's Request for Review dated 9th September, 2015 and which was filed with the Board on the same day hereby succeeds and is allowed.

- b) The award of the tender for the supply of motorized number plate Blanks to M/s EHA Hoffmann International GMBH is hereby annulled.

- c) The award of the tender for the supply and delivery of motorized number plate Hot Stamping foils to M/s MIG International Ltd for Hot stamping foils size 120mm x 305mm is hereby annulled.

- d) The decision of the Procuring Entity failing to award the tender for foil 220mm x 305mm and the recommendation that the tender for the supply of the said foil be re-advertised and is hereby annulled.

- e) IN exercise of the powers conferred upon the Board by the Provisions of Section 98(c) of the Act, the Board hereby substitutes

the decision of the Procuring Entity declaring the Applicant's tenders in tender No. 10 and No. 11 as unsuccessful and hereby substitutes the said decision by awarding the Applicant:-

- i) Tender number KPS/ICB/T/10/2014/2015 - 2016-2017 for the supply and delivery of motorized vehicle number Plate Blanks at the price out in the form of tender dated 2nd March, 2015 and the schedule annexed thereto.
- ii) Tender number KPS/ICB/T/11/2014/2015 - 2016/2017 for the supply of motorized number Plate Hot Stamping Foils size 120mm x 305mm including foil size 220mm x 305m at the unit prices set out in the Applicant's form of tender dated 2nd March, 2015 and the schedule annexed thereto.
- f) The Procuring Entity is directed to issue letters of award to the Applicant in respect of the two tenders and complete the entire procurement process in accordance with the law within a period of Fifteen (15) days from the date of this decision.
- g) In exercise of the powers conferred upon this Board by the Provisions of Section 98 of the Act, the Board recommends that the Director of the Public Procurement Oversight Authority and the other investigative Agencies of the Government do carry out an investigation to establish whether there was any impropriety in the Procuring Entity's decision to alter the prices submitted by the parties in their tenders and or in adopting prices and awarding the

subject tenders to bidders at prices not set out in the form of tenders.

h) Since each party has been partly successful in the Request for Review, the Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 8th day of October, 2015.

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CHAIRMAN
PPARB

[Handwritten Signature]
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SECRETARY
PPARB