

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 26/2014 OF 20TH JUNE, 2014

BETWEEN

CIVICON LIMITED.....APPLICANT

AND

KENYA PIPELINE COMPANY LTD.....PROCURING ENTITY

Review against the decision of Kenya Pipeline Company Limited dated 6th June 2014 in the Matter of Tender No. SU/QT/784N/13 for Construction of Additional White-Oils Storage Tanks and Accessories at Pump Station 10 (Nairobi Terminal).

BOARD MEMBERS PRESENT

- | | |
|-----------------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Peter Bitia Ondieki, MBS | - Member |
| 3. Nelson Orgut | - Member |
| 4. Paul Ngotho | - Member |

IN ATTENDANCE

- | | |
|----------------------|-------------------------------------|
| 1. Stanley C. Miheso | - Holding brief for Board Secretary |
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PRESENT BY INVITATION

Applicant - Civicon Limited

- | | |
|--------------------|------------|
| 1. Kiragu Kimani | - Advocate |
| 2. Irene Kashindi | - Advocate |
| 3. George Kashindi | - Advocate |
| 4. Marcy Mathai | - Advocate |
| 5. Victor Rapahdo | - Lawyer |

Procuring Entity - Kenya Pipeline Company Limited

- | | |
|------------------------|------------------------|
| 1. Gloria R. Khafafa | - Senior Legal Officer |
| 2. Sospeter P. Mwakoma | - Senior Engineer |
| 3. Andrew K. Birir | - Senior Engineer |
| 4. Maureen Mwenje | - Procurement |

Interested Parties

1. Wilson Mwihuri - Advocate, IOT – H Young Consortium
2. Arthur Kung'u - Lawyer, IOT – H Young Consortium
3. Audrey Namwakira - IOT – H Young Consortium
4. Kimani A. G - IOT – H Young Consortium
5. Austine Odoyo - Advocate, Prashant Projects Limited
6. George Jumba - Vijay Tanks and Vessels (P) Ltd.

THE DECISION OF THE BOARD

The Board has considered the Request for Review the responses, all the submissions made by the parties and has arrived at the following decision.

BACKGROUND OF AWARD

The tender for the EPC contract for Construction of Additional White-Oils Storage Tanks and Accessories at Pump Station 10 (Nairobi Terminal) was re-advertised in the Respondent's Website and in the Business Daily Newspaper of Monday 28th April 2014, and the Standard Newspaper of 26th April 2014. The Tender closing/opening date was 16th May 2014.

Fourteen (14) firms purchased the tender document. However, only eleven (11) bidders/consortia responded. The following tender requirements for each bidder were read out and recorded:

1. Separate Technical and financial bids.
2. A copy of a valid KRA tax compliance certificate for local bidders.
3. A copy of Certificate of Incorporation.
4. Tender security of USD 150,000
5. National Construction Authority certificate.
6. Site visit certificate.
7. Agreement between tenderer and a local company

EVALUATION

PRELIMINARY EVALUATION

The preliminary evaluation was performed to ensure that the bidders met the mandatory requirements listed below, as detailed under Clause 1.3 of the Tender Document.

The Tender Processing Committee also evaluated the local partners against the requirements detailed under Clause 3.2.2 (f) of the Tender Document. Failure to submit any one of the listed requirements led to disqualification.

RESULTS ON MANDATORY REQUIREMENTS (CLAUSE 1.3)

No	Lead Partner	Certificate of Incorporation of the company	Valid KRA tax compliance certificate (for local firms)	Original Tender Security of USD.150,000- must be valid for 150 days from closing date	Signed Declaration form	Certificate of Tenderer's Site Visit	Local Partnership Agreement	National Construction Authority (Local Firms)	Statement on any current litigation or arbitration proceedings
1	Lanpec Technologies	Business License Reg. No 620105000000367 (3-1)	Not applicable	KCB Valid up to 20 th October 2014	Provided	Provided	Local Partnership with: Aegis Construction Ltd.	Not applicable	Provided – No Litigation
2	Paresa	Letter of Association provided.	Not applicable	BNL Valid up to 23 rd November 2014	Provided	Provided	MOU with: 1. Abe-Tec 2. Mayji Kanji	Not applicable	Provided– No Litigation
3	CPECC	Business License 100000000000098 (14-14)	Not applicable	CFC Stanbic 30 th November 2014	Provided	Provided	MOU with Empro	Not applicable	Provided– No Litigation
4	Vijay Tanks & Vessels	Certificate of Incorporation 1430 pf 1969	Not applicable	Standard Chartered valid up to 23 rd October 2014	Provided	Provided	Consortium Agreement with M/s Weldcon	Not applicable	Provided– No Litigation
5	Prashanth	Certificate of Incorporation No.14-51410	Not applicable	Chase Bank valid up to 23 rd October 2014	Provided	Provided	MOU with Nyoro Construction	Not applicable	Provided– No Litigation
6	Mahathi	Certificate of Incorporation U45209AP2010PTC 070448	Not applicable	I&M Bank valid up to 12 th October 2014	Provided	Provided	MOU with Seyani Bros.	Not applicable	Provided– No Litigation
7	Civicon	C. 13944	Provided and Valid	APA Insurance Valid up to 01 st November 2014	Provided	Provided	100% Kenya owned	NCA Letter	Provided– No Litigation
8	IOT	Certificate of Registration 11-102222	Not applicable	Explico Insurance Valid up to 29 th November 2014	Provided	Provided	Partnership Agreement with H. Young	Not applicable	Provided but have Litigations
9	JGH – WMS JV	1. JGH – AS196.891 2. WMS – CH-C-1657	Not applicable	Spar Nord Valid up to 23 rd October 2014	Provided	Provided	Partnership with Magic General Contractors	Not applicable	Provided– No Litigation
10	CPP	Business License 130000100001893	Not applicable	APA Insurance Valid up to 31 st October 2014	Provided	Provided	MOU with Tisco Construction	Not applicable	Provided – No litigation
11	Petrojet	Article of Association provided	Not applicable	I&M Bank valid up to 20 th October 2014, an extension provided	Provided	Provided	Pre-Bid Agreement	Not applicable	Provided – No litigation
					5				

RESULTS ON EVALUATION OF LOCAL FIRM/PARTNER (CLAUSE 3.2.2(f))

No	Lead Partner	Local Partner	Certificate of Incorporation of the company	Valid KRA tax compliance certificate (for local firms)	National Construction Authority	Undertaking to abide by the Public Procurement and Disposal Act, 2005	Sections of the work to be executed by the local firm	Relevant experience	Financial capability (1 year Accounts)	Human Resource	Availability of equipment
1	Lanpec Technologies	Aegis Ltd	C. 94069	Valid	No. 010333	Not Provided	Provided	Provided	Provided	Provided	Provided
2	Paresa	1. Abe-Tec 2. Mavji Kanji	1. C. 129107 2. C. 52244	1. Valid 2. Valid	1. No. 027500 2. NCA Letter	1. Provided 2. Provided	1. Provided 2. Provided	1. Provided 2. Not provided	1. Provided 2. Provided	1. Provided 2. Not provided	1. Provided 2. Provided
3	CPECC	Empro	C. 161907	Valid	NCA Letter	Provided	Provided	Provided	Provided	Provided	Provided
4	Vijay Tanks & Vessels	Weldcon	C. 113847	Valid	No. 035416	Provided	Provided	Provided	Provided	Provided	Provided
5	Prashanth	Nyoro Construction	C. 25710	Valid	No. 029901	Provided	Provided	Provided	Provided	Provided	Provided
6	Mahathi	Sevani Bros	C. 56447	Valid	No. 020318	Provided	Provided	Provided	Provided	Provided	Provided
7	Civicon	Civicon	C. 13944	Valid	NCA Letter	Provided	100% Local	Provided	Provided	Provided	Provided
8	IOT	H. Young	C. 2424	Valid	NCA Letter	Provided	Provided	Provided	Provided	Provided	Provided
9	JGH - WMS	Magic General Contractors	C. 28235	Valid	NCA Letter	Provided	Provided	Provided	Provided	Provided	Provided
10	CPP	Tisco Const. Ltd.	CPR/2010/22312	Valid	No. 000329	Provided	Provided	Provided	Provided	Provided	Provided
11	Petrojet	1. Linksoft 2. Sitmond 3. Mellech	1. C. 65108 2. CPR2010/16329 3. C102325	1. Valid 2. Valid 3. Valid	1. NCA Letter 2. NCA Letter 3. NCA Letter	1. Provided 2. Provided 3. Provided	1. Provided 2. Provided 3. Provided	1. Provided 2. Provided 3. Provided	1. Provided 2. Provided 3. Provided	1. Provided 2. Provided 3. Provided	1. Provided 2. Provided 3. Provided

OBSERVATIONS ON THE RESULTS ON THE MANDATORY REQUIREMENTS

1. The Original Tender Security for M/S Mahathi Infra Services Ltd/ Seyani Brothers was valid for less than 150 days.
2. The local partner for M/s Lanpec Technologies Ltd, i.e M/s Aegis Construction Ltd, did not provide an undertaking to abide by the Public-Procurement-and-Disposal Act, 2005.
3. One of the local partners for M/s Paresa SPA, i.e M/s Mavji Kanji & Brothers did not provide proof of relevant experience and human resource.
4. All the other bidders met all the requirements as listed and qualify for the detailed technical evaluation.

On the basis of the above observations:

The following three bidders did not fulfill the requirements and were therefore deemed non-responsive and were disqualified from further evaluation.

1. Lanpec Technologies Ltd/ Aegis Construction Ltd
2. Paresa SPA / ABE-TEC & Mavji Kanji & Brothers
3. Mahathi Infra Services Ltd/ Seyani Brothers

The following eight (8) bidders qualified for the detailed technical evaluation:

1. CPECC/ Empro Electrical And Mechanical Engineers Co Ltd
2. Prashanth Projects/ Nyoro Construction
3. IOT Infrastructure & Energy Services Ltd/ H Young
4. Vijay Tanks & Vessels (P) Ltd/ Weldcon

5. Civicon Kenya Ltd
6. China Petroleum Pipeline Bureau/ Tisco Construction Ltd
7. Josh Gram-Hanssen A/S-Western Marine Service Ltd / Magic General Contractors Petrojet/ Linksoft Communications, Sintmond & Mellech
8. Petrojet/ Linksoft Communications, Sintmond & Mellech.

DETAILED TECHNICAL EVALUATION

The detailed technical evaluation was carried out as per Clause 3.26 of the Tender Document, which states that all responsive bidders shall be evaluated and scored against the criteria provided in the tender document. The criteria is summarized as follows:-

Summary of Evaluation Criteria and Scoring

Item	Criteria	Marks
1	Experience and Past Performance	20
2	Tank Design	10
3	Financial Capability	9
4	Qualifications and Experience of Key Personnel	17
5	Construction Plant and Equipment	15
6	Draft Programme and Methodology of Works	24
7	Environmental Impact Assessment (EIA)	5
	TOTAL	100

In accordance with Clause 3.26 only tenderer's who score at least 50% in each of the seven (7) evaluation categories and attain an overall score of 75% shall qualify to have their financial submissions opened and evaluated.

The findings and scores for the Applicant are tabulated here below.

Detailed Evaluation - Civicon

Item	Criteria	Civicon	Marks
1	Experience and Past Performance		
	Bidders shall provide proof of successful design and construction of petroleum storage tanks to API 650 in an EPC contract during the last 5 years. The tank shall be of minimum capacity 30,000m³.	No evidence of having constructed a tank of 30,000m³ and above.	0
	i. A bidder who provides evidence for more than four (4) tanks shall be awarded 20 marks.		
	ii. A bidder who provides evidence for three (3) tanks shall be awarded 15 marks		
	iii. A bidder who provides evidence for two (2) tanks shall be awarded 10 marks		
	iv. A bidder who provides evidence for one (1) tank shall be awarded 5 marks		
	v. A bidder who provides no evidence at all or provides evidence that does not meet the above requirements shall be awarded 0 marks		
	<i>The documentary proof shall be in the form of copies of Completion Certificates from the clients and any other documentary evidence showing that the tanks were constructed to API 650 and the projects carried out in an EPC (turnkey) approach.</i>		
	Total		0
2	Tank Design		
	The bidder shall provide sample calculations of a typical tank design based on API 650, Eleventh Edition (June 2007) Section 5 or latest edition on the tank design and using the preliminary data provided in this document. The bidder shall assume the responsibilities of the purchaser where required in API 650.		
	i. Calculation of design shell thickness and hydrostatic shell thickness by 1-foot method for each shell course. (5 marks otherwise zero).	Provided	5
	ii. Calculation to determine whether intermediate wind girders shall be required. Use thickness of the thinnest shell course determined in (a) above. (5 marks otherwise zero)	Provided	5
	Total		10
3	Financial Capability		
	a. Annual financial turnover during any one of the last 5 years. Scores shall be awarded as follows: i. Over USD 50 million gets 5 marks. ii. Between USD 40 million and USD 50 million gets 4 marks. iii. Between USD 30 million and USD 40 million gets 3 marks. iv. Between USD 20 million and USD 30 million gets 2 marks. v. Below USD 20 million gets 0 marks. <i>The documentary shall be audited accounts for the last five years.</i>	USD 62.5 Million	5
	b. Current Ratio: Scores shall be awarded as follows: i. A current ratio greater than 2 gets 3 marks. ii. A current ratio greater or equal to 1 but less or equal to 2 gets 2 marks.		
	iii. A current ratio less than 1 gets 1 mark. <i>The bidder shall provide current audited accounts.</i>	1.4	2
	c. Solvency (Debt to equity ratio) of less than 2 gets 1 mark otherwise zero. <i>The bidder shall provide current audited accounts.</i>	0.06	1
	Total		8

Item	Criteria	Civicon	Marks
4	Qualifications and Experience of Key Personnel		
	<p>i. Project Manager The bidder shall provide names and detailed curriculum vitae of two members of staff (<i>prime and alternate</i>) who have designed and supervised the construction of petroleum storage depots. The candidates should be Registered/Chattered/Certified Engineers or their degree certificates attested/notarized by appropriate authorities in country of origin and holders of a Bachelor's Degree in Mechanical Engineering or equivalent. They must have a minimum of 15 years working experience after graduation. The members must have participated in the design and construction of at least two (2) petroleum storage depots. (Attach copies of certificates). A bidder who provides two project managers meeting the above requirements shall be awarded 4 marks, otherwise zero.</p> <p>ii. Health, Safety and Environment (HSE) Officer The bidder shall provide names and detailed curriculum vitae of two members of staff with recognized HSE certification from their country of origin and have at least 5 years' experience in HSE matters in the Oil and Gas Industry (attach copies of certificates). A bidder who provides two HSE Officers meeting the above requirements shall be awarded 2 marks, otherwise zero.</p> <p>iii. Welders. The bidder shall provide names and copies of certificates of at least 12 (twelve) welders who have 6G qualifications to ASME IX or API 1104 or equivalent. 0.25 marks per welder meeting the above requirements.</p> <p>iv. Civil Engineer The bidder shall provide a names and curriculum vitae of two (2) Registered/Chattered/Certified Engineer or Engineer whose degree certificates have been attested/ notarized by appropriate authorities in country of origin. The Engineers shall be graduates with minimum of 10 years working experience with at least 5 years in the Oil and Gas industry (attach copies of certificates). A bidder who provides two Civil Engineers meeting the above requirements shall be awarded 2 marks, otherwise zero.</p> <p>v. Mechanical Engineer The bidder shall provide a name and curriculum vitae of two (2) Registered/Chattered/Certified Engineer or Engineer whose degree certificates have been attested/ notarized by appropriate authorities in country of origin. The Engineer shall be a graduate with Bachelor's Degree in Mechanical Engineering or equivalent with a minimum of 10 years working experience with at least 5 years in the Oil and Gas industry (attach copies of certificates). A bidder who provides two Mechanical Engineers meeting the above requirements shall be awarded 2 marks, otherwise zero.</p> <p>vi. Instrumentation and Controls Engineer The bidder shall provide a name and curriculum vitae of one (1) Registered/Chattered/Certified Engineer or Engineer whose degree certificates have been attested/ notarized by appropriate authorities in country of origin. The Engineer shall be a graduate with Bachelor's Degree in Electrical and Electronics or Telecommunication with a minimum of 10 years working experience in control and process automation. (Attach copies of certificates). A bidder who provides one Instrumentation and Control Engineer meeting the above requirements shall be awarded 1 mark, otherwise zero.</p> <p>vii. Electrical Engineer The bidder shall provide a name and curriculum vitae of one (1) Registered/Chattered/Certified Engineer or Engineer whose degree certificate has been attested/ notarized by appropriate authorities in country of origin. The Engineer shall be a graduate with Bachelor's Degree in Electrical or its equivalent with a minimum of 10 years</p>	<p>Provided</p> <p>Provided</p> <p>Provided</p> <p>Provided</p> <p>Provided</p> <p>Provided</p> <p>Provided</p>	<p>4</p> <p>2</p> <p>3</p> <p>2</p> <p>2</p> <p>1</p>

Item	Criteria	Civilcon	Marks
	working experience in electrical installations. (Attach copies of certificates). A bidder who provides one Electrical Engineer meeting the above requirements shall be awarded 1 mark, otherwise zero.		
	viii. Corrosion Control Engineer The bidder shall provide name and curriculum vitae of one (1) Engineer certified by NACE. The Engineer shall be a graduate with a minimum of 10 years experience in Corrosion Control with at least 2 years experience in Oil and Gas Industry (Attach copies of certificates). A bidder who provides one Corrosion Control Engineer meeting the above requirements shall be awarded 1 mark, otherwise zero.	Provided	1
	ix. QA/QC Personnel The bidder shall provide name and curriculum vitae of one (1) QA/QC personnel with minimum qualification of a diploma in any Engineering discipline with certification in Non-destructive testing (NDT). The personnel shall have a minimum of Level II certification. (Attach copies of certificates). A bidder who provides one QA/QC personnel meeting the above requirements shall be awarded 1 mark, otherwise zero.	Provided	1
	Total		17
5	Construction Plant and Equipment		
	Bids shall be evaluated on submission of proof of ownership/ ability to hire where applicable of the following construction plant and equipment:		
	i. Excavators – 2 No. (1 mark for each otherwise zero)	i) Provided	2
	ii. Cranes with at least 25 ton capacity – 2 No. (1 mark for each otherwise zero)	ii) Provided	2
	iii. Tipper – 6 No. (0.5 marks each otherwise zero)	iii) Provided	3
	iv. DC welding generators – 8 No. (0.25 marks for each otherwise zero)	iv) Provided	2
	v. NDT (X-ray) equipment – 2 sets (0.25 marks for each otherwise zero)		
	vi. Compaction Plant - 2 No. (1 mark each otherwise zero)	v) Provided	0.5
	vii. Holiday test equipment – 2 No. (0.25 marks for each otherwise zero)	vi) Provided	2
	viii. Diesel Power Generators – at least 2 No. (0.5 marks for each otherwise zero)	vii) Provided	0.5
	ix. Air Compressors of at 300 - 600 CFM – 2 No. (0.25 marks for each otherwise zero)	viii) Provided	1
	x. Airless Painting Equipment – 2 sets (0.25 marks each otherwise zero)	ix) Provided	0.5
	xi. Concrete mixers – 4No. (0.25 marks each otherwise zero)	x) Provided	0.5
	<i>NB: Attach log books, calibration certificates where applicable, purchase receipts or plant lease agreements in event of hiring. Where necessary, all interpretation must be in English language.</i>	xi) Provided	1
	Total		15
6	Draft Programme and Methodology of Works		
	a. The bidder shall provide a reasonable draft programme in Ms Project of performing the works within the stipulated timeframe. The Gantt chart shall enlist milestones of the project activities (design, procurement, construction, testing and commissioning). (4 marks otherwise Zero)		
	b. The bidder shall provide a comprehensive works methodology incorporating the following as a minimum: For the listed below, the marks shall be awarded as follows:	Provided – To execute in 24 months	4
	i. A Health, Safety and Environment Policy. (2 marks otherwise zero)		
	ii. A Job Safety Analysis (JSA). (2 marks otherwise zero)	i) Provided and adequate	2

Item	Criteria	Civicon	Marks
	iii. Geotechnical Investigation Survey (GIS) Methodology. (2 mark otherwise zero)	ii) Provided and adequate	2
	iv. Tank Construction Methodology including but not limited to construction technique bearing in mind that the tanks shall be constructed in a live depot, foundation construction and installation of fixed aluminum dome roof. (6 marks otherwise zero).	iii) Provided and adequate	2
	v. Station Piping and Valve Installation Construction Methodology. (2 marks otherwise zero).	iv) Not comprehensive – omitted dome construction methodology	0
	vi. Tank Gauging and Process Automation & Control (2 marks otherwise zero).	v) Provided and adequate	2
	vii. Depot Fire Protection Methodology (2 marks otherwise zero)	vi) Provided and adequate	2
	viii. Cathodic Protection for tanks and buried pipelines (2 marks otherwise zero).	vii) Not comprehensive – omitted design and construction details	0
		viii) Provided and adequate	2
	Total		16
7	Environmental Impact Assessment (EIA)		
	The bidder shall be required to undertake EIA study prior to commencement of the works with a valid NEMA license issued for the project. Firms/Experts undertaking the study shall ;		
	a) Be locally based (Based in Kenya).		
	b) Have adequate experience in EIA studies including petroleum sector.		
	c) The key experts shall have the following;	c)	
	i. Lead expert – 5 years experience in petroleum sector with valid NEMA practicing license (1 mark otherwise zero).	i) Sanjay Gandhi - has adequate experience in petroleum sector and attached valid certificate.	1
	ii. Hazard assessment expert – 5 years experience in petroleum sector with valid NEMA practicing license (1 mark otherwise zero).	ii) Eng. Mwangi - has adequate experience in petroleum sector and attached valid certificate.	1
	iii. EIA Associate experts – 5 Years experience in petroleum sector with valid NEMA practicing license (1 mark otherwise zero)	iii) Stella Oirere- has adequate experience in petroleum sector and attached valid certificate	1
	d) Present an adequate proposed methodology and work plan for EIA (2 marks otherwise zero).	d) Provided and adequate	2
	Total		5

Summary of the Detailed Evaluation

No.	Bidder	Criteria						Environmental Impact Assessment (EIA) (5 marks)	TOTAL (100 marks)
		Experience and Past Performance (20 marks)	Tank Design (10 marks)	Financial Capability (9 marks)	Qualifications and Experience of Key Personnel (17 marks)	Construction Plant and Equipment (15 marks)	Draft Programme and Methodology of Works (24 marks)		
1	CPECC/ EMPRO ELECTRICAL	20	10	8	13	8	20	4	83
2	PRASHANTH PROJECTS/ NYORO CONSTRUCTION	20	10	9	17	14.75	24	4	98.75
3	IOT INFRASTRUCTURE & ENERGY SERVICES LTD/ H YOUNG	20	10	8	16	14	22	3	93
4	VIJAY TANKS & VESSELS (P) LTD/ WELDCON	20	10	9	15	10	24	3	91
5	CIVICON LTD	0	10	8	17	15	16	5	71
6	CHINA PETROLEUM PIPELINE BUREAU/ TISCO CONSTRUCTION LTD	20	10	8	15	12.5	24	5	94.5
7	JOSH GRAM-HANSEN A/S – WESTERN MARINE SERVICE LTD / MAGIC GENERAL CONTRACTORS	10	10	6	6.5	6	16	3	57.5
8	PETROJET / LINKSOFT COMMUNICATIONS, SINTMOND/MELLECH	20	10	9	3.5	0	18	3	63.5

OBSERVATIONS ON DETAILED EVALUATION

1. **M/S Civicon Ltd** did not achieve the 75% overall pass mark and 50% in one of the criteria (Experience and Past Performance)
2. **M/S Josh Gram-Hanssen A/S - Western Marine Service Ltd / Magic General Contractors** did not achieve the 75% overall pass mark and 50% in two of the criteria (Qualifications and Experience of Key Personnel and Construction Plant and Equipment)
3. **M/S Petrojet/ Linksoft Communications, Sintmond & Mellech** did not achieve the 75% overall pass mark and 50% in two of the criteria (Qualification and Experience of Key Personnel & Construction Plant and Equipment).
4. ALL the other bidders attained the minimum overall score of 75% and 50% in each of the criteria.

CONCLUSION

Based on the evaluation carried out herein above, the following companies were disqualified from further evaluation:

1. Lanpec Technologies Ltd/ Aegis Construction Ltd
2. Paresa SPA / ABE-TEC & Mavji Kanji & Brothers
3. Mahathi Infra Services Ltd/ Seyani Brothers
4. Civicon Ltd
5. Josh Gram-Hanssen A/S - Western Marine Service Ltd / Magic General Contractors.
6. Petrojet/ Linksoft Communications, Sintmond & Mellech

RECOMMENDATION

The Tender Processing Committee invites the Tender Committee to note the contents of this report and consider inviting the following bidders for financial bid opening:

1. CPECC/ Empro Electrical And Mechanical Engineers Co Ltd
2. Prashanth Projects/ Nyoro Construction
3. IOT Infrastructure & Energy Services Ltd/ H Young
4. Vijay Tanks & Vessels (P) Ltd/ Weldcon
5. China Petroleum Pipeline Bureau/ Tisco Construction Ltd

RESOLUTION OF TENDER COMMITTEE MEETING NO. TCM 42- ~~2013/2014 HELD ON 12th JUNE 2014~~

The Tender Committee approved the following 5 bidders to proceed to the financial opening:

1. CPECC/ Empro Electrical And Mechanical Engineers Co Ltd
2. Prashanth Projects/ Nyoro Construction
3. IOT Infrastructure & Energy Services Ltd/ H Young
4. Vijay Tanks & Vessels (P) Ltd/ Weldcon
5. China Petroleum Pipeline Bureau/ Tisco Construction Ltd

THE REQUEST FOR REVIEW

This Request for Review was filed by M/s Civicon Limited on 20th June, 2014 in the matter of the EPC Tender for the construction of additional white – oils storage tanks and accessories at pump station 10 (Nairobi Terminal) for Kenya Pipeline Company Limited. The Applicant sought the following reliefs in it's Request for Review:-

1. *That the decision of the Procuring Entity declaring the Applicant's bid non-responsive be nullified.*
2. *That the decision of the Procuring Entity conducting the technical evaluation and comparison of the Applicant's bid by using procedures and criteria other than those set out in the tender documents and awarding the Applicant 0% score in the Experience and Past Performance Criteria be nullified.*
3. *That the Procuring Entity be directed to undertake the Technical Evaluation of the Applicant afresh and to take into account the proof and evidence submitted by the Applicant in the Experience and Past Performance Criteria.*
4. *If the Procuring Entity has already awarded the tender, that such award be nullified and the Procuring Entity be ordered to re-tender.*
5. *That the costs of this Review be awarded to the Applicant*
6. *The Board be at liberty to make any other order as may be applicable so that the interests of justice are met.*

The Board has framed the following four issues for determination:

1. Whether the Board has Jurisdiction to hear and determine the Request for Review in view of the Preliminary Objection filed by the Procuring Entity.
2. ~~Whether or not the Procuring Entity Breached the Provisions of~~ Section 66(2) and (3) of the Public Procurement Act 2005 (Hereinafter referred to as the Act) and Regulations 47 and 49(1) and (2) of the Public Procurement and Disposal Regulations and Clause 3.25 of the Tender Document.
3. Whether the Board can base its decision on an unpleaded issue or a prayer not sought before it.
4. Who will bear the costs?

Issue No. 1 - The Preliminary Issue of Jurisdiction

When the Applicant's Request for Review came up for hearing before the Board on 14th July, 2014 the Respondent supported by both Interested Parties submitted that the Request for Review was filed out of time and therefore ought to have been struck out under the Provisions of Regulation 73 of principal regulations as amended by Regulation 20(a) of the amended Regulations of 18th June, 2013. The Respondent's preliminary Objection on time was set out in paragraph 1 of its response to the Request for Review dated 27th June 2014 and in paragraphs 7, 8 and 9 of the Replying affidavit of NICHOLAS GITOBU sworn on 27th June 2014. The Respondent's basic argument was that the Applicant had been notified under the provisions of Section 67 of the Public

Procurement and Disposal Act that its tender for this project was unsuccessful via an email communication dated and forwarded by the Procuring Entity on 6th June, 2014 and that, accordingly, the Applicant ought to have filed the Request for Review within a period of Seven (7) days from the date of such notification.

The Procuring Entity produced a bundle of copies of email correspondences allegedly sent out to other bidders' as annexure 'NG1' to the affidavit of NICHOLAS GITOBU and submitted that since no other bidder apart from the Applicant had complained about not receiving the notification then it must be assumed that the Applicant received the email and the notification that its technical proposal was unsuccessful.

Counsel for the Procuring Entity relied on the decision in the case of TRUSTMARK INSURANCE BROKERS LTD =VS= KENYA PIPELINE COMPANY LTD [PPARB CASE NO.22 OF 2013] in support of her argument that a request for review filed with the Board outside the statutory period set out under Regulation 73(2)(c)(ii) of the Regulations is incompetent and that the same ought to be struck out on the account of the incompetence.

Mr. Kimani Kiragu who appeared before the Board on behalf of the Applicant opposed the Respondent's preliminary objection and maintained that the Applicant was not served with any letter of notification on 6th June, 2014 as alleged. To buttress his argument on this issue, Counsel for the Applicant referred the Board to the

supplementary affidavit sworn by one Ben Kiilu on 8th July, 2014 who denied at paragraph 6 of the affidavit that the Applicant had ever received any letter of notification on 6th June 2014 as alleged. Mr. Kiilu further produced a tender questionnaire in which the Procuring Entity had been informed that Mr. Ben Kiilu would be the tenderer's representative to be contacted on matters of the tender during the tender period.

The Applicant produced the notification at page 45 of its Request for Review and the envelope by which the letter of notification had been forwarded to the Applicant which appeared at page 46 of the Request for Review and stated at paragraph 5 of the statement of facts that it received the letter on 19th June, 2014. Counsel for the Applicant urged the Board to find that once service of the notice was disputed then the burden of proving such service lay with the Procuring Entity which ought to have proved on a balance of probability that it actually effected service of the notification.

The Board has perused all the documents placed before it and particularly the letter dated 6th June 2014 which appears at page 45 of the request for review.

The Board has also looked at the copies of emails attached to the affidavit sworn by Mr. Nicholas Gitobu and particularly at the alleged copy of an email print out attaching and forwarding the letter dated 6th June 2014. The email expresses itself as having been dispatched at 5.26

p.m. to the email ericmathuku@civicongroup.com and the subject was the construction of additional tanks.

It is fairly clear from the email document and the letter of notification at page 45 of the Request for Review that the two email addresses are the same. While the email address on the letter and the notification are the same, Board has perused several other documents supplied to it under the Provisions of Section 44(1) (2) (c) of the Act starting from the Applicant's proposal submission letter dated 14th May, 2014 and the letter addressed to the Applicant's Managing Director dated 17th March 2014 and which Mr. Kiilu produced as annexure BK2 all of which show that the correct email through which past correspondences have been forwarded to the Applicant is eric.mathuku@civicongroup.com. The dot (.) is missing between the names eric and mathuku both in the copy of the email extract of 6th June 2014 and in the notification itself.

The Board therefore has no difficulty in concluding that on the basis of the material placed before it by all the parties to this review, the Applicant was not served with the notification that its bid was unsuccessful until 19th June 2014 and that its Request for Review which was filed on 20th June, 2014 was therefore filed within time.

In view of the above findings, the Preliminary Objection fails and is hereby dismissed.

The Board will accordingly proceed and hear the Request for Review on its merits and will address the remaining issues.

Issue No. 2 - Whether or not the Procuring Entity Breached the Provisions of Section 66(2) and (3) of the Public Procurement Act 2005 (Hereinafter referred to as the Act) and Regulations 47 and 49(1) and (2) of the Public Procurement and Disposal Regulations and Clause 3.26 of the Tender Document.

Though the notification send out by the Procuring Entity and which the Board has addressed while determining the Preliminary Objection refers to the results communicated to the bidders on 6th June 2014 as having arisen following the preliminary evaluation, it is evident in the same letter that the results were the results of the technical evaluation though some issues touching on the preliminary evaluation arose in the course of the arguments. The following extract from the letter of 6th June, 2014 confirms this position:-

"You attained a total technical score of 71% and 0% in the experience and past performance criteria. You therefore did not achieve the required 75% overall pass mark and 50% for each criteria."

It was common ground by all the parties during the hearing and this is supported by all the documents placed before the Board that the Technical Evaluation was conducted and according to the documents placed before the Board as evidenced by the letters which were send out to the bidders who qualified at the technical evaluation stage and the Financial proposal's opening register dated 13th June 2014 and which was placed before the Board shows that financial opening was done on 13th June 2014. There was no evidence placed before the Board to

demonstrate that financial evaluation had been concluded and according to the tender documents which the Board has in its possession, the tender validity period for this tender ends on 20th September 2014 which is a period of 120 days from the tender opening/closing date.

The Bulk of the Applicant's grievances therefore touched on the manner in which the Procuring Entity had evaluated its technical Bid.

Mr. Kimani Kiragu who led arguments on behalf of the Applicant started off his submissions by setting out the stages which ought to be followed by a Procuring Entity while carrying out evaluation and submitted that a Procuring Entity was bound to observe the Provisions of Regulations 47, 48, 49 and 50 of the Regulations and was also enjoined to take into account the objectives set out in Section 2 of the Act in addition with complying with Requirements of Sections 64 and 66(1) of the Act.

Counsel for the Applicant submitted that the Procuring Entity had misdirected itself on the above legal requirements and the evaluation criteria set out in the tender documents in several respects.

The Applicant submitted as a starting point that the Applicant was a Kenyan company incorporated in 1975 and was participating in the Procurement the subject matter of this dispute as a sole contractor or bidder. This statement is contained in paragraphs 14 to 17 of the supplementary affidavit sworn by Ben Kiilu which read as follows:-

14. *In reply to paragraph 3 of the Respondent's response, I aver that Civicon Limited, a Kenyan company incorporated in 1975 was participating as the sole EPC contractor or bidder.*

15. *There was no need to comply with clause 1.3 of the tender document requiring 40% local participation since the Applicant bidder is a locally established company and not a foreign entity.*

16. *The evaluation criteria identified and referred to by the Respondent at paragraph 4 of its Response was not to be applied to the Applicant's bid as the Applicant was not tendering in association with any foreign firms as contended by the Respondent.*

17. *Civicon's bid was not a joint venture (with international participants). It was not a MOU. Civicon did not need a local partnership arrangement since they themselves are local. Rather, Civicon was tendering as a sole bidder who would then engage subcontractors for part of the works and the applicable provision was clause 3.2.1(d) of the Tender document (page 7 of 202).*

While placing reliance on the Provision of clause 3.2.1, counsel for the Applicant contended that there was nothing in the tender documents that prohibited it from subcontracting part of the works and that it was therefore wrong for the Procuring Entity to have evaluated it's technical

bid under the criteria set out in Clause 3.2.2 yet this clause dealt with joint ventures/memorandum of understanding or local partnership agreements as the case may be where a foreign bidder elected to present it's bid in conjunction with local sub-contractors. The Applicant submitted that this clause was only applicable where the tender was submitted by two or more such firms. The Applicant insisted that it tendered as a sole bidder and that the use of sub-contractors was allowed by clause 3.2.1 (d) and that the Procuring Entity therefore erred in failing to take into account the sub-contractors performance and past experience under clause 3.26 of the Tender Document.

The Applicant further asserted that had the Procuring Entity applied it's mind to the right criteria then it would have at least been entitled to 5 marks on the issue of experience based on the assessment of its sub-contractors.

The Procuring Entity together with the first and the second interested party could not however hear any of these. The Procuring Entity submitted that it had rightfully evaluated the Applicant under the Provisions of clause 3.2.2 of the tender document.

This clause according to the Procuring Entity required all companies bidding in association with foreign firms to fulfil the following requirements:-

- (a) The participation for local firms was at least **40% of the contract value**. The local partnership agreement could take the form of a

joint venture, a memorandum of understanding (MOU) or any other form of agreement signed by all the parties involved.

(b) Certificate of Incorporation of the company/Business Registration of the local firm.

(c) Valid Tax Compliance Certificate of the local firm.

(d) The local firm's proof of registration with NCA.

(e) The local firm's undertaking to abide by the Public Procurement and Disposal Act, 2005 and the regulations thereto. The local firm shall not be limited or disqualified under the provisions of the Public Procurement and Disposal Act, 2005 and regulations, 2006 in force in Kenya.

(f) Sections of the work to be executed by the local firm.

(g) The local firm's relevant experience in the works to be executed.

(h) The local firm's financial capability. Attach audited accounts for at least one year to demonstrate financial capability for undertaking the project.

(i) The local firm's availability of Human Resources. The tenderer shall demonstrate availability of necessary staff with adequate qualifications, capability and experience to undertake the

assignment. All the key personnel must be able to effectively communicate in the English language.

- (j) The local firm's availability of equipment. The local partner shall submit a list of the major equipment proposed for carrying out the Contract, including details of ownership.

The Procuring Entity submitted that this criteria was aimed at curtailing and preventing the emerging practice of what Counsel referred to as "Cowboy" contractors whose main and only aim was to place in a bid, secure the contract and then sublet the entire contract to foreign firms by whom the Procuring Entity would not have any control over. She urged the Board to find that the procurement related to a very sensitive area namely the fuel industry. She further argued that prudence required that a Procuring Entity be given the leeway to vet such sub-contractors and that is why clause 3.2.2 required joint ventures, a memorandum of understanding (MOU) or any other form of agreement signed by all the parties involved together with all the other documents listed under items 3.2.2(a) to (j).

The Procuring Entity however submitted that the Applicant did not submit any of these documents in its sealed proposal containing the details of preliminary evaluation and the Procuring Entity had therefore proceeded with the preliminary evaluation on the assumption that the Applicant had presented a sole bid. The Procuring Entity however stated that when it opened the envelope containing the Applicant's Technical proposal, it discovered that the Applicant had included

particulars of the following sub-contractors who it intended to sub-contract the works to if awarded.

- (i) Entreprose projects Ltd of France.
- (ii) Trident Engineering Ltd of Scotland.
- (iii) Kurrent Technologies Ltd and
- (iv) Mehta Electronics Limited.

The Procuring Entity however submitted that no Sub-contracts, joint venture agreements, memoranda of understanding or any other form of agreement signed between the intended sub-contractors were provided by the Applicant in the Technical proposal.

On the issue of Regulation 49(1) and (2) of the Public Procurement and Disposal Regulations, the Procuring Entity submitted that under Clause 3.26 of the Tender Document the Procuring Entity was required to evaluate the technical bids according to the criteria set therein.

The Procuring Entity denied the entire contents of paragraphs 4, 5 and 6 of the Request for Review. In response thereto, the Procuring Entity restated that the criteria for technical evaluation was clear from clause 3.26 which states as follows:-

(a) That in carrying out the Technical Evaluation, the Procuring Entity was guided by Clause 3.26 of the Tender Document, which reads as follows:-

"Technical Evaluation Criteria:-

- i. KPC will carry out technical evaluations of the bids first, which shall be scored based on the evaluation criteria given below. Only tenderers who garner at least 50% in each of the seven (7) evaluation categories and attain an overall score of 75% shall qualify to have their financial submissions opened and evaluated.
- ii. Bidders are therefore requested to carefully read the qualification criteria and furnish authentic and complete information in response. KPC shall carry out due diligence to ascertain the accuracy of the information provided.
- iii. Documentary evidence may be in the form of literature, drawings and data, diagrams, photographs, catalogues, illustrations and any other information which is required for evaluation purposes. Such information shall clearly illustrate the bidder's ability to undertake the project.
- iv. Documentary evidence may be in the form of literature, drawings and data, diagrams, photographs, catalogues, illustrations and any other information which is required for evaluation purposes. Such information shall clearly illustrate the bidder's ability to undertake the project.

(b) That under Criteria No.1, the Bidder was required to provide the following information:-

"Criteria

Experience and Past Performance

Bidders shall provide proof of successful design and Construction of petroleum storage tanks to API 650 in an EPC contract during the last 5 years. The tank shall be of minimum capacity 30, 000m³.

- i. A bidder who provides evidence for more than four (4) tanks shall be awarded 20 marks.*
- ii. A bidder who provides evidence for three (3) tanks shall be awarded 15 marks.*
- iii. A bidder who provides evidence for two (2) tanks shall be awarded 10 marks.*
- iv. A bidder who provides evidence for one (1) tank shall be awarded 5 marks.*
- v. A bidder who provides no evidence at all or provides evidence that does not meet the above requirements shall be awarded 0 marks."*

The documentary proof shall be in the form of copies of Completion Certificates from the clients and any other documentary evidence showing that the tanks were constructed to API 650 and the projects carried out in an EPC (turnkey) approach.

The Procuring Entity further argued that the only acceptable evidence of past experience was through the provision of completion certificates

from the tenderers and any other documentary evidence, would just be additional. The Procuring Entity submitted that the Applicant attempted to provide proof of its past experience but none of the projects quoted met the mandatory requirements in the Tender document and thus the Applicant scored zero (0) marks for this category.

The Procuring Entity argued that since the Applicant presented itself as a sole bidder, the Procuring Entity could only consider past experience in the form of projects actually carried out by the Applicant and not any other entity which was not a bidder or which was not involved in the bidding process as envisaged by the tender document.

The Procuring Entity enumerated the projects cited by the Applicant in support of its contention on experience and stated that only three of the projects were backed by proof of completion in the form of completion certificates. None of the projects were however scored for the reasons that they did not meet the required threshold capacity of 30, 000m³ or because the project/projects were outside the 5 years limit placed in the tender document.

The Procuring Entity stated in paragraph 12 of the Replying Affidavit that in the interest of fairness and in compliance with the Provisions of Clause 3.26 of the Tender document, the Procuring Entity carried out a due diligence on the projects provided by the Applicant through the VTTI Limited which was the Applicant's main referee on past experience and that VTTI had responded to the inquiry by supplying the Respondent with a complete data sheet on the tanks completed by the

Applicant which showed that the biggest tank constructed by the Applicant did not meet the requirements in the tender specification. The Data sheet was produced and annexed to the Replying affidavit of Nicholas Gitobu as annexure NG 3.

Both the 1st interested party and the 2nd interested party who were represented by the firms of M/s Njoroge Rigeru & Company Advocates and the firm of M/s Kipkenda & Company Advocates respectively, opposed the Applicant's application and associated themselves with the Procuring Entity's submissions and urged the Board to re-affirm the procuring Entity's decision that had declared the Applicant's tender as being technically non responsive.

The 1st interested party stated at paragraph 3 of its memorandum of response that contrary to what the Applicant had alleged in paragraph 5 at page 2 of the Request for Review, the Applicant did not possess the requisite experience in design and construction of petroleum storage tanks to API 650 in an Engineering Procurement Construction (EPC) contract during the last 5 years and stated that the only project that the Applicant executed in Mombasa was in fact substantially performed by other contractors as the Applicant was only the Tank erection contractor and its role in the project excluded civil works which were executed by Laxmanbhai Construction Limited while the electrical and instrumentation works and the Procurement of the Tanks plate steel materials were carried out by other parties and the design/engineering work was executed by a design/engineering consultant appointed by the employer.

The 1st Interested Party further submitted that none of the past projects submitted by the Applicant met the requirements in the Tender document and were thus scored Zero (0) marks in that category. The 1st Interested Party placed emphasis on the requirement that a bidder had to demonstrate that it had constructed a tank with a minimum capacity of 30, 000 M³. None of the tanks listed by the Applicant met this criterion. The 1st Interested Party urged the Board to look at paragraphs 39(d) and (e) of the affidavit sworn by Mr. Ben Kiilu on 8th July, 2014 where he had expressly admitted that the Applicant had not constructed a tank with a capacity of 30, 000m³ and above and that this admission alone was enough to dispose of the matter.

The 1st Interested Party finally submitted that instead of the Applicant demonstrating its own experience it was now seeking to rely on the purported experience of sub-contractors who were not bidders in the contract and that none of them had at any rate demonstrated that it had constructed a tank with a minimum capacity of 30,000 m³ within the period set out.

The 2nd interested party similarly opposed the Applicant's application and filed a memorandum of response dated 8th July, 2014 and which was filed with the Board on 9th July, 2014. The 2nd interested Party associated itself with the Procuring Entity's submissions and for good measure stated at paragraph 3 of the statement that it was the successful tenderer in the tendering process conducted by the Respondent, Kenya Pipeline Company Limited having scored 98 percent in the bid for the construction of additional white use storage tanks and accessories at

pump station 10 - [Nairobi Terminal] tender No. SU/QT/784N/13. The 2nd interested party then dedicated a substantial part of its response in responding to allegations of debarment which had been made against it and which were allegedly pending before the Director General of the Public Procurement Oversight Authority under the Provisions of Section 114 of the Act.

The Board wishes to state at the onset that it has considered the 2nd interested party's response and will not pronounce itself on the allegations of debarment since these are allegedly pending before a different arm of the authority and further because there was no ground of debarment raised in the Request for Review.

In response to the submissions made by the Procuring Entity, the 1st Interested Party and the 2nd Interested Parties, Counsel for the Applicant reiterated his submissions that the Procuring Entity used the wrong criteria. He reiterated that the Applicant was perfectly within its rights to use sub-contractors who it would in turn engage once it was awarded the tender and that nothing prevented it from so doing.

Counsel additionally submitted that upon perusing the Response by the Procuring Entity and the Interested Party, counsel for the Applicant submitted that the 2nd Interested Party's disclosure at paragraph 3 of its memorandum of response that it had already been declared as the successful bidder had affected the integrity of the of the entire tendering process and that though the Applicant sought for a re-evaluation of its technical proposal which was the main prayer in the Request for

Review, it had now opted to request for the nullification of the entire process and for an order that the whole tendering process starts a fresh. Counsel argued that the Board had wide powers to do so under the Provisions of Section 98 of the Act.

The Board has examined the Request for Review, the responses and the affidavits filed by the parties in this Request to Review together with the oral and the written submissions filed by the parties. The Board finds at the onset that the most substantial issue and which formed the basis for the Applicant's application was whether it had established that it had the necessary experience and had proved past performance as required under criteria 3.26 of the Tender Document to enable it carryout the works. Criteria 3.26 of the Tender Document made provision for the following crucial ingredients which a tenderer ought to have satisfied:

- (i) *Provide proof of successful design and construction of Petroleum Storage Tank to API 650 in the EPC Contract during the last 5 years.*
- (ii) *The tank shall be of a minimum capacity of 30, 000 M³.*
- (iii) *The documentary proof shall be in the form of copies of completion certificates from the clients and any other documents evidence showing that the tanks were constructed to API 650 and the projects carried out in the EPC (turnkey) approach.*

This was an express requirement in the tender document and the Applicant which collected the document and had it from the word go had notice of this requirement. The Board therefore finds that the

requirement for the provision of evidence of the construction of a tank whose holding capacity was a minimum of 30, 000 M³ was there from the begging of the tendering process. It was not mischievously introduced midstream to disqualifying the Applicant and was applied uniformly to all bidders.

The Board has perused all the documents submitted to it by all the parties on the issue of past experience and capacity and has established as a fact based on the Applicant's own admission contained at paragraphs 39(d) and (e) of the Applicant's supplementary affidavit sworn by BEN KIILU on 8th July, 2014 that it had not constructed a tank of the required capacity within the last 5 years. Though this admission alone is enough to dispose of this matter, the Board will however examine the issue further.

Instead of demonstrating that it had constructed a tank with a capacity of 30, 000M³ the deponent of the affidavit instead stated as follows in paragraph 39 (d) of the said affidavit:-

39 (d) The Applicant has constructed tanks of greater height than that required by the Respondent that is over 20 metres and has infact exhibited one totalling 110,000 Cubic Metres."

As no point during its oral submissions did the Applicant refer the Board to any tank with a minimum the capacity of 30,000M³ which it had itself constructed but instead faulted the Procuring Entity for using the criteria under Clause 3.2.2 of the tender document by failing to

consider alleged evidence of the experience of persons it sought to subcontract the works to if it was awarded the tender.

The Board has perused the original tender document and the Responses filed by the parties and holds the view that the provision of a completion certificate was a mandatory requirement under Clause 3.26 of the tender document which had to be provided. The bidder was however at liberty to provide any further documentary evidence in addition to the certificate of completion. A certificate of completion is indeed the established means of proving completion in the construction industry.

That notwithstanding the Board has perused and confirmed the following matters as relates to the projects relied upon by the Applicant as proof of experience:-

- (i) The VTTI project - The Board perused pages 0003-0022 of the tender documents and has established that the project consisted of only 10 tanks none of which had a minimum capacity of 30, 000M³.
- (ii) The Soluochem Liquid Bulk Terminal Project, Tanzania - The Board has perused pages 0023-0025 of the tender document and has established that this project entailed the construction of 11 tanks, each with a capacity of 10, 383 M³ which was below the minimum required capacity of 30, 000 M³ for each tank.
- (iii) The Sangechal terminal Expansion, Ezerbaiyan. The Board has examined page 0026 of the Applicant's tender document and has confirmed that **Entrepose** was the contractor and not the Applicant and that the project commenced in June 2002 and was completed in 2008 outside the 5 years limit set out in the Tender

Document. The five year period for the purposes of the requirement in the tender document starts from 2009.

- (iv) The other projects set out by the Applicant and which appear at pages 0032 -0084 and 0085 - 0090 of the tender document did not meet the minimum capacity of at least 30,000 M³ or fell out of the time limit of not less than five years as stipulated in Clause 3.26 of the tender documents.

The above findings by the Board which are borne out by the Applicant's own tender document clearly show that the Applicant did not have the necessary experience either alone or in conjunction with its so called sub-contractors.

The above findings therefore make it unnecessary for the Board to determine whether the Applicant was bound by the criteria set out in Clause 3.2.2 namely to provide a joint venture agreement, a memorandum of understanding, signed contracts or any other form of sub-contract agreements. The Board says the issue is unnecessary to determine because the Applicant did not demonstrate the ingredients on experience even upon consideration of the documents submitted by it and some of which belonged to the so called subcontractors.

The Board has carefully perused the Provisions of Clause 3.2.2 of the tender document. The Board must give a purposive interpretation to the said criteria which is that although the clause seems aimed at enforcing the 40% rule on preference to local firms, nothing in the criteria prevents a local tenderer from being awarded 100% of the tender. But

where such a tenderer intends to sub-contract part or the whole of the contract to foreign tenders which is what the Applicant seeks to do, the Procuring Entity would be entitled to know from the word go what percentage of the contract has or is intended to be sub-contracted to such foreign firms.

The Procuring Entity which is the consumer of the end product should also be able to determine the competence of the sub-contractors. This can only be determined by looking at the sub-contract agreements or any other evidence of a like manner what would otherwise prevent any local bidder from tendering for works, getting it and then sub-contracting 100% of such works to foreign firms which would naturally be entitled to receive the payment for the works. How would that promote local industry which was the intention behind the enactment of the Regulations on preference?

The Applicant in this tender had several options open to it. If any provision in the tender document was not clear, the Applicant had the option of seeking for clarification using the time window allowed in the Tender Documents or challenging the criteria promptly through the filing of a request for review; assembling a bid through strategic partnership or not tendering on realising it had no capacity or would not qualify.

The Board also reiterates that the duty to draw up a tender document and the evaluation criteria is vested in the Procuring Entity and having therefore formulated a tender document providing for the criteria for the

evaluation of the tenders, the Procuring Entity cannot be said to have breached any of the Provisions of the Act or the Regulations and more particularly the Provisions of Section 64 (1) of the Act or Regulations 48(1) and 49(1) of the Regulations which read as follows:-

Section 64 (1) of the Act provides that a tender is responsive if it conforms to all the mandatory requirements in the tender documents.

Regulation 48 (1) provides that a Procuring Entity shall reject all tenders which are not responsive in accordance with Section 64 of the Act.

Regulation 49 which governs the issue of Technical Evaluation stipulates as follows:-

49 (1) upon completion of the preliminary evaluation under Regulation 47, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods.

Once the Procuring Entity had prepared a tender document containing the relevant criteria it would not be practical for every bidder to come up with its own evaluation criteria any more than candidates in an examination would each come up with his or her own marking scheme.

If the Board were to uphold the Applicant's submission, it would be opening up Procuring Entities to the possibility of a nominal bidder or a bidder who has no experience or capacity to obtain work and assign it to a third party at the possible catastrophic experience of the Procuring

Entity being left with strangers to the Contract performing the contracted works or services.

Section 66(2) of the Act on the other hand binds a Procuring Entity to use the procedure and criteria set out in the Tender Document while evaluating tenders.

The upshot of all the above findings is therefore that the Applicant has not established any breach of the Act or the Regulations by the Procuring Entity and all the grounds of the Applicant's Request for Review as set out in issue No. 2 therefore fail and are dismissed.

Issue No. 3 - Whether the Board can base its decision on an unpleaded issues or a prayer not sought before it.

Mr. Kimani Kiragu, while acknowledging that the Applicant had sought for re-evaluation of its technical bid in the Request for Review, later stated that instead of re-evaluation the Board should make an order annulling the entire Procurement process and ordering a retender of the whole project because it had emerged from the document filed in reply to the Request for Review that the entire process was tainted with illegality. He stated that, had these documents and particularly the 2nd Interested Party's response been available at the time the Applicant was making its Application then he would have included the prayer that the entire process be annulled and the Procuring Entity be directed to start the process afresh. Counsel for the Applicant argued that the Board has wide powers under the Provisions of the Section 98 of the Act to grant such a prayer.

This submission appears to have largely been necessitated by what the Applicant saw as the use of a wrong criteria and misdirection and by the statement at paragraph 3 of the 2nd Interested Party's reply where it had stated that it was already the winner in this tendering process having scored 98 percent of the marks. Mr. Odoyo for the 2nd Interested Party however clarified that the result was actually related to technical evaluation since the tendering process was still ongoing.

The Board has perused the documents submitted to it by the Procuring Entity and notes that by its letter dated 12th June, 2014, the Procuring Entity notified the 2nd Interested Party just like all the other bidders that their technical proposals were either successful or unsuccessful. The 2nd Interested Party was in that letter notified and that it had attained a technical score of 98.7% and the 2nd Interested Party was thus invited to attend the Financial opening on 13th June, 2013. The information having resulted from a notification to the 2nd Interested Party as a bidder cannot therefore be termed confidential as it was actually the result of a notification on the technical result.

It is further trite that a party to any proceedings of a judicial or quasi judicial nature is bound by its case as pleaded and cannot go outside its pleadings which for the Applicant in this case are set out in the Request for Review filed on 20th June, 2014 as supported by the attached statement of facts and the annextures thereto.

The central role played by pleadings in any dispute cannot be overemphasized. This central role has been stated by the courts over

time and byway of illustration the court of appeal stated as follows at in the case of Nzoia Sugar Company Limited -vs- Capital Insurance Nairobi Court of Appeal Civil Appeal No. 86 of 2009.

"It is trite law that in an adversarial system parties are bound by their pleadings. It has to be so in order to avoid the possibility of unfair surprise or trial by ambush. What a party pleads is what his opponent or opposite party responds to and it would be imprudent were a court to introduce at the judgment stage an issue that the parties did not place before it by way of pleadings. It has indeed been stated, with justification, we think that pleadings bind not only the parties but the court as well"

And in the case of The Independent Electoral and Boundaries Commission and another -vs- Stephen Mutinda Mule and 3 others the court stated as follows:-

"In the adversarial system of litigation therefore it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if these are strictly not adhered to. In such an agenda, there is no room for an item called "Any other Business" in the sense that points other than those specified may be raised without notice."

And finally in the Ugandan case of Libyan Arab Uganda Bank for Foreign Trade and Development & Anor -vs- Adam Vassiliadls (1986) UG CA 6 where the Ugandan court of appeal (the judgment of Odoki

JA) cited with approval the dictum of Lord Denning in Jones -vs- National Coal Board [1957] 2 QB 5S, it was held that;

"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct investigation or examination on behalf of the society at large".

The Board has perused the Applicants entire Request for Review and notes that the Applicant did not seek for an order that the Board nullifies the entire Procurement process and or orders a retender or that the entire Procurement process starts again. Counsel for the Applicant did not even apply for amendment of the prayers in the Request for Review at the commencement of the hearing as would be expected. The Board would therefore be acting without jurisdiction if it granted a prayer not sought for.

Issue No. 4 - Who will bear the costs?

Costs normally follow the event. In the instant case, the Applicant has been partly successful because it has demonstrated that the Procuring Entity's notification was not served and that the letter of notification was in any case slightly defective. Even though it lost on the other issues, the Applicant's Request for Review cannot therefore be said to have been entirely frivolous or vexatious.

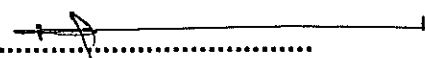
In the circumstances, each party shall bear its own costs.

FINAL ORDERS

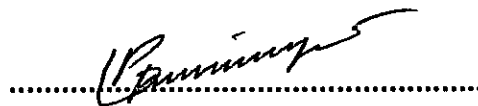
In Conclusion and in the exercise of the powers conferred upon the Board by the provisions of Section 98 of the Act, the Board makes the following Orders:-

1. The Applicant's Request for Review filed with the Board on 20th June, 2014 is hereby dismissed and the Procuring Entity's decision declaring the Applicant's technical bid as being non-responsive is hereby upheld.
2. Since the Procuring Entity has not awarded the tender, the prayer for the nullification of any award made is premature and is therefore declined.
3. The Procuring Entity is at liberty to proceed with procurement process.
4. Each party shall bear its own costs.

Dated at Nairobi on this 17th day of July, 2014.


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CHAIRMAN
PPARB


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SECRETARY
PPARB