REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 19/2016 OF 17th MARCH, 2016

BETWEEN

PALONA ENTERPRISES &
GENERAL SUPPLIES LIMITED.....APPLICANT

AND

UNIVERSITY OF ELDORET.....PROCURING ENTITY

Review against the University of Eldoret in the matter of Tender No. UOE/PRE-Q/30/2015-2016 for prequalification for provision of printing services.

BOARD MEMBERS PRESENT

1.	Mr. Paul Gicheru	- Chair
2.	Mr. Nelson Orgut	- Member
3.	Mr. Paul Ngotho	- Member
4.	Mr. Peter B. Ondieki, MBS	- Member
5.	Mrs. Gilda Odera	- Member

IN ATTENDANCE

1.	Mr. Stanley Miheso	-Holding Brief for Secretary
2.	Ms. Shelmith Miano	-Secretariat

PRESENT BY INVITATION

Applicant –Palona Enterprises & General Supplies Limited

1. Julius Sunkuli - Advocate
2. Mary Njagi - Lawyer
3. Patricia Sawe - Director
4. Susan Mwenda - Employee
5. Judy Kayele - Employee

Procuring Entity–University of Eldoret

1. Collins Bush Wamalwa - Advocate
2. Barbara Awour - Pupil

BACKGROUND

TENDER NO: CATEGORY B - UOE/PRE-Q/30/2014-16 - PREQUALIFICATION FOR PROVISION OF GENERAL PRINTING, LAMINATION AND BINDING SERVICES

The University of Eldoret sent out an invitation for Pre-qualification of Suppliers and Service providers through an advertisement in the Standard Newspaper dated 4th April, 2014, which invited interested and competent firms to submit their applications for consideration for the supply and delivery of goods and services as for the period 2014/2015 and 2015/2016.

Category B number UOE/PRE-Q/30/2014-16 was for the Provision of general printing, lamination and binding services.

The Prequalification tender documents for the financial year 2014-2016 was opened on 14th April, 2014 at 11.00 am at the Annex Hall and 14 bidders applied in the category for Provision of general printing, lamination and binding services.

On 30th April, 2014, the Technical Evaluation Committee evaluated the bids submitted for prequalification and approved all the 14 bidders for prequalification.

The 10th Special Tender Committee Meeting held on 28th August, 2014 at the Vice Chancellor's Boardroom at 2.00pm recommended all the 14 bidders for prequalification in the category of Provision of general printing, lamination and binding services.

QUOTATION NUMBER: Q/UOE/15-16/ACADEMICS/088 FOR PRINTING OF EXTERMINATION BOOKLETS.

The Procuring Entity floated quotation number Q/Uoe/15-16/Academics/088 for Printing of examination booklets.

The Applicant was among the six (6) of the prequalified suppliers who were invited to submit quotations on 3rd November, 2015. The Quotations were opened by the Procurement Committee on 9th November, 2015 at 12.00 noon in the presence of Representatives from most of the bidders. The bidders submitted their bids including the samples. Their financial quotations were as shown in Table A below:

Table A: Quotation opening

NO.	NAME OF BIDDER	SUM QUOTED (K.SHS.)
1.	Flogin East Africa Ltd	16.00
2.	Talent Graphics	16.50
3.	Palona Enterprises	14.40
4.	East Coast Printers	16.00
5.	The Print Experts	16.70

6.	Dawin Printing & Stationers	16.80

PRELIMINARY EVALUATION

All the six bidders passed the preliminary evaluation stage and were recommended to move to the Technical Evaluation by the Tender Processing Committee.

TECHNICAL EVALUATION

1. **Technical evaluation**

The bidders underwent technical evaluation. The bidders scored as shown in Table B below:-

Table B: Technical Evaluation Average Scores for the Bidders

Name of Bidder	Days to deliver	Texture of paper	Colour	Outside print	Inside print	Total Marks
Flogin East Africa Ltd	1	7.50	6.25	6.25	7.50	**28.50**
Talent Graphics	5	6.25	7.50	5.00	7.50	**31.25**
Palona Enterprises	5	6.25	7.50	5.00	8.75	**32.25**
East Coast Printers	10	3.75	3.75	5.00	7.50	**30.00**
The Print Experts	1	3.75	5.00	1.25	1.25	**12.25**
Dawin Printing & Stationers	1	1.25	3.75	2.50	5.00	**13.50**

Recommendation

The following three (3) bidders qualified for further evaluation after scoring (30 out of 50 marks) and above: Talent Graphics, Palona Enterprises and East Coast Printers.

The Tender Processing Committee (TPC) then decided to physically visit the facilities of the above companies to evaluate their capability to handle the job

at hand before financial evaluation. The site visits took place on 14th December, 2015 at the bidders' respective places of business in Nairobi.

The TPC agreed that the minimum score for any bidder to qualify for the next level of evaluation (Financial) was a score of 60% (21 out of 35 marks) and above.

The results of the site visits are as shown in Table C below.

Table C: Results after the Site Visits

Name of Bidder	Machinery	Clientele of the firm	Duration in business	General observation
Talent Graphics	Owns several machines	Many	Above 5years	Variety of machines and they were owned by the firm
Palona Enterprises	Does not own machines	Many	Above 5years	Outsources machinery
East Coast Printers	Owns several machines	Many	Above 5years	Variety of machines and they were owned by the firm

Technical Scores

The due diligence evaluation scores were as shown in Table D below.

Table D: Due diligence Evaluation Scores for the Bidders

Name of Bidder	Machinery	Clientele of the firm	Duration in business	Total Marks	Responsiveness
Talent Graphics	20	10	5	**35**	**R**
Palona Enterprises	5	10	5	**20**	**NR**
East Coast Printers	20	10	5	**35**	**R**

(R and NR stand for Responsive and Non-Responsive, respectively)

Recommendation

Talent Graphics and East Coast Printers were considered responsive having scored at least 60% (21 out of 35 marks), and hence qualified for further evaluation. The Applicant's quotation was disqualified at this point.

Financial Evaluation

The sum quoted for the two (2) responsive bidders and results of the financial evaluation were as shown in Table E

Table E: Bidders and sum quoted for the 16 page examination booklet

NO	NAME OF BIDDER	SUM QUOTED (KES)	REMARKS
1	East Coast Printers P. O. Box 14456 Nairobi	16.00	Lowest Evaluated bidder
2	Talent Graphics P. O. Box 380 Nairobi	16.50	-

It was agreed that East Coast Printers Limited was the lowest evaluated bidder.

Final Recommendation

The tender processing committee recommended that East Coast Printers, be awarded the tender for the supply of the 16 page examination booklet Quotation No.Q/UOE/15-16/ACADEMICS/088 at their quoted price of Kenya Shillings Sixteen (16/=) per booklet, that being the lowest evaluated price of the bid.

TENDER COMMITTEE

The tender committee in its 24th meeting held on 8th February, 2016, deliberated and awarded the quotation for printing of examination booklets to the M/s. East Coast Printers Limited at their quoted price of KES. 16/= per

booklet. The bidder was to supply 90,000 booklets at a total cost of KES. 1,440,000/=.

REQUEST FOR REVIEW

The Request for Review was lodged by Palona Enterprises & General Supplies Limited on 17th March, 2016 in the matter of the tender No. UOE/PRE-Q/28/2015-2016 for prequalification for provision of printing services.

The Applicant sought for the following orders:-

1. ***That the Board annuls in whole the decision of the tender committee of the Procuring Entity.***
2. ***That the Board awards the tender to the Applicant.***
3. ***That the Procuring Entity be condemned to pay Costs of the Request for Review to the Applicant.***
4. ***That the Board grants it such other or further relief as the board shall deem fit just and expedient.***

During the hearing of the request for review, the Applicant was represented by Mr. Julius Sunkuli Advocate while the Procuring entity was represented by Mr. Collins Bush Wamalwa Advocate.

The Applicant raised a total of 11 grounds of review. A substantial number of the grounds set out by the Applicant were factual while the remaining grounds raised specific breaches of the Act and the Regulations.

The Board will therefore proceed to consider and address the grounds raised bearing in mind the above distinction.

Ground 1:- Breach of Section 67 of the Public Procurement and Disposal Act, 2005 (hereafter referred to as the Act) and Regulation 66 of The Public Procurement and Disposal Regulations, 2006 (as amended) (hereafter referred to as the Regulations)

The Applicant stated in support of this ground that the Procuring Entity acted in breach of the Provisions of Section 67 of the Act as read together with Regulation 66 of the Regulations as amended by not notifying the Applicant of the outcome of it's tender/quotation nor providing the Applicant with the reasons why it's tender had not been successful as required by the above Provisions of the law.

The Applicant in it's Statement in support of the Request for Review sworn by Patricia Cherotich Sawe, the Chief executive Officer of Palona Enterprises and General Supplies Limited acted that there was also no communication forthcoming from procuring entity four months after the evaluation process had been completed and an award made.

The applicant therefore urged the Board to find that this conduct on the part of the procuring entity was not only prejudicial but was meant to keep the Applicant in the dark to prevent it from challenging the outcome of the tender in the event that it was unsuccessful.

In response to this ground of review, counsel for the procuring entity readily conceeded that the evaluation process was indeed complete but stated that

the Applicant's request for review was premature since neither the successful nor the unsuccessful bidders had been notified of the outcome of their tenders. He therefore urged the Board to dismiss this ground of review.

The Board has considered the submissions made by the parties on this issue and finds on the basis of the procuring entity's own admission that although the evaluation process was completed four months prior to the filing of this request for review no letters of notification had been issued to the successful and the unsuccessful bidders.

The Board has also perused the bundle of documents submitted to it by the procuring entity and notes that no copies of letters of notification were provided to the Board by the procuring entity in relation to this procurement.

The Board does not therefore have any option but to conclude that the procuring entity acted in contravention of the Provisions of Sections 67 of the Act and Regulation 66(2) of the Regulations which provide as follows:-

The said Provisions of the law state as follows:-

> *"67.(1) Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.*
>
> *(2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.*
>
> *(3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security."*

"66. (2) A procuring entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful."

The Board finds that other than stating that this request for review was premature, the procuring entity did not even attempt to give any explanation as to why it did not notify the Applicant and other bidders of the outcome of their tenders.

As the Board has always stated, the procurement process is a serious process which should not be treated casually. Every bidder who participates in a procurement process is entitled to know the eventual outcome of such a process.

Inview of all the foregoing findings this ground of the request for review therefore succeeds and is allowed.

Ground 2 & 3

The issues raised by the Applicant under these grounds were factual matters which have been addressed elsewhere in this decision.

Grounds 4 and 5:- Breach of Section 51 of the Act and Regulation 46(1) of the Regulations as amended.

Counsel for the Applicant nor the procuring entity did not address the Board on the two consolidated grounds at the hearing of the request for review and the Board will therefore treat them as having been abandoned.

Ground 6, 7, 8, 9 and 10.

These grounds of review have been consolidated as they raise issues relating to the evaluation and award of the quotation/tender.

The Applicant contended in support of the above grounds that the Procuring Entity acted in breach of the law when it failed to declare the Applicant's tender as the lowest evaluated tender at a price of Ksh 14.40/= for 500,000 pieces of the examination booklets which would have added upto the sum of Kshs.7,200,000/= .

The Applicant stated that the Procuring Entity instead unfairly evaluated and wrongly awarded the tender to one of the Applicant's Competitors whose evaluated price was Kshs 16.50/= for 500,000 pieces of examination booklets totalling the sum of Kshs.8,250,000/=.

The Applicant contended that the Procuring entity's action of awarding the tender to a bidder with a higher price would result in the procuring entity losing a sum of Kshs1,050,000/= of the tax payers money.

Counsel for the Applicant further stated that the Procuring Entity breached the law in relation to the category reserved for youth, women and persons with disabilities by awarding the tender to an unqualified competitor which did not fall in that category.

In response to the Applicant's submissions, counsel for the Procuring Entity stated that the criteria for evaluating tenders or bids was not restricted to the

financial aspect but extended to evaluation which was equally important. Counsel for the Procuring Entity added that pursuant to Regulation 47 of the Regulations the procuring entity conducted the technical evaluation as required by law and that the Applicant was therefore properly disqualified.

The Board has perused copies of the tender documents submitted to it and finds as follows:-

1). All the six bidders who participated in this tender/quotation passed the preliminary evaluation;

2). Three bidders including the Applicant, passed the Technical evaluation stage after scoring 30 marks and above out of the 50 marks assigned to Technical evaluation;

3). The Tender Processing Committee then agreed to carry out physical visits to the three qualified bidders before carrying out financial evaluation;

4). On 14th December, 2015, the 3 bidders were visited by the Tender Processing Committee at their respective places of business.

5). After the so called due diligence, two bidders, M/s. Talent Graphics and M/s. East Coast Printers were found to be responsive while the Applicant was disqualified because it had allegedly scored less than 21 out of 35 marks;

It is apparent from all the foregoing that the tenders/quotations were evaluated in three stages namely the preliminary, technical (plus due diligence) and financial evaluation. The Board has perused all the documents placed before it by the procuring entity and has also looked at the Provisions of the law. In none of the said documents was the tender

processing committee mandated to carry out what it called due diligence after technical evaluation. This was not therefore a criteria for the evaluation of the tenders/quotations.

Section 66(2) of the Act expressly prohibits a procuring entity from evaluating tenders using procedures and criteria other than the procedures and the criteria set out in the tender document. The said Section 66(2) of the Act stipulates as follows:-

> *"66. (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."*

Even when called upon to point out the source of the criteria for carrying out due diligence after technical evaluation had been concluded, Counsel for the procuring entity could not point out to the Board the source of the said criteria.

The Board has perused the prices quoted by the bidders as set out in paragraph 11 of the procuring entity's response and finds that the six bidders who participated in the above tender gave the following prices:-

NO.	NAME OF BIDDER	SUM QUOTED (K.SHS.)
1.	Flogin East Africa Ltd	16.00
2.	Talent Graphics	16.50
3.	Palona Enterprises	14.40
4.	East Coast Printers	16.00

5.	The Print Experts	16.70
6.	Dawin Printing & Stationers	16.80

It is clear from the above table that the Applicant gave the lowest quotation of Kshs.14.40 yet the procuring entity awarded the East Coast Printers Limited which gave a quotation of Kshs.16.00 which was higher than the Applicant's. This was contrary to the Provisions of Section 89(4) of the Act which states in mandatory terms that the successful quotation shall be the one with the lowest price.

Section 89(4) of the Act states as follows:-

> *"89. (4) The successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotations."*

This ground of the Applicant's request for review therefore also succeeds and is allowed.

Ground 11

Having overally found that the Applicant's request for review has merits, it is therefore not necessary to determine ground 11 of the Request for Review on the issue of whether the Applicant suffered loss.

Inview of the foregoing findings, the Applicant's request for review dated 17th March 2016 is allowed in the terms set out below:-

FINAL ORDERS

In view of the foregoing findings and in exercise of the powers conferred upon the Board by the Provisions of S. 173 of the Public Procurement and Asset Disposal Act of 2015, the Board makes the following orders with respect to this Request for Review:-

a) *The award of quotation number Q/UOE/15-16/ACADEMICS/008 for the printing of examination booklets to M/s East Coast Printers Limited is hereby annulled.*

b) *The Board hereby substitutes the procuring entity's decision and awards the said tender to the Applicant M/s Palona Enterprises and General Supplies Limited and directs the procuring entity to issue a letter of notification of award to the Applicant on or before 15th April, 2016.*

c) *The procuring entity shall pay the costs of this Request for Revies to Palona Enterprises & General Supplies Ltd which are assessed at Ksh. 250,000/=.*

Dated at Nairobi on this 7th day of April, 2016.

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CHAIRMAN
PPARB

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SECRETARY
PPARB