

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 59/2021 OF 22ND APRIL 2021

BETWEEN

VISROM COMPANY LIMITED APPLICANT

AND

**ACCOUNTING OFFICER,
LIMURU WATER & SEWAGE COMPANY LTD.....1ST RESPONDENT**

**BLUESWIFT CONTRACTOR &
GENERAL SUPPLIES LTD..... 2ND RESPONDENT**

Review against the decision of the Accounting Officer of the Limuru Water and Sewerage Company Limited with respect to Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8).

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Njeri Onyango | -Member |
| 3. Ms. Rahab Chacha | -Member |
| 4. Mr. Ambrose Ogetto | -Member |
| 5. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philomen Kiprop | -Holding brief for the Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Limuru Water and Sewerage Company Ltd (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8) (hereinafter referred to as “the subject tender”) through an advertisement published in the Daily Nation Newspaper and the Procuring Entity’s Website (www.limuruwater.go.ke) on 10th March 2021.

Pre-Tender Site Visit & Addendum

A Mandatory site visit and pre bid meeting took place at the Procuring Entity’s offices on 19th March 2021 from 10:00 am.

The following addendums were issued

- a. Addendum 1 was issued on 22nd March 2021 making a clarification that bidders must be registered with NCA 3 and above. Bidders further requested to take note of the additional drawings. All other details remain unchanged.
- b. Addendum 2 issued on 23rd March 2021 making clarifications pursuant to Clauses 5.1 and 7.1 of the tender document, all bidders advised of the clarifications and revisions to the tender. All other terms and conditions of the tender shall remain unchanged.
- c. Addendum 3 issued 24th March 2021 making a clarification that annual turnover be Kshs. 200,000,000 (Kenya Shillings Two Hundred Million)

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of four (4) bids by the bid submission deadline of 30th March 2021. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders' representatives and recorded as follows: -

Bidder	Bid Bond	Total price
Visrom Company Limited	1,980,000 NCBA Bank	98,994,568.20
Yellow House Limited	6,960,000 Consolidated Bank	126,224,867.56
Comroad Construction & Equipment's Limited	2,600,000 Equity Bank	120,610,947.00
Blue swift Contractors & General Supplies Limited	2,578,129 Rafiki Bank	128,905,156.60

Evaluation of Bids

An Evaluation Committee appointed by the Procuring Entity's Managing Director evaluated bids in the following stages: -

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Preliminary Evaluation

This stage of evaluation involved examination of pre-qualification conditions set out in the Tender Document as follows:

S/No	Completeness and responsiveness Criteria/ Requirement	Bidder 1	Bidder 2	Bidder 3	Bidder 4
A	Form of bid- Form provided in the right format and signed	R	R	R	R
B	No. of copies provided- 3 No. plus the original	R	R	R	R
C	Bid Validity- 120 days from bid submission date	R	R	R	R
D	Pre-tender site visit- Attended the mandatory Pre-Tender site visit and attached certificate	R	R	R	R
E	Bid security- Right form from a recognized bank amount being equal to 2% of bid price and valid for 150 days from bid submission date	R	R	R	R
F	Eligibility- Registered in NCA 3 and above registered with the Ministry of Water	R	R	R	R
G	Form of power of attorney- Authority granted to bidder's representative	R	R	R	R
H	Bid submitted complete with all forms and Bills of Quantities Appendix to Bid Technical Schedules Form PER 1& 2 Form ELI 1&2 Form CON 2 Form FIN 1,2,3 &4 Bills of Quantities	N	R	R	R
	Overall Score	N	R	R	R

At the end of Preliminary Evaluation, out of the four (4) bidders who bid for the works, three (3) bidders satisfied the mandatory requirements thus proceeded to the Technical Evaluation stage.

2. Technical Evaluation

Technical Evaluation was carried in accordance with the criteria outlined herein below;

S/no	Item	Requirements	Bidder 2	Bidder 3	Bidder 4
1.	Structure of Bidding Company	Single entity/JV/Consortium/Association	R	R	R
Eligibility					
2.	Conflict of Interest	No conflicts of interests as described in ITB 3.2	R	R	R
3.	History of non-performance	Non-performance of a contract did not occur within the last five (5) years prior to the deadline for application submission based on all information on fully settled disputes nor litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the dispute resolution mechanism under the respective contract where all	R	R	R

		appeal instances available to the bidder have been exhausted.			
4.	Pending litigations	All pending litigation shall in total not represent more than 100% of the bidder's net worth and shall be treated as resolved against the bidder	R	R	R
Technical Experience					
5	General Experience	Experience under contracts in the role of contractor, subcontractor or management contractor for at least the last five (5) years prior to the applications submission deadline	R	R	R
6	Specific Experience	a. Participation as a contractor or subcontractor in at least three (3) similar contracts within the last five (5) years each with a value of Kshs. 150,000,000(Kenya Shillings One Hundred Million) that have been successfully and substantially completed (attach completion certificates) that are similar to the proposed works. The similarity shall be based on the physical size, complexity or methods/technology	N	N	R
		b. For the above or other contracts executed during the period stipulated in 2.4.2 (a) above a minimum experience in the following key activities Experience in laying of water supply and sewer pipelines Contractors should have laid UPVC/ferrous pipes/HDPE size between 200mm for UPVC and 1000mm dia. and above	N	R	R
7	Personnel Experience				
		Project Manager-1 Nr person 15 years of general experience and 5 years of similar experience	R	R	R
		Site Agent- 1 Nr. Person, 10 years of general experience and 5 years of similar experience	R	R	R
		Deputy site agent- 1 Nr person, 8 years of general experience and 5 years of similar experience	R	R	R
		Pipeline Engineer(Civil engineer)- 1 Nr person, 8 years of general experience and 5 years of general experience	R	R	R
		Foreman (Pipe laying, testing)- 2Nr persons 8 years of general experience and 5 years of general experience	R	R	R
		Engineering surveyor- 2Nr persons 5 years of general experience and 2 years of similar experience	R	R	R
		CAD technician 1 Nr person 5 years of general experience and 3 years of similar experience	R	R	R
8	Equipment	No. Equipment Type Min req. 1. 7/10 ton tipper lorry 2 2. Concrete mixers(0.4m3) 3 3. Concrete vibrator(50m 3 4. Pick up 3 5. Roll breakers 1 6. Mechanical/hydrostatic/pressure testing equipment 2 7. Backhoe excavator 3 8. Dewatering pumps 2 9. Self-loading crane 1 10. Excavator 0.4m3 2 11. Excavator 0.4m3 2 12. Crane able to lift 15 ton 1	R	R	R
9	Technical proposal	Site organization	R	R	R
		Method statement	R	R	R
		Mobilization schedule	R	R	R
		Construction schedule	R	R	R
10	Financial Situation				

	Historical Financial Performance	Submission of audited financial statement for the last three (3) years to demonstrate the current soundness of the bidder's financial position and prospective long-term profitability	R	R	R
	Average annual turnover	Minimum annual turnover of Kshs200,000,000 (Kenya Shillings Two Hundred Million) or equivalent in a freely convertible currency calculated as certified payments received for contracts in progress or completed within the last three (3) years	N	R	R
	Financial Resources	The bidder must demonstrate access to or availability of financial resources such as liquid assets, lines of credit and other financial means other than any contractual advance payments to meet <ul style="list-style-type: none"> i. The following cash flow requirement: ii. Cash flow of Kshs100,000,000 (Kenya Shillings One Hundred Million) iii. The overall cash flow requirements for this contract and its concurrent commitments 	R	R	R
	Total technical score		N	N	R

At the end of Technical Evaluation, only one (1) bidder was found responsive thus proceeded to the Financial Evaluation Stage.

3. Financial Evaluation

The bidder responsive at the technical stage was subjected to financial evaluation. The Tender Sum quoted by M/s Blueswift Contractors & General Supplies Limited was recorded as follows: -

Bidder No.	Bidder's Names	Amount (Kshs)	Ranking
4	BLUESWIFT CONTRACTORS & GENERAL SUPPLIES LIMITED	128,905,156.60	1

Recommendation

The Evaluation Committee recommended award of the subject tender to **M/s Blueswift Contractors & General Supplies** at a unit cost of **Kshs. 128,905,156.60** (Kenya Shillings One Hundred Twenty Eight Million Nine

Hundred and Five Thousand One Hundred Fifty Six and Sixty Cents) only having submitted the lowest evaluated tender price.

Due Diligence

Due diligence was conducted to verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender. At the end, responses received were tabulated as follows;

S/No.	Parameters	Bidder No.1 (Blueswift Contractors & General Supplies LTD)
1	NTSA/Equipment Hire	Y
2	Firm's Experience	Y
3	Site Agent	Y
4	Bid Bond	Y
5	CR12 Form	Y
6	TCC Online Checker	Y
7	NCA Online Checker	Y
8	ICPAK Auditor Online Check	Y
9	Ongoing Works	Y
	Overall Remarks	pass

Professional Opinion

In a professional opinion dated 15th April 2021, the Procuring Procurement Officer, outlined the manner in which the subject procurement process was undertaken including evaluation of bids. He concurred with the Evaluation Committee's award recommendation, thus advised the Accounting Officer to approve award of the subject tender to **M/s Bueswift Contractors & General Supplies Ltd** at a unit cost of Kshs. 128,905,156.60 (Kenya Shillings One Hundred Twenty Eight Million Nine Hundred Five Thousand

One Hundred Fifty Six and Sixty Cents) Only having submitted the lowest evaluated tender price. This professional opinion was approved on the same date of 15th April 2021, by the Managing Director.

Notification to Bidders

In letters dated 16th April 2021, the Accounting Officer notified all bidders of the outcome of their respective bids.

THE REQUEST FOR REVIEW

M/s Visrom Company Limited lodged (herein referred to as "the Applicant") a Request for Review dated 21st April 2021 and filed 22nd April 2021 together with a Statement in Support of the Request for Review sworn on 21st April 2021 and filed on 22nd April 2021 and the Applicant's Supplementary Affidavit sworn on 7th May 2021 and filed on 10th May 2021 seeking the following orders: -

- 1. An order setting aside the decision by the Procuring Entity addressed to the Applicant in a letter dated 16th April 2021 finding the Applicant's tender as non-responsive at the preliminary evaluation stage and awarding the Tender No. LIWASCO/001/KENHA/2020/21 Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa to the 2nd Respondent;***
- 2. An order substituting and/or amending the decision of the Procuring Entity by reviewing all the records submitted in the procurement process including the Bill of Quantities of the Applicant, the form and substance of the Applicant's tender document and awarding the Tender No.***

LIWASCO/001/KENHA/2020/21 Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa to the Applicant;

- 3. An order directing the Procuring Entity to progress the procurement process to its logical conclusion inclusive of the Applicant and make an award within seven (7) days;***
- 4. An order directing the 1st Respondent to pay the full costs of and incidental to these proceedings.***

In response, the 1st Respondent acting in person, lodged a Response to the Request for Review dated 3rd May 2021 and filed on even date while the 2nd Respondent lodged its Response to Request for Review dated 3rd May and filed on even date through the firm of Meritad Law Africa LLP Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged its written submissions dated 9th April 2021 and filed 10th May 2021. The 1st Respondent filed written submissions dated 6th May 2021 and filed on even date while the 2nd Respondent lodged written submission dated 6th May 2021 and filed on even date.

BOARD'S DECISION

The Board has considered parties' pleadings including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public

Procurement and Asset Disposal Act 2015 (hereinafter referred to as the Act) and finds that the following issues call for determination: -

- i. Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with section 80 (2) read together with the criteria and procedures in the Tender Document specifically, section 82 of the Act**

- ii. Whether the 2nd Respondent satisfied the requirement of registration with the National Construction Authority (NCA), category NCA3 and registration with the ministry of water and sanitation as required in Clause 1.3 of section 1 invitation to tender of the tender Document**

The Board now proceed to address the above issues as follows: -

The first issue framed for determination requires the Board to address the manner in which the Applicant's bid was evaluated at the Preliminary Evaluation Stage.

The Applicant in its Request for Review at paragraph 4 thereof states that through a letter dated 16th April 2021, the 1st Respondent informed the Applicant that its bid was unsuccessful for the following reasons:

"Reference is made to the above tender of relocation of water and sewerage infrastructure along Rironi Magumu Flyover and Rironi Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8).

We wish to inform you that your tender was non-responsive on Preliminary Evaluation and could not proceed to Technical Evaluation because of the following reason.

- Based on the finding of the Evaluation Committee, you did not attach two (2) pages of the Bill of Quantities (BOQ) under bill number 2 (Water Transmission Lines). Your bid therefore was incomplete hence failing in Mandatory Criteria H as per the Bid Document.*

The above tender was awarded to M/S BLUESWIFT CONTRACTORS & GENERAL SUPPLIES being the responsive bidder for Preliminary, Technical and Finance evaluation at a total tender sum of Kshs 128,905,156.60 (Kenya Shillings One Hundred Twenty Eight Million Nine Hundred Five Thousand One Hundred Fifty Six and Sixty Cents Only).

We thank you for participating and look forward to a future working relationship.”

The Applicant avers that the reason stated by the 1st Respondent is non-factual and misleading thus invites the Board to critically examine the bid it submitted with specific reference to its Bill of Quantities being the issue in contention.

In Response to the Request for Review, the 1st Respondent states that the decision was based on the provisions of Section 79 of the Act which provides that; “A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender document.”

The 1st Respondent further avers that Condition H of the mandatory requirements of the subject tender stipulated that the “bid submitted

[should be] complete with all forms and Bill of Quantities including Appendix to the Bid, Technical Schedules , Form PER 1&2, Form ELI 1&2, form FIN 1, 2, 3, & 4 and the Bill of Quantities.” The 1st Respondent avers that the Applicant did not submit all the fully filled pages provided for under the Bill of Quantities. In addition to this, the 1st Respondent took the view that 2 pages from pages 228-248 were missing hence the Evaluation Committee concluded that the Applicant’s bid document was incomplete.

On the other hand, the 2nd Respondent in its response to the Request for Review, draws the Board’s attention to the Evaluation and Qualification Criteria thereof outlined in section IV of the Tender Document ITB Clause 34 and ITB Clause 36. It further makes reference to ITB Clause 26 of the Tender Document which provides that: “Evaluation of the Bidder’s Technical Proposal will include an assessment of the Bidder’s technical capacity to mobilize key equipment and personnel for the contract consistent with its proposal regarding work methods, scheduling and material sourcing in sufficient detail and fully in accordance with the requirements stipulated in Section IX- Employer Requirements.” The 2nd Respondent avers that it is imperative for the Board to review ITB Clause 26 of the Tender Document as it forms part of the evaluation and qualification criteria because the said Clause outlines a criteria on Determination of Responsiveness.

The 2nd Respondent further avers that the Applicant’s letter of notification dated 16th April 2021 clearly outlined the Applicant’s failure to attach two (2) pages of the Bill of Quantities under Bill Number 2 for Water Transmission Lines.

The Board has considered parties' rival cases and observes that through the letter of notification of successful bid dated 16th April 2021, the Applicant was informed that its bid was unsuccessful because the it did not attach two (2) pages of its Bill of Quantities under bill number 2 (Water Transmission Lines thus its bid was incomplete hence failed to satisfy Mandatory Criteria (H) as per the Bidding Document.

The Board studied the Bidding Document in its entirety to establish the criteria for evaluation of bids in the Subject tender and proceeds to make the following findings;- Clause 29 of section II. Instructions to Bidders on page 14 of the Bidding Document provided the criteria and methodologies for evaluation as follows;

"29.1 The Employer shall use the criteria and methodologies listed in this Clause 29. No other evaluation criteria or methodologies shall be permitted.

29.2 To evaluate a bid, the Employer (Procuring Entity) shall consider the following:

(a) The bid price, excluding Provisional Sums and the provision, if any, for contingencies in the Summary Bill of Quantities, but including Daywork items, where priced competitively;"

(b) The evaluation criteria indicated in Section IV: Evaluation and Qualification Criteria

Clause 29 of the Bidding Document provides that during Evaluation the Procuring Entity would consider; the bid price, excluding Provisional sums and the provisions if any, in the Summary Bill of Quantities but would include Daywork items which were priced competitively.

Put differently, the bid price, the Summary Bill of Quantities including Daywork items would be considered during evaluation.

Section IV. Evaluation and Qualification Criteria at page 22 of the Bidding Document states;

"This section contains all the criteria that the Employer shall use to evaluate bids and qualify Bidders if the bidding was not preceded by a prequalification exercise and post qualification is applied. In accordance with ITB 34 and ITB 36, no other methods, criteria and factors shall be used. The Bidder shall provide all the information requested in the forms included in section 4 (Bidding Forms)"

From the above excerpt, Section IV of the Tender Document provided all the criteria for evaluation that the Procuring Entity would use in the Evaluation process, if the bids were not subjected to a prequalification exercise. From the confidential documents furnished to the Board, the Procuring Entity did not undertake a prequalification exercise but undertook a post qualification (due diligence) exercise.

This therefore means, in the absence of a prequalification, the Evaluation and Qualification Criteria under Section IV. Applies in the circumstances.

ITB 34 Clause and ITB Clause 36 referenced in Section IV. Evaluation and Qualification Criteria of the Bidding Document, deal with Notification of Award and Performance security respectively which are not provisions on Evaluation and Qualification Criteria. It is also mentioned that no other method shall be used for the evaluation of bids.

Further, Section 4" which is also referenced in the introductory paragraph of section IV above, is erroneous and ought to have been cited as Section V

because , On careful inspection the forms in section V, the Board notes that bidding forms are found in Section V at pages 43-67 of the Bidding Document. None of the Bidding Forms include a form for Bill of Quantities.

Turning to the Table of Criteria in Section IV Evaluation and Qualification Criteria on page 22 of the Bidding Document, the Evaluation and Qualification Criteria was divided in two parts as follows:

The first stage involves Evaluation containing one parameter known as "Adequacy of Technical Proposal."

The second stage involves Qualification Criteria containing six Parameters which are: Eligibility; Historical Contract non-performance; Financial Situation; Experience; Personnel; and Equipment. The Evaluation Report dated 9th April 2021 on the other hand provided three stages, of evaluation that is, the Preliminary/Mandatory Evaluation, Technical Evaluation and Financial Evaluation stages. The Board observes that whereas bidders were informed of evaluation under Evaluation and Qualification criteria the Evaluation Report shows Evaluation was undertaken at the Preliminary, Technical and Financial Evaluation stages. The categorization of Preliminary, Technical and Financial Evaluation stages by the Evaluation Committee are not provided in the Tender Document.

At page 23 under Section IV Evaluation and Qualification Criteria, the Bidding document mentioned ITB Clause 26 which we note is found at page 13 of the Bidding Document stating as follows:

"26.1 The Employer's determination of a *bid's* responsiveness is to be based on the contents of the bid itself, as defined in ITB 10.

26.2 A substantially responsive bid is one that meets the requirements of the Bidding Documents without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that,

(a) If accepted, would

(i) Affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or

(ii) Limit in any substantial way, inconsistent with the Bidding Document, the Employer's rights or the Bidder's obligations under the proposed Contract; or

(b) If rectified, would unfairly affect the competitive position of other Bidders presenting substantially responsive bids.

(c) Has arithmetic errors in the bills of quantities

26.3 The Employer shall examine the technical aspects of the bid submitted in accordance with ITB 14, Technical Proposal, in particular, to confirm that all requirements of Section IX, Works Requirements have been met without any material deviation, reservation or omission.

26.4 If a bid is not substantially responsive to the requirements of the Bidding Document, it shall be rejected by the Employer and may not subsequently be made responsive by correction of the material deviation, reservation, or omission.

Clause 26.1 referenced hereinbefore states that the Procuring Entity's determination of a bid's responsiveness is to be based on the contents of

the bid itself as defined in ITB Clause 10. The Board notes that this does not affect the scope, quality or performance of works in the contract. This should also not limit the Employer's rights or the rights of the bidder under the contract.

ITB 10 provides for the Documents comprising the bid and lists them as follows:

10.1 (a) Letter of Bid and Appendix to Bid

(b) Completed schedules as required, including priced Bill of Quantities, in accordance with ITB 11 and 12;

(c) Bid Security, in accordance with ITB 16;

(d) Alternative bids, if permissible, in accordance with ITB 12; (e) written confirmation authorizing the signatory of the Bid to commit the Bidder, in accordance with ITB 17;

(f) documentary evidence in accordance with ITB 14 establishing the Bidder's continued qualified status or, if post-qualification applies, as indicated in accordance with ITB 3.4, the Bidder's qualifications to perform the contract if its Bid is accepted;

(g) Technical Proposal in accordance with ITB 14; and

(h) Any other document required in the BDS.

From the above, ITB Clause 10 page 8 of the Bidding Document provided for the documents comprising the Bid but did not state that a bidder would be disqualified for having an incomplete Bill of Quantities and as already established by the Board, consideration would be made on Summary of Bill of Quantities. Further ITB Clause 11 is on letter of bid and schedules; whereas ITB Clause 12 talks about Alternative Bids, Bid Prices and

Discounts. ITB Clause 16 deals with bid security; ITB Clause 17 is on Format and signing of bids; lastly, ITB Clause 14 provides for Documents Comprising the Technical Proposal. All these provisions do not state that a bidder would be disqualified for having an incomplete Bill of Quantities because consideration would be made on the Summary of Bill of Quantities pursuant to Clause 29.2 of section II. Instructions to Bidders which made reference to section IV. Evaluation and Qualification Criteria of the Bidding Document.

Regarding the Document Comprising the Technical Proposal, ITB Clause 14 made reference to section V. Bidding Forms but none of those Forms deal with Bill of Quantities. The said Forms include the following:

“Bid Submission Sheet

Appendix to Bid

Table B. Foreign Currency (FC)

Not Applicable

Table C. Summary of Payment

Technical Proposal

Site Organization

Method Statement

Mobilization Schedule

Form EQU: Equipment

Personnel

Form PER-1: Proposed Personnel

Form PER-2: Resume of Proposed Personnel

Bidder’s Qualification

Form ELI-1: Bidder Information Sheet

Form ELI-2: JV Information Sheet

Form CON-2: Historical Contract Non-Performance

Form FIN-1: Financial Situation

Form FIN-2: Average Annual Construction Turnover

Form FIN-3: Financial Resources

Form FIN-4: Current Contract Commitments/Works in Progress

Form of Bid Security"

It is worth pointing out that ITB Clause 26.2 which was cited hereinbefore, explained what a material deviation is in the following terms

(a) If accepted, would

(i) Affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or

(ii) Limit in any substantial way, inconsistent with the Bidding Document, the Employer's rights or the Bidder's obligations under the proposed Contract; or

(b) If rectified, would unfairly affect the competitive position of other Bidders presenting substantially responsive bids.

(c) Has arithmetic errors in the bills of quantities

The Applicant's omission of two pages of its Bill of Quantities does not affect the scope, quality, or performance of the Works specified in the Contract; does not limit the Procuring Entity's rights or the Bidder's obligations under the proposed Contract and since a bidder is bound by its tender sum no rectification is required. In addition, correction of arithmetic errors is not undertaken during financial evaluation for the following reasons:-

Under the repealed Public Procurement and Asset Disposal Act, 2005 (hereinafter referred to as "the Repealed Act"), a tenderer would quote a tender price/sum, or what was referred to as the total price of a tender which would be read out by a procuring entity at the time of opening of

tenders in accordance with section 60 (5) (b) of the Repealed Act which provided as follows: -

"As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register —

(a) The name of the person submitting the tender;

(b) The total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed;"

Further, section 66 (4) of the Repealed Act provided that: -

"The successful tender shall be the tender with the lowest evaluated price."

Consequently, an award of a tender would be based on the lowest evaluated price as determined by a procuring entity at the conclusion of Financial Evaluation. In arriving at the lowest evaluated price during Financial Evaluation, a procuring entity would correct arithmetic errors by following the procedure outlined in section 63 of the Repealed Act as follows: -

"(1) the procuring entity may correct an arithmetic error in a tender.

(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.

(3) If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited."

Pursuant to this provision, a procuring entity would determine if there were any discrepancies in the amount quoted in a bid during financial evaluation of bids. If any discrepancies or errors were detected, a procuring entity would correct arithmetic errors only if the bidder in question accepted the corrections as made by the procuring entity. If the respective bidder rejected the corrections, the bid in question would be rejected at this stage of evaluation.

The process of arriving at the lowest evaluated price was further explained in Regulation 50 of the repealed Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Repealed Regulations") which Regulations were made pursuant to the Repealed Act. The said provision stated as follows: -

"(1) upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by-
(a) Taking the bid price, as read out at the bid opening;
(b) Taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender;

(c) Taking into account any minor deviation from the requirements accepted by a procuring entity under section 64 (2) (a) of the Act [Repealed Act];

(e) Where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;

(f) Applying any discounts offered in the tender;

(g) Applying any margin of preference indicated in the tender documents.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66 (4) of the Act (now section 86 (1) in the 2015 Act) [Emphasis by the Board]

Regulation 50 of the Repealed Regulations introduced steps for arriving at the lowest evaluated price during Financial Evaluation. As far as corrections were concerned, a procuring entity in determining the evaluated price of a bid would include any corrections noted by it relating to arithmetic errors in a tender in accordance with Regulation 50 (2) (b) of the Repealed Regulations. As explained hereinbefore, a procuring entity would correct arithmetic errors only if there was concurrence with the bidder in question pursuant to section 63 (3) of the Repealed Act. Following acceptance of these corrections by a bidder, and taking into consideration the other factors listed under Regulation 50 of the Repealed Regulations, a procuring entity would arrive at the evaluated price of a tender. A procuring entity would

then proceed to rank bidders in order to determine the lowest evaluated bidder in accordance with Regulation 50 (3) of the Repealed Regulations. An award of tender would then be made on the lowest evaluated price pursuant to section 66 (4) of the repealed Act and which evaluated price would be different from the tender price, now known as the tender sum under section 82 of the Act.

Moving forward, the Board notes, the enactment of the Act [i.e. the Public Procurement and Asset Disposal Act, 2015] changed the manner in which a procuring entity should treat errors found in a tender during Financial Evaluation.

Section 82 of the Act states as follows: -

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity."

On its part, section 86 of the Act which specifies several award criteria among them, the one applicable to open tenders (where Request for Proposal is not used) is expressed in subsection (1) thereof as follows: -

"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price"

The Board takes cognizance that through Gazette Notice No. 4957 (found in Vol. CXXII —No. 142 of Kenya Gazette of 10th July 2020, the Cabinet Secretary for the National Treasury stated thus: -

"THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT (No. 33 of 2015)

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL REGULATIONS

(LN. No. 53 of 2020)

COMMENCEMENT

IT IS notified for the general information of the public that the Public Procurement and Asset Disposal Regulations, 2020 came into operation on the 2nd July, 2020 following the approval by Parliament under section 180 of the Act.

Dated the 9th July, 2020."

According to the said Gazette Notice, the commencement date for Regulations 2020 was 2nd July 2020, following approval by Parliament pursuant to section 180 of the Act, which provides as follows: -

"The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013"

Regulation 224 of Regulations 2020 confirms the following: -

"The Public Procurement and Disposal Regulations 2006 are hereby revoked"

Hence, Regulations 2020 are applicable to the subject procurement process having established Regulations 2020 came into force on 2nd July 2020. Regulation 77 of Regulation 2020 which explains the procedure for Financial Evaluation states as follows: -

"77 (1) upon completion of the technical evaluation under regulation 76 of these Regulations the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender

(2) The evaluated price for each bid shall be determined by—

(a) Taking the bid price in the tender form

(b) Taking into account any minor deviation from the requirements accepted by a procuring entity under section 79 (2) (a) of the Act

(c) Where applicable converting all tenders to the same currency using the Central Bank of Kenya exchange rate prevailing at the tender opening date

(d) Applying any margin of preference indicated in the tender document

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act"

It is evident that pursuant to section 82 of the Act, the tender sum as submitted and read out (i.e. the amount specified in a tenderer's Form of Tender) is absolute and final thus cannot be corrected, adjusted or amended in any way by any person or entity. It is also worth noting that the process for correction of arithmetic errors through concurrence by a bidder, previously outlined in section 63 of the Repealed Act does not exist in the Act and Regulations 2020. To buttress this position, the Board notes that Regulation 77 of Regulations 2020 have departed from considering any corrections made by a procuring entity relating to arithmetic errors in a tender during financial evaluation previously recognized by Regulation 50 (2) (b) of the Repealed Regulations. This in the Board's view, shows a clear intention by the legislature to abolish correction of errors relating to

arithmetic errors in a tender which have the effect of correcting, adjusting or amending tenderer's tender sum as specified in the Form of Tender contrary to section 82 of the Act.

It is the Board's considered view that the mischief the Act and Regulations 2020 have cured is a scenario where a bidder can quote a figure 'X' as its tender sum in the Form of Tender in anticipation of being the lowest evaluated bidder. However, upon realization that such a bidder is not the lowest evaluated bidder, it would collude with a procuring entity to correct arithmetic errors which it 'deliberately' created in its breakdown of prices (i.e. in the Bill of Quantities) so that upon correction, its tender sum is revised downwards, lower than the initial lowest bidder and be awarded the tender based on the corrected figure.

The Board takes cognizance of section 79 of the Act which provides that: -

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a) Minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) Errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2) (a) shall—

(a) Be quantified to the extent possible; and

(b) Be taken into account in the evaluation and comparison of tenders.

It is not lost to the Board that section 79 (2) (b) of the Act gives the implication that there are some errors and oversights that can be corrected without affecting the substance of a tender.

Since the legislature abolished the procedure for correction of arithmetic errors during financial evaluation as was previously outlined in section 63 of the Repealed Act and further, removed the provision of section 50 (2) (b) of the Repealed Regulations on corrections made by a procuring entity relating to arithmetic errors in a tender, then it is true to say that arithmetic errors is a good example of an error that leads to correction, adjustment and amendment of the tender sum contrary to section 82 of the Act and more so, affects the substance of a tender.

It is the Board's considered view that, it was never the intention of the legislature that section 79 (2) (b) of the Act would be applied by procuring entities in a way that goes against the provision of section 82 of the Act and Regulation 77 of Regulations 2020. We say so, having established that any error resulting in correction, adjustment and amendment of the tender sum as specified in the Form of Tender affects the substance of a tender, thus prohibited by section 82 of the Act.

Regulation 74 (2) of Regulations 2020 which provides as follows: -

"Subject to section 79 (2) (b) of the Act any errors in the submitted tender arising from a miscalculation of unit price quantity subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive"

The import of section 79 (2) (b) of the Act read together with Regulation 74 (2) of Regulations 2020 was the subject of proceedings before this Board in **PPARB Application No. 144 of 2020, County Builders Limited v. The Accounting Officer, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works, State Department for Housing and Urban Development & Another** (hereinafter referred to as "the **County Builders Limited Case**") where the Board held as follows: -

"In considering the provisions cited herein, the Board observes that Regulation 74 (2) of Regulations 2020 is subject to the provision of section 79 (2) (b) of the Act. In the article on "Solicitors at Risk" published on November 2013, Andrew Nickels explains the meaning of the phrase "subject to" in legal agreements and legislation as follows: -

"Subject to" looks ahead to the exception. It is used in a clause that is secondary to the clause it is expressed to be "subject to". It tells the reader which clause takes priority where there is an overlap"

In its **"Guide to Legislative Processes in Kenya"** published in 2015, the Kenya Law Reform Commission explains the relationship between subsidiary legislation and a primary legislation (i.e. the parent Act/Statute) as follows:

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"In other words, subsidiary legislation must conform to the primary legislation in all respects"

Thus, the Board deduces the meaning of "subject to" as applied in Regulation 74 (2) of Regulations 2020 to mean that Regulation 74 (2) of Regulations 2020 must conform in all respects with section 79 (2) (b) of the Act because the primary legislation being the Act, takes priority over Regulations 2020.

Furthermore, section 31 (b) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that: -

"Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—

(a)

(b) No subsidiary legislation shall be inconsistent with the provisions of an Act"

Section 24 (2) of the Statutory Instruments Act No. 23 of 2013 further provides that: -

"Statutory instrument (i.e. subsidiary legislation) shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency" [Emphasis by the Board]

The Court in **Petition No. 20 of 2019, Victor Juma v Kenya School of Law & Council of Legal Education (Interested Party) [2020] eKLR** also addressed the legal relationship between a primary/parent legislation and a subsidiary legislation while comparing provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 and the Kenya School of Law Act, 2016 when it held as follows: -

"I see no reason why the provisions of a subsidiary legislation should override the express provisions of an Act of Parliament. It is therefore my finding that the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 are not applicable in this case, and the relevant legislative instrument to be applied is the KSL Act. This means that the Petitioner cannot benefit from the vertical progression recognized in the Legal Education (Accreditation and Quality Assurance) Regulations, 2016."

Given that subsidiary legislation should not be inconsistent with provisions of an Act, when such an inconsistency arises, provisions of the Act

supersede. In this instance, Regulation 74 (2) of Regulations 2020 states that any errors should lead to disqualification of a tender yet, the said Regulations should only apply to the extent of section 79 (2) (b) of the Act which allows errors or oversights can be corrected without affecting the substance of a tender to be declared responsive. There is therefore an inconsistency, and thus section 79 (2) (b) of the Act must prevail.”

Having considered the finding of the Board in the County Builders Limited Case, the Board would like to simply reiterate that Regulation 74 (2) of Regulations 2020 must conform to section 79 (2) (b) of the Act because the said Regulation is subject to section 79 (2) (b) of the Act and where there is an inconsistency, section 79 (2) (b) of the Act will take precedence over Regulation 74 (2) of Regulations 2020. The corrections contemplated in section 79 (2) (b) of the Act should not interfere with a bidder’s tender sum as required by section 82 of the Act.

Having established the Act and Regulations 2020 do not permit any correction of arithmetic errors ITB Clause 26.2 © could not be applied during evaluation because the Procuring Entity is precluded from considering arithmetic errors considering and correcting arithmetic errors in the Bill Of Quantities during Financial Evaluation. Therefore, the procuring entity ought to have taken into account the Applicant’s Summary of Bill of Quantities as required by Clause 29.2 (a) of Section II. Instructions to Bidders of the Bidding document. This Summary of Bill of Quantities is found in page 570 of the Applicant’s Original Bid under the title “Grand Summary” totaling to Kshs. 98,994,568.20. The said amount of Kshs. 98,994,568.20 was carried forward to the Applicant’s duly completed bid submission sheet dated 23rd March 2021 at page 039- 040 of the Applicant’s Original bid.

The Board has established correction of arithmetic errors is not permitted by section 82 of the Act, read together with Regulation 77 of Regulations 2020 and that the Procuring entity was required to consider the Applicant's Summary of the Bill of Quantities during evaluation but failed to do so.

Accordingly, the Board finds that the Procuring Entity failed to evaluate the Applicant's bid at the Preliminary Evaluation stage in accordance with Section 80 (2) & 82 of the Act read together with the criteria and procedures in the Tender Document.

On the second issue for determination, the Applicant in its Request for Review at paragraph 10 avers that it was a mandatory requirement that eligible bidders comply with the requirement of having been registered with the National Construction Authority (NCA) in category NCA3 and also be registered with the Ministry of water and Sanitation. He further states that the list of contractors registered with the Ministry of Water and Sanitation is available for Public Scrutiny and the 2nd Respondent is not registered with the Ministry.

The 1st Respondent at paragraph 10 of its Response to the Request for Review has attached annexure LIWASCO 9 a copy of Certificate of Registration of the successful bidder Blue swift Contractors & General Supplies Limited dated 6/2/2020 and which is valid until June 30th 2022. It is the 1st Respondent's position that the 2nd Respondent fully complied with the provisions of this requirement.

The 2nd Respondent in its Response to the Request for Review states at paragraph 11 that the allegations that registration with the Ministry of water and Sanitation is a mandatory requirement for eligible bidders is false, untrue and misleading.

From the parties' pleadings, two issues in contention arise regarding the question whether registration with the Ministry of Water and Sanitation was a requirement and if the answer is in the affirmative, whether the 2nd Respondent satisfied the said requirements.

In addressing the first sub issue, the Board studied the Tender Document and notes that Clause 1.3 of section 1 stated;

'Limuru Water and sewerage Company, invites bids from eligible bidders registered with the National Construction Authority (NCA) in category NCA3(also registered with the Ministry of Water and Sanitation) for the relocation of water and sewerage infrastructure for section 1:Rorini-Magumu Flyover and Ririni-Mtarakwa to be funded by the GoK involving the following:

- a) Relocation approximately 11km water transmission pipeline comprising various diameters between DN 50 and DN315**
- b) Drilling and Equipping of a Borehole'**

The Procuring Entity issued 3 addenda as follows;

1. Addendum 1 dated 22nd March 2021 clarified that bidders must be registered with National Construction Authority (NCA) category 3 and above. Further, Bidders were requested to take note of the additional drawings attached to the said addendum. That notwithstanding, all other conditions in the Tender Document remained unchanged.
2. Addendum No. 2 dated 23rd March 2021 made clarifications on several provisions including the requirement for registration with the

National Construction Authority under Category NCA 3 and above but pursuant to Answer 4 of the said Addendum, made the requirement of NCA 2 and above applicable in the subject tender;

3. Addendum 3 dated 24th March 2021 made a clarification on Sub-Factor 2.3.2 on page 26 of the Bidding Document that “the right figure was Kshs 200,000,000 (Kenya Shillings Two Hundred Million) whilst stating all other details remained unchanged.

From the foregoing, the Board notes that all of the 3 addenda did not waive the requirement of having a National Construction Authority Certificate of Registration, Category NCA 3 neither did it waive the requirement for registration with the Ministry of Water and Sanitation. In any case, the Addenda stated all other conditions in the Bidding Document remain unchanged, meaning that the requirement of registration with the Ministry of Water and Sanitation still applied to the subject tender.

This therefore leads the Board to address the second sub-issue as to whether the 2nd Respondent satisfied the requirement of registration with the Ministry of Water and Sanitation under Clause 1.3 of Section I. Invitation to Tender of the Bidding Document.

The Board has perused the 2nd Respondent’s original bid and notes that Divider No. 9 of the said bid contains the following:

- *A certificate of registration for Water Development Contractors issued by the Ministry of Water and Sanitation and Irrigation to the 2nd Respondent, dated 26th September 2019 under*

Registration No MTAC-1558/18 attached to Licence No. WD/WC/2403 dated 26th September 2019;

- *Official Receipt of Serial No. 11090000665 dated 23^d March 2021 issued to the 2nd Respondent as Renewal Fee for registration with the Ministry of Water, Sanitation and Irrigation.*

It is evident that the 2nd Respondent provided evidence of registration with the Ministry of Water and Sanitation and Irrigation as a Water Development Contractor. We note that this requirement was provided together with a requirement for registration with the National Construction Authority under Category NCA 3. Even if the Board were to consider the second limb of the requirement of Clause 1.3 of Section 1. Invitation of Tender of the Bidding Document, the Board notes the 2nd Respondent attached the following:

1. Certificate of Registration Water Works Contractor Category NCA3 Registration Number 31222/W/0517 dated 6/2/2020 and valid until June 30th 2022.
2. Contractors Annual Practising License Water Works Contractor Registration Number 31222/W/0517 dated 15/7/2020 to 30/6/2021
3. Certificate of Registration-Building Works Contractor Category NCA3 registration number 31222/B/0517 dated 15/7/2020 valid until June 30th 2022
4. Contractors Annual Practising License Building Works Contractor category NCA3 registration number 31222/B/0517 dated 15/7/2020 valid until 30/6/2021
5. Certificate of Registration Road works Contractor category NCA3 registration number 31222/R/0517 dated 15/7/2020 dated 15/7/2020 valid until June 30th 2022

6. Contractors Annual Practicing License Roadworks Contractor category NCA3 registration number 31222/R/0517 dated 15/7/2020 valid until 30/6/2021.

From the foregoing, the Board finds the 2nd Respondent satisfied the requirement under Clause 1.3 of Section I. Invitation to Tender of the Bidding Document. The authenticity of the registration certificates provided by the lowest evaluated bidder can be verified in a due diligence exercise conducted on such lowest evaluated bidder in accordance with section 83 of the Act.

Having found the Applicant was not properly evaluated, the Request for Review succeeds in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon in by section 173 of the Act, the Board makes the following final orders: -

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8) dated 16th April 2021, addressed to the Applicant herein and all other unsuccessful bidders, be and are hereby be set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and**

Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8) dated 16th April 2021, addressed to the 2nd Respondent herein, be and is hereby be set aside.

3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's bid back into the procurement process including all other bidders and conduct a re-evaluation in accordance with Clause 29 of Section II. Instructions to Tenderers read together with Section IV. Evaluation and Qualification Criteria of the Bidding Document and thereafter proceed with the subject procurement process to its logical conclusion, including the making of an award, subject to a post qualification (due diligence) exercise conducted on the lowest evaluated bidder pursuant to Section IV. Evaluation and Qualification Criteria at page 22 of the Bidding Document read together with section 83 of the Act within fourteen (14) days from the date of this decision.
4. Given that the subject procurement process has not been completed, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 12th day of May 2021


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CHAIRPERSON

PPARB


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SECRETARY

PPARB