

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 74 OF 2017 DATED 11<sup>TH</sup> AUGUST, 2017**

**BETWEEN**

**KEMAX TRADING CO.LIMITED.....APPLICANT**

**AND**

**MINISTRY OF INTERIOR AND CO-ORDINATION  
OF NATIONAL GOVERNMENT .....PROCURING ENTITY**

Review against the decision of the Ministry of Interior and Co-ordination of National Government in the matter of Tender No. GP/4/2016-2018 for the Supply and Delivery of Paper and Boards for Government Press.

**BOARD MEMBERS PRESENT**

1. Mr. Paul Gicheru - Chairman
2. Mr. Peter B.Ondieki - Member
3. Mr. Hussein Were - Member
4. Mr. Nelson Orgut - Member

**IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

**Applicant: Kemax Trading Company Limited**

Nick Omari - Advocate

**Procuring Entity: Ministry of Interior and Co-ordination of National Government.**

1. Judy Kirichu - Legal Officer
2. Lydia Munialo - CSCMO
3. Kenneth Mwangi - Director, procurement

### **Interested parties**

4. J.N. Kuria - Advocate, Woodworld paper monger
5. John M. Iringo - Director, Naval Logistics
6. Stanislaus Kimani - Manager, Curated Spaces ltd
7. James Mbugu - Manager, Curated Spaces Ltd

## **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**

The Government Press advertised four (4 No.) tenders for various items in the Standard newspaper of 7<sup>th</sup> November, 2016 and on the IFMIS tender portal; supplier.treasury.go.ke.Tender No. GP/4/2016-2018 was for supply and delivery of paper and boards.

The tender was closed/opened on 21<sup>st</sup> November, 2016, 11am at Government Press and 169 bidders responded.

A Tender Evaluation Committee was duly appointed, did its work and submitted the report below:

Samples of Paper and Boards were taken to KEBS for analysis.

## EVALUATION

### Evaluation Criteria

The evaluation process for the tender was carried using the criteria set out in the bid document. The stages are as detailed below:-

1. Preliminary Evaluation
2. Technical Evaluation
3. Financial Evaluation

### Stage 1: Preliminary Evaluation

This first stage considered the **Mandatory** requirements as set out in the bid document and bidders were evaluated on a "YES" (tick)/"NO"(X) basis; whereby a tick meant the bidder met the requirement and a No(X) meant the requirement was not met. Only bidders complying with **ALL** the Mandatory requirements were considered responsive and were allowed to proceed to stage 2 (technical) of the evaluation.

Summary of evaluation is as below:-

Sample for B1-B10 on how Preliminary Evaluation was carried for GP/4/2016-2018 – Supply and Delivery of Paper and Boards

No.	Criteria	B1	B2	B3	B4	B5	B6	B7	B8	B9	B10
1.	Must Submit a copy of valid certificate of Registration/ Incorporation	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
2.	Must Submit a copy of a valid Tax Compliance certificate	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
3.	Must provide a copy of a valid Business Permit	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓
4.	Must Fill, sign and stamp the Price Schedule in the format provided	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
5.	Must Fill, sign and stamp the Form of Tender in the Format provided	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
6.	Must pay for samples (in cash office, GP) to be analyzed by KEBS as specified in this tender. Attach Copy of the	✗	✓	✓	✓	✓	✓	✓	✗	✓	✓

	receipt.																				
7.	Must submit five samples of each item tendered and on the size specified therein. The samples must be submitted on or before the closing date of the tender indicated in the tender document																				
8.	<p>Samples must be properly labeled with the following details clear on the labels:</p> <ul style="list-style-type: none"> <li>• Size, grammage &amp; colour</li> <li>• Whether Writing or Printing</li> <li>• Description of Paper (whether full coated board, smooth finishes etc.)</li> <li>• Item No.</li> </ul>																				
9.	Samples should be in plain form without any indication of the company's name or official rubber stamp																				

10.	The Samples will be visually inspected by the evaluation committee with reference to physical characteristics of the materials for conformity to reference stock samples (Color And Dimension)								
11.	Must provide Original Tender Security of Kshs 500,000.00 in the format approved by the Public Procurement Regulatory Authority and valid for 280 days	AGAPO	AMACO 280 DAYS		PARAMOUNT	PARAMOUNT	MONARCH	AMACO 28/8/17	AGPO &
12.	Must submit a dully filled up self-declaration form in format provided	✓	✓	✓	✓	✓	✓	✓	✓
13.	Must submit a dully filled, signed and stamped Confidential Business Questionnaire in format provided	✓	✓	✓	✓	✓	✓	✓	✓
	<b>REMARKS</b>	<b>NR</b>	<b>R</b>	<b>R</b>	<b>R</b>	<b>R</b>	<b>R</b>	<b>R</b>	<b>R</b>

Responsive bidders were:

B2, B3, B4, B5, B6, B7, B9, B10, B11, B12, B13, B14, B15, B16, B17, B18, B19, B20, B21, B22, B23, B24, B26, B27, B28, B29, B30, B31, B32, B33, B34, B35, B37, B38, B39, B40, B41, B42, B43, B44, B45, B46, B49, B51, B52, B53, B54, B55, B57, B58, B60, B61, B62, B63, B66, B67, B68, B69, B70, B72, B73, B74, B75, B76, B77, B78, B79, B80, B84, B85, B86, B87, B88, B89, B90, B92, B97, B98, B101, B102, B104, B105, B106, B107, B109, B110, B111, B114, B115, B116, B117, B118, B121, B123, B125, B126, B127, B128, B129, B130, B131, B132, B133, B134, B135, B136, B137, B138, B142, B143, B144, B145, b147, B148, B149, B151, B152, B154, B156, B157, B158, B159, B160, B161, B162, B163, B164, B165, B167, B168 and B169

**The rest of the bidders were non responsive**



## Stage 2: Technical

### Technical Stage

All the bidders who qualified in the preliminary Stage proceeded to the technical evaluation stage. Bidder's samples were forwarded to Kenya Bureau of Standards for Testing and Analysis. The Minimum score at this stage was 60% to qualify for financial evaluation.

All the samples which were paid for and receipted were submitted to KEBS for Testing and Analysis and the results of the technical evaluation for the bidders per item was as follows: two items were sample for demonstration as below

#### a) Technical Scores (T.S.)

##### Item 1: 100gsm Conqueror White Laid Size 43 x 61cm

Criteria/ Requirements	Maximum Expected Score	Scores per Bidders					
		B24	B67	B116	B121	B130	B131
Colour/watermark	1	1	1	1	1	1	1
▪ Dimensions	1	1	1	1	1	1	1
▪ Grammage	3	3	3	3	3	3	3
▪ Moisture	2	2	2	2	2	2	2
▪ Ph content	1	1	1	1	1	1	1
<b>Total Expected Score</b>	<b>8</b>	<b>8</b>	<b>8</b>	<b>8</b>	<b>8</b>	<b>8</b>	<b>8</b>
<b>Percentage</b>	<b>60%</b>	<b>60%</b>	<b>60%</b>	<b>60%</b>	<b>60%</b>	<b>60%</b>	<b>60%</b>

**Item 2: 100gsm Conqueror Blue Laid Size 43X61 cm**

Criteria/ Requirements	Max	Scores per Bidders										
		B24	B29	B37	B44	B86	B97	B109	B121	B123	B126	B129
Colour/water	1	1	1	1	1	1	1	1	1	1	1	1
Dimensions	1	1	1	1	1	1	1	1	1	1	1	1
Grammage	3	3	3	3	3	3	3	3	3	3	3	3
Moisture	2	2	2	2	2	2	2	2	2	2	2	2
Ph content	1	1	1	1	1	1	1	1	1	1	1	1
Score	8	8	8	8	8	8	8	8	8	8	8	8
Percentage	60%	60%	60%	60%	60%	60%	60%	60%	60%	60%	60%	60%

From the forgoing technical evaluation, all the bidders qualified for financial evaluation. Bidder's prices were considered item per item as follows: three items are sample as below to demonstrate how the financial were carried out

**Financial**

**Price Comparison Schedule**

**Item 1:**

Item No.	Description	Qty.	Unit	Unit Price
1	100gsm Conqueror White Laid Size 43 x 61cm	1500	Rms	
				B24
				B67
				B116
				B121
				B130
				B131
				17,250
				20,000
				16,500
				19,000
				17,700
				15,400

**Bidder B131 awarded**

Item No.	Description	Qty.	Unit of Issue	Unit Price
2	100gsm Conqueror Blue Laid Size 43X61	1,000	Rms	
				B24
				B29
				B37
				B44
				B49
				B72
				B86
				17,250
				15,020
				14,500
				18,400
				18,950
				15,950
				14,300
2	100gsm Conqueror Blue Laid Size 43X61	1,000	Rms	
				B97
				B109
				B121
				B123
				B126
				B129
				23,500
				15,550
				19,000
				17,780
				18,500
				15,550

**Item 3**

Item No.	Description	Qty.	Unit of Issue	Unit Price
				B37
				B53
				B77
				B121
				B149

3	100gsm Conqueror Dark Blue Laid Size 43 X 61 cm	1,000	Rms	15,400	19,500	19,500	19,000	18,500	
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Item 55:

Item No.	Description	Qty.	Unit of Issue	Unit Price										
				B4	B45	B54	B55	B63	B67	B69	B106	B121	B133	B157
55	135gsm. Art Matt Paper Size 640 X 900 mm	4,000	Packets of 250 shts	6,800	8,300	4,000	7,500	3,800	8,400	8,424				
55	135gsm. Art Matt Paper Size 640 X 900 mm	4,000	Packets of 250 shts	3,400	7,500	6,450	7,200	10,250						

Bidder B157 awarded

Item 62:

Item No.	Description	Qty.	Unit of Issue	Unit Price										
				B9	B5	B10	B22	B26	B38	B40	B52	B54	B63	
62	70gsm White Printing Paper size 610 x 860 mm	40,000	Rms.	4400	3550	4750	4050	4350	4349	4300	4200	3500	4400	
				B67	B68	B73	B78	B84	B87	B98	B104	B105	B116	

62	"	40,000	Rms.	4130	4183	4300	4250	4676.40	3900	4350	4410	3600	10500
				B117	B118	B121	B127	B132	B160	B162	B168		
62	"	40,000	Rms.	4300	3900	5000	4150	5300	4410	5696	4400		

Bidder B22 awarded

ITEM 69:

Item No.	Description	Qty.	Unit of Issue	Unit Price										
				B9	B20	B27	B92	B116	B151	B145	B161	B165		
69	60gsm White Writing Paper Reels width 82.5cm Centre Core 7.6 cm radius 35-50cm	300,000	Kg.	365	360	2800	3400	380	465	460	460	250		

ITEM 70:

Item No.	Description	Qty.	Unit of Issue	Unit Price										
				B63	B105	B116	B145	B151	B161	B162	B163	B165		
70	60gsm White Writing Paper Reels Width 102.8cm Centre Core 10 cm radius 35-50cm	600,000	Kg.	370	365	400	440	465	450	576	400	250		

**ITEM 71: 70gsm White Printing Reels width 8 1/2" centre core 3" radius 14"**

Item No.	Description	Qty.	Unit of Issue	Unit Price							
				B13	B25	B34	B60	B63	B72	B73	B75
71	70gsm White Printing Reels width 8 1/2" centre core 3" radius 14"	100,000	Kg.	390	290	335	320	340	385	345	400

**Bidder No.34 awarded**

**ITEM 72:**

Item No.	Description	Qty.	Unit of Issue	Unit Price										
				B9	B13	B35	B60	B73	B97	B127	B145			
72	60gsm White Printing Reels width 8 1/2" centre core 3" radius 14"	200,000	Kg.	365	380	350	320	345	550	380	456			
72	60gsm White Printing Reels width 8 1/2" centre core 3" radius 14"	200,000	Kg.	360	460	350	465	250						

**Bidder B73 awarded**

**RECOMMENDATION**

The evaluation Committee proposed the lowest evaluated bidders in each case to be recommended for award as follows: Sampled three items and was replicated for all the items:

Item	Description	Qty	Unit of issue	Bidder No.	Bidder Name.	Recommended PRICE	REMARKS
1	100gsm Conqueror White Laid Size 43 x 61cm	1500	Rms	B131	M/S Kika Power Transmission Ltd.	15,400	Lowest evaluated bidder
2	100gsm Conqueror Blue Laid Size 43X61 cm	1,000	Rms	B86	M/S Megtech Africa P.O. Box 8052 Nairobi	14,300	Lowest evaluated bidder
3	100gsm Conqueror Dark Blue Laid Size 43 X 61 cm	1,000	Rms	B37	M/s Sapath General Supplies & Services	15,400	Lowest evaluated bidder

**Note: Prevailing market prices were used to determine the lowest evaluated bidder in each case.**

### **PROFESSIONAL OPINION**

The Head of Procurement stated that the instant procurement is in accordance with section 96 of the Public Procurement and Asset Disposal Act, 2015.

The Accounting Officer approved award of tender No. GP/4/2016-2018 for supply and delivery of paper and boards to Government Press for the Financial Years 2016-2018 to the firms being the lowest responsive bidders as per the Tender Evaluation Committee's recommendation:

## THE REQUEST FOR REVIEW

This Request for Review was lodged by Kemax Trading Co. Limited on 11th August, 2017, against the decision of the Ministry of Interior in matter of tender No. GP/4/2016-2018. For the supply and delivery of paper and boards for Government Press.

The Applicant sought for the following orders:-

1. *An order quashing the award of the tender in respect of tender item numbers 53, 54, 64, 73, 77, 103 and 109 to any other bidder other than the Applicant, who submitted the lowest prices.*
2. *An order directing the Respondent to award the Applicant the tender in respect of item numbers 53, 54, 64, 73, 77, 103 and 109.*
3. *Costs of the request for review to the Applicant.*
4. *Any other relief that the Review Board deems fit to grant under the circumstances.*

During the hearing of this Request for Review, the Applicant was represented by Mr Nick Omari Advocate from the firm of M/s Macharia Odongo & Kosgei Advocates while the Procuring Entity was represented by Mr. Judy Kirichu, Legal Officer. Interested party present was M/s Woodworld Paper Monger ltd was represented by Mr. J.N. Kuria; advocate from the firm of M/s J.N. Kuria& Co. Advocates. While Mr. John Iringo and Mr. James Mwangi appeared for the interested parties Naval logistics ltd and Curated Spaces Ltd.



The tender in dispute comprised of 136 items, the Applicant in this application was however only challenging the awards in respect of items 53, 54, 64, 73, 77, 103 and 109.

### **Preliminary Objection**

In response to the Request for Review the Procuring Entity filed a notice of preliminary objection with the Board on 22nd August, 2017 and averred that the Applicant has filed its request for review outside the 14 days window period in contravention of section 167(1) of the Public Procurement and Asset Disposal Act. The Procuring Entity stated that it notified all the Successful and unsuccessful bidders of the outcome of their tenders vide letter(s) of notification dated 30<sup>th</sup> June, 2017, but stated that the request for Review was filed on 11<sup>th</sup> August, 2017, which in the Procuring Entity's view was almost 30 days after notification. It annexed the letter of notification as annexure KM1 indicating that the Applicant had been successful in the tender for item No. 85. The letter stated as follows:-

*'All the items you bided for, you were unsuccessful financially /commercially'*

In response to the preliminary objection, the Applicant filed a supplementary Affidavit Sworn by Mr. STEPHEN MBURU the Applicant's General Manager and which was filed with the Board on 23<sup>rd</sup> August, 2017 and stated that the Applicant got to know what it was unsuccessful in respect of the tender for items No. 53, 54, 64, 73, 77, 103 and 109 on 1<sup>st</sup> August, 2017 when it obtained the pleadings in party in request

for review Application No.68 of 2017 where the Applicant was enjoined as an interested party in request for review Application No.68 of 2017,the Applicant states that it could challenge the award for the above items since it had not filed its independent request for review seeking to challenge the Procuring Entity's decision to award the items listed in this appeal.

The Applicant in the affidavit disputed the contents of the Procuring Entity's letter of notification (Annexure KM1) and submitted that the insertion of the words '*NB: All the items you bided for, you were unsuccessful financially /commercially*' in the said annexure KM 1 by the procuring Entity was mischievous.

Upon considering the nature of the preliminary objection, the Board directed that the same be incorporated and be argued as part of the main request for review because the preliminary objection could not be argued without referring to contested facts. The Board further directed that it would consider and determine the preliminary objection first in its decision and depending on the outcome of the preliminary objection, the Board would then proceed and determine the substantive request for review on its merits if the preliminary objection failed.

The Board has considered the rival submission made by the parties to this request for review on the preliminary objection and finds that the letter of notification of award to the Applicant was dated 30<sup>th</sup> June, 2017 indicating that the Applicant was awarded Item No.85. The Procuring Entity did not however produce before the Board evidence that it issued a letter of

notification to the Applicant in respect of the tender for items numbers 53, 54,64,73,77,103 and 109. This was therefore contrary to the provisions of Section 87(3) of the Act which provides as follows:-

*'3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof'.*

The Board is therefore persuaded that the Applicant learnt that its bid for the above items was unsuccessful on 1<sup>st</sup> August, 2017 through the pleadings in the request for review Numbers.67 & 68 of 2017.

The Board therefore holds that the Applicant having learnt of the status of the said tender items on 1<sup>st</sup> August, 2017 and the request for review having been filed on 11<sup>th</sup> August, 2017 the same was filed 11 days from 1<sup>st</sup> August, 2017 and hence the same was filed within the 14 days appeal window period provided for by law and as such, the Request for Review was filed within time.

Related to the above finding is the issue raised by the Counsel for the Applicant namely whether the failure by the Procuring Entity to serve a letter of notification on the Applicant pursuant to the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act rendered the entire procurement process herein fatally defective.

The Board is however unable to agree with the said submission for the reason that a letter of notification is issued after evaluation and is meant for the purposes of enabling an unsuccessful bidder decide whether there is sufficient basis for challenging the outcome of the evaluation process and the resultant award of a tender.

In this particular instance however, the Applicant was able to file its Request for Review with the Board on time and the Board therefore holds the view that the Applicant did not suffer any prejudice as a result of the Procuring Entity's failure to strictly comply with the provisions of Section 87(3) of the Act.

Consequently the preliminary objection by the Procuring Entity that this request for review was filed out of time fails and similarly the Applicant's contention that the failure by the Procuring Entity to strictly comply with the provisions of Section 87(3) of the Act renders the procurement process fatally defective also fails and is disallowed.

### **The Applicant's case**

The Applicant through its advocate Mr. Nick Omari submitted that the Procuring Entity only filed a preliminary objection in answer to the Applicant's Request for Review and that if the preliminary objection failed, the Request for Review would stand unopposed. He referred the Board to the provisions of regulation 77(5) as read together with Regulations 74(3) of the Public procurement and disposal Regulations 2006(the Regulations)

and maintained that where a preliminary objection fails the Board is bound to proceed and determine the Request for Review on the merits.

He further submitted that pursuant to the provisions of Regulations 74(3) of the Regulations an answer to a request for review must be in the form of a written memorandum. He additionally stated that the preliminary objection was not a written memorandum for the purpose of responding to substantive request for review and as such argued the Board to hold that the request for review as filed by the Applicant was an unopposed and that the Board should proceed to grant the prayers sought in the request for review.

Notwithstanding the above submission counsel for the Applicant submitted that the award criteria set out under clause 2.24.4 at page 27 of the Application provided that the award will be made to the lowest evaluated bidder per item contrary to the awards for items 53, 54,64,73,77 and 103 which were made to bidders who submitted prices which were higher than those submitted by the Applicant. He urged the Board to therefore find that the Procuring Entity had contravened the provisions of Section 86 of the Act and therefore reverse the Procuring Entity's decision and award the tender for the said items to the Applicant.

He therefore urged the Board to allow Requests for Review as prayed.

### **The Procuring Entity's response**

M/s Judy Kirichu advocate who appeared on behalf of the Procuring Entity opposed both Requests for Review

She stated that there were a total of other 92 bidders who had submitted tenders in this procurement but who were not awarded even one item yet they did not lodge any complaint before the Board.

She stated that in the Procuring Entity's opinion, the procurement under consideration had been done in good faith and in accordance with the law. She further stated that the Applicant was successful in its bid for items 85 and that it had unconditionally accepted the awards of the items to it and there was therefore no basis for the complaints lodged by the Applicant.

On the issue of price, counsel for the Procuring Entity submitted that the price at which the Applicant had offered to supply the goods in dispute was unrealistically low. She urged the Board to look at the market survey conducted by the Procuring Entity and stated that the market survey and the prices at which the same goods had previously been supplied would show that prices quoted by the Applicant were unrealistically low.

#### **The interested parties' responses**

Mr. J. N. Kuria advocate for Woodworld Paper Monger Ltd opposed the Applicants request for review and fully associated himself with the Procuring Entity's response. He submitted that the Procuring Entity had acted objectively in the evaluation of his client's tender for item 69. He further relied on the affidavit sworn by Mr. David Mwangi Ndungu on 21<sup>st</sup> August, 2017 where the deponent averred that the award of item 69 to it was made at a price which was within the market range and that it was therefore proper.

It was Mr. Kuria's additional submissions that the Applicant which had been awarded the two tenders falling under item 85 could not accept part of the award and object to another part of the same award since the tender was one and the same and was not severable

He further submitted that going by the evidence provided by the Procuring Entity, the prices offered by the Applicant were grossly undervalued and were merely meant to enable the Applicant secure the subject tender without any intention of performing it satisfactorily.

● He therefore urged the Board to dismiss the Applicant's request for review.

Mr. John Iringo and Mr. James Mwangi who appeared on behalf of Naval Logistics Limited and Curated Spaces Limited who were awarded the two sub items falling under item number 64 opposed the Applicant's request for review and associated themselves with the submissions made by the Procuring Entity. They stated that they offered realistic market prices which were evaluated by the Procuring Entity leading up to the making of the awards in their favour.

● They therefore urged the Board to uphold the awards made in their favour and dismiss the Applicant's request for review.

### **THE BOARD'S DECISION**

The Board has considered the Requests for Review filed by the Applicant on 11<sup>th</sup> August, 2017 and all the affidavits and the responses filed by the Procuring Entity and other interested parties. The first issue that the Board

wishes to deal with is Mr. Omari's submission that the Procuring Entity did not file a response to the Applicant's application and that the Board ought to treat the Request for Review as unopposed. The above submission cannot however stand for the simple reason that a perusal of the documents filed with the Board show that the Procuring Entity filed two sets of responses one comprising of a preliminary objection which was filed on 22<sup>nd</sup> August, 2017 and the other on 24<sup>th</sup> August, 2017 .Both the two documents were served on Counsel for the Applicant.

The only application which Counsel for the Procuring Entity made at the hearing of the request for review was the one seeking to have the documents annexed to the Procuring Entity's preliminary objection dated 22<sup>nd</sup> August, 2017 expunged a prayer which the Board allowed without any objection by Counsel for the Applicant. In view of the above state of the pleadings, the Applicant's contention that the Request for Review was not opposed is clearly without merit.

But even assuming for arguments sake that the Procuring Entity had not filed a response that fact alone would not have led to the Applicant's Request for Review being allowed as a matter of course. The Applicant would still be under a duty to prove its case in order to be granted any of the reliefs sought. The Board is additionally entitled by law to receive and consider confidential documents forwarded to it under the provisions of Section 67(3) (c) of the Act and Regulation 74(3) of the Regulations and which documents the Procuring Entity would perfectly be entitled to rely upon in its response.



This is not the first time that the Board is considering a similar issue. The Board had occasion to consider a similar argument in the case of **Paarl Media (PTY) A Division of Novus Holding Limited -vs- Independent Electoral and Boundaries Commission, Coalition for Reforms and Democracy (CORD) & Jubilee Party (PPARB Appl. No. 93 of 2016)** where the Board held as follows:-

*“The Board further finds that it does not automatically follow that an applicant before the Board will succeed in its application merely because the Procuring Entity has not filed a response as the burden to prove the grounds set out in a Request for Review still lies with the Applicant. It does not also naturally follow that a Procuring Entity will not be accorded a hearing just because it has not filed a response. A Procuring Entity may as well rely on points of law or invite the Board to decide a case on the basis of the facts contained in the documents submitted to it by the Procuring Entity pursuant to the provisions Regulation 74(3) of the Regulations as amended which include but are not limited to the original tender documents and evaluation reports”.*

The contention by the Applicant that the present Request for Review is unopposed therefore lacks any factual or legal basis and the Board will proceed and consider the only other remaining ground of review

It is evident from all the documents submitted and the submissions made before the Board that the instant Requests for Review raises only one issue for determination namely; whether or not the Procuring Entity breached

the provisions of the Constitution and the Public Procurement and Asset Disposal Act by awarding the tenders for the disputed items to bidders who were not the lowest evaluated bidders in each category.

The Board has looked at the law and the totality of the evidence placed before it and finds that as a matter of law as set out in the Public Procurement and Asset Disposal Act, a Procuring Entity is bound to prepare a tender document setting out the criteria which bidders who wish to participate in a tender must comply with.

The provisions of Section 80 of the said Act also set out the considerations which the tender evaluation committee must take into account while evaluating tenders and one of such requirements is that the Procuring Entity must take into account the issue of price while evaluating and awarding a tender.

This requirement on price is meant to enable the Procuring Entity avoid the mischief of bidders either quoting very low prices during tender submission so that they are awarded tenders with the aim or the hope of renegotiating the prices upwards when awarded the tenders or alternatively quoting prices which are clearly excessive.

Under the provisions of Section 54(2) of the Act, the law directs in mandatory terms that standard goods, services and works with known market prices shall be procured at the prevailing market price.

By virtue of the provisions of the said Section 54(2) of the Act, a Procuring Entity is therefore bound by law and general good practice to establish the

market prices for standard goods, services and works and take the said prices into consideration while evaluating tenders.

The Board wishes to reiterate that the duty to carry out a market survey to establish the applicable market prices is vested on the Procuring Entity by law. The Procuring Entity must do so diligently and once it does so, it is not open for each individual bidder to carry out its own independent market survey through obtaining proforma invoices from shops or other sources of its choice. This is to avoid the danger of each bidder obtaining quotations which are slanted in its favour thereby rendering it virtually impossible for the Procuring Entity to undertake a fair evaluation of price without influence by any extraneous preferences or factors.

The Board finds that in this particular case the Procuring Entity did its own independent survey to establish the relevant prices for the disputed items and the Board's duty is to only therefore ascertain whether the financial evaluations for the disputed items was carried out objectively and within the acceptable price limits.

The Board has looked at the provisions of the tender document and finds that the Procuring Entity was conscious of the requirements of the law and more particularly those of Sections 54(2) and 80 of the Act and included the following provision in the tender document which made any award of any item of the tender subject to the prevailing market price:-

*"The successful tenderer will be the lowest evaluated bidder with the highest combined score per item.*

*“Prevailing market prices will be used to determine the responsiveness”.*

All bidders and the Procuring Entity were therefore bound by this criteria in the tender document and it would have been an act in contravention of the law and particularly Sections 54(2) and 80 of the Act if the Procuring Entity failed to take the prevailing market prices into account while evaluating and awarding the tenders for the particular items in dispute.

Turning to the evidence before the Board, it is evident from the tender document submitted by the Applicant and the successful bidders who were awarded the tenders in issue that the Applicant and the said successful bidders offered the following prices:-

Item No.	Unit Of Issue	Applicant's Bid Price (Kshs.)	Successful Bidder's Price
53	KG	2500	5100
54	KG	3600	5600
64	KG	4500	5000
73	KG	250	340
77	KG	300	355
103	KG	250	370
109	KG	2200	2050

The Board has looked at the above figures against the framework contract prices for the periods between 2014 to 2016 and the corresponding local purchase orders (LPO's) provided to the Board by the Procuring Entity and which were contained in the response filed by the Procuring Entity on 24<sup>th</sup> August, 2017 and it is evident from the said documents that the following

were the prices at which the said items were supplied by the named suppliers to the Procuring Entity during the relevant periods.

**Prices as per the index and the framework contracted prices for the period 2014-2016 as supported by the local purchase orders**

Item No.	Framework contract price for the period 2014 - 2016	LPO's No	supplier
53	-		
54	5400	5400	Tripac Office
64	5200	2040327	Kemax Trad.Co
73	360	2040445	Kemax trad.Co
77	360	2666187	Phoenix solutions
103	370	2666015	First paper House
109	3500	2666177	Kada Enterprises

The above tabulation crystallizes the Board finding that some bidders under stated the prices with prospect of seeking a possible variation once they secure an award; by way of example, the Applicant was contracted for the period 2014-2016 to supply item no.64 and 73 with the price of Ksh. 5200/- and 360 respectively but three years down the Applicant quoted prices of Ksh.4500 and 250 respectively which were way below the prices at which the tenders for the said items had been awarded three years ago.

From foregoing, the Board notes that prevailing market prices were used in evaluation and the awards for the various bidders. The Board wishes to rely on the following observation which it made in Applications No. 67

and 68 of 2017 Somwet Limited & Paper Plus Trading Co. Ltd -vs- Ministry of Interior and Co-ordination of National Government:-

*“ The Board further wishes to observe that there is no way that the Applicants would have been able to supply the same goods currently at prices which are far lesser than prices which were prevailing three years ago. Such a proposition by the Applicants does not also make any economic sense and the Board is persuaded that the Applicants deliberately offered low prices so as to be awarded the tenders in the hope of a future price variation’*

The above observation applies to and is relevant to the dispute now before the Board.

In view of all the foregoing findings the Board holds that the Applicant’s request for review lacks merit and the same is dismissed in the following terms.

### **FINAL ORDERS**

Pursuant to all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders on the consolidated Requests for Review.

- a) The Applicants amended Requests for Review dated 11<sup>th</sup> August, 2017 in the matter of items number 53,54,64,73,77,103 and 109 in the matter of Tender Number GP/4/2016 - 2018 for the supply and

delivery of paper and boards for Government press be and are hereby dismissed.

- b) The Procuring Entity is therefore at liberty to proceed with the procurement process herein to its logical conclusion.
- c) In view of the fact that the Applicant was successful in resisting the preliminary objection by the Procuring Entity each party shall bear it's own costs of Requests for Review.

Dated at Nairobi on this 25<sup>th</sup> day of August, 2017.



CHAIRMAN  
PPARB



SECRETARY  
PPARB

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