

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 67 AND 68 OF 2017 DATED 21ST JULY, 2017

BETWEEN

SOMWET LIMITED & PAPER PLUS TRADING

CO.LIMITED.....APPLICANT

AND

MINISTRY OF INTERIOR AND CO-ORDINATION OF

NATIONAL GOVERNMENTPROCURING 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. Stanley Miheso - Holding Brief for Secretary
2. Maureen Kinyundo -Secretariat

PRESENT BY INVITATION

Applicant: Somwet Ltd and Paper Plus Trading Company Limited

Anthony Kiprono - 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

1. Waithaka Ngarunya -Advocate, Remington Agencies Ltd
2. Stanley Rakita -Remington Agencies Ltd
3. Imran Hassan -Remington Agencies Ltd
4. J.N. Kuria -Advocate, Karose Biashara, Wajoda traders, Paper Furniture and Wood world Paper

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 7th 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 21st 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"> • Size, grammage & colour • Whether Writing or Printing • Description of Paper (whether full coated board, smooth finishes etc.) • Item No. 																			
9.	Samples should be in plain form without any indication of the company's name or official rubber stamp																			

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
Total Expected Score	8	8	8	8	8	8	8
Percentage	60%	60%	60%	60%	60%	60%	60%

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. Bidders 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						
				B24	B67	B116	B121	B130	B131	
1	100gsm Conqueror White Laid Size 43 x 61cm	1500	Rms	17,250	20,000	16,500	19,000	17,700	15,400	

Bidder B131 awarded

Item No.	Description	Qty.	Unit of Issue	Unit Price						
				B24	B29	B37	B44	B49	B72	B86
2	100gsm Conqueror Blue Laid Size 43X61	1,000	Rms	17,250	15,020	14,500	18,400	18,950	15,950	14,300
2	100gsm Conqueror Blue Laid Size 43X61	1,000	Rms	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	B67	B68	B73	B78	B84	B87	B98	B104	B105	B116
62	70gsm White Printing Paper size 610 x 860 mm	40,000	Rms.	4400	3550	4750	4050	4350	4349	4300	4200	3500	4400										

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 ½" 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 ½" 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 ½" centre core 3" radius 14"	200,000	Kg.	365	380	350	320	345	550	380	456		
72	60gsm White Printing Reels width 8 ½" 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:

REVIEW

The Requests for Review were lodged by M/s Somwet Ltd and Paper Plus Trading Company Limited on 21st July, 2017 in the matter of Tender No. GP/4/2016-2018 for the Supply and Delivery of Paper and Boards for Government Press.

The Applicant in Application No.67 /2017 sought for the following orders:-

1. *An order quashing the award of the tender in respect of tender item numbers 55, 62, 74, 75 and 97 to any other bidder other than the Applicant.*

In the alternative;

2. *An order directing the Respondent to issue the Applicant with the reasons why its tender in respect of item numbers 55, 62, 74, 75 and 97 was unsuccessful.*

3. *Leave to amend its request for review depending on the outcome of prayer 2 hereinabove.*

3A *An order directing the Respondent to award the Applicant the tender in respect of item numbers 55, 62, 74, 75 and 97.*

4. *Costs of the request for review to the Applicant.*

5. *Any other relief that the Review Board deems fit to grant under the circumstances.*

While the Applicant in Application no.68/2017 sought for the following orders:-

a) An order quashing the award of the tender in respect of tender item numbers 69, 70, 71, 72, 81, 83 and 104 to any other bidder other than the Applicant.

In the alternative;

b) An order directing the Respondent to issue the Applicant with the reasons why its tender in respect of item numbers 69, 70, 71, 72, 81, 83 and 104 was unsuccessful.

c) Leave to amend its request for review depending on the outcome of prayer 2 hereinabove.

d) Costs of the request for review to the Applicant.

e) Any other relief that the Review Board deems fit to grant under the circumstances.

During the hearing of the consolidated Requests for Review, the two Applicants' were represented by Mr. Anthony Kiprono Advocate from the firm of M/s A.E Kiprono Company Associates while the Procuring Entity was represented by Ms. Judy Kirichu, Legal Officer. The following interested parties appeared at the hearing, M/s Remington Agency Limited which was represented by Mr. Waithaka Ngarunya, Advocate while Mr. J.N. Kuria; advocate from the firm of M/s J.N. Kuria & Co. Advocates represented Wajoda Traders, Woodworld Paper Monger and

Karose Biashara in addition to the above Mr. Omari advocate appeared on behalf of the bidder Kemax Trading Company Ltd.

Although the tender in dispute comprised of 136 items, the Applicants in the two applications only challenged the award of items 69, 70, 71, 72, 81 83 and 104 in the Request for Review number 67 of 2017 while the Applicant in the Request for Review number 68 of 2017 only challenged the award of items numbers 55, 62,74, 75 and 97.

The Applicant's case

The Applicants in both Requests for Review set out a total of 5 grounds of review which were all similar save for a few modifications in the description of the items under challenge.

During the course of his submissions, Counsel for the Applicant sought and was granted leave to amend the Requests for Review in each matter a request which was granted by the Board leading upto the filling of the Amended Requests for Review dated 31st July, 2017 and which were filed with the Board on the same day.

Counsel for the Applicant relied on the amended Requests for Review and the affidavit sworn by one Mr. Boniface Kairu. He stated that the main issue in dispute in the two Requests for Review was that the Procuring Entity had awarded the disputed items to various bidders who had offered to supply the same at prices which were higher than those quoted by the Applicants.

He further submitted that the Applicants had supplied various types of papers to the Procuring Entity for a period of approximately 20 years and were therefore in a better position to know the prices of the papers in the market and while relying on the supplementary affidavit sworn by Mr. Bonface Kairu on 3rd August, 2017, Counsel for the Applicant submitted that his client had obtained quotations from two suppliers namely M/s International paper & Board Supplies Ltd and M/s Unsceco Paper Products Ltd both of which were dated 3rd August, 2017 which showed what the current market prices for the papers were.

The Applicants therefore contended that their prices were within the market range and that the Procuring Entity had consequently erred by awarding the tenders for the said items to bidders who had quoted higher prices than the Applicants.

Mr. Kiprono advocate referred the Board to the supplementary responses signed by Mr. Kennedy Mwangi and which were filed with the Board by the Procuring Entity and argued that the said responses confirmed beyond doubt that the prices at which the items were awarded to the various successful bidders were much higher than the prices offered by the Applicants.

Turning to the Procuring Entity's response that the Applicants could not be awarded the disputed items because the prices quoted by them were too low and would therefore affect the Applicants ability to supply the subject items, Counsel for the Applicants stated that at the time the Applicants

submitted their bids, they knew what they were getting into. He further stated that the Applicants were fully aware of the consequences of any future failure to supply the items and stated that the law and the tender document were clear on the consequences of such a default.

He referred the Board to clause 2.3.1 and 3.7.1 of the tender document and submitted that the said clauses required a successful bidder to provide a performance security equivalent to 5% of the contract price if awarded the tender for the items.

He stated that 5% of the value in review application No. 67 of 2017 would work out to the sum of Kshs. 23,750,000 while that in application number 68 of 2017 would work out to the sum of Kshs. 24,110,000.

Counsel for the Applicants also referred the Board to the provisions of Section 142 (2) of the Public Procurement and Asset Disposal Act and stated that the same also provided for the provision of a performance security and the consequences of a failure to do so.

In addition to the performance security, Counsel for the Applicants further stated that clause 3.16 of the general conditions appearing at page 25 of the tender document also provided for termination of a contract and the consequences of a failure to perform a contract which included the levy of liquidated damages.

Turning to the award criteria, Counsel for the Applicant stated that page 25 of the tender document containing the award criteria provided that the successful tender would be the lowest evaluated tender with the highest

combined score per item. He further stated that the said criteria also provided that the Procuring Entity would consider the prevailing market prices in awarding the tenders for various items.

He however stated that the clause on the use of the market prices was only meant to check against bidders offering prices which were higher than the prevailing market prices and was therefore irrelevant to the case under consideration.

He additionally stated that in any event clause 2.24.1 provided that an award of the tender for each item would be made to the lowest evaluated bidder per item provided that the tenderer was qualified to perform the contract.

He further argued that tax payers stood to lose a lot of money by reason of the Procuring Entity's action of awarding the tenders for the disputed items to bidders who had offered higher prices. He stated that the Procuring Entity stood to lose the sums of Kshs. 162 Million in application no. 67 and the sum of Kshs. 165 Million in application no. 68.

The Applicants relied on the provisions of Section 3(e), (f) & (h) of the Public Procurement and Asset Disposal Act and stated that the said provisions set out the objectives of procurement one of which was to maximize economy. The Applicants also relied on the provisions of Article 201(d) of the Constitution on the management of public finances and stated that the Article lays emphasis on the prudent and responsible use of public money.

Counsel for the Applicants also relied on the provisions of Article 227 and 232 of the Constitution and emphasized that a totality of the reading of the said provisions placed emphasis on the need to obtain value for money in procurement issues which the Procuring Entity had allegedly failed to do in this case.

He therefore urged the Board to allow both 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 and relied on the initial responses and the supplementary responses signed by Mr. Kennedy Mwangi on behalf of the Procuring Entity.

She stated that by their own admission, the Applicants had supplied the disputed items to the Procuring Entity for about 20 years and that their grievance in this instance was borne out of malice and a sense of entitlement arising from the fact that the Procuring Entity had this time round awarded certain items in the tender to other bidders.

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 Applicants were successful in their bids for

certain items and that they had unconditionally accepted the awards of the items to them and there was therefore no basis for the complaints lodged by the Applicants.

She stated that both the items which the Applicants won and those which they lost were evaluated by the same tender evaluation committee and the Applicant could not therefore lodge complaints in respect of some items and leave out others. She stated that if the Applicants were dissatisfied with the process then they ought to have challenged the whole process in its entirety but not some items only.

Counsel for the Procuring Entity additionally submitted that the Procuring Entity had carried out its own independent investigations to establish the market prices for the various items and that this was conducted by way of several means. She stated that the Procuring Entity's decision was also informed by the past relationship with the Applicants contending that they had been awarded tenders in the past but were unable to deliver the goods because of under-quoting. She further stated that in this particular case the Applicants had under-priced several items and that is why their tenders in several categories were not successful.

She additionally submitted that the Procuring Entity was mandated both by the law and the tender document to take into account the market prices while awarding the tenders for the items and stated that was exactly what the Procuring Entity had done in this particular case.

On the method of carrying out the market survey, Counsel for the Applicant submitted that the law did not set out any mode of carrying out the market survey which she stated can be carried out by telephone contact or through any other means that did not necessarily involve physically visiting shops.

She finally urged the Board to look at the evaluation report which would confirm that the Procuring Entity's tender evaluation committee had conducted the whole process fairly and therefore dismiss both applications and allow the procurement process to proceed to conclusion.

The interested parties responses

Mr. Omari advocate for the interested party Kemax Trading Company Ltd submitted that his client had bid for items numbers 13, 53, 54, 64, 73, 77, 85, 103 and 109 and was only successful in item 13. Counsel for the said interested party however complained that his client was not notified of the outcome of it's tender for item numbers 53, 54, 64, 73, 77, 85, 103 and 109. He however conceded that his client had not filed it's own independent Request for Review seeking to challenge the Procuring Entity's award of the tenders for the items set out above. He however generally stated that his client supported the Applicants Requests for Review and urged the Board to allow the same.

Mr. Waithaka Ngaruiya advocate who appeared on behalf of Remington Agencies Limited opposed both Requests for Review and more particularly the Request for Review number 67 of 2017. He stated that his client was

successful in item No. 72. He referred the Board to the provisions of Section 80(2) of the Act and stated that the said provision of the Act makes it mandatory for a Procuring Entity to set out a process and to provide a criteria through which tenders should be evaluated.

He additionally submitted that under the provisions of Section 80(3)(d) of the Act, the law requires that all Procuring Entities take into account price considerations while evaluating tenders. He further stated that in this particular case, the Applicants did not show that the Procuring Entity failed to take into account price considerations while evaluating and awarding the tenders to the successful bidders per item.

Mr. Waithaka also referred the Board to the affidavit sworn by one Imran Hassan the interested party's Managing Director who swore under oath that the market price for item number 72 ranged between Kshs. 325 to 330 and argued that the price at which the interested party was awarded the tender was fair as he was the lowest evaluated bidder as per its tender price for that item.

He therefore urged the Board to dismiss both Requests for Review and to allow the process to go on.

Mr. J. N. Kuria advocate who appeared on behalf of Karose Biashara, Wajoda Traders and Woodworld Paper Monger Ltd also opposed both Requests for Review. He submitted that his clients had been successful in items No. 67, 69, 83 and 104. He also relied on the affidavit sworn by one Casper Kamunya on behalf of Karose Biashara Ltd and another one sworn

by one Ben Thuku on 3rd August, 2017. He argued that the evaluation process in this case was fair and wondered how the Applicants could challenge part only of the awards and not the whole.

He similarly therefore urged the Board to dismiss the Requests for Review.

THE BOARD'S DECISION

The Board has considered the amended Requests for Review together with all the responses filed in support and or in opposition thereto and which have already been referred to above. The Board has also considered the original tender documents, the original evaluation report, copies of previous framework contracts and local purchase orders for the items in contention for the years 2014, 2015, 2016 and 2017 together with a schedule of the market price index for the same items for the years 2014, 2015 and 2016.

The Board has additionally considered the submissions made by all the advocates who appeared before it during the hearing of the consolidated Requests for Review.

It is evident from a totality of all the documents and the submissions placed before the Board together with the submissions made before it that the consolidated Requests for Review raised only one issue for determination namely; whether or not the Procuring Entity breached the cited 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 first 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 the tender must comply with.

The provisions of Section 80 of the said Act also sets 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 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 when evaluating and awarding the tenders for the particular items in dispute.

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

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Item No.	Unit Of Issue	Applicant's Bid Price (Kshs.)	Successful Bidder's Price
69	KG	250	360
70	KG	250	365
71	KG	250	335

72	KG	250	345
81	KG	250	375
83	KG	250	350
104	KG	250	360

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Item No.	Unit of issue	Applicant's Bid Price (Kshs.)	Successful Bidder's Price
55	Packets of 250 sheets	4,000	7,200
62	Reams	3,500	4,050
74	KG	250	350
75	KG	250	448
97	KG	250	360

The Board has looked at the above figures against the market price index and the framework contracted 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 it is clear from the said documents that the following were the prices for the said items 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

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Item No.	Framework contract price for the period 2014 - 2016
69	370
70	360
71	350
72	350

81	370
83	350
104	350

APPLICATION NO. 68 OF 2017

Item No.	Framework contract price for the period 2014 - 2016
55	8,200
62	4,450
74	350
75	350
97	350

It is plainly evident that the Applicants tender prices were grossly understated and the Board therefore finds that the Procuring Entity's tender evaluation committee acted within the confines of the law and the Applicants contention lacks merit.

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.

In view of the above findings, the Applicants amended Requests for Review therefore lack merit and are dismissed in terms of the following final orders:-

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 31st July, 2017 in the matter of items number 55, 62, 69, 70, 71, 72, 74, 75, 81, 83, 97 and 104 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) **Each party shall however bear it's own costs of the consolidated Requests for Review.**

Dated at Nairobi on this 10th day of August, 2017.

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CHAIRMAN
PPARB

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SECRETARY
PPARB

