

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.57/ 2017 OF 27TH JUNE, 2017

BETWEEN

APA INSURANCE LIMITED APPLICANT

AND

MINISTRY OF AGRICULTURE, LIVESTOCK & FISHERIES

STATE DEPARTMENT OF LIVESTOCKPROCURING ENTITY

Review against the Decision of the Ministry of Agriculture, Livestock & Fisheries, State Department of Livestock in the matter of Tender No. MOAL&F/SDL/DLRMD/RT/16/2016-2017 for the Provision of Livestock Insurance Services For the Kenya Livestock Insurance Program (KLIP).

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

- | | |
|---------------------|-------------------------------|
| 1. Philemon Kiprop | - Holding Brief for Secretary |
| 2. Maureen Kinyundo | - Secretariat |

PRESENT BY INVITATION

Applicant – APA Insurance

- | | |
|--------------------|-----------------------------------|
| 1. Kennedy Ochieng | - Advocate |
| 2. Erastus Ndege | -APA Insurance |
| 3. Charles Wambua | -APA Insurance |
| 4. Susan Muguku | - Legal Asst.Ochieng & Associates |
| 5. Rehema Ochieng | - Legal Asst.Ochieng & Associates |

Procuring Entity – Ministry of Agriculture

- | | |
|-------------------|---------------------------|
| 1. Rizpha Mukonyu | - Legal Counsel |
| 2. Nancy Mbae | - Legal Counsel |
| 3. Wambaya Kituyi | - Procurement Officer |
| 4. Richard Kyumo | - Program co-ordinator |
| 5. Gordon Andiego | - Supply Chain Management |

Interested Parties –

- | | |
|------------------------|----------------------------------|
| 1. Isaac Wanjohi | - Advocate for Takaful Insurance |
| 2. Dr.Wanyonyi Wanyama | - General Manager |
| 3. Gibson Kamau | - Heritage |
| 4. Edward Mugambi | - CIC |
| 5. Fatuma M Abdallah | -Takaful Insurance |

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 OF AWARD

1.1 INTRODUCTION

Pastoralists in Kenya remain vulnerable to natural disasters. These present significant social and economic challenges to inhabitants living in the arid and semi-arid areas (ASAL) where drought occurs with great frequency and is severe. Occurrence of a drought event in Northern Kenya is approximately after every three to five years and causes huge losses. For example, during the severe droughts between 2008 and 2011, the Kenyan economy lost an estimated Kshs 968.6 billion, 72 percent of that loss, was incurred in the livestock sector which left almost 9 percent of livestock dead. Insurance can provide the much-needed protection to keep livestock keepers out of extreme poverty, by smoothing income during shocks and enabling them to protect their livelihoods.

In order to cushion pastoralists against losses of their livestock as a result of drought, the Ministry of Agriculture, Livestock and Fisheries, MALF, has designed the Kenya Livestock Insurance Program (KLIP) that will use satellite generated data on forage availability for purposes of developing insurance tools and products that are suitable for livestock keepers in the ASAL's of the country.

Objectives of KLIP

The overall objective of Kenya Livestock Insurance Program (KLIP) is to minimize risks emanating from drought-related disasters and build resilience of pastoralists for enhanced and sustainable food security. This livelihood support program is intended to enhance the capacity of pastoral communities to minimize weather related risks through provision of index based livestock insurance.

Scope of the Program

Starting from the 2014/2015 Financial Year, the program was implemented in Wajir and Turkana Counties and it is has now been rolled out to other ASAL counties including Turkana, Wajir, Marsabit, Mandera, Garissa, Tana River, Samburu and Isiolo.

Design of the Insurance Program

The program will use insurance as a tool to contribute to resilience building of pastoralist communities against shocks from drought. Implementation of the activities of KLIP will result in an increase in the number of fodder markets in the arid and semi-arid areas and the promotion of insurance service provision in these areas.

PROCUREMENT PROCESS

Invitation of Bids.

The following firms were invited to submit their bids as per the proposed list of prequalified firms approved by the Accounting Officer vide letter Ref. No. MOAL&F/SDL/DLRMD/PROC/VOL.2/1.M/s Kenya Orient Insurance Co. Ltd.M/s Alliance Insurance Co. of Kenya Ltd.M/s ICEA Lion General Insurance Company Ltd.

1. M/s UAP Insurance Company Ltd.
2. M/s the Heritage Insurance Company Ltd.
3. M/s Madison Insurance Co. Kenya Ltd.
4. M/s Takaful Insurance of Africa Ltd.
5. M/s APA Insurance Ltd.
6. M/s Africa Merchant Assurance Company Ltd.
7. M/s CIC General Insurance Co. Ltd.
8. M/s the Jubilee Insurance Co. of Kenya Ltd.

Pursuant to Section 119 of the Public Procurement and Asset Disposal Act 2015, the program took such steps to bring the invitation to the attention of bidders.

The Restricted Tenders were opened on Friday, 9th June, 2017 at 11.00a.m in the Committee Room on 6th floor Kilimo House, in the presence of bidders or their representatives who choose to attend

Pursuant to section 78 (5) of the Public Procurement and Asset Disposal Act 2015, members of the tender opening committee received and opened the Bids and assigned the tenders identification numbers.

N/B.

M/s APA Insurance Limited were the lead Insurer for a consortium of the following Insurance Companies:-

1. M/s CIC General Insurance Group Limited.
2. M/s African Merchant Assurance Co. Ltd.
3. M/s Heritage Insurance Company Ltd.
4. M/s UAP Insurance Company Ltd.
5. M/s Kenya Orient Insurance Company Ltd.
6. M/s Jubilee Insurance Company Ltd.

THE EVALUATION PROCESS.

The Evaluation Process of the tender for the Provision of Livestock Insurance Services For The Kenya Livestock Insurance Program (KLIP).

The evaluation of the Restricted Tender was conducted between 9th June and 12th June, 2017. The evaluation of the Restricted Tender was conducted in three stages. The first stage was a Preliminary Examination, second was detailed Technical Evaluation and finally the Financial Evaluation.

1.1 Preliminary/Mandatory and Detailed Examination

The tenders were subjected first to Preliminary and then to detailed examination. The Preliminary examination was to determine the conformity to basic instructions and mandatory eligibility requirements of the Restricted Tenders. Detailed evaluation was to determine bidder's conformity to technical requirements. The criteria the Committee applied for both stages of evaluation was as stipulated in the Restricted Tenders document as shown in the tables below:

PRELIMINARY EVALUATION

BIDDER

S/NO	Bidder Name	Registered With Coi	Premiums Of 500 M done	Paid Up Capital 450 Million	Previous Copy Of audited Accounts	Vat/ Pin Cert.	Tax Compliance Certificate	Certificate Of Inc.	Membership Aki	Original And One	Cut Through Agreement-Reinsurer	Remarks
1.	Bidder 01	x	x	x	x	√	x	√	x	x	x	NR
2.	Bidder 02	√	√	√	√	√	√	√	√	√	√	R
3.	Bidder 03	√	√	√	√	√	√	√	√	√	√	R

INSURANCE BROKER

S/No	Bidder Name	Registered With Coi	Bank Guarantee	Professional Indemnity	List Of 5 Reputable	Current Member	Copy Of Audited	Remarks
1.	Bidder	X	X	X	X	X	X	Nr
2.	Bidder	√	X	√	X	√	√	Nr
3.	Bidder	√	√	√	√	√	√	R

Key: -

x - Non-Compliant, √ - Compliant
 R - Responsive, NR - Nonresponsive

4. OBSERVATIONS AND RECOMMENDATIONS

OBSERVATIONS

Section 2.22.5 Evaluation Criteria in the Tender document stipulated that: Each Insurance Company shall be expected to submit alongside their bid an appointed Insurance Broker who will be mandated to liaise with the Procuring Entity in the management of the Policy.

This shall include *Submission and* confirmation of the following: -

INSURANCE COMPANY

- Must be registered with the Commissioner of Insurance for the current year and a copy of the current license be submitted.
- Must have done annual gross premiums in previous year of Five Hundred Million (Kshs.500, 000,000.00).
- Must have paid up capital of at least Four Hundred and Fifty Million (Kshs.450, 000,000.00).
- Must submit a copy of the audited accounts for the previous year
- Must submit copies of the following documents;
 - (a) VAT/PIN Certificate
 - (b) Tax Compliance Certificate
 - (c) Certificate of Registration/Incorporation
- Must be a member of the Association of Kenya Insurance (AKI)
- Must indicate that they will provide a Cut-through Agreement from their re-insurers undertaking to indemnify the insured in the event of default by the insurer. This instrument must be provided before entering into contract.

INSURANCE BROKER

- Must be registered with the Commission of Insurance for current year and a copy of the current license be submitted.
- Must have a Bank guarantee of Three Million (Kshs.3,000,000.00) deposited with the Commissioner of Insurance and a Copy be submitted
- Must have a Professional Indemnity Insurance Cover of at least Ten Million (Kshs.10,000,000.00) and a copy be submitted
- Must give a list of 5 (five) reputable clients and the total clients premium in the previous year
- Must submit a copy of the audited accounts for the previous year
- Must be a current member of the Association of Insurance Brokers (AIB) (to be completed as appropriate).

Failure to meet any one of the above requirements shall lead to automatic disqualification.

Bidders who meet the Mandatory Requirements shall proceed to the technical evaluation.

Bidder 01. M/s Alliance Insurance of Kenya Ltd of P.O.Box 66257-00800 Nairobi. failed in meeting the Mandatory criteria set for the Insurance Company and the Insurance Broker as stipulated in the Preliminary Evaluation table.

Bidder 02 M/s APA Insurance Limited of P.O. Box 30065-00100 Nairobi, met the Mandatory criteria set for the Insurance Company but failed in meeting the Mandatory criteria set for the Insurance Broker by not providing a Bank Guarantee of 3 Million and a List of 5 Reputable Firms.

Bidder 03 M/s Takaful Insurance of Africa of P.O. Box 1811-00100, met all the Mandatory requirements

RECOMMENDATIONS

From the preliminary examination outcome the Committee concluded as follows:

- i. **Bidder 03 M/s Takaful Insurance of Africa of P.O. Box 1811-00100, was responsive and therefore should proceed to stage 2; namely the detailed technical evaluation.**
- ii. **Bidders Number 01 and 02 were Non-responsive and were therefore disqualified at the preliminary evaluation stage.**

3.4 Outcome of detailed technical evaluation

The detailed technical evaluation was conducted on the Restricted Tender that was determined to be responsive at the Preliminary Examination stage. Members of the tender evaluation committee went through the tender identifying the technical requirements and awarding marks accordingly. The table below shows the final rating for the bidder from the detailed evaluation:

TECHNICAL EVALUATION

Criteria	Details	Maximum Score	Scores
Experience related to the provision of general Insurance cover	Shall have executed at least three (3) types of general insurance cover within the last five (5) years for approximately 1, 500,000,000.00	5	5
	Must give a list of 5 (five) reputable clients and the total clients premiums for the previous year for at least Five Hundred Million (Kshs 500,000,000.00)	5	5
Specific experience related to the provision of index based insurance cover	Shall have executed at least Five Thousand (5,000) index based livestock insurance contracts within the last four (4) years	10	10
Adequacy of the proposed work plan and methodology in responding to the terms of reference	The firm must submit a detailed methodology and procedures for the execution of the stipulated tasks	10	7
	The firm must submit a detailed work plan with clear	5	5

	timelines for the execution of the stipulated tasks		
Qualifications and competences of the key staff for the assignment	The team leader must possess a minimum of a Master's degree with 10 years' experience in the Insurance sector	10	10
	The team leader must have undertaken at least five (5) major contracts in insurance during the last 5 years	10	8
	Technical Staff should consist of a team having minimum qualifications of Bachelor's degree in <ul style="list-style-type: none"> • Actuarial science • Information technology (IT) • Marketing 	5	5
Important Requirements from the bidder	The team must have undertaken at least two (2) assignments related to index based livestock insurance	10	5
	Demonstrate experience in the working Counties covered under KLIP	5	4
	Must demonstrate successful implementation of the commercial index based Livestock Insurance (Indicate the members insured under this scheme).	10	10

	Must demonstrate efficiency in settlement of claims under similar programs.	5	5
	Must provide evidence of the presence of field infrastructure (personnel, equipment and offices) in the working Counties covered under KLIP	5	4
	Experience in pastoralist training on index based livestock insurance products	5	4
	Total Score.	100%	87%
	Average Score(5 Evaluators)	93.75%	

4. CONCLUSIONS AND RECOMMENDATIONS

After subjecting the Bidder to the detailed evaluation criteria, the firm met the prerequisite criteria having attained 93.75% of the Technical Score. The minimum Technical Score for consideration for Financial Evaluation was set at 70% and above.

FINANCIAL EVALUATION.

The formulae for determining the Financial Score (Sf) was follows:-

$$Sf = 100 \times \frac{Fm}{F}$$

Where

Sf is the financial score;

Fm is the lowest priced financial bid and

F is the price of the bid under consideration. The lowest evaluated price was allocated the score of 100.

Based on the above formula, the following were the financial scores for the firm of M/s Takaful Insurance of Africa.

Bidder No.	Bidder name	Financial evaluation	
		Price -Kshs	Financial score(sf)
1	M/s. Takaful Insurance of Africa	246,557,230.00	100

a) Combined technical (St) and financial (Sf) scores

The Evaluation Committee applied the formulae indicated in the appendix to information to consultants of the Tender Document using

the weights (T =the weight given to the Technical Bid; P = the weight given to the Financial Bid; $T + p = 1$) indicated in the Appendix.

The weights given to the Technical and Financial Proposals were:-

$$T = 0.80 - (80\%) : P = 0.20 - (20\%)$$

The combined technical and financial score, S , was calculated as follows:-

$$S = St \times T \% + Sf \times P \%$$

S is the total combined scores of technical and financial scores

St is the technical score; Sf is the financial score

T is the weight given to the technical proposal and

P is the weight given to the financial price

Weighted Technical and Financial scores

Bidder name	Technical Evaluation		Financial Evaluation			Combined
	Technical score (st)	Technical weight score(T) 80% (0.8)	Price-Kshs	Financial score(sf)	Financial weight score(P)20 % (0.2)	Combined score(S) (T+P)
M/s. Takaful Insurance of Africa	93.75	75	246,557,230	100	20	95

Tender Evaluation Committee's Recommendations.

Pursuant to section 80 (4) of the Public Procurement and Asset Disposal Act 2015, the Tender evaluation Committee recommended as follows:-

1. Bidder 03 be notified in writing of the results of the Tender and be considered for award for Provision of Livestock Insurance Services for the Kenya Livestock Insurance Program (KLIP) at the amount

of Kenya Shillings Two Hundred and Forty Six Million, Five Hundred and Fifty Seven Thousand, Two Hundred and Thirty (Kshs 246,557,230.00) only.

2. Bidder 01 and 02 be notified in writing the reasons for their non-responsiveness.

PROFESSIONAL OPINION

In view of the evaluation report, the Head of Supply Chain Management recommended as follows:-

- a) That the most responsive Bidder No 3. **M/S Takaful Insurance of Africa of P.O Box 1811-00100 Nairobi** be awarded the tender for Provision of Livestock Insurance Services for the Kenya Livestock Insurance Program (KLIP) in the amount of Kenya Shillings Two Hundred and Forty Six Million, Five Hundred and Fifty Seven Thousand, Two Hundred and Thirty (Kshs 246,557,230.00) only being the lowest evaluated bidder **inclusive of all taxes**.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s APA Insurance Limited on 27th June, 2017 in the matter of Tender No. MOAL&F/SDL/DLRMD/RT/16/2016-2017 for the Provision of Livestock Insurance Services for the Kenya Livestock Insurance Program (KLIP).

During the hearing of the Request for Review, the Applicant was represented by Mr. Kennedy Ochieng, Advocate while the Procuring Entity was represented by Mr. Wambaya Kituyi, Head of the Procuring

Entity's Supply Chain Management assisted by M/s Rizpha Mukonyu, Advocate. The Interested Party M/s Takaful Insurance Company Limited on the other hand was represented by Mr. Isaac Wanjohi, Advocate.

The Applicant sought for the following orders:-

1. *The decision by the respondent for RT. No. MOAL/SDL/DLRMD/RT/2016-2017 to be declared null and void.*
2. *Consequent to granting of prayer 1. above, the respondent is stopped from awarding the KLIP tender to Takaful Insurance Africa under the circumstances.*
3. *The Board be pleased to declare that the Applicant was the successful bidder and consequently be awarded the Tender.*
4. *In the alternative to prayer number 3, the respondent be directed to re-tender the subject provision of Livestock Insurance Services for the Kenya Livestock Insurance Program (KLIP).*
5. *That the Board gives any other suitable directions and or orders as it may deem fit in the circumstance.*
6. *The respondent bears the costs of the application.*

The Board has considered the Request for Review together with the responses filed by the Procuring Entity and the Interested Party. The Board has also considered the submissions made before it by the parties and finds that this Request for Review raised the following two issues which the Board will now proceed to determine.

- i) **Whether the Board has the jurisdiction to hear the Applicant's Request for Review.**

ii) Whether the Applicant was rightly disqualified at the preliminary evaluation stage for failing to comply with the provisions of clause 2.22.5 of the tender document.

ISSUE NO. 1

Whether the Board has the jurisdiction to hear the Applicant's Request for Review.

The Procuring Entity mounted a two pronged jurisdictional challenge to the Applicant's Request for Review. The first jurisdictional challenge which was raised by the Procuring Entity was that the Applicant's Request for Review was filed out of time while the second ground of preliminary objection was that the Board did not have the jurisdiction to hear and determine the Request for Review on the ground that the Procuring Entity and the successful bidder/Interested Party had entered into a contract on 27th June, 2017 thereby depriving the Board of the jurisdiction to hear the matter under the provisions of Section 167(4)(c) of the Public Procurement and Asset Disposal Act 2015.

The two grounds of preliminary objection were based on the contention that the Applicant was served with a letter of notification that its tender was unsuccessful on 13th June, 2017 and that according to the Procuring Entity, time started running from the date of service. It was the Procuring Entity's further contention that the period of fourteen (14) days required for the filing of a Request for Review and the period of fourteen (14) days for the purposes of the execution of the contract lapsed on 26th June, 2017 and that consequently the Applicant's Request for Review had been filed out of time.

The Procuring Entity which was supported by Counsel for the Interested Party further argued that the Procuring Entity and the Interested Party entered into a contract on 27th June, 2017 upon the expiry of the period of fourteen (14) days stipulated by the law thereby depriving the Board of the jurisdiction to hear and determine the matter under the provisions of Section 167(4) (c) of the Act.

Both the Procuring Entity and the Interested Party therefore urged the Board to strike out the Request for Review based on the above grounds. Counsel for the Applicant however opposed both limbs of the Procuring Entity's Preliminary Objection and contended that the same lacked merit.

Counsel for the Applicant disputed that the Applicant was served with a letter of notification on 13th June, 2017 and instead stated that the Applicant was served with the letter of notification informing it that its tender was unsuccessful on 16th June, 2017. He alternatively submitted that even if the Applicant had been served with the letter of notification on 13th June, 2017 as alleged by the Procuring Entity time started running from the next day namely on 14th June, 2017 for the purposes of reckoning time.

He further submitted that the period of fourteen (14) days from 14th June, 2017 lapsed on 27th June, 2017. Counsel for the Applicant therefore contended that the Request for Review was filed on time and that the contract agreement entered into between the Procuring Entity and the Interested Party was entered into prematurely and was therefore contrary to the provisions of Section 135 of the Public Procurement and Asset Disposal Act 2015.

Counsel for the Applicant further submitted that in order for the provisions of Section 167(4)(c) of the Act to come into play, the contract agreement relied upon by the parties must have been signed in accordance with the law in order to deprive the Board of the jurisdiction to hear and determine a Request for Review.

He therefore urged the Board to dismiss both limbs of the Procuring Entity's preliminary objection.

The Board has considered the submissions made by all the parties who appeared before it and finds that Section 167(1) of the Act requires an aggrieved candidate or a tenderer to file a Request for Review with the Board within 14 days of notification that its tender was unsuccessful while Section 167(4)(c) read together with Section 135(3) of the Act stipulate that a contract shall be signed "not before the expiry of 14 days" after the date of service of a notification to the bidders informing them of the outcome of their tenders.

Section 167(1) of the Act on the other hand requires that a bidder who is dissatisfied with the decision of the Procuring Entity shall file a Request for Review within fourteen (14) days from the date of service of the notification that its tender was unsuccessful.

Based on the above provisions of the law, the Board finds that the only issue that it needs to determine in order to determine both limbs of the Procuring Entity's preliminary objection is when time started running for the purposes of ascertaining when the period of fourteen (14) days required for the filing of a Request for Review and the signing of a

contract under the provisions of Sections 167(1) & (4)(c) and 135(3) of the Act lapsed.

According to the Procuring Entity's own delivery book, which was signed by the Applicant acknowledging receipt of the letter of notification, the Applicant was served with the letter of notification on 13th June, 2017. The Applicant did not disown the signature attributed to it. All the same, the Applicant submitted that it received the letter of notification on 16th June 2017 as noted on its receipt stamp affixed on its copy of the notification letter, and not on 13th June, 2017. The Board is however satisfied based on the contents of the delivery book that the letter of notification was served on the Applicant on 13th June 2017.

The Procuring Entity insisted that the period of 14 days from 13th June 2017 lapsed on 26th June 2017 and that, the said date was the last day when the Request for Review should have been filed. It also insisted that the contract, which was signed on 27th June 2017 was signed after a period of fourteen (14) days and therefore deprived the Board of the jurisdiction to hear and determine the matter before it.

The Applicant, on the other hand insisted that time started running from 14th June, 2017 and expired on 27th June, 2017 and that the Request for Review was therefore filed within time.

The Board has considered the submissions made by the parties regarding the above issues and finds that the issue of when time starts running for purposes of computing the number of days within which a Request for Review should be filed and a contract executed under the provisions of the Act is now well settled.

The Board wishes to observe that there are numerous decisions by the Court and the Board which are to the effect that time starts running from the next day after the service of a letter of notification.

One such decision is the decision in the case of **Republic -vs- Administrative Review Board (High Court of Kenya at Nairobi (Nairobi Law Courts) Miscellaneous Application No. 53 of 2010)** where the High Court stated as follows:-

“In light of the earlier decisions of the Board which I find to represent the correct position, the time started to run on 29/12/2009 when the Applicant's office in Shanghai received the notification on 28/12/09. The Board found in the alternative that if they were to accept 28th as the date of notification, the time for the window of appeal started to run on 29/12/2009 and ended on 11/1/2010. This court agrees with this computation”

Based on the above legal position and having found that the letter of notification was served on the Applicant on 13th June, 2017, the Board holds that time started running from 14th June, 2017 for the purposes of computing time for the filing of the Request for Review and executing a contract. The period of fourteen (14) days from 14th June, 2017 therefore lapsed on 27th June, 2017 which was the date when the Request for Review was filed with the Board and the contract agreement executed.

The Board therefore finds that this Request for Review was filed on the fourteenth day while the contract which was executed on 27th June, 2017 was executed prematurely.

As already stated in this decision, the provisions of the law are clear that in order for the provisions of Section 167(4)(c) of the Act to deprive the Board of the jurisdiction to hear and determine a Request for Review, it must be demonstrated that the contract sought to be relied upon was executed in accordance with the provisions of the Act. Section 135 of the Act required that a period of at least fourteen (14) days lapses from the date of service of a notification before a contract could be entered into between the Procuring Entity and the successful bidder. There are numerous authorities by the High Court and the Board on this legal position which is also well settled.

The requirement in Section 135 of the Act was enacted so as to give an unsuccessful bidder the opportunity to challenge the outcome of a tender process within the Appeal period of fourteen (14) days provided for under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act, 2015.

Where a procuring entity and the successful bidder execute a contract before the expiry of the period of fourteen (14) days, such a contract is illegal and cannot deprive the Board of the jurisdiction to hear and determine the matter.

Consequently the Board finds that the contract agreement entered into between the Procuring Entity and the Interested Party was entered into in contravention of the provisions of the Act and is therefore of no legal effect.

The upshot of all the foregoing findings is that both limbs of the Procuring Entity's preliminary objection fail and are hereby disallowed.

ISSUE NO. II

Whether the Applicant was rightly disqualified at the preliminary evaluation stage for failing to comply with the provisions of clause 2.22.5 of the tender document.

The substantive ground which was set out by the Applicant in its Request for Review was that it submitted both an original and a copy of its tender document to the Procuring Entity on the date when the tender closed.

The Applicant submitted that the Procuring Entity however declared its tender as non-responsive because the Applicant did not provide a Bank guarantee of Kshs.3 Million and a list of 5 reputable clients as required by the provisions of Clause 2.22.5 of the tender document.

Counsel for the Applicant who relied on the statement signed by Mr. Charles Wambua in support of the Request for Review however maintained that the Bank guarantee and the references from six reputable clients were part of the Applicant's tender document as submitted to the Procuring Entity and that if the said documents were missing from the tender documents as submitted, then the same had been removed/plucked out from the Applicant's tender documents upon the submission of the same to the Procuring Entity.

To buttress its argument on this issue, the Applicant produced and annexed to its Request for Review copies of the Bank guarantee and the six (6) references it had allegedly included in its original tender document. The Applicant further contended that besides the original and a copy of the tender document it had submitted to the Procuring

Entity, the Applicant was in possession of another copy of the tender document which was reproduced from the original tender document and which contained the Bank guarantee and the references which were contained in the original tender document.

The Applicant finally argued that if the said documents were missing from the Applicant's original tender document as alleged, then this fact ought to have been noted at the tender opening stage as had happened in the case of one of the bidders, namely M/s Alliance Assurance Company Ltd whose tender security was established as missing at the tender opening stage.

The Applicant finally submitted that the allegation of the missing documents and the allegation that the same had been removed/plucked off from the Applicant's tender document had not been contravened and was therefore deemed to have been admitted. Counsel for the Applicant relied on the High Court decision in the case of **Kenya Commercial Bank Ltd =vs= Suntra Investment Bank Ltd [2015] eKLR** in support of the argument that where a party did not file a reply to a defence then such party was deemed in law to have admitted the uncontroverted allegations in the defence.

Both counsel for the Procuring Entity and counsel for the Successful Bidder/Interested Party opposed the Applicant's contention and maintained that the Applicant had rightfully been declared non responsive at the Preliminary evaluation stage for having failed to provide a Bank guarantee and references from 5 reputable clients as required by the Provisions of Clause 2.22.5 of the tender document.

The Procuring Entity maintained that the said documents were not part of the Applicant's tender document as submitted to it and urged the Board to peruse the said documents in order to confirm the correct position.

Both counsel for the Procuring Entity and the Interested Party maintained that the Board could only rely on the contents of the tender document in ascertaining the true position and that no extrinsic evidence was admissible in determining this allegation.

The Procuring Entity further argued that the Procuring Entity would derive no benefit by removing documents from the Applicant's tender document while counsel for the Interested Party stated that the Interested Party's members of staff were not part of the Procuring Entity's tender evaluation committee and were not therefore responsible for the safe custody of the bidders' tender documents upon submission of the same to the Procuring Entity.

The Procuring Entity and the Interested Party therefore urged the Board to dismiss the Applicant's Request for Review with costs.

The Board has considered both the oral and the written submissions made before it on behalf of the parties. The Board has also perused the original and a copy of the tender documents submitted to the Procuring Entity by the Applicant.

It was generally agreed by the parties to this request for review that under the provisions of Clause 2.22.5 of the Tender Document, it was a mandatory requirement of this tender that all the bidders had to submit

a Bank guarantee for the sum of Kshs.3 Million and references from 5 reputable clients as part of its tender document.

The Board has confirmed both from the original and a copy of the tender documents submitted by the Applicant to the Procuring Entity that the said documents were missing from the bid documents submitted by the Applicant to the Procuring Entity.

The Board has weighed the two opposing submissions and wishes to state at the outset that in order to determine the issue of completeness or otherwise of a tender document, the Board can only have recourse to the contents of the tender document as submitted to the Procuring Entity and no extrinsic evidence is admissible.

Based on the above test, the Board finds as already stated above that the Bank guarantee and the 5 client references were missing from the Applicant's tender documents as submitted to the Procuring Entity. In view of the clear position in the tender documents, the Board has no option but to find that the Applicant did not comply with the provisions of clause 2.22.5 of the tender document.

The Board further notes and this is also clear from the original and the copy of the tender document that the Applicant did not take any steps to paginate its tender documents. The effect of this failure is that it made it difficult for the Applicant to prove that any documents were included by it in its tender documents had been removed or plucked from the said documents. The Applicant should have acted diligently by paginating its original tender document since the mere allegation that documents were removed from its document was not sufficient to

discharge the heavy burden of proving such a serious and weighty accusation which borders on an allegation of criminal conduct.

The Applicant did not also show what benefit the Procuring Entity or its staff would derive from removing/plucking a document from the Applicant's tender document. The Board also finds that members of the Interested Party's staff were not part of the Procuring Entity's staff or members of its tender evaluation committee. The Interested Party cannot therefore reasonably be blamed for any loss of documents from the Applicant's tender document.

Finally the Applicant stated during the hearing of the Request for Review that it had in its possession a copy of a tender document photocopied by it from the original tender document which contained all the documents. The Applicant did not however annex the alleged copy of the tender document to its Request for Review or supply it as evidence to the Board.

In view of the above findings and owing to the serious nature of the allegation made by the Applicant in this ground of Review, the Board finds that the same was not proved and accordingly the same is disallowed.

Overally therefore and based on the Board's finding on the second issue, the Applicant's Request for Review dated 23rd June 2017 therefore fails and is disallowed in terms of the following orders.

FINAL ORDERS

In the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act 2015, the Board makes the following orders on this Request for Review:-

(a) The Applicant's Request for Review dated 23rd June 2017 seeking to challenge the award of tender No. MOAL/SDL/DLRMD/RT 2016-2017 by the Procuring Entity to the Interested Party be and is hereby dismissed.

(b) In view of the Board's finding that the agreement dated 17th June 2017 entered into between the Procuring Entity and the Interested Party was entered into prematurely, the Board hereby nullifies the said agreement and directs the Procuring Entity and the Interested Party to enter into a fresh agreement and conclude the procurement process herein in accordance with the law.

(c) Since both parties were partly successful in this Request for Review, the Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 18th day of July, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB

