

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
CONSOLIDATION APPLICATIONS NO. 14 & 15 OF 2022
BETWEEN

**FOMENTO AL DESARROLLO DEL
COMMERCIO INTERACIONAL SL
AND MULJI DEVRAJ & BROTHERS
LTD.....1ST APPLICANT
M/S ASSOCIATED CONSTRUCTION CO. (K) LTD....2ND APPLICANT**

AND

**PRINCIPAL SECRETARY MINISTRY
OF AGRICULTURE, LIVESTOCK,
FISHERIES & COOPERATIVES,
STATE DEPARTMENT FOR FISHERIES
AQUACULTURE AND THE BLUE ECONOMY.....RESPONDENT
M/S CEER PROCESSING LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer of the Ministry of Agriculture, Livestock, Fisheries & Cooperatives, State Department for Fisheries Aquaculture and the Blue Economy In Relation To Tender No. MOALF&C/SDFA&BE/012/2021-2022 for the Proposed HACCP Compliant Ultra-Modern Tuna Fish Hub at Liwatoni Mombasa County (Phase One).

BOARD MEMBERS

1. Ms. Faith Waigwa - Chairperson
2. Ms. Isabelle Juma -Member
3. Arch. Steven Oundo,OGW -Member
4. Mr. Joseph Gitari -Member
5. Mr. Jackson Awele -Member

IN ATTENDANCE

Mr. Stanley Miheso -Secretariat

BACKGROUND

The Government of Kenya through the State Department for Fisheries, Aquaculture and Blue Economy proposes to develop a Hazard Analysis Critical Control Point (HACCP) Compliant Ultra-Modern Tuna Fish Hub at Liwatoni, Mombasa to allow landing and processing of fish from the Indian Ocean by both domestic and foreign fishing vessels.

Tendering process

This procurement was undertaken vide a restricted tendering process. The Respondent conducted a pre-qualifications exercise by advertising for pre-qualification of applicants for the Pre-qualification and Contract NO. MOALF&C/SDFA&BE/4/2021-2022. Vide a letter reference number No. MOALF&C/SDFA&BE/4/2021-2022 dated 28th October, 2021 the Accounting officer appointed a Tender Opening Committee for the prequalification exercise and the tenders were opened on 15th November, 2021 at 10.00 a.m. The Accounting officer then appointed a Tender Evaluation Committee for

the purposes of pre-qualifying the successful Applicants vide letter Reference No. MOALF&C/SDFA&BE/4/2021-2022. The applications were opened and evaluated on 15th November, 2021 at 11.00a.m and out of 13 firms that submitted bids for prequalification, only seven Firms, among them the Applicants and the interested party were determined responsive and therefore were Shortlisted for Prequalification for Construction of Proposed Hazard Analysis Critical Control Point (HACCP) Compliant Ultra-Modern Tuna Fish Hub at Liwatoni, Mombasa County.

The tender that is the subject of the consolidated applications was a restricted tender which only firms that were successful in the prequalification exercise were invited to bid. The tender closing date was initially scheduled for 18th January, 2021. However, vide Addendum No.1 published in the Ministry of Agriculture, Livestock, Fisheries, Cooperative and Blue Economy Website; www.kilimo.go.ke and the Public Procurement Information Portal (PPIP), on 24th December, 2021 the tender opening date was extended to 28th January, 2022.

The tender was opened on **28th January, 2022**, at Maji House, 6th Floor Boardroom at 10.00 a.m. in the presence of officials from the State Department for Fisheries, Aquaculture and the Blue Economy, the Oceans and Blue Economy Office (TOBEO), State Department for Public Works and the bidder's representatives.

Out of a total of Seven (7) firms that had been prequalified to participate in this tender, only five returned their bids as follows;

Bid No	Firm Name & Address
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Bid No	Firm Name & Address
1	M/S Ceer Processing Limited
2	M/S jvFomento al Desarrollo Del Comercio Internacional.com S.V
3	M/S Seven Fourteen Limited
4	M/S Yaiscule
5	M/S Associated Construction Co. (K) Ltd

Messrs. AM/S Urbacon Trading & Contracting W.L.L. and M/S Pacific Engineering Project Limited did not return their bids.

Tender Evaluation

The Evaluation Committee was appointed by the Accounting Officer vide memo and letters dated 24th January, 2022. Pursuant to Section 46 Sub Section (7) of the Public Procurement and Asset Disposal Act, 2015, two officers were invited by the evaluation committee to give technical advice in their areas of expertise. The evaluation committee undertook the evaluation exercise between 2nd and 7th February, 2022 at Kenya Fishing Industries Corporation premises in Mombasa.

The evaluation was done in four (4) stages namely;

- (i) Evaluation for Eligibility
- (ii) Preliminary Evaluation;
- (iii) Technical Evaluation; and
- (iv) Financial Evaluation.

According to the evaluation report supplied to the board as part of confidential documents, the following bidders did not meet the eligibility criteria as set out in the tender document for the following reasons.

Bidder 3

- (i) The Tenderer did not demonstrate that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as Kenya Shillings 300,000,000.00 equivalent for the subject contract(s) net of the Tenderer's other commitments;
- (ii) The tenderer did not provide Minimum average annual construction turnover of KenyaShillings1.44Billion or equivalent calculated as total certified payments received for contracts in progressand/or completed within the last three (3) years, divided by three (3) years (See appendix vi).

Bidder 4

The tenderer did not provide;

- (i) The Tenderer did not demonstrate that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as Kenya Shillings 300,000,000.00 equivalent for the subject contract(s) net of the Tenderer's other commitments.

Bidder 5 (the 2nd Applicant)

The tenderer did not demonstrate;

- (i) That it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as Kenya Shillings 300,000,000.00 equivalent for the subject contract(s) net of the Tenderer's other commitments;
- (ii) to the satisfaction of the Procuring Entity, that it has adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments. The audited balance sheets or, if not required by the laws of the Tenderer's country, other financial statements acceptable to the Procuring Entity, for the last 3 years shall be submitted and must demonstrate the current soundness of the Tenderer's financial position and indicate its prospective long-term profitability.

Accordingly, only Bidder No. 1 and Bidder No. 2 were determined to be responsive to the eligibility requirements and therefore qualified for further evaluation in accordance to ITT 38.3

Preliminary Evaluation

At the preliminary evaluation stage bidders were evaluated for compliance with the following requirements

Requirement	
a)	Firm has submitted the required number of copies of the Technical

Requirement	
	Proposals.
b)	Firm has submitted a sealed form of Tender (Financial proposal).
c)	The Proposal is valid for the required number of days (154 days)
d)	The Technical Proposal is signed by the person with power of attorney, without material deviation, reservation or omission.
e)	The Technical Proposal is complete with all the forms and required documentary evidence submitted.
f)	Valid Tax Compliance Certificate for Kenyan firms.
g)	Key Experts are from eligible countries.
h)	A tenderer has not participated in more than one tender, except for alternative tenders if so allowed.
i)	The tenderer is not in solvent, in receivership, bankrupt or in the process of being wound up.
j)	The Tenderer, its sub-consultants and experts have not engaged in or been convicted of corrupt or fraudulent practices.
k)	The Tenderer is neither precluded from entering into a Contract nor debarred by Public Procurement Regulations Authority (PPRA).
l)	The Tenderer has not proposed employing public officials, civil servants and employees of public institutions.
m)	The Tenderer, its sub-consultant and experts have no conflicts of interest
n)	Any other material requirement in the ITT
Evaluation According To Section III	
1.	Certificate of registration/incorporation in the country of origin
2.	Provide list of directors/shareholders (form CR12) from the registrar of companies or equivalent for foreign bidders

Requirement	
3.	Proof of signatory authorization shall be furnished in the form of a written power of attorney which shall accompany the tender if the signatory to the tender is not a director of the company (provide name and attach proof of citizenship of the signatory to the Tender)
4.	List of brands and models for key equipment for installation on the project for the following among others; i. Fresh and Frozen Fish Processing Plant; ii. Tuna Canning Plant; iii. Cold Rooms
5.	Evidence of having constructed a tuna and tuna-like species processing plant
6.	Valid tax registration certificate by Kenya revenue authority for local contractors. International bidders will be required to register with Kenya Revenue Authority (KRA) after award of tender
7.	Valid tender security of 182 days in the provided format
8.	Duly filled and signed form of tender
9.	Duly filled and signed self-declaration forms SD1 and SD2 in their format
10.	Proof of sourcing at least 40% of the supplies and process from the local market
11.	Completeness of the tender proposal (design drawings, schedule of costs and layouts)
12.	Original and one copy of the tender document
13.	Work plan indicating completion period milestones
14.	Tape bound is required (book bound) tender document (loose documents or spiral document shall be disqualified)

Requirement	
15.	Submitted bids must be serialized (failure to serialize shall be automatically be disqualified)

Technical Evaluation

The two responsive bids were adjudged to be responsive to the above requirements and were subjected to technical evaluation. The results of the technical evaluation were tabulated in the table below:-

Item	Description	Points Scored		Maximum points
		Bidder 1	Bidder 2	
A	Compliance with design notes and HACCP Requirements			
	AVERAGE TOTAL	17.7	10.3	20
B	Construction Methodology and Management			
	AVERAGE TOTAL	3.9	4.4	10
C	Work Program and Schedule			
	AVERAGE TOTAL	6.9	9.3	10
D	Cash Flow Projections			
	AVERAGE TOTAL	4.6	4.5	5
E	SCHEDULE OF CONSTRUCTION EQUIPMENT			
	AVERAGE TOTAL			0

Item	Description	Points Scored		Maximum points
		Bidder 1	Bidder 2	
F	Environmental and Social Impact Requirements			
	AVERAGE TOTAL	5	0	5
G	Health & Safety Plan of The Infrastructure			
	AVERAGE TOTAL	5	0.7	5
H	Project Management Structure			
	AVERAGE TOTAL	5.0	2.5	5
I	Key expert (both design and site agents) attach evidence or relevant qualifications and number of years of experience			
	AVERAGE TOTAL	22.2	12.2	26
J	Participation By Kenya Citizens among proposed key experts			
	AVERAGE TOTAL	4	2	4
K	Other aspects (evidence of having undertaken works of similar nature (tuna factory). Provide evidence (completion certificates), and details on project size (plant capacities)			
	AVERAGE TOTAL	10	10	10
	AVERAGE TOTAL SCORE	84.3	55.9	100

Item	Description	Points Scored		Maximum points
		Bidder 1	Bidder 2	
REMARKS		R	NR	

The Technical Evaluation criteria required that a bidder scores over 70% to qualify for further evaluation. From the above table the results of technical evaluation were as follows;

1. Bidder No. 1 had an average of 84.3/100 marks
2. Bidder No. 2 had an average score of 55.9/100 marks

Bidder No. 1 having scored above the threshold required for the Technical Evaluation was subjected to a Financial Evaluation.

Financial Evaluation

At this stage, the bid was evaluated for the following;

- a. schedule of prices
- b. arithmetic error

The results were as follows;

Bidder No	Total bid amount (kshs)	Corrected tender sum (kshs)	Difference (kshs)	% error

1	1,498,169,658. 00	1,498,169,658.0 0	NIL	NIL
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Recommendation

From the foregoing, the evaluation committee recommended the bid by **Bidder No. 1; (M/S Ceer Processing Limited of P O Box 52666 – 00100 Nairobi)** for consideration for award of the tender for Proposed Hazard Analysis Critical Control Point (HACCP) Compliant Ultra-Modern Tuna Fish Hub (Phase One) at Liwatoni, Mombasa County at a tender price of **Kenya Shillings One Billion, Four Hundred Ninety Eight Million, One Hundred Sixty Nine Thousand, Six Hundred Fifty Eight (KShs.1,498,169,658.00)** only being the lowest evaluated responsive bidder.

Professional Opinion

Pursuant to section 84(1) of the Act, the Head of Supply Chain Management opined that funds to defray the resultant expenditure from this contract if awarded were available as reflected in the printed estimates of the Department for Fisheries, Aquaculture and Blue Economy 2021-2022 financial year and that the procurement process for this contract adhered to the requirements and necessary approvals to conform with the Public Procurement and Asset Disposal Act, 2015 and the attendant Regulations of 2020. He therefore concurred with the recommendations of the evaluation committee.

Letters of Notification/termination

Bidders were notified of the decision to award the tender to Messrs Ceer Processing Limited vide a notification letter dated 9th February 2022. The reasons why the Applicants were determined as unsuccessful were equally stated in the said letters.

REQUEST FOR REVIEW NO. 14/2022

This Request for Review was lodged by M/s Fomento Al Desarrollo Del Comercio Internacional SL, on 17th February, 2022 and is supported by the statement of Mr. Juan Sebastian Garrigues sworn on 16th February, 2022.

The Applicant seeks for the following orders:

- 1. THAT the decision by the procuring entity to the Applicant contained in the letter referenced MOALF&C/SDFA&BE/012.2021-2022, finding the Applicants technical evaluated score to be below the threshold of 70%, be set aside;***
- 2. THAT the Board be pleased to review the technical evaluation process in the form and substance of the Applicant's submitted tender document, and substitute and/or amend the decision of the procuring entity to allow the Applicant to proceed to the Financial Evaluation.***
- 3. THAT in alternative to prayer (2) above, the Procuring entity to be directed to progress to its logical conclusion inclusive of the Applicant in the Financial evaluation stage.***

4. THAT the 1st Respondent be ordered to pay the full costs of and incidental to these proceedings.

REQUEST FOR REVIEW NO. 15/2022

This Request for Review was lodged by M/s Associated Construction Co. (K) Limited, on 22nd February, 2022 and is supported by the affidavit of Mr. Nanak Bansal sworn on even date.

The Application seeks the following orders;

- I. The Applicant's Request for Review is merited, and the Board is pleased and hereby quashes and annuls the decision of the Respondent reposed in awarding Tender No. MOAL&C/SDFA&BE/012.2021-2022 Proposed Hazard Analysis Critical Control Point (HACCP) Compliant Ultra-Modern Tuna Fish Hub At Liwatoni, (Phase One) to M/s Ceer Processing Limited contained in the letter transmitted on 9th February 2022 at 1100 hours.***
- II. The Applicant's Request for Review is merited, and the Board is pleased and hereby directs the Respondent to evaluate the Applicant's bid and award Tender No. MOAL&C/SDFA&BE/012.2021-2022 Proposed Hazard Analysis Critical Control Point (HACCP) Compliant Ultra-Modern Tuna Fish Hub At Liwatoni, (Phase One) to the Applicant ; and award the tender to the Applicant, having satisfied all criteria and quoted Kshs 1,820,861,860 the***

closest amount to the engineer's estimate of Kshs 1.8 billion,

III. The Respondent be awarded costs on a full indemnity basis.

Pursuant to regulation 215 of the Public Procurement and Asset Disposal Regulations 2020 (the Regulations), the Board having considered the party's pleadings made the decision to consolidate Applications No. 14 of 2022 and Application No. 15 of 2022 as the same arose from the same tender.

That said, the Board observes the Respondent filed the following documents in response to the Applications;

- a) Confidential documents relating to the tender process
- b) A Replying affidavit sworn by Dr. Francis Owino on 22nd February, 2022
- c) A Replying Affidavit sworn by Dr. Francis Owino on 28th February, 2022.

THE BOARD'S DECISION

The Board has reviewed the rival arguments presented in the respective parties' pleadings alongside the confidential documents availed by the procuring Entity pursuant to section 67(3)(e) of the Act. In the event, the Board has established the following issues for determination:

- a) Whether the 1st Applicant's bid was evaluated in accordance with the criteria set out in the tender document and the law.**

b) Whether the 2nd Applicant's bid was evaluated in accordance with the criteria set out in the tender document and the law.

a) Whether the 1st Applicant's bid was evaluated in accordance with the criteria set out in the tender document and the law.

The Applicant contends that the Ministry of Agriculture, Livestock, Fisheries and Cooperatives-The State Department for Fisheries Aquaculture and Blue Economy (the Respondent) invited bids from eligible contractors in respect of the subject tender on 12th October, 2021. It avers that the scope of works at prequalification stage indicated the design and installation of an Ultra-Modern tuna fish hub with HACCP certification and EU establishment listing but that the scope of works at the tender stage was however reduced. The Applicant avers that it duly submitted its bid documents in full compliance with the requirements specified in the Tender document. The Applicant is aggrieved by the Respondent's decision to award its bid the score of 55.9% which is below the required 70% and therefore rendered it unsuccessful.

The Applicant contests the above score as non-factual and misleading and argues that if it was prequalified for the bigger scope of works then the actual tender which was only a partial representation of the original prequalification scope of works should on an objective evaluation have advanced it to financial evaluation. It avers that an objective evaluation of Section III - Evaluation and qualification criteria, part 3: Evaluation of the Technical Proposal contained in page 31 to 36 of its bid document, would have earned it a score of more than 70% at the Technical Evaluation Stage since it diligently complied with the technical evaluation table of scores.

It contends that awarding the tender to the interested party was contrary to section 46 (4)(e) and 80(3) of the Public procurement and Assets Disposal Act, 2015 and Article 227(1) of the constitution which provides that the procurement of public goods and services must be "in accordance with a system that is fair, equitable, transparent, competitive and cost -effective." It further contends that the intention to award the tender to the said interested party did not meet the constitutional threshold of fairness, equity, transparency and competitiveness as set out under Article 10 and 227 of the Constitution, neither was it in compliance with the principles set out in section 3 of the Public Procurement and Disposal Act, 2015.

In response, the 1st Respondent in its Replying Affidavit avers that restricted tender procurement method was used in sourcing for the supplier for the subject tender in line with the provisions of Sections 93 and 102 of the Public Procurement and Asset Disposal Act (The Act). It avers that at pre-qualification of applicants, seven firms, including the Applicant and the interested party, were found responsive and prequalified and as per the provisions of Sections 102(1)(a) and 102 (2) of the Act, they were subsequently invited to bid for the subject tender via restricted tender method.

It contends that the Applicants' bids were evaluated by the Evaluation Committee and two technical experts who were invited specifically to provide an advisory opinion on the financial aspect of the bids and to assist in the interpretation of architectural designs and design layouts submitted for evaluation by the prequalified Applicants.

The 1st Respondent states that the evaluation process was done in four stages namely Evaluation for Eligibility, Preliminary Evaluation, Technical evaluation and Financial Evaluation and that from the Evaluation Report the Applicant scored 55.9% as follows: -

- a. Compliance with design notes and HACCP Requirements scored 10 out of the possible 20
- b. Construction Methodology and Management scored 4.4 out of 10
- c. Work program and Schedule scored 9.3 out of 10
- d. Cash flow Projections scored 4.5 out of 5
- e. Environmental and social impacts requirements scored 0 (zero) out of 5
- f. Health and Safety Plan at the Infrastructure scored 0.7 out of 5
- g. Project Management Structure scored 2.5 out of 5
- h. Key expert (both design and site agents) attach evidence or relevant qualifications and number of years of experience) scored 12.2 out of 26
- i. Participation by Kenyan Citizens among proposed key experts scored 2 out of 4
- j. Other aspects (evidence of having undertaken works of similar nature (tuna factory). Provide evidence (completion certificates), and details on project size (plant capacities) scored 10 out of 10
- k. Average total score 55.9% out of the required 70%

The Respondent accordingly avers that the Applicant did not attain the requisite scores at Technical Evaluation and therefore could not proceed to the final category of Financial Evaluation. The interested party, it contends, scored 84.3% well above the 70% threshold required in the tender document hence was progressed to financial evaluation.

The 1st Respondent further avers that the 1st Applicant was in any event the highest bidder and irrespective of its responsiveness at Technical Evaluation, it could not have been successful bidder. It states that the Applicant's bid for Kshs. 4,514,874,495.00/- was way above the budgetary allocation for the proposed project which was Kshs. 1.8 billion.

The Board has examined the confidential documents and the parties' respective pleadings and observes that there is not contested that the subject tender was indeed a restricted tender and further that the bidders who were invited to bid were only those that had been prequalified in the prequalification process as afore stated. In this regard, the Board notes that under section 93 of the Act, an accounting officer of a procuring entity may conduct a pre-qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement.

The said section states;

93 (1) Subject to provisions of subsection (2), an accounting officer of a procuring entity where applicable, may conduct a pre-qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement.

Further, under section 102 of the Act, an accounting officer of a procuring entity may use restricted tendering if inter-alia because of the complex or

specialized nature of the goods, works or services is restricted to prequalified tenderers resulting from the procedure under section 94 (sic);

Regulation 89(1) & (4) of the PPADA Regulations further provide that

(1) An accounting officer may use restricted tendering, only if any of the conditions set out in section 102(1) of the Act are satisfied.

(2) A procuring entity that conducts procurement using the restricted tendering method shall be subject to the procurement thresholds set out in the Second Schedule to these Regulations.

...

(4) A procuring entity shall, for the purpose of identifying pre-qualified contractors pursuant to section 102(1)(a) of the Act, use the pre-qualification procedures set out in sections 93, 94 and 95 of the Act.

It is important to note that the subject tender was undertaken under section 102(1)(a) of the Act. Under schedule 2 of the PPADA Regulations, there is no minimum threshold for the level of expenditure that is required in order to undertake restricted tendering section 102(1)(a) of the Act. The maximum level of expenditure is however determined by the available budget for the particular, procurement. We note that in this case, the budgetary allocation for the proposed project was Kenya Shillings. 1.8 billion. The same was accordingly procedurally undertaken in so far as the requirement for

restricted tendering is concerned. Needless to state there is no contest about this.

Back to the issue at hand, the Board notes that at Page 36 of the blank tender document the qualification for evaluation beyond the technical evaluation stage was stated as follows;

"Any bidder who scores 70 points and above shall be considered for further evaluation."

As noted above, the Applicant was notified vide a letter titled Notification of Intention to Award and transmitted on 9th February, 2022 that stated the reason they were not successful as:-

"Scored 55.9% which is below the required 70%"

It is this score that forms the gravamen of the Applicant's grievance before the Board. The Applicant's contention is that it ought to have scored higher because it was prequalified on a bigger scope of works than the actual tender which was only a partial representation of the original prequalification scope of works. It argues that based on the technical evaluation criteria found on pages 32 to 36 of the blank tender document, had its bid been objectively evaluated, it would have scored 70% and above.

The Board observes that this ground of appeal is vague and fails to state with particularity the basis upon which the Applicant believes the marks awarded to it were not objective. The mere fact that the Applicant was prequalified on a bigger scope of works did not, in our opinion, ipso facto render it technically responsive. That argument in our respectful opinion finds no basis in law and cannot hold. The purpose and/or object of prequalification of bidders under section 93 of the Act is as stated therein, to identify the best few qualified

firms for the subject procurement. Under that section, the pre-qualification procedure is undertaken as a basic procedure and for the limited purpose of limiting the number of applicants based on their demonstrated competencies. Whether the said firms are subsequently able to demonstrate technical capacity or ability set out in the substantive tender document is to be assessed and evaluated in strict compliance with the criteria set out in the said tender document and the law.

In this regard, the Board observes that the technical evaluation criteria in the subject tender document contains about 64 different variables upon which tenderers were to be evaluated. Though the Applicant claims that it meets the technical evaluation criteria set out at pages 31-36 of the tender document, it fails to state with specificity how the Respondent deviated from the said criteria in evaluating its bid. It has instead thrown the gauntlet at the board to interrogate its bid document to ascertain whether the evaluation criteria was fair and quantifiable. It is the duty of the party who disputes the outcome of an evaluation process to set out its case with sufficient specificity as to enable the board appreciate and fully address the issues arising from it and to enable parties to the proceedings fully respond to the same. As it were, the technical evaluation of bids especially in a restricted tender as this is more often than not a complex and highly technical activity. It is no wonder that the evaluation committee itself saw it fit to co-opt various experts to assist it with different aspects of the said evaluation. The Board would accordingly be ill advised to second guess and/or substitute its opinion with that of the evaluation committee and its experts unless reasonably credible and authoritative evidence is supplied to warrant the same. Save for the general statement to the effect that pages 31-36 of its bid document should

have earned it more than 70 points, the Applicant has not made any attempt to demonstrate why or how it asserts so. The Applicant's invitation to the Board to 'interrogate' its entire bid is tantamount to an invitation to the Board re-evaluate the bid and to substitute its opinion with that of the evaluation committee.

This Board like a court of law is bound by parties' pleadings and cannot venture on a discovery expedition on behalf of a litigant. To do so would not only be ultra vires our powers as an independent tribunal but would also prejudice the rights of the Respondent and the interested party to a fair hearing as they will not have the opportunity to respond to any issues we discover in such an endeavor. In the event, the Board finds that the Applicant's contentions are unfounded and have not been made out by evidence or at all.

In the unlikely event we are wrong, we cannot but agree with the Respondent that in any event the Applicant would not have been successful even had it been progressed to financial evaluation as it not only presented the highest financial bid at Kshs 4,514,874,495.00, its said bid was far beyond the Respondent's budget of Kshs. 1,800,000,000 for the subject. Accepting any bid in excess of the budgeted bid would have been in violation of the expenditure threshold set out in the second schedule to the PPADA Regulations for restricted tenders.

In the circumstances, we find no merit in the 1st Applicant's complaints and have no difficulty dismissing the same as we hereby do.

b) Whether the 2nd Applicant's bid was evaluated in accordance with the criteria set out in the tender document and the law.

The gravamen of the 2nd Applicant's case is that it was unfairly disqualified at the technical evaluation stage on the basis that it did not demonstrate financial capability as required in the tender document. The Board observes in this regard that at page 40 and 41 of the blank tender document tenderers were required to demonstrate financial capability as follows;

- (i) The Tenderer shall demonstrate that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as Kenya Shillings 300,000,000.00 equivalent for the subject contract(s) net of the Tenderer's other commitments.

- (ii) The Tenderers shall also demonstrate, to the satisfaction of the Procuring Entity, that it has adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments. The audited balance sheets or, if not required by the laws of the Tenderer's country, other financial statements acceptable to the Procuring Entity, for the last 3 years shall be submitted and must demonstrate the current soundness of the Tenderer's financial position and indicate its prospective long-term profitability.

The Applicant has averred that it demonstrated compliance with the above requirements as follows;

- a. At page 189 of their tender documents-Form 3.1: A Statement of Financial Situation and Performance.
- b. At Page 261- Form Fin-3.2: Average Annual Construction turnover showing their annual turnover to be Kshs 2,473,641,049.00
- c. At pages 189 and 261, Clause 5.2 and Form Fin -3.3: Sources of Finance /Bankers showing that the tenderer enjoys a facility of Kshs 5,323, 500.00
- d. At Page 263-A letter from KCB Bank dated 24th January 2022 indicating that our client enjoys banking facilities in excess of Kshs 4 billion and indicating that upon request and subject to successful credit assessment, the bank can finance the subject tendered process.
- e. At page 264- Form Fin-3.2: Average Annual Construction turnover showing their annual turnover to be Kshs 2,473,641,049.00 and Form Fin -3.3: Sources of Finance /Bankers showing that the tenderer enjoys a facility of Kshs 5,323, 500.00

The Board observes from the evaluation report submitted as part of the confidential documents that two different reasons were proffered by the Respondent for disqualification of the 2nd Applicant in the evaluation report and in the notification letter of intent to award. The reasons stated in the evaluation report for disqualification of the Applicant at the eligibility evaluation stage was that it had not demonstrated;

- (i) That it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the

construction cash flow requirements estimated as Kenya Shillings 300,000,000.00 equivalent for the subject contract(s) net of the Tenderer's other commitments;

- (ii) to the satisfaction of the Procuring Entity, that it has adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments. The audited balance sheets or, if not required by the laws of the Tenderer's country, other financial statements acceptable to the Procuring Entity, for the last 3 years shall be submitted and must demonstrate the current soundness of the Tenderer's financial position and indicate its prospective long-term profitability.

However, in its notification of intention to award letter, the following reason was stated as the basis of the Applicant's disqualification;

"Did not demonstrate to have access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as Kenya Shillings 300,000,000.00 equivalent for the subject contract(s) net of the Tenderer's other commitments"

In a further debrief dated 15th February 2022 the Respondent inter-alia reiterated as follows in respect of the Applicant's bid;

"In view of the above the committee noted that your bid did not meet the requirements of Kshs.300,000,000 because the letter from the bank does not state the available facility intended for this project. The Kshs.300,000,000/- was not clearly demonstrated in the letter".

The Board has carefully reviewed the Applicant's original bid as submitted by the Respondent and observes as follows in respect of the issues arising in the request for review;

- (i) That at page 263 thereof, the Applicant submitted a letter from Kenya Commercial Bank Limited that inter-alia dated 24th January 2022 indicates that the Applicant enjoys banking facilities in excess of Kshs 4 billion and that upon request and subject to successful credit assessment, the bank can finance the subject tendered process."
- (ii) At pages 191-259 thereof, the Applicant submitted audited financial statements for the year ended 31st December, 2018, 31st December 2019 and 31st December 2020.

From the foregoing, the Board observes that the reasons proffered by the Respondent in both the evaluation committee's report and the notification letter were not supported by the available evidence, to wit; the Applicant's bid document. Firstly, as regards the reason proffered in the notification of intent to award letter, the board observes that the letter from Kenya Commercial bank at page 263 of the bid document complied with the evaluation criterion for financial capability at paragraph 10(i) of page 40 of

the blank tender document which criterion was quite permissive in its terms and required a bidder to demonstrate that it had access to or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means to meet cashflow requirements of Kenya Shillings 300 Million only. The Respondent did not specify the form in which the said lines of credit or other financial means were to be established provided that the same was of Kshs 300 Million and above. The Letter at page 263 of the Bid document was sent by the 2nd Applicants bankers and confirmed that the Applicant was already enjoying financial facilities in excess of Kshs 4 Billion and that they were willing and ready to offer additional lines of credit for the subject tender process. The Board is of the considered opinion that the letter from KCB Bank was for all intents and purposes unequivocal in its commitment to offer a line of credit as was the confirmation that the Applicant was in fact already enjoying facilities of Kshs 4 Billion. The same was in the Board view sufficient for this purpose considering the permissive nature of the instructions to tenderers at page 40 paragraph 10(i) of the tender document.

As regards the 2nd disqualification reason proffered in the evaluation committee's report, the Board notes that to demonstrate '*adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments*' the tender document at paragraph 10(ii) in page 41 required bidders to submit audited financial statements for the last 3 years from which the profitability and financial soundness of bidders would be assessed. As the Board has observed, the Applicant submitted Financial statements for the years ended 31st December, 2018, 31st December 2019 and 31st December 2020 all audited by Cliff & Company

auditors at pages 191-259 of the original bid document. Evidently therefore, the 2nd Applicant complied with this requirement and the decision as to whether the said statements demonstrated financial soundness could not possibly have been made at the eligibility stage. The Board finds that at the said stage bidders are supposed to be assessed for compliance with basic eligibility requirements only and not more as under Clause 38.3 of the blank tender document, the Respondent was only required to ascertain the following;

- a) Firm has submitted the required number of copies of the Technical Proposals.
- b) Firm has submitted a sealed form of Tender (Financial proposal).
- c) The Proposal is valid for the required number of days.
- d) The Technical Proposal is signed by the person with power of attorney, without material deviation, reservation, or omission.
- e) The Technical Proposal is complete with all the forms and required documentary evidence submitted.
- f) Valid Tax Compliance Certificate for Kenyan firms.
- g) Key Experts are from eligible countries.
- h) A tenderer has not participated in more than one tender, except for alternative tenders if so allowed.
- i) The tender is not in solvent, in receivership, bankrupt or in the process of being wound up.
- j) The Tenderer, its sub-consultants and experts have not engaged in or been convicted of corrupt or fraudulent practices.
- k) The Tenderer is neither precluded from entering into a Contract nor debarred by PPRA.

- l) The Tenderer has not proposed employing public officials, civil servants and employees of public institutions.
- m) The Tenderer, its sub-consultants and experts have no conflicts of interest.
- n) Any other material requirement in the ITT.

The Board further notes that as per clause 42.1 of the blank tender document, the qualification of tenderers was to be determined as follows;

The Procuring Entity shall determine to its satisfaction whether the eligible Tenderer that is selected as having submitted the lowest evaluated cost and substantially responsive Tender, meets the qualifying criteria specified in Section III, Evaluation and Qualification Criteria'.

At SECTION III - EVALUATION AND QUALIFICATION CRITERIA and in particular clause 8 at page 39 of the blank tender document, the evaluation of bidder's financial capability was to be undertaken at post qualification and before contract award. The Board accordingly concurs with the 2nd Applicant that it was unfairly disqualified at eligibility evaluation stage and that having submitted audited financial statements for at least 3 years, it ought to have progressed to technical evaluation.

Under section 80(2) of the Act, all tenderers are entitled to fair evaluation of their bids in strict compliance with the tender documents and the applicable law. The 2nd Applicant was unfairly disqualified at eligibility evaluation stage and thereby denied the opportunity at further evaluation. That said, we do not wish to delve into the arguments made by the 2nd Applicant regarding its

eligibility for preference margins and/or its financial soundness as these ought to be the subject of other stages of evaluation in the event it is progressed to that stage. The Upshot of the foregoing is that the consolidated request for Review partially succeeds and the Board makes the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the consolidated Request for Review:-

- 1. Application Number 14 of 2022 lacks merit and be and is hereby dismissed.**
- 2. Application No. 15 of 2022 partially succeeds to the extent determined in the Board's decision.**
- 3. The Procuring Entity is hereby directed to re-admit the 2nd Applicant's bid at the technical evaluation stage and to subject the same to evaluation alongside other bids that were admitted to technical evaluation in strict compliance with the tender documents and the applicable law.**
- 4. The Procuring Entity's notification of intent to award letter dated 9th February 2022 be and is hereby set aside and cancelled to the extent set out in (3) above.**

5. As the procurement process is still ongoing, each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 10th day of March, 2022



.....
CHAIRPERSON
PPARB



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SECRETARY
PPARB