

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 11/2016 OF 19TH FEBRUARY, 2016

AMRO INSURANCE BROKERS LIMITEDAPPLICANT

AND

KENYA WILDLIFE SERVICE.....PROCURING ENTITY

Review against the decision of the Kenya Wildlife Service (KWS) to award Tender No. KWS/ADM/OT/47/2015-2016 for the Provision of Aviation Insurance Brokerage Services to M/s Four M Insurance Brokers Ltd.

Board members present

1. Paul Gicheru - Chairman
2. Gilda Odera - Member
3. Rosemary Gituma - Member
4. Eng. Weche Okubo - Member
5. Nelson Orgut - Member

In attendance

- Philemon Kiprop - Secretariat
- Shelmith Miano - Secretariat

Present by invitation

Applicant - AMRO INSURANCE BROKERS LTD

1. Maureen Kiiru - Advocate
 2. Mmuka Valence - Advocate
-

Procuring Entity - KENYA WILDLIFE SERVICES

1. Patrick Lutta - Advocate
 2. Nyongesa Raymond - Advocate
 3. Walter Akwambi- Lawyer
 4. Francis Mwaita - DDF & A
 5. John Kagwi - AD
 6. James Sokoro - SA
 7. Tom Ogola - Ag. Corporation Secretary
 8. Christopher Oludhe - Procurement Manager
 9. Stephen Wanjohi - Insurance Officer
 10. John Mugendi - Management accountant
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Interested party (Four M Insurance Brokers (K) Ltd)

1. Antony Kiprono - Advocate
 2. Mary Musyoka - Lawyer
 3. Nancy Koech - HOD - Corporate Four M Ins. Brokers Ltd
 4. Lilian Njuguna - Finance Manager
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The board's decision

Upon hearing presentations from the parties and the interested candidate and upon considering the information in the documents before it, the Board decides as follows:

Background of award

The tender for provision of Aviation Insurance Brokerage Services (Aviation Policies for the Year- 2016/2017, 2017/2018) Tender No: KWS/ADM/OT/47/2015-2016 was advertised on 11/Dec/15.

A pre-bid meeting was held on 17th Dec 2015 and interested bidders attended. As a result of the pre- bid meeting, an Addendum No 1 was uploaded on 22nd Jan 2016.

The Tenders were opened on 5th Jan 2016 at 12 noon in the presence of bidders /representatives and nine (9) firms submitted their bids.

TENDER OPENING

The tender opening was conducted at veterinary conference hall and attracted the following insurance brokerage firm M/S Amro Insurance Broker Ltd Package Insurance Brokers Ltd, Four M Insurance Brokers Ltd Liaison Group Insurance Brokers Ltd, Chancery Wright Insurance Brokers Ltd Prime Mover Insurance Brokers Ltd, Alexander Forbes Risk & Insurance Brokers Ltd ,Eagle Africa Insurance Brokers Ltd and Consolidated Insurance Brokers Ltd

EVALUATION COMMITTEE

An evaluation committee appointed by the Ag. Director General on 11th Jan 2016 comprised 8 members of staff.

EVALUATION PROCESS

The evaluation was conducted in three stages that involved the following Stages:-

- I. Preliminary assessment of whether the bidders (brokers) and their respective proposed underwriter(s) met the mandatory requirement
- II. Technical evaluation of the Bidders(s) & proposed underwriter(s) responsiveness to KWS requirements
- III. Financial evaluation of the bid(s) completeness
- IV. Recommendation(s) to the Tender Committee

STAGE I - PRELIMINARY EVALUATION FOR THE BROKERS (MANDATORY)

1.1 Mandatory qualifying requirements for Brokers (Go-No-Go)

To be eligible for this procurement, Bidders were required to provide the following mandatory requirements with their technical proposal as per Section B. 2.3 and Section G: - Tender Evaluation:-

1. Certificate of business registration [certificate of incorporation for the Broker]
2. Current certificate of registration with the Insurance Regulatory Authority for year 2015
3. Current membership certificate from Association of Insurance Brokers of Kenya-2015
4. Copy of the Current professional indemnity policy with a limit of not less than Kenya shillings 50,000,000 .

5. Premium turnover- the Broker shall submit documentary evidence indicating that the aviation premium underwritten through the Broker over the last two years (2013/2014, 2014/2015) was at least Kshs. 10,000,000
6. A valid Tax Compliance Certificate from KRA for the Broker and the proposed Underwriters
7. Brokers shall also submit as part of the technical proposal, their latest audited financial statements for the period 2013 and 2014
8. The technical bid documents must be accompanied by a bid security of Kshs 200,000.00 in its original form, from a reputable bank incorporated in Kenya
9. Bank guarantee of Kshs. 3 million deposited with the Insurance Regulatory Authority and a certified copy of the guarantee must be attached
- 10.No unpaid claims (fully documented and unpaid for more than 21 days) with Kenya Wildlife Service will be disqualified. The bidders should confirm in with the proposed Underwriters that they do not have unpaid claims with KWS.
- 11.A letter of undertaking that they will render services to KWS until all the claims that fall under the Broker's period of insurance are fully settled
- 12.Letter of undertaking that all information provided is accurate and that any material misrepresentation could lead to policy cancellation.

The mandatory requirements for the brokers as set out in the tender documents were examined by the committee members and the results of the examination is as shown in the table below.

Summary of responsiveness to mandatory requirements for brokers (√ or x)

KEY:

√ Meets the requirement

X Does not meet the requirement

N-R Non-Responsive

R Responsive

List of Brokers who **did not** comply with the MANDATORY requirements with the respective reason(s).

Respective Reason(S) for disqualification

BID NO.	Reason(s) for disqualification
1	<ul style="list-style-type: none">• Inadequate Bank guarantee – provided 1 million bank guarantee.
2	<ul style="list-style-type: none">• Bank guarantee not certified by IRA• Aviation premium two years (2013/2014, 2014/2015) is below Kshs. 10m.
4	<ul style="list-style-type: none">• Current membership certificate from Association of Insurance Brokers of Kenya-2015 not certified• Professional Indemnity cover not valid.
5	<ul style="list-style-type: none">• Bank guarantee not certified/acknowledged by IRA• Has unpaid KWS claims with Lakestar Insurance Company (under liquidation) for the period 2000/2001
6	<ul style="list-style-type: none">• Has KWS unpaid claims with Kenindia Assurance Company Limited from 2005 to 2013

7	<ul style="list-style-type: none"> • Bank guarantee not certified/acknowledged by IRA • aviation premium turn over not provided
8	<ul style="list-style-type: none"> • No 2015 Certificate of registration by Association of Kenya Insurance Brokers
9	<ul style="list-style-type: none"> • Copy of IRA registration certificate not certified • Copy of AIBK registration certificate not certified • Bank guarantee not certified/acknowledged by IRA • No Letter of undertaking that all information provided is accurate and that any material misrepresentation could lead to policy cancellation

List of Broker(s) who complied with the MANDATORY requirements and qualified to proceed to the next stage of TECHNICAL Evaluation

BID NO	Firm's Name
3	Four M Insurance Brokers Ltd

1.2 Mandatory qualifying requirements for proposed underwriter(s) (Go-No-Go)

The above named Broker proposed the following Underwriter

BID NO	Firm's Name	Proposed Underwriter
3	Four M Insurance Brokers Ltd	Jubilee Insurance Company Ltd

To be eligible for this procurement, Underwriters were required to meet the following mandatory requirements as per **Section B. 2.4** of the tender document:-

1. Copy of certificate of registration under the Companies Act.
2. Certified copy Registration with the Insurance Regulatory Authority for year 2015
3. Certified copy of Registration as member of Association of Kenya Insurers (AKI) for year 2015
4. The proposed insurance companies shall be registered members with AKI for the year 2015.
5. The proposed insurance companies must provide a copy of the Aviation reinsurance arrangement treaty.
6. Certified copies of latest audited financial statements.
7. Prove on aviation Premium turnover over the last two years (2013/2014, 2014/2015) was at least 20 million
8. Acceptable Financial Ratios (minimum 1)

a) Claims coverage ratio = $\frac{\text{net liquid assets}}{\text{Outstanding claims}}$

b) Current ratio= (1) without factoring reinsurance arrangements.

$$\text{Current ratio} = \frac{\text{Current Assets}}{\text{Current Liabilities}}$$

9. Paid Up Capital. The recommended underwriter shall have a paid -up capital of at least Kshs. 300 million.

10.The recommended underwriter shall have no unpaid claims. (Fully documented and unpaid for more than 21 days) with Kenya Wildlife Service will be disqualified.

Summary of responsiveness to mandatory requirements for the Underwriter (√ or x)

Mandatory requirements for the Underwriter:-	Jubilee Insurance Company
1. Copy of certificate of registration under the Companies Act.	√
2. Certified copy Registration with the Insurance Regulatory Authority for year 2015	√
3. Certified copy of Registration as member of Association of Kenya Insurers (AKI) for year 2015	√
4. The proposed insurance companies shall be registered members with AKI for the year 2015.	√

5. The proposed insurance companies must provide a copy of the Aviation reinsurance arrangement treaty.	√
6. Certified copies of latest audited financial statements.	√
7. Prove on aviation Premium turnover over the last two years (2013/2014, 2014/2015) was at least 20 million	√
8. Acceptable Financial Ratios (minimum 1) a) Claims coverage ratio = $\frac{\text{net liquid assets}}{\text{Outstanding claims}}$ b) Current ratio= (1) without factoring reinsurance arrangements. Current ratio = $\frac{\text{Current Assets}}{\text{Current Liabilities}}$	√
	√
9. Paid Up Capital. The recommended underwriter shall have a paid -up capital of at least Kshs. 300 million.	√
10.The recommended underwriter shall have no unpaid claims. (fully documented and unpaid for more than 21 days) with Kenya Wildlife Service will be disqualified.	√
RESPONSIVNESS	R

KEY:

√ Meets the requirement

X Does not meet the requirement

R Responsive

BID NO	Firm's Name	Proposed Underwriter	Proposed Underwriter's Responsiveness
3	Four M Insurance Brokers Ltd	Jubilee Insurance Company Ltd	RESPONSIVE

Jubilee Insurance Company was RESPONSIVE to the MANDATORY requirements together with Bidder Number 3 qualified to proceed to the next stage of TECHNICAL Evaluation

STAGE II - TECHNICAL EVALUATION OF THE BIDDER AND PROPOSED UNDERWRITER

The criteria for technical evaluation were set out in *SECTION G Technical Evaluation Criteria* of the tender document: since only one bidder was recommended it attained 93.25% average mark.

STAGE III - FINANCIAL EVALUATION

The financial proposals were opened on 18th January, 2016 in the presence of the qualified bidder.

	Rate (@)	Annual Gross Premium(US\$)	Deductible/ Excess	Remarks
1) Aviation Hull All Risks & Liability Insurance Policy				
A) Hull				
B) Liability				
C) Hull Ground Risks Only				
2) Aviation Hull, War & Allied Perils Insurance				
3) Hangar Keeper's, & Airport Owners Liability Policy				
4) Spares & Equipment (US\$500,000)				
1) Aviation Personal Accident Insurance (A) FOR TRAINEES & PERMANENT PILOTS) (B) FOR RESERVE PILOTS ONLY)				
TOTAL		USD301,177		

OF THE EVALUATION COMMITTEE

- The evaluators observed that the proposed underwriter had quoted a block figure of USD301,177 which seems to cover all the policies we had asked for against our budget of USD 500,000.
- The members noted that the bidder did not complete the price schedule as was required in the tender document and specifications on page 29 section F.
- That the bidder did not quote the unit rates for the five different policies as was requested on page 29 note.
- That the bidder's quotation has no mention of reserve pilots and did not quote or give a rate for the reserve pilots as per the requirements of the tender document specifications page 28 section 5 C (Note), which states that "the bidder to quote the rates for reserve pilots and crew separately as the cover will apply only when flying KWS aircrafts." The benefits for the personal accident cover on reserve pilots is also not mentioned in the underwriter's quotation.
- Limit of liability in respect of Cessna C208B has been limited to USD 2,500,000 for any one occurrence which is less than our proposed limit of USD. 5,000,000 for any one accident
As contained in our Specifications section 1- limits of liability - page 24)
- Airport Owners, Hangar Keepers and Operators liability policy has not been included in the Underwriter's quotation as per the policy details contained in the tender document page 26

Recommendation

The Tender Committee was requested to consider and approve the award of Tender No. KWS/ADM/OT/47/2015-2016 for Provision of Aviation Insurance Brokerage Services (Aviation Policies For Year- 2016/2017, 2017/2018) be awarded to M/s. **Four M Insurance Brokers Ltd** at a total cost of USD 301,177 inclusive of taxes, being the best evaluated bidder.

TENDER COMMITTEE'S DECISION

The Tender Committee at its meeting No .12/2015-2016 held on 5th February, 2016 discussed and adopted the Evaluation Report presented before it and made the awarded M/s. **Four M Insurance Brokers Ltd** at a total cost of USD 301,177 inclusive of taxes, and the proposed underwriter Jubilee Insurance Co.Ltd being the best evaluated bidder.

THE REQUEST FOR REVIEW

This Request for Review was filed by the Applicant on 19th February, 2016 challenging the decision of the procuring entity to award the tender for the Provision of Insurance Brokerage services under Tender No. KWS/ADM/OT/47/2015-2016 to the successful bidder herein M/s Four Insurance Brokers Ltd.

During the hearing of the Request for Review, the Applicant was represented by M/s Maureen Kiiru and M/s MMuka Valence Advocates while the procuring entity was represented by Mr. Patrick Lutta Advocate.

Mr. Anthony Kiprono advocate appeared on behalf of the successful bidder.

The Applicant raised a total of 18 grounds in support of the Request for Review which were largely factual.

When this Request for Review came up for hearing before the Board, it was generally agreed by all the advocates who appeared before the Board that this Request for Review raised two broad grounds namely:-

- a) Whether the Applicant had rightly been declared non-responsive on the ground that it had failed to provide a Bank Guarantee of Kenya Shillings Three Million to be deposited with the Insurance Regulatory Authority and a certified copy of the guarantee attached to the tender document.
- b) Whether the Applicant based its Request for Review on confidential documents contrary to the Provisions of Section 44 and 45(2)(e) of the Public Procurement and Disposal Act 2005.

The Applicant's case

M/s Kiiru who appeared in this matter on behalf of the Applicant submitted that under the Provisions of mandatory requirement number 9 of the tender document relating to Brokers any bidder who fell into that category was required to provide a Bank Guarantee of Kshs. 3 Million to be deposited with the Insurance Regulation Authority and a certified copy of the guarantee ought to have been attached to the tender document.

Counsel for the Applicant submitted that pursuant to the said mandatory requirement, the Applicant included in its tender document two Bank guarantees for the sum of Kenya Shillings One Million (Kshs. 1,000,000) issued by the National Bank of Kenya Limited and a second one issued by Investments and mortgage Bank Limited for the sum of Kenya Shillings Two Million Kshs. 2,000,000. Counsel for the Applicant stated on the basis of the two Bank guarantees that it had complied with the mandatory requirement no. 9 and that it was therefore wrong for the procuring entity to declare its tender as non-responsive on the ground that it did not comply with the mandatory requirement on providing an Insurance Guarantee of Kshs. 3,000,000.

M/s Kiiru stated that the basis for the Applicant's disqualification was in contravention of the Provisions of Section 64 of the Public Procurement and Disposal Act 2005 since the Applicant's tender was responsive and that the Applicant should have been allowed to proceed to the next stage of evaluation namely, the technical evaluation.

Counsel for the Applicant stated that the letter dated 22nd October, 2012 from the Insurance Regulatory Authority appearing at page 81 of its Request for Review had confirmed that the Authority was holding Bank guarantees of Kenya Shillings Three Million issued by the Applicant.

Counsel for the Applicant therefore urged the Board to find and hold that the Applicant had been declared unresponsive based on the wrong premise.

On the second ground that the Applicant had based its Request for Review on confidential documents, Counsel for the Applicant admitted at the hearing that indeed the Applicant had relied on confidential documents. She specifically admitted that the Applicant had in its possession the full minutes of the tender evaluation committee which she produced and annexed at pages 408 -418 of the Applicant's Request for Review. She stated that the Applicant had in its possession both the technical and the financial evaluation report.

She also produced and annexed the minutes of the tender committee at pages 419 - 421 of the Request for Review. M/s Kiiru also confirmed that the Applicant had in its possession the supplementary evaluation report which she produced and annexed to the Request for Review at pages 424 to 427. She also annexed an internal memo signed by one Julius Kimani appointing members of the evaluation, negotiations, inspection and acceptance committee of the procuring entity which she produced at page 396 of the Request for Review.

She additionally produced and annexed the successful bidder's financial proposal at page 399 of the Request for review and a letter dated 5th January, 2016 addressed by the successful bidder to the procuring entity and which was not copied to the Applicant.

M/s Kiiru however stated that she saw nothing wrong in relying on confidential information as a basis for the Request for Review. She relied on the privy Council's decision in the case of **Kuruma son of Kaniu -vs- Reginam (1955)(1) All E. R 236** and stated that in considering whether

evidence is admissible, the test is whether it is relevant to the matters in issue and if it is relevant, the Court is not concerned with the method by which it was obtained. She further submitted on the basis of the above decision that the Board or the Court could rely on illegally obtained evidence so long as it was relevant and it mattered not how it was obtained.

She also relied on the case of **Nicholas Randa Owano Ombija -vs- The Judges and Magistrates Vetting Board (Civil Appeal No. 218 of 2015)** for the same proposition.

Counsel for the Applicant therefore urged the Board to rely on the confidential documents while considering the Request for Review now before it.

The procuring entity's

Mr. Patrick Lutta who appeared on behalf of the procuring entity in this matter opposed the Applicant's Request for Review and submitted that the Applicant was rightly declared as non-responsive. Counsel for the procuring entity informed the Board that the procuring entity had in fact issued an Addendum No. 1 which amended the form of the Bank guarantees to be issued by Brokers. The said Addendum required Brokers to comply with the following requirement:-

"3 Section B (Instructions to tenderers) paragraph 2.3 (ix) is amended to read in full as follows:-

“The brokers shall have a Bank Guarantee of Kshs. 3 Million deposited with the Insurance Regulatory Authority and a certified copy of the guarantee must be attached”.

Counsel for the procuring entity however submitted that contrary to this requirement, the Applicant produced two Bank guarantees one dated 18th May, 2006 issued by the National Bank of Kenya Limited and another unclear guarantee bearing no year of issue from the Investments and Mortgage Bank Limited.

Counsel for the procuring entity however stated that the two documents contravened the Provisions of the addendum since they were not clear or certified and were therefore in contravention of the mandatory terms of addendum No. 1 which required certification of the guarantees in order to render them compliant with the mandatory requirement.

On the Provisions of Section 44 and 45 2(e) of the Act, Counsel for the procuring entity submitted that the Applicant’s conduct in the circumstances of this case was flagrant. He submitted that under the Provisions of Section 37(1) of the Act, all written communication between a procuring entity and a bidder ought to be in writing. He stated that the Applicant had not displayed any letter written by it to request for a summary of the evaluation report from the procuring entity under the provisions of Section 45(2)(e) of the Act and noted that the Applicant had not disclosed the source of its information. Counsel for the procuring entity submitted that the Applicant’s conduct was criminal in nature since reliance on confidential documents was criminalized by the Provisions of

Section 44(4) of the Public Procurement and Disposal Act which was still applicable to this case.

Counsel for the procuring entity submitted that the Applicant had by its own documents and the submissions by Counsel for the Applicant admitted that the Applicant had relied on confidential documents and information to mount this application and stated that this admission was enough proof of the illegality and was a sufficient ground to have the Applicant's Request for Review dismissed with costs.

He relied on this Board's decision in the case of **Thwama Building Services Ltd -vs- Tharaka Nithi County Government (PPRB APPL. NO. 21 of 2015)** and the case of **China Wu Yi Company Ltd -vs- Kenya Pipeline Company Ltd (PPRB NO. 24 of 2014)** where the Board held that confidential documents could not be relied upon to support a Request for Review and that where a party had based its application on confidential documents, then such an application was liable to be dismissed on that ground alone.

He therefore urged the Board to dismiss the Applicant's Request for Review be dismissed with costs.

Mr. Kiprono who appeared on behalf of the successful bidder associated himself with the submissions made by Counsel for the procuring entity and urged the Board to dismiss the Applicant's Request for Review with costs firstly because the Applicant had relied on confidential documents and had even obtained the successful bidder's financial proposal and other

confidential documents which was highly irregular in a procurement process. He stated that under the law, the Applicant was only entitled to a summary of the evaluation report and not to other bidders documents.

Counsel for successful bidder submitted that what the Applicant was seeking to do based on it's own admission was to further an illegality and she could not therefore be heard to state that because the Evidence act or the common law allows for the production of illegally obtained evidence then that gave the applicant a licence to justify what in the successful bidder's view amounted to theft of other bidders documents such as had happened in the case of his client, the successful bidder.

Turning to the decisions relied upon by Counsel for the Applicant, Counsel for the successful bidder submitted that procurement law was a special jurisdiction which was governed by a statute specially enacted for that purpose and where the Provisions of the Procurement Law were in conflict with any other law, then the Provisions of Section 5(1) of the said Act was explicit that the Provisions of the Public Procurement and Disposal Act must prevail.

On the issue of whether the Applicant had been rightly declared as non-responsive, Counsel for the successful bidder submitted that the Bank guarantees provided by the Applicant were not certified as required by the mandatory requirements and were not legible. He therefore stated that this also brought the issue of their legitimacy in question.

The Applicant's response

In a brief response to the procuring entity and the successful 'response Counsel for the Applicant maintained that the Applicant was within its right to use confidential documents and that there was no element of criminality in the use of the said documents.

She also maintained that the Applicant had supplied Bank guarantees worth Kshs. 3,000,000 as part of the mandatory requirements and maintained that they were proper. She however conceded that the two guarantees were not certified and that the year on the form of guarantee allegedly issued by the Investments and Mortgages Bank Limited was not legible and even herself could not even read the year when it was issued.

She therefore urged the Board to allow the Applicant's Request for Review as prayed.

The Board's decision

The Board has considered the Applicant's Request for review, the statement in support thereof together with all the documents relied upon by the Applicant. The Board has also read through the procuring entity's objection and all the original tender documents for the bidders who participated in this tender.

The Board has additionally perused the documents filed by the successful bidder and the list and the authorities relied upon by the parties.

ISSUE NO. 1

Whether the Applicant had rightly been declared non-responsive on the ground that it had failed to provide a Bank Guarantee of Kenya Shillings Three Million to be deposited with the Insurance Regulatory Authority and a certified copy of the guarantee attached to the tender document.

On the first issue framed for determination by the Board, the Board finds that one of the mandatory conditions which a bidder had to comply with before proceeding for technical evaluation was the requirement in Addendum number 1 of that Brokers shall have a Bank guarantee of Kshs. 3,000,000 Million deposited with the Insurance Regulatory Authority and a certified copy of the guarantee must be attached to the tender document.

The Board has perused through the Applicant's tender document and has come across two guarantees one issued by the National Bank of Kenya Limited on 18th May, 2006 which is a period of about 9 years from the date when this tender was advertised and another apparently undated guarantee ostensibly issued by the Investments and Mortgages Bank Ltd which does not bear the year when it was issued.

It is clear on the face of the two guarantees that the same are not certified. This is contrary to the express Provisions of Addendum No. 1 which required that the guarantees to be certified.

The Board has perused the two guarantees and the letter from the Insurance Regulatory Authority dated 22nd October, 2012 confirming that the said guarantees were valid as at the date of that letter. The dated guarantee from the National Bank of Kenya Limited is dated over 9 years

ago and the letter of confirmation of the guarantee is over three years old. The Board is unable to understand how the procuring entity could allow a bidder to participate in a tender of this magnitude and importance on the basis of guarantees that are 9 years old, which are not certified and which were authenticated by a letter from IRA which is over three years old.

The Board therefore holds without hesitation that based on the above state of facts that this ground of the Applicant's Request for Review cannot stand and is accordingly dismissed as it lacks merit.

ISSUE NO. 2

Whether the Applicant based its Request for Review on confidential documents contrary to the Provisions of Section 44 and 45(2)(e) of the Public Procurement and Disposal Act 2005.

Turning to the issue of reliance on confidential documents, Counsel for the Applicant readily conceded that the Applicant had in its possession copies of the original tender evaluation Committees Technical and Financial Evaluation reports which she produced and annexed at pages 408 - 418 of the Request for Review. The Applicant also had in its possession the original minutes of the tender committee which if produced at pages 419-421 of its Request for Review in addition to having in its possession the supplementary evaluation report which it produced at pages 424-427 of the Request for Review. The Applicant also obtained the successful bidder's financial proposal which it annexed at page 399 of the Request for Review

and a letter addressed by the successful bidder to the procuring entity which it produced and annexed at page 400 of the Request for Review.

When asked to explain how it obtained these documents, Counsel for the Applicant while conceding that the Applicant was not entitled to the possession of these documents nonetheless argued that there was no law that prevents the Applicant from using illegally obtained evidence to support a Request for Review.

The Board has severally held as demonstrated by the decision in the case **Thwama Building Services Ltd -vs- Tharaka Nithi County Government (PPARB Review no. 21 OF 2015)** that a bidder cannot base its Request for Review on confidential information obtained contrary to the Provisions of Sections 44 and 45 of the Public Procurement and Disposal Act.

The Board further held that a bidder whose Request for Review is based on confidential information was furthering an illegality and further held based on the Court of Appeal decision in the case of **Kenya Airways Limited -vs Satwart Singh Flora (Nai CA No. 54 of 2005)** that any action prohibited by statute is against public Policy and that a party who breaches the Provisions of the law cannot benefit from such a breach.

To deter such trend from recurring as is currently the case the Board stated as follows in the case of **Application No. 7 of 2016 between China Overseas Engineering Group Company Limited -vs- Kenya Rural Roads Authority** and made the following orders:-

“Finally in view of the Board’s finding that the Applicant relied on confidential information in bringing this Request for Review the Board finds that this is a proper case to direct the Director General of the Public Procurement Regulatory Authority to investigate the circumstances under which confidential information came to the knowledge of the Applicant with the aim of taking any remedial measure in order to stop this recurring trend which the Board has observed in several applications currently coming before it.

On the argument that the Applicant was entitled to use confidential information obtained illegally, the Board finds that the two decisions relied upon by the Applicant, namely the case of **Kuruma Son of Kaniu and Reginam (1955) (1) ALL ER 1236** and the case of **Nicholas Randa Owano Ombija -vs- The judges and Magistrates Vetting Board (Nai CA 281 of 2015)** were interpreting the Provisions of the Evidence Act and the common law and not the Provisions of the Public Procurement and Disposal Act. Both the repealed statute and the new Public Procurement and Asset Disposal Act No. 33 of 2015 state in mandatory terms that if there is a conflict between the Act or the Regulations made under the Act and any other Act or the Regulations in matters relating to Procurement and Disposal, the Act or the Regulations made under the Act shall prevail”.

Regulation 86 of the Public Procurement and Disposal Regulations 2006 which is still in force on the other hand provides as follows:-

“86: The Review Board shall not be bound to observe the rules of evidence in the Request for Review under these Regulations”.

It is clear that the authorities relied upon by the Applicant dealt with the interpretation of the Evidence Act and the common law and are therefore distinguishable from the circumstances of this case. The court in both cases was not interpreting the Provisions of the procurement law. The Court of Appeal in the case of **Kenya Pipeline Company Ltd -vs- Hyosung Ebara Company Limited, The Public Administrative Review Board and Another (Nai CA 45 of 2011)** has however held that the Public Procurement and Disposal Act is a complete code of law on Procurement and that the Review Board is a specialised statutory body established to deal with all complaints of breach of duty by the procuring entity.

The Board has looked at the Applicant's conduct in this application and finds the same to be gross and highly inappropriate. The Applicant's conduct of obtaining evaluation reports and other bidders tender and other confidential documents defeats the objectives of Article 227 of the Constitution and the objectives of Public Procurement and is not capable of any reasonable explanation. Such conduct amounts to impunity and if allowed to recur will adversely affect competition, fair treatment to all bidders, it will diminish integrity and reduce transparency and accountability and erode public confidence in the Procurement processes.

Owing to the gravity of this matter, the Board finds that the Applicant's application cannot stand and must therefore also fail.

The Board further recommends that the Ethics and Anti Corruption Commission (EACC) and other relevant authorities to investigate the circumstances under which the Applicant in this Request for Review came

into the possession of confidential documents including the tender documents belong to other bidders with a view of taking any such remedial action as it or they may deem appropriate.

Since costs follow the event, the Applicant will pay the costs of the Request for Review to the Procuring Entity and the successful bidder.

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 173 of the Public Procurement and Asset Disposal Act 2016, the Board makes the following orders on this Request for Review.

a) The Applicant's Request for Review dated 19th February, 2016 and which was filed by the Applicant on the same day be and is hereby dismissed.

b) The procuring entity is therefore at liberty to proceed with the Procurement Process herein in accordance with the law.

c) The Applicant will pay the costs of Kshs. 300,000 each to the procuring entity and the successful bidder.

d) The Board hereby recommends that matter be referred to the Ethics and Anti Corruption Commission and all the other relevant authorities to investigate under what circumstances the Applicant came into the possession of evaluation reports and the tender and

other documents belonging to another bidder with a view to taking such remedial action as it or they may deem fit.

- e) To facilitate such investigation, the secretary of the Board is hereby directed to forward the Request for Review filed by the Applicant herein to the relevant authorities named in (c) and (d) above.

Dated at Nairobi on this 8th day of March, 2016.



CHAIRMAN
PPARB



SECRETARY
PPARB

