

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 47/2016 OF 8th JULY, 2016**

**BETWEEN**

**H. YOUNG & CO. (E.A) LIMITED /  
GIBB AFRICA LIMITED.....APPLICANT**

**AND**

**KENYA NATIONAL  
HIGHWAYS AUTHORITY.....PROCURING ENTITY**

Review against the Kenya National Highways Authority the matter of Tender No. KeNHA/1220/2016 for the Construction of Garsen - Witu - Lamu (C112) Road.

**BOARD MEMBERS PRESENT**

- |                        |            |
|------------------------|------------|
| 1. Mr. Paul Gicheru    | - Chairman |
| 2. Mr. Hussein Were    | - Member   |
| 3. Mr. Nelson Orgut    | - Member   |
| 4. Mrs Rosemary Gituma | - Member   |
| 5. Peter Ondieki, MBS  | - Member   |

**IN ATTENDANCE**

- |                   |              |
|-------------------|--------------|
| 1. Stanley Miheso | -Secretariat |
| 2. Maureen Namadi | -Secretariat |

## **PRESENT BY INVITATION**

### **Applicant -H. Young & Co. (E.A) Limited /Gibb Africa Limited**

1. WangokoNjoroge - Advocate
2. Samuel Gitonga - Advocate
3. Audrey Namwakira - In house Advocate

### **Procuring Entity-Kenya National Highways Authority**

1. Ligunya Stephen - Advocate
2. Lawrence Maruti - Legal Officer
3. Eng. Paul Onalo - M (D&E)
4. Richard Kilel - SPO
5. Eric Wamae - Procurement Officer
6. Agwata Peter - Procurement Assistant
7. Birgen Vincent - Procurement Assistant
8. John Odhiambo - Procurement Assistant
9. Edna Mokaya - Procurement Assistant
10. David Maina - Procurement Assistant
11. Ayub Muhuri - Pupil

### **Interested Parties**

1. George Kamau - Partner, Wambugu&Muriuki. Adv.
2. John Wambugu - Partner, Wambugu&Muriuki. Adv.
3. Geoffrey Ngine - Advocate, Wambugu&Muriuki. Adv.
4. Walter Mbata - COO-NorKen, China Wu Yi & Others
5. Zhang - Manager Contract, China Wu Yi & Others
6. Eng. John Ndemi - Engineer, China Wu Yi & Others
7. Lily Lin Fang - Legal Officer, China Wu Yi & Others

8. He Yinhui - Officer, China National Aero-Technology  
9. Gladys Karige - GM-BD, APEC Consortium/ CATIC

## **BACKGROUND OF AWARD**

### **1. PROJECT BACKGROUND**

#### **I. Introduction**

The Government of Kenya's (GoK) vision is to enhance and sustain economic growth by provision of physical infrastructure through rehabilitation, improvement and effective management of existing infrastructure activities. The Government has earmarked funds through the Development Budget for use in design and construction of the Garsen - Witu - Lamu (C112) Road.

#### **II. Project location and description**

The Road the subject matter of this review provides important access to Lamu County and has the potential to be an international link to Somalia. The approximate length of the road is 135 Km long and is located in the Tana River and Lamu counties. The region traversed by the project road is climatically semi-arid and topographically can be classified as flat terrain. The land generally lies between altitudes of 0m to 50m above sea level.

The project road is mostly gravel/earth road sections with a minor section of approximately 20Km of dilapidated tarmack. The existing gravel/earth road alignment requires construction to bitumen standard.

The bidders were required to visit the project area and ascertain actual site conditions before submitting their bids.

### III. Scope of Works

The scope of works consists of design and construction of Garsen - Witu - Lamu (C112) Road approximately 135Km. The project road starts at B8/C112 junction in Garsen and ends at Mokowe in Lamu. The following access roads will also be constructed under the contract;

- Mkunumbi - Mpeketoni loop road - 19 Km
- Witu town bypass and town roads

This project will be undertaken as a Design & Build Contract (FIDIC EPC/TURNEY: fixed price) within the construction period specified in the Appendix to Tender document. The following is the summary of the works to be undertaken:

1. Phase I & II: Preliminary & Detailed Engineering Design
2. Phase III: Construction and Maintenance of Works

The Contractor will initiate their design effort by completing the necessary investigations and studies required by their proposed design and the Contract Provisions.

The critical path elements of the project will most likely be centred on the right-of-way and permit processes of the project. The necessary right-of-way will be acquired based on the preliminary engineering design. The Right-of-way requirements will be addressed immediately to ensure minimal impact to the project.

The Contractor shall determine the need for utility relocations that are dependent on the design and construction activities shall be responsible for coordination of the necessary relocations.

#### **IV. Programme and Project Phases**

The Contractor shall provide a time programme as required under Clause 8.3 of the Conditions of Contract.

The Contractor shall allow in his programme for construction of trial sections and carrying out tests upon them as directed by the Employer's Representative. The time for completion of the Contract shall not be extended because of the time taken to carry out tests and evaluate trial sections.

The Contractor shall be required to carry out works in three distinctive phases as follows:

- a. Feasibility Study and Preliminary Design
- b. Detailed Engineering Design
- c. Construction

Construction of permanent works shall not proceed until the detailed engineering design of the said works has been approved by the Employer.

Unless instructed otherwise by the Employer's Representative, the Contractor shall commence the works from Garsen (B8/C112) Junction and progress continuously towards the project end without leaving any isolated section or sections of the road uncompleted.

#### **2. PROJECT FUNDING**

The Authority has received Government of Kenya funds through the Development Vote and wishes to expend some of the funds for the Design and Construction of Garsen - Witu - Lamu Road (C112).

### 3. METHOD OF TENDER

An invitation notice to all eligible entities (NCA 1) or persons (“Bidders”) was placed through advertisement notices in The Standard and The Star Newspapers of Friday, 8<sup>th</sup> January, 2016, inviting bids from eligible entities or persons (“Bidders”) to bid for the works. The same was also uploaded onto IFMIS and the KeNHA Websites.

### 4. TENDER ADDENDUM

Tender addendum Nos: 1 & 2 and Minutes of pre-bid conference and site visit were issued to bidders on 29<sup>th</sup> January 2016 and 18<sup>th</sup> February 2016 respectively pursuant to the provision of Section 8 of the Bid document headed: Instructions to bidders (ITB).

### 5. BID SUBMISSIONS

The bids were received and opened on Thursday, 3<sup>rd</sup> March 2016 at 1100hrs at the KeNHA Headquarters office in the presence of bidders’ representatives who chose to attend.

**Table 1: List of Bidders who submitted their Proposals were:-**

Bidder No.	Bidders’ Name	Responsiveness proposal	BID Security		Technical/Qualification proposal	Financial Bid
			Amount (Kshs)	Issuing Entity		
1	China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited	1-Original 2-Copies	8,000,000	CFC Stanbic Bank	Submitted	Sealed
2	Sinohydro Corporation Limited	1-Original 2-Copies	8,000,000	Equity Bank	Submitted	Sealed
3	Zhongheng Construction in Association with KinConsult Associates Limited	1-Original 2-Copies	8,000,000	Credit Bank	Submitted	Not Sealed
4	China National Aero-Technology International Engineering Corporation in Association with APEC Consortium Limited	1-Original 2-Copies	8,000,000	Credit Bank	Submitted	Sealed
5	H-Young In JV with GIBB Africa Limited.	1-Original 2-Copies	8,000,000	I & M Bank	Submitted	Sealed

## 6. TENDER PROCESSING COMMITTEE

The Tender Processing Committee was appointed by the Director General vide a Memo Ref: KeNHA/SC&SS/TEC/Vol. 1.7(37) dated 8<sup>th</sup> March 2016 and consisted of the following officers:

<b>Name</b>	<b>Designation</b>	<b>Position</b>
1. Eng. Paul Onalo	M (D&C)	Chairman
2. Eng. Eric Wambua	SE (D&C)	Member
3. Eng. Brian Shikoli	SE (P&E)	Member
4. Eng. Julius Giti	E (P&E)	Member
5. Ms. Jeniffer Lang'at	Accountant	Member
6. Ms. George Ng'inja	Procu. Officer	Secretary
7. Mr. Victor Njiru	AE Intern (D&C)	In Attendance

**NOTE:** Eng. Julius Giti did not participate in the Tender evaluation exercise because he had another official assignment in Mombasa during the same period.

## 7. EVALUATION PROCESS

### 7.1. Responsiveness of the Bids

The bids were checked for responsiveness and completeness as per the criteria contained in the bid document.

The results of the responsiveness findings are presented in the table below.

**Table 3: Results of Evaluation for Responsiveness of bidders**

Bidder Names		China Wu Yi Co. Ltd in JV with Voyants Solutions Pvt Ltd, in Assc. with Norken International Ltd	Sinohydro Corporation Limited	Zhongheng Construction in Association with Kinconsult Associates Limited	China National Aero-Technology International Engineering Corporation in Association with APEC Consortium Ltd	H-Young In JV with GIBB International
Item	Requirement	Bidder 1	Bidder 2	Bidder 3	Bidder 4	Bidder 5
	Bidder's Responsiveness (Pass (P) or Fail (F))	PASS	PASS	FAIL	PASS	PASS

### Comments on Responsiveness Evaluation

#### Bidder #: 3 - Zhongheng Construction Technology International Limited in Association with KinConsult Associates Limited

- The bidder did not submit their bid as per ITB 13 & ITB 21 in the bid document and the respective addendum.
- The bidder did not provide information to confirm that Non-performance of Contract did not occur within the last five years.
- The bidder did not provide information to confirm that they have never failed to sign a Contract within the last five years.
- The bidder did not have adequate experience under Eligibility and qualifications criteria sections below in the bidding documents
  - i. Section 4.1 General Construction Experience
  - ii. Section 4.2 Similar Construction Experience
  - iii. Section 4.3 Specific Construction Experience

- The bidder did not dully fill the following Forms as required by the bidding document
  - i. Form EXP-4.4(b)
  - ii. Form EXP-4.1
  - iii. Form EXP-4.2
  - iv. Form EXP-4.3.
  - v. Form EXP-4.4(a).
  - vi. Form ELI-1.2
  - vii. Form CON-2 (b)
  - viii. Form EL-1.1 (ITB 4.1
  - ix. Form CON-2 (a)
- The bidder did not did not provide the following key staff as outlined under Section 5.0 of the Eligibility and qualifications criteria:
  - i. Materials Engineer
  - ii. Contracts Engineer
  - iii. Hydrologist
  - iv. Environmentalists
  - v. Transport Economist
  - vi. Social/Gender expert
- The bidder instead provided several Assistant Engineers who lacked the requisite qualification and experience

- The bidder did not provide a duly filled schedule of major items of plant and equipment to be used on the contract.
- Some sections of the bidders bid document were in the Chinese language contrary to the recommended language of the bid which is English

Based on the above notes, Bidder No. 3 was found to be non-responsive and therefore was not subjected to the Technical Evaluation.

However, the following four (4No.) bidders were found to be substantially responsive and therefore qualified for the Technical Evaluation:-

Bidder No.	Bidder Name
1	M/s. China Wu YI Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited
2	M/s. Sinohydro Corporation Limited
4	M/s. China National Aero-Technology International Engineering Corporation in Association with APEC Consortium Limited
5	M/s. H-Young in JV with GIBB Africa Limited.

## 8. TECHNICAL EVALUATION

In accordance with section III: Evaluation and Qualification Criteria, subsection B, the responsive bidders were subjected to Technical Evaluation. A summary of the Technical Evaluation criteria and the results is indicated in table 4 below.

**Table 4: Technical Offer Evaluation Criteria and scores**

TECHNICAL OFFER CRITERIA						
S/No.	Requirement	Points (%)	Bidder 1	Bidder 2	Bidder 4	Bidder 5
1	Adequacy of Design Proposal with Employer's Requirements, as it relates to the Works, using Form TOF 1.1	15	13.48	12.08	9.80	12.19
2	Adequacy of proposal on Construction Works Requirements, as it relates to the whole of the Works, using Form TOF 1.2	15	12.90	9.31	6.69	13.05
3	Adequacy of proposal on Program and schedule, as it relates to the whole of the Works, using Form TOF 1.3	10	8.20	7.52	4.33	8.10

TECHNICAL OFFER CRITERIA						
S/No.	Requirement	Points (%)	Bidder 1	Bidder 2	Bidder 4	Bidder 5
4	Adequacy of proposal on cash flow projections as it relates to the whole of the works, using Form TOF 1.4	10	6.90	8.33	4.89	8.17
5	Adequacy of proposal on Construction equipment as it relates to the whole of the works, using Form TOF 1.5	10	9.75	7.50	1.75	10.00
6	Adequacy of proposal on Project Management Structure as it relates to the whole of the works, as submitted by the Bidder, using Form TOF 1.6(a) and 1.6(b)	10	8.97	8.46	5.54	8.68
7	Adequacy of proposal on Environmental & Social Impact requirements, as submitted by the Bidder, using Form TOF 1.7	10	8.45	7.10	2.27	7.00
8	Adequacy of proposal on Health & Safety Plan (Must meet the Occupation, Safety and Health Act, (OSHA), 2007, as submitted by the Bidder, using Form TOF 1.8	10	8.17	5.45	2.50	7.73
9	The Quality Assurance System proposal (must demonstrate compliance with the Contract requirements), as submitted by the Bidder, using Form TOF 1.9	10	8.42	6.98	2.63	7.62
<b>TOTAL</b>		<b>100</b>	<b>85.23</b>	<b>72.73</b>	<b>40.40</b>	<b>82.54</b>

## 8.1. BIDDERS TECHNICAL SCORES

The bidders' technical scores and ranking were as follows;

Bidder No.	Firm	Total marks (%)	Ranking
1.	China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited	85.23	1
2.	Sinohydro Corporation Limited	72.73	3
4.	China National Aero-Technology International Engineering Corporation in Association with APEC Consortium Limited	40.40	4
5.	H-Young In JV with GIBB Africa Limited.	82.54	2

## 9. TECHNICAL EVALUATION CONCLUSION AND RECOMMENDATION

Having examined the technical proposals submitted by the bidders, the tender processing Committee recommended that the financial proposals of the following bidders that scored above the minimum threshold of 80% as stipulated in *Section 3 part B* of the bid document, be opened.

**Table 7: Summary of Recommendations**

Bidder No.	Firm	Total Marks (%)	Ranking
1	China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited	85.23	1
2	H-Young In JV with GIBB Africa Limited.	82.54	2

## 10. EVALUATION OF FINANCIAL PROPOSALS

### 10.1. Opening of the financial proposals

Following conclusion of the Technical Evaluation for *Construction of Garsen - Witu - Lamu (C112) Road* and the invitation of the technically qualified bidders, the financial proposals were publicly opened on 15<sup>th</sup> April 2016 at KeNHA 3<sup>rd</sup> floor Boardroom Blue Shield Towers, Nairobi at 1200Hrs.

### 10.2. Financial opening summary

During financial opening of the proposals, financial information presented from the bids was recorded and is summarized below:-

**Table 10-1: Tender opening summary for the financial proposals**

Bid No	Name of Bidder	Technical Scores (%)	Read Out Bid Price (Excluding Taxes)	TAXES	TOTAL
				VAT 16%	BID PRICE

Bid No	Name of Bidder	Technical Scores (%)	Read Out Bid Price (Excluding Taxes)	TAXES	TOTAL
				VAT 16%	BID PRICE
1.	China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited P.O Box 49282 - 00100, Nairobi	85.23	KES 9,042,904,299.00	KES 1,446,864,688.00	KES 10,489,768,987.00
2.	H-Young In JV with GIBB Africa Limited P.O Box 30118 - 00100, Nairobi	82.54	KES 9,369,506,373.00	KES 1,499,121,020.00	KES 10,868,627,394.00

### 10.3. Analysis of financial proposals

The Analysis of the financial bids was undertaken in accordance with provisions of the ITB clauses 25 to 30 as stated in the Tender documents.

In accordance with ITB 14.5, all duties, taxes (excluding VAT) and other levies payable by the contractor under the contract, or for any other cause prior to the deadline for the submission of tenders, shall were included in the rates and prices and the total tender price submitted by the bidder.

In accordance with ITB 14.6, the price to be quoted in the Letter of Bid was to be the total price of the Bid, excluding any discounts offered. Required details of the prices to be presented by the Bidders are provided in the BDS. This price, subject to any adjustments pursuant to the Conditions of Contract (the sections making up Part II of these Bidding Documents), was to be the Contract Amount.

In accordance with ITB 31.1, Subject to Clause 32, the Employer was to award the contract to the bidder whose bid had been determined to be substantially responsive to the bidding documents and who had offered the lowest Evaluated Bid Price pursuant to Clause 29, provided that such bidder had

been determined to be (a) eligible in accordance with the provisions of Sub-Clause 4.1, and (b) in accordance with the provisions of Clause 5.

#### **10.4. Correction of errors**

Clause 29.1 of the tender document provided that the Bid is substantially responsive, the Employer shall correct arithmetical errors on the following basis:

- (a) if there is a discrepancy between the lump sum price for a line item and the total lump sum price that is obtained by adding the lump sum prices for all line items, the line item lump sum price shall prevail and the total lump sum price shall be corrected, unless in the opinion of the Employer there is an obvious misstatement of the lump sum price for a line item, in which case the total lump sum price as quoted in the priced Schedule of Prices shall govern and the lump sum price for the line item shall be corrected;
- (b) if there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected; and
- (c) if there is a discrepancy between words and figures, the amount in words shall prevail, unless the amount expressed in words is related to an arithmetic error, in which case the amount in figures shall prevail subject to (a) to (c) above.
- (d) If the Bidder that submitted the lowest-evaluated Bid does not accept the correction of errors, its Bid shall be rejected and the Bid Security may be forfeited in accordance with ITB Sub-Clause 17.6.

## 10.5. FRONT LOADING CHECK

In accordance with 30.6 If the Bid, which results in the lowest evaluated Bid price, is seriously unbalanced or front loaded in the opinion of the Employer, the Employer may require the Bidder to produce detailed price analyses for any or all items of the Schedule of Prices and Bill of Quantities to demonstrate the internal consistency of those prices with the construction methods and proposed schedule. After evaluation of the price analyses, taking into consideration the schedule of estimated Contract payments, the Employer may require that the amount of the Performance Security be increased at the expense of the Bidder to a level sufficient to protect the Employer against financial loss in the event of default of the successful Bidder under the Contract.

However, given that there was no Engineer's Estimate provided for this Evaluation, the front loading check was not conducted.

The summary of the Correction of errors is presented in Table 10-1.

*Table 10-1: Summary of Correction of Errors*

Bidder (a)	Read-out Bid Price(s) inclusive of Taxes		Corrections	Corrected Bid Price(s) in Kshs  (e) = (c) + (d)
	Currenc y(ies) (b)	Amount(s) (c)	Computatio nal Errors <sup>1</sup> (d)	
China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited	Kenya Shillings	10,489,768,987.00	-N/A	-N/A
H-Young In JV with GIBB Africa Limited.	Kenya Shillings	10,868,627,394.00	+9,147,084.02	10,877,774,478.02

## 10.6. RANKING OF EVALUATED BIDDERS

Bidder No	Name of Bidder	Technical Scores (%)	CORRECTED BID PRICE (Kshs)	RANK
1.	China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited	85.23	10,489,768,987.00	1
2.	H-Young In JV with GIBB Africa Limited	82.54	10,877,774,478.02	2

The Bills of Quantities of the lowest evaluated bidder are as shown in the table below.

SUMMARY OF THE BILLS OF QUANTITIES			
BILL NO	DESCRIPTION	AMOUNT (KSH)	% OF BILL ITEM TO SUBTOTAL
1	PRELIMINARY AND GENERAL ITEMS	378,900,000	4.47%
4	SITE CLEARANCE AND TOP SOIL STRIPPING	131,616,000	1.55%
5	EARTHWORKS	2,339,452,000	27.60%
7	EXCAVATION AND FILLING FOR STRUCTURES	205,571,000	2.43%
8	CULVERT AND DRAINAGE WORKS	253,750,000	2.99%
9	PASSAGE OF TRAFFIC	102,304,000	1.21%
12	NATURAL GRAVEL MATERIAL SUB-BASE AND BASE	1,400,688,000	16.53%
14	CEMENT AND LIME TREATED MATERIALS	946,542,000	11.17%
15	BITUMINOUS SURFACE TREATMENT AND SURFACE DRESSING	691,956,000	8.16%
16	BITUMINOUS MIX WEARING COURSE	1,579,750,000	18.64%
17	CONCRETE WORKS	59,640,000	0.70%
20	ROAD FURNITURE	243,654,580	2.87%
21	MISCELLANEOUS BRIDGE WORKS	10,795,000	0.13%
22	DAY WORKS	18,880,000	0.22%
23	BUS-BAYS	48,155,740	0.57%
24	STREET LIGHT	55,860,000	0.66%
25	HIV / AIDS AWARENESS AND EDUCATION	7,560,000	0.09%
	<b>SUB TOTAL 1</b>	<b>8,475,074,320</b>	<b>100.00%</b>

SUMMARY OF THE BILLS OF QUANTITIES			
BILL NO	DESCRIPTION	AMOUNT (KSH)	% OF BILL ITEM TO SUBTOTAL
	ADD A SUM OF 4.2% OF SUB-TOTAL (1) FOR THE DESIGN WORKS AND SUPERVISION SERVICES	355,953,121	
	ADD A SUM OF 2.5% OF SUB-TOTAL (1) FOR SAFETY AND SECURITY FACILITIES OF THE CONTRACTOR	211,876,858	
	<b>SUB TOTAL 2</b>	9,042,904,299	
	16% VAT	1,446,864,688	
	<b>BID PRICE CARRIED FORWARD TO FORM OF BID</b>	<b>10,489,768,987</b>	

## 11. CONCLUSION AND RECOMMENDATION

### 11.1. Conclusion

After Evaluation, it was determined that M/s *China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited* had provided the most technically sound proposal and the lowest financial proposal.

### 11.2. Recommendation

The Evaluation Committee recommended that the tender for the *Construction of Garsen - Witu - Lamu (C112) Road* be awarded to M/s *China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited* at tender price of Kenya Shillings Ten Billion, Four Hundred and Eighty Nine Million, Seven Hundred and Sixty Eight Thousand, Nine Hundred and Eighty Seven Shillings (Kshs 10,489,768,987.00)

## THE REQUEST FOR REVIEW

The Applicant joint venture of M/s H. Young & Co. (E.A.) Limited/Gibb Africa Limited (hereinafter referred to as the Applicant joint venture) filed this Request for Review on 8<sup>th</sup> July 2016 challenging the decision of the Kenya National Highways Authority (hereinafter referred to as the procuring entity) contained in the letter of award dated 29<sup>th</sup> June 2016 awarding the tender number KenHA/1220/2016 for the construction of the Garsen-Witu - Lamu (C112 Road) to M/s China Wuyi Company Limited (hereinafter referred to as the successful bidder).

During the hearing of the Request for Review, the Applicant joint venture was represented by M/s WangokoNjoroge and Mr. Samuel Gitonga Advocates while the procuring entity was represented by Mr. Ligunya Stephen Advocate. Mr. George Kamau and Mr. John Wambugu Advocates appeared on behalf of the successful bidder.

Two other bidders who participated in the tender process namely M/s China National Aero Technology and M/s Apec Consortium/Catic appeared during the hearing of the request for review and were represented by M/s He Yinhui and M/s Gladys Karige respectively.

The Applicant consortium relied on the request for review, the statement in support of the request for review dated 8<sup>th</sup> July 2016 together with the further/Replying Affidavit sworn by Mr. Paul Murage on 20<sup>th</sup> July 2016 and which was filed with the Board on the same day. The Replying Affidavit was admitted in to the record of the Board on 22<sup>nd</sup> July, 2016 pursuant to the leave granted to the Applicant joint venture by the Board on the said date. Upon the grant of leave the said affidavit was deemed as duly filed.

Upon being served with the Request for Review, the procuring entity filed a memorandum of reply and an affidavit in support of the memorandum of reply sworn by Eng. Peter Mundinia on 18<sup>th</sup> July 2016. Counsel for the procuring entity also filed a notice of preliminary objection seeking to have the Further/Replying Affidavit sworn by Mr. Paul Murage sworn on 20<sup>th</sup> July 2016 in response to the procuring entity's memorandum of reply and the affidavit in support of the said memorandum struck out.

The Board heard the Preliminary objection dated 21<sup>st</sup> July 2016 on 22<sup>nd</sup> July, 2016 and dismissed the same and at the same time allowed the Applicant joint venture to rely on the further/Replying Affidavit sworn by Mr. Paul Murage on 20<sup>th</sup> July 2016.

The Board in addition to allowing the Applicant joint venture to rely on the said affidavit also granted the successful bidder leave to rely on its written submissions dated 22<sup>nd</sup> July 2016 and which had been filed with the Board on the same day.

Turning to the substance of the Request for Review, the Applicant raised the following 12<sup>th</sup> grounds on the basis of which it sought to challenge the decision of the procuring entity:-

1. On the 8<sup>th</sup> day of January 2016, the Respondent invited bids from eligible construction companies who had both experience and capacity in both design and construction works for the construction of Garsen-Witu-Lamu (C112 Road). The Tender was issued one day after the Public Procurement and Disposal of Assets Act No.33 of 2015 came into force.

2. The Tender document clearly stipulated under clause 2.1 that the source of funding is the Government of Kenya (Development vote) hence the Tender is subject to and compliant with the Public Procurement and Disposal of Assets Act No.33 of 2015.
3. The Applicants are a local companies incorporated in the Republic of Kenya and whose majority shareholders are citizens of the Republic of Kenya.
4. In compliance with the provided instructions to Bidders under the Tender document, the Applicants, H. Young & Co. (E.A) and & Gibb Africa Limited submitted a bid as a consortium on the 3<sup>rd</sup> day of March 2016, which bid was accepted for evaluation in accordance with the qualification evaluation criteria of the Tender Document.
5. On the 13<sup>th</sup> day of April 2016 upon conclusion of part A and B of the evaluation and qualification criteria exercise as provided under the Tender document; the Applicants were dully notified that their technical proposal met the stipulated threshold and it therefore proceeded for the financial evaluation in accordance with section 3 of the Tender document.
6. On the 15<sup>th</sup> day of April 2016 the eligible and qualified financial bids, one of which was the Applicants, were publicly opened as per the terms of the Tender document and in accordance with Section 78(6)(b) of the Public Procurement and Disposal of Assets Act No.33 of 2015 whereupon the Applicants financial proposal was announced as offering the second lowest bid price.
7. Pursuant to the provisions of Section 86(1) read together with the Provisions of Section 86(2) of the Public Procurement and Disposal of

Assets Act No.33 of 2015 the margin of preference of 20% was to be applied to the Applicants given that they are Companies incorporated in the Republic of Kenya with their majority shareholders being citizens of the Republic of Kenya.

8. Further Part XII of the Public Procurement and Asset Disposal Act No. 33 of 2015 provide the requirements of preferences and reservations. Specifically, Section 155(3)(b) provides that preferential procurement shall be given to firms where Kenyans are shareholders.
9. Additionally, Section 157(8)(b) as read together with Regulation 15 of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011; provide for a prescribed margin of preference to be given for works, goods and services where a preference may be applied depending on the percentage of shareholding of local bidders on a graduating scale as prescribed.
10. The failure and disregard by the Respondent to evaluate the Tender in accordance with the Provisions of Section 86(1) as read together with the Provisions of Section 86(2), Section 155(3)(b), Section 157(8)(b) of the Public Procurement and Disposal of Assets Act No.33 of 2015 and Regulation 15 of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 is erroneous and in clear contravention of the relevant and governing laws.
11. Thus, the decision of the Respondent is erroneous, misleading and contrary to the Law and express terms of the Tender document. Unless the said error is rectified the integrity and legality of the entire tender evaluation process stands to be prejudiced.

12. The Applicants are exercising a statutory right so as to determine the integrity and propriety of the tender evaluation process, a right whose exercise ought to be preserved by granting the orders sought herein.

The Applicant thereafter sought for the following orders:-

- (a) The decision of the procuring entity to award the Tender to be nullified.
- (b) The procuring entity be ordered to award the Tender No. KeNHA/1220/2016 to the Applicant.
- (c) In the alternative and without prejudice to the request in (b) above, the Procuring Entity be ordered to evaluate the Tender No. KeNHA/1220/2016 and award the Tender in compliance with the provisions of the Public Procurement and Disposal of Assets Act No.33 of 2015, the regulations therein and the Tender documents issued by the Procuring Entity.
- (d) The costs of the review be awarded to the Applicant.
- (e) Any other order as applicable that this Board may make.

It is apparent on the face of the request for review that although the Applicant joint venture set out 12 grounds of review, the first six grounds in the Request for Review were factual in nature while grounds 7 to 12 set out the legal provisions and the grounds upon which the Applicant joint venture challenged the process of evaluation and the award of the subject tender to the successful bidder.

A further look at grounds 7 to 12 of the Applicant joint venture's Request for Review also show that all the six grounds set out under the said grounds 7 to 12 raised only two substantive issues namely:-

(a) Whether or not the procuring entity considered whether the Applicant was entitled to preference under the provisions of Sections 86(1), 86(2) and 155 of the Public Procurement and Asset Disposal Act No.33 of 2015.

(b) Whether the Applicant was entitled to the benefit of preference under the provisions of Section 86(2) as read together with the Provisions of Section 155 of the Public Procurement and Asset Disposal Act No.33 of 2015.

Owing to the already stated position that grounds 1, 2, 3, 4, 5 and 6 are factual in nature, the Board has consolidated grounds 7, 8, 9, 10, 11 and 12 of the Request for Review and will consider them together with a view to arriving at a decision in this Request for Review. The Board will however first set out the parties respective arguments.

#### THE APPLICANT'S CASE.

M/s Wangoko Njoroge advocate who appeared on behalf of the Applicant Joint Venture relied on the Request for Review dated 28<sup>th</sup> July, 2016 together with the annexed statement in support of the Request for Review signed by Mr. Paul Murage and the sworn further/Replying affidavit dated 20<sup>th</sup> July, 2016 sworn by the same person.

Counsel for the Applicant submitted based on the above documents that the evaluation and the award process for this tender was flawed and submitted that the procuring entity failed to take into account the Provisions of Section 86(1) and (2) of the Public Procurement and Asset Disposal Act No. 33 of 2016 which entitled the Applicant joint venture to a 20% margin of preference on it's tender price.

It was the Applicant's case as stated by Counsel for the Applicant that both H. Young & Company (East Africa) Limited and Gibb Africa Limited were Citizen Contractors which were incorporated in the Republic of Kenya with the majority shareholders being Citizens of the Republic of Kenya. She further submitted that the Kenya Constitution defined a Citizen as one who held a Kenyan passport or a national Identity Card and that Citizenship may be acquired either at birth or by registration.

On the issue of who the directors and the shareholders of the Applicant joint venture were, Counsel for the Applicant joint venture referred the Board to the CR12 for H. Young & Company (East Africa) Limited together with the passports contained in the tender document and the National Identity Cards contained in the further/Replying Affidavit sworn by Paul Murage and stated that the directors of H. Young & Company (East Africa) Limited namely Mr. Joseph Shwarzman and Mrs. Hannah Shwarzman were holders of Kenyan National Identity Cards and passports and were therefore Kenyan Citizens as defined by law.

Turning to the issue of shareholding, Counsel for the Applicant joint venture submitted that the shareholders of H. Young & Company (East Africa) Limited were H. Young Holdings Limited and Mr. Watson Anderson Murigo who hold 12,447,917 and 52,083 shares representing 99.6% and 0.4% respectively. Counsel for the Applicant submitted that H. Young Holdings Limited was a Company registered in Kenya while Mr. Watson Anderson Murigo is a Citizen of the Republic of Kenya.

Based on the above status on directorship and shareholding it was the Applicant joint venture's case that both the directors and shareholders of H.

Young and Company (East Africa) Limited were Kenyan Citizens and that the company was therefore 100% owned by Kenyans.

Counsel for the Applicant joint venture further submitted that Gibb Africa Limited was incorporated in Kenya on 24<sup>th</sup> December, 1990 and changed names to it's current name on 17<sup>th</sup> December, 2013. Counsel for the Applicant joint venture referred the Board to the CR12 issued by the Registrar of Companies which was produced and annexed to the replying affidavit sworn by Paul Murage on 20<sup>th</sup> July, 2016 and submitted that based on the said document the directors of the company were Joseph Karekezi, Johnson Kinyua and Maurise Baraza who held nil shares while the shareholders of the Company according to the latest annual return filed on 26<sup>th</sup> July, 2015 were Kamase Holdings Limited which was registered in Kenya and Gibbal Holdings Limited which was registered in Mauritius. The two companies hold 600,000 and 400,000 shares respectively.

Based on the above documents, Counsel for the Applicant joint venture submitted that both companies in the Applicant joint venture had surpassed the threshold of 51% local shareholding set out under Section 86(2) of the Public Procurement and Asset Disposal Act No. 33 of 2015 and were therefore entitled to benefit from the preference margin of 20% set out in the law.

Counsel for the Applicant joint venture additionally submitted that the Applicant provided as part of it's tender document, documents showing that the Applicant joint venture was entitled to the benefit of preference and that some of the documents provided by the Applicant joint venture included the certificates of incorporation and the Memorandum and Articles of Association for both companies, the passports of the directors of H. Young &

Company (East Africa) Limited and a Certificate of incumbency prepared by the secretary of H. Young and Company (East Africa) Limited which gave the particulars of the directors and shareholders of the said Company including that of H. Young Holdings Limited.

Counsel for the Applicant joint venture however submitted that the procuring entity did not take the said documents into account when evaluating its tender and stated that under the provisions of the Act, the procuring entity's tender processing committee was bound to consider the issue of preference on the basis of the documents which were placed before it. It was the Applicant's case that having been supplied with documents, the procuring entity's tender processing committee was bound to consider the documents submitted to it and give reasons why it considered the said documents unsatisfactory for the purposes of awarding the Applicant joint venture preference under the law. Counsel for the Applicant joint venture further stated that the procuring entity was under an obligation under the provisions of Section 83(2) of the Act to conduct due diligence by obtaining further documentary evidence and information to establish whether the Applicant joint venture was entitled to a margin of preference in the event that it found that the documents submitted by the Applicant were not satisfactory but not to just sit back and fail to consider the issue at all.

Counsel for the Applicant joint venture additionally submitted that this was not the first time that the issue of whether H Young & Company (East Africa) Limited was entitled to preference and submitted that the Board had held in the case of **China Overseas Engineering Group Company Limited -vs- Kenya Rural Roads Authority (PPARB No. 7 of 2016)** that the Applicant was

entitled to the application of a margin of preference. The Applicant joint venture produced and annexed the said decision to its Request for Review.

Based on the above submissions, Counsel the Applicant joint venture therefore urged the Board to allow the Request for Review, annul the award of the tender to the successful bidder and award the same to it. The Applicant joint venture also prayed for the costs of the Request for Review.

### **THE PROCURING ENTITY'S RESPONSE**

Mr. Ligunya Stephen advocate who appeared on behalf of the procuring entity opposed the Applicant's Request for Review and relied on the Memorandum of Reply and the affidavit sworn in support of the Memorandum of response on 18<sup>th</sup> July, 2016. Counsel for the procuring entity submitted that the Applicant before the Board hinged its case on the fact that the Applicant joint venture which were Kenyan registered companies were not given statutory preference as provided for under the Provisions of the Public Procurement and Asset Disposal Act No. 33 of 2016. He further stated that the Applicant joint venture's case was based on the allegation that the evaluation process of this tender was flawed and the Applicant joint venture had relied on the provisions of Sections 86(1) and (2), 155(3) (b), 157(8)(b) and Regulation 15 of the preference and Reservations Regulations 2011. It was the procuring entity's case as stated by Counsel for the procuring entity that it was admitted that H Young & Company (East Africa) Limited was a Kenyan Company and that the procuring entity was not contesting that the said company was incorporated in Kenya.

Mr. Ligunya however submitted that incorporation in Kenya was not the test of whether a company ought to enjoy preference but the test was in the

shareholding of the company and whether the company was a citizen contractor where Kenyan Citizen held more than 51% shares in the company.

Counsel for the procuring entity further submitted that in order to be entitled to the benefit of preference under the provisions of section 86(2) of the Act the Applicant had to produce evidence to enable the procuring entity determine whether the applicant met the threshold of 51% shareholding and above.

While quoting an extract appearing at page 47 of the decision in the case of **China Overseas Engineering Group Company Limited -vs Kenya Rural Roads Authority** which has been cited above, Counsel for the applicant submitted that the issue of who the shareholders of a company from time to time were not static and can change from time to time and that the issue was therefore an issue of fact which the Applicant joint venture ought to have proved.

Counsel for the procuring entity however stated that the Applicant joint venture had failed to produce evidence to enable the procuring entity reach a decision on whether the Applicant joint venture was entitled to preference and that the documents contained in the Applicant joint venture's tender document were not sufficient to prove that the Applicant joint venture was entitled to the application of the margin of preference under the law.

Counsel for the procuring entity further submitted that under the provisions of Section 157(6) of the Act, the law required a candidate to provide evidence of eligibility and that there was no obligation on the part of the procuring entity to carry out due diligence under the provisions of Section 83 of the Act

to establish whether a bidder was entitled to the benefit of preference under the Act.

It was the procuring entity's case that while looking at the question of whether a bidder was entitled to preference or not, the procuring entity was only bound to look at the documents contained in the tender documents and was not bound to go outside the said documents.

Counsel for the procuring entity submitted that in this particular case that the only documents which the bidder H Young & Company (East Africa) Limited incorporated into its tender document were passports to prove that Mr. and Mrs. Shwartzman are Kenyans, a CR 12 of the company, its Certificate of Incorporation and its Memorandum and Articles of Association while for Gibb Africa Limited, the Applicant joint venture provided a Certificate of Incorporation, Certificates of change of name and the Memorandum and Articles of Association of the Company.

Counsel for the procuring entity submitted that the CR12 provided by the lead bidder only proved that Joseph Shwartzman and Mrs. Hannah Shwartzman were Kenyan Citizens but the CR12 produced showed that they hold nil shares in the company. Counsel for the procuring entity further stated that although the applicant had argued that they hold 100% shareholding in the lead bidder, the Applicant joint venture did not produce any evidence to prove the registration status of H Young Holdings Limited or the Citizenship status of Mr. Watson Anderson Murigo. He therefore submitted that the Applicant joint venture had not proved that the Applicant joint venture was 100% owned by Kenyan citizens.

Counsel for the procuring entity further submitted that in addition to not proving the registration status of H. Young Holdings Limited, the Applicant joint venture had not produced any evidence both in the tender document and the further/Replying affidavit sworn by Paul Murage to show who the shareholders of H. Young Holdings Limited were.

Turning to the tender document and while conceding that the lead bidder had submitted as part of its tender document a certificate of incumbency, Counsel for the procuring entity stated that the certificate of incumbency was not known to law and did not have the force of law since it was formulated by the lead bidder company. He stated that the only known evidence of shareholding was the CR12 document issued by the Registrar of the companies.

Counsel for the procuring entity further submitted that the Further/Replying Affidavit sworn by Paul Murage was no admissible and that the only documents that the procuring entity was bound to look at in arriving at its decision on preference were the documents contained in the tender document and no more. He argued that relying on the Further/Replying Affidavit and the evidence annexed thereto would be contrary to the provisions of Article 47 of the Constitution and the fair administrative Act as it would amount to introducing extrinsic evidence into the tender evaluation process.

On the contention that the procuring entity had breached the provisions of Section 39 of the repealed Public Procurement and Disposal Act 2005 and Regulation 15 of the Public Procurement and Disposal (preference and Reservation) Regulations 2011, Counsel for the procuring entity argued that

the old Act having been repealed the Applicant could not rely on Section 39 thereof and Regulation 15 of the said Regulations.

Counsel for the procuring entity relied on the High Court's decisions in the cases of **Guo Dong -vs- Multwin Trading (E.A) Company Limited & 6 Others (Nai HC Misc. Appl. NO. 264 of 2015)** and the case of **Tatu City Limited & 3 Others -vs- Stephen Jenkins and 6 Others (Nai HC NO. 46 of 2015)** in support of the proposition that a person who holds nil shares in a company is not a shareholder of the company.

Counsel for the procuring entity therefore urged the Board to find and hold that the Applicant joint venture had not proved its case and urged the Board to dismiss the same with costs.

#### **THE SUCCESSFUL BIDDER AND THE INTERESTED PARTIES RESPONSES**

Mr. George Kamau advocate who appeared on behalf of the successful bidder China Wu Yi Company Limited associated himself with the submissions made by Counsel for the procuring entity and submitted that the successful bidder put in a bid for the works in compliance with the provisions of the Public Procurement and Asset Disposal Act 2015 and followed all the instructions that were given to bidders by the procuring entity. He further argued that the successful bidder submitted all the supporting documents that were required and upon the process of evaluation which the successful bidder believes was properly undertaken within the criteria set out in the tender document and in line with the law, it was found to be the lowest evaluated bidder. On the issue of preference, Counsel for the successful bidder conceded that the successful bidder was a foreign Company which was not a Citizen contractor and was not therefore

entitled to the benefit of preference under the Provisions of Section 86(2) of the Act or any other provisions of the law.

Counsel for the successful bidder therefore urged the Board to dismiss the Request for Review with costs and allow the procurement process to proceed to conclusion.

During the hearing of the Request for Review, two other bidders namely M/s China National Aero -Technology and Apec Consortium/Catic appeared at the hearing of the Request for Review and were represented by M/s He Yinhui and Gladys Karige respectively but when the two parties were invited to make representations by the Board they indicated that they did not wish to make any admissions in the matter in spite of having been given an opportunity to be heard.

#### **THE APPLICANT'S RESPONSE TO THE SUBMISSIONS MADE BY THE PROCURING ENTITY AND THE SUCCESSFUL BIDDER**

In a brief response to the submissions made by Counsel for the procuring entity and Counsel for the successful bidder M/s Wangoko reiterated that the evaluation process leading up to the award of the tender to the successful bidder was flawed. She further reiterated that the Applicant joint venture provided sufficient evidence to the procuring entity to evaluate the Applicant's tender in order to determine whether the Applicant joint venture was entitled to preference but the procuring entity failed to consider the issue of preference while evaluating the Applicant joint venture's tender.

She stated that in addition to the documents that were provided by the lead bidder, the said bidder had provided a certificate of incumbency which was drawn by its company Secretary. She stated that the said document

contained all the particulars of the status of the lead bidder's shareholding and that the procuring entity had not disputed the contents of the said document and it was not now open to the procuring entity to question the authenticity of the said document. Counsel for the Applicant reiterated her earlier submissions that the procuring entity's tender processing committee ought to have applied its mind to the issue of preference and ought to have considered all the documents submitted and give reasons why the Applicant joint venture was not entitled to preference and having failed to do so, it's decision was flawed and was bound to be reversed.

Counsel for the Applicant joint venture therefore urged the Board allow the Applicant's Request for Review.

#### **THE BOARD'S FINDINGS**

The Board has considered the request for review, the statement in support therefore and the Further/Replying Affidavit sworn by Paul Murage on 20<sup>th</sup> July 2016 together with all the annexures thereto. The Board has also considered the memorandum of reply dated 18<sup>th</sup> July 2016 and which was filed by Counsel for the procuring entity and the affidavit in support of the memorandum of reply sworn on 18<sup>th</sup> July 2016 and both of which were filed in opposition to the request for review. The Board has additionally considered the oral and the written submissions made by all the parties to this request for review together with the tender documents which were submitted by all the bidders who participated in this procurement process. The Board has also read through the evaluation reports and all the other documents which were supplied to it by the procuring entity.

It was common ground during the hearing of this Request for Review and this is evident from the documents filed before the Board that the tender for the construction of the Garsen-Witu-Lamu (C112 Road) was advertised on 8<sup>th</sup> January 2016 in both the star and the Standard Newspapers of that day. The procurement process and the evaluation and award of the said tender is therefore governed by the provisions of the Public Procurement and Asset Disposal Act No.33 of 2015 which came into force on 7<sup>th</sup> January 2016.

It was also common ground in this request for review that under Clause 2.1 of the tender document, the source of funding for the project was from the Government of Kenya.

It is additionally clear from the tender document and the technical and financial evaluation reports dated 23<sup>rd</sup> March, 2016 and 18<sup>th</sup> April, 2016 respectively that both the Applicant joint venture and the successful bidder submitted their bids to the procuring entity for evaluation and the said bids went through the preliminary, technical and financial evaluation stages. Both the tenders submitted by the Applicant consortium and the successful bidder were determined to be responsive at the preliminary and the technical evaluation stages.

Under the provisions of Section 3 part B of the tender document, a bidder had to score a minimum score of 80% at the technical evaluation stage in order to proceed to the financial evaluation stage.

The Board has looked at the Technical Evaluation report dated 23<sup>rd</sup> March, 2016 which was prepared by the procuring entity and has established that the successful bidder attained a total technical score of 85.23% while the Applicant joint venture scored a total technical score of 82.54%. Both the

Applicant joint venture and the successful bidder therefore attained the minimum technical score stipulated in the tender and were invited for the opening of the financial proposals which took place on 15<sup>th</sup> April 2016 at the procuring entity's Board room located on the 3<sup>rd</sup> Floor at the Blue Shield Towers, Nairobi at 12.00 hours pursuant to letters dated 13<sup>th</sup> April, 2016.

A perusal of the financial evaluation report dated 18<sup>th</sup> April, 2016 shows that the following prices were read out and recorded at the financial opening meeting.

Bid No.	Name of Bidder	Technical Scores (%)	Read Out Bid Price (Excluding Taxes)	TAXES	TOTAL
				VAT 16%	BID PRICE
1.	China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited P.O. Box 49282-00100, Nairobi.	85.23	KES 9,042,904,299.00	KES 1,446,864,688.00	KES 10,489,768,987.00
2.	H-Young In JV with GIBB Africa Ltd P.O. Box 30118-00100, Nairobi.	82.54	KES 9,369,506,373.00	KES 1,499,121,020.00	KES 10,868,627,394.00

The financial evaluation report dated 18<sup>th</sup> April, 2016 further shows that procuring entity's tender processing committee carried out a financial evaluation of the financial proposals submitted by the two bidders by correcting arithmetical errors in the prices and arrived at the following corrected figures for the successful bidder and the Applicant joint venture respectively.

Bidder (a)	Read-out Bid Price(s) inclusive of Taxes		Corrections	Corrected Bid Price (s) in Kshs. (e) = (c) + (d)
	Currency (ies) (b)	Amount (s) (c)	Computational Errors <sup>1</sup>	
China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited	Kenya Shillings	10,489,768,987.00	-N/A	-N/A
H-Young In JV with GIBB Africa Ltd	Kenya Shillings	10,868,627,394.00	+9,147,084.02	10,877,774,478.02

The evaluation committee then ranked the two bids which proceeded to the financial evaluation stage as follows:-

Bidder No.	Name of Bidder	Technical Scores (%)	CORRECTED BID PRICE (Kshs)	RANK
1.	China Wu Yi Co. Limited in Joint Venture with Voyants Solutions Pvt Limited, in Association with Norken International Limited.	85.23	10,489,768,987.00	1
2.	H-Young In JV with GIBB Africa Limited	82.54	10,877,774,478.02	2

Upon the conclusion of the preliminary, technical and the financial evaluation process the successful bidder and the Applicant joint venture consortium were ranked as follows:-

(a) China Wu Yi Co. Ltd in Joint venture with Voyants Solutions Pvt Limited in association with Norken International Limited-technical Score of 85.23% with a bid price of Kenya Shillings 10, 489, 768, 987.00, ranked number 1.

(b) H Young & Co. (E.A) Limited in Joint Venture with GIBB Africa Limited – technical score of 82.54 with a bid of Kshs.10, 877, 774, 478.20, ranked number 2.

On the first issue/ground of review as set out at page 23 above, namely, whether the procuring entity considered whether any of the bidders including the Applicant joint venture was entitled to the benefit of preference under the provisions of Section 86 of the Act as read together with Section 155 of the Public Procurement and Asset Disposal Act No.33 of 2015, the Board has read the entire financial evaluation report dated 18<sup>th</sup> April, 2016 containing the financial evaluation report for the successful bidder and the Applicant joint venture and finds that the only factor which the procuring entity's tender processing committee took into account was the correction of arithmetical errors and that at no given time during the evaluation process did the procuring entity's tender processing committee apply its mind to the issue of whether or not any of the two bidders was entitled to the benefit of the preference scheme set out in the Act.

Both the provisions of Article 227(2) of the Constitution and Section 155(1) of the Public Procurement and Asset Disposal Act No. 33 of 2015 place an obligation on all state organs and procuring entities to comply with the legislation relating to preferences and reservations in procurement as set out under part XII of the Act.

Section 155(1) of the Public Procurement and Asset Disposal Act states as follows:-

**Section 155(1): pursuant to Article 227 (2) of the Constitution and despite any other Provisions of this Act or any other legislation, all procuring entities shall comply with the provisions of this part.**

In addition to the above express Provisions of the Constitution and the Act requiring all procuring entities to comply with the Provisions relating to

preferences and reservations, the court has restated this requirement in several decisions where the court has unanimously held that a procuring entity must determine whether any bidder is entitled to benefit from the preference and reservations scheme and that where a procuring entity fails to do so, then such failure on the part of the procuring entity vitiates any decision arrived at by the procuring entity at the end of the procurement process and that such a procuring entity commits a fundamental error of law and its decision is bound to be annulled and set aside.

In the case of **Republic vs= The Public Procurement Administrative Review Board and The Kenya Revenue Authority [Na HC Constitutional and Judicial Review Miscellaneous Application No.540 of 2008]** where the court was dealing with the issue of preference and reservations, the High Court stated as follows in so far as the procuring entity's and the Review Board's obligation to consider the issue of preference and reservations is concerned:-

**"The margin of preference consideration was a statutory one and although in the Act the Provision is couched in discretionary terms due to the use of the word 'may, in Regulation 28(2)(a) the preference is couched in mandatory terms and therefore forms part of the substantive law on procurement. The procuring entity was clearly in violation of Regulation 28(2)(a) and so is the Board. This category of preference is also incorporated in the tender documents in mandatory terms."**

**“...The Applicant was entitled to a preference per the existing law and consequently the Board did commit a fundamental error of law in not addressing it at all.”**

The court also held that a consideration of the issue of preference and reservation was a mandatory requirement of law which a procuring entity was bound to consider while evaluating a tender submitted to it in a procurement process.

In the more recent decision of **Republic =vs= The Public Procurement and Administrative Review Board, National Industrial Training Authority and Coretech Solutions & Systems Limited ExparteMicrohouse Technologies Ltd [Nai HC JR Misc. Appl. No.334 of 2005]** The High Court (The Honourable Justice W. Korir) held that where the issue of a procuring entity's failure to apply the legal provisions on preference and reservations was raised before it, the Board was under an obligation to determine it. In this decision where the Court was dealing with the issue of preference and reservations under the old Act, the Court stated as follows at pages 23 and 24 of its decision;

**“It goes without saying that the issue of preference and reservations is one provided for by the procurement laws.... The Board was under a duty to consider the question and make a determination. Its ultimate decision was therefore made without taking this very relevant question into consideration.... I find that the failure by the Board to make a determination on the question of preference and reservations rendered its decision incomplete.”**

Upon making the above findings the Court remitted the Board's decision back to the Board for consideration and determination of the question of whether the Applicant was entitled to the benefit of the preference and the reservation scheme under the law.

On the basis of the above two decisions, the procuring entity was therefore under an obligation to determine whether any of the two bidders who proceeded to the financial evaluation stage in this tender were entitled to benefit from the provisions of the preference and reservations scheme under the Act but as the Board has already observed, the procuring entity's tender processing committee did not even address its mind to this issue. Having failed to address itself to the issue at all, it was not therefore a defence as sought to be argued by counsel for the procuring entity that the Applicant joint venture did not provide the procuring entity with the evidence of eligibility to enable the procuring entity consider the issue.

The Board has perused the Applicant joint venture's tender document and has established from the documents contained in the said tender document that the Applicant joint venture provided several documents which the Board will shortly refer to below that would have enabled the procuring entity's tender evaluation committee to consider the issue of preference and reservations and to make an appropriate determination on the issue. What happened instead was that the procuring entity did not consider any of the said documents and either accept or reject them as not providing a basis for the application of the law on preferences and reservations. Simply put therefore, the procuring entity's tender processing committee did not consider the issue of preference and there is no mention of such a consideration or the outcome of the said exercise in the final financial

evaluation report dated 18<sup>th</sup> April, 2016. As already stated, all that the procuring entity's tender processing committee did was to consider the computation of errors and then proceeded to recommend an award of the tender to the successful bidder.

During the course of the hearing of this Request for Review, Counsel for the procuring entity submitted that the duty to provide the evidence of eligibility to prove the Applicant joint venture's entitlement to the benefit of the preference scheme lay with the Applicant joint venture which did not do so. Counsel for the procuring entity additionally argued that there was no obligation on the part of the procuring entity to undertake due diligence or request for information from the Applicant joint venture regarding its entitlement to be granted preference.

The Board has considered the above arguments and the contents of the tender document. The Board wishes to observe that under the provisions of the Public Procurement and Asset Disposal Act No. 33 of 2015 that it is the duty of the procuring entity to prepare and set out the requirements which have to be met by the bidders. This includes the obligation to require that bidders supply certain documents. The Board has looked at the tender document and more particularly clause 4.1 headed "**instructions to bidders**" appearing at page 8 of the tender document and items 1.1 and 1.5 of the evaluation and qualification criteria appearing under item D headed "**qualification**" appearing at page 32 of the tender document. The above clauses show that the only documents on eligibility which bidders were required to submit in this tender were evidence that the bidder was legally registered or incorporated in the Republic of Kenya by production of a certified copy of the bidder's certificate of incorporation showing that the

bidder was a legally registered company and legally authorized to do business in Kenya, secondly proof of registration with the National Construction Authority NCA 1 and thirdly evidence of registration with the relevant Engineers Board of Kenya.

The other requirements which bidders were supposed to provide under Section 2 of the instructions to tenderers to prove eligibility are set out under clauses 5.1 to 5.4 of the tender document which provide as follows:-

### **5 Qualification of the Bidder**

**5:1 Bidders shall as part of their bid:**

- a) Submit a written power of attorney authorizing the signatory of the bid to commit the bidder; and
- b) Update any information submitted with their bids and update in any case the information indicated in the schedules and continue to meet the minimum threshold criteria set out in the bid documents.

**5:2 As a minimum, Bidders shall provide latest information set out below:**

- a) Evidence of access to lines of credit and availability of other financial resources.
- b) Financial predictions for the current year and the two subsequent years, including the effect of known commitments.
- c) Current work commitments.
- d) Current litigation information and
- e) Availability of critical equipment.
- f) Availability of key technical personnel.
- g) Similar work experience.
- h) History of non performing contracts.

i) Details of sub-contracts if any.

5:3 Bidders shall also submit proposals of work methods and schedule in sufficient detail to demonstrate the adequacy of the bidder's proposals to meet the Employers Requirements and the completion time referred to in Clause 1.2 above.

5:4. In case of a joint venture, the following shall apply:-

- a) The bid and in case of a successful bid the Form of Agreement, shall be signed so as to be legally binding on all partners.
- b) One of the partners shall be nominated as being in charge and this authorization shall be evidenced by submitting of a power of attorney signed by legally authorized signatories of all the partners.
- c) The partner in charge shall be authorized to incur liabilities and receive instruction for and on behalf of any and all partners of the joint venture and the entire execution of the contract including payment shall be done exclusively with the partner in charge.
- d) All partners in a joint venture shall be liable jointly and severally for the execution of the contract in accordance with the contract terms and a relevant statement to this effect shall be included in the authorization mentioned under (b) above as well as in the Form of Bid and the Form of Agreement (in case of a successful tender).
- e) A copy of the agreement entered into by the joint venture partners shall be submitted with the tender.

In none of the said requirements was a bidder required by the procuring entity to provide documents to show who the shareholders of the bidder were for the purposes of determining the issue of preference and neither the

Applicant joint venture nor any other bidder can be faulted on account of failing to provide documents not required by the tender document.

On the issue of whether the procuring entity was under an obligation to seek for more information or carry out due diligence, the Board has considered the provisions of the tender document and more particularly clause 27.1 of the said document headed **“Clarification of Bids and contracting of the employer”** and finds that the said clause required the procuring entity to seek for further information from bidders.

The submissions made by Counsel for the procuring entity are not therefore entirely correct and the Board finds that even if the procuring entity’s tender processing committee was not in possession of full information to enable it determine the issue of preference or was in doubt as to whether the Applicant joint venture met the criteria for the award of preference, it was obliged to seek for information from the Applicant joint venture to enable it consider and determine whether the Applicant joint venture was entitled to preference. The procuring entity was also required to undertake due diligence particularly where the issue at hand involved the consideration of such important requirement of the law such as the granting of preference.

The procuring entity’s tender processing committee having failed to consider and determine the issue of preference and reservation, the Board is therefore bound to consider whether the Applicant was entitled to the benefit of the preference scheme under the Act. This obligation on the part of the Board arises from among others the two High Court decisions which are binding on it and from the fact that this was a matter directly in issue in this Request for Review.

The issue of preference and reservations is inter-alia governed by the Provisions of S.155(3) and 157(8) of the Public Procurement and Asset Disposal Act No. 33 of 2015 which provide as follows:-

**S.155 (3):** Despite the Provisions of subsection (1) preference shall be given to:

- (a).....
- (b) firms where Kenyans are shareholders.

**S.157(8):** In applying the preferences and reservations under this section

- (a).....
- (b) a prescribed margin shall be given to
  - (i) .....
  - (ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale prescribed.

Section 86(1) and (2) of the same Act which are now part of the substantive Act provide as follows in so far as they are material to the request for review now before the Board;

**86(1)** The successful tenderer shall be the one who meets any one of the following as specified in the tender documents:-

- (a) the tender with the lowest evaluated price.

**86(2)** For the avoidance of doubt Citizen contractors or those entities in which Kenyan Citizens own at least fifty one percent shares, shall be entitled to twenty percent of their total score in the evaluation provided the entities or contractors have attained the minimum technical scores.

- (f) Copies of Kenyan National Identity Cards No's 31138826 and 31742816 issued to Mr. and Mrs. Schwartzman appearing at pages 32 to 34 of the further/Replying affidavit of Paul Murage.
- (g) A certificate of registration of Gibb Kenya Limited, a certificate of change of name from Gibb Kenya Limited to Gibb (Eastern Africa) Limited and a certificate of change of name from Gibb (East Africa) Limited to Gibb Africa Limited issued on 17<sup>th</sup> December 2003 under the provisions of the Kenyan Companies Act and all bearing registration certificate numbers 44849 appearing at pages 71 to 76 of the tender document.
- (h) The Memorandum and Articles of Association of Gibb Kenya Limited appearing at pages 77 to 94 of the tender document which are dated 10<sup>th</sup> December 1990.

A large number of the above documents which are contained in the tender document establish that both H. Young & Company (East Africa) Limited and Gibb Africa Ltd are limited liability companies which are registered in the Republic of Kenya under the provisions of the Companies Act.

The certificate of incumbency produced by the lead bidder M/s H. Young & Company (East Africa) Limited and which is contained in the tender document further shows that the shareholders of the said company as at the date of submission of its tender were M/s H. Young Holdings Limited of P.O. Box 49729 Nairobi which holds 12, 447, 917 or an equivalent of 99.6% of the shares and which is a company registered in Kenya and Mr. Watson Anderson Murigo of P. O. Box 40530 Nairobi who hold 52,083 shares in the

lead bidder which is an equivalent of 0.4% of the Company's total shareholding.

To further fortify its position, the Applicant joint venture produced the certificates of incorporation of H. Young Holdings Limited as annexure PMC to the affidavit sworn by Paul Murage on 20<sup>th</sup> July 2016 which shows that H. Young Holdings Limited was registered under the Provisions of the Companies Act on 18<sup>th</sup> January 1984. The Applicant consortium also produced a CR 12 belonging to Gibb Africa Limited marked as annexure PMC 5(c) which established that Gibb Africa Limited is fully owned by Gibbal Holdings Limited and Kamase Holdings Limited which hold 400, 000 and 600, 000 shares respectively in the company representing a shareholding of 40% and 60% respectively.

In addition to producing the CR 12 for Gibb Africa Limited, the Applicant joint venture also produced the current form of Annual Returns of Kamase Holdings Limited which demonstrates that the said Company it is a limited liability company registered under the provisions of the Kenyan Companies Act as company registration number 119844. The latest returns also show that Kamase Holdings Limited is wholly owned by the following persons who are of Kenyan Nationality and who hold shares in the said company; Paul Karekezi, Sean Trevor Avery, Samuel Kinyua Mambo, Maurice BarasaNamiinda and Charles Maunda.

The above evidence demonstrates that both the companies in the joint venture have individual persons and corporate persons as shareholders in the two companies.

The two corporate entities namely H. Young Holdings Limited and Kamase Holdings Limited being companies registered in Kenya under the provisions of the Kenyan companies Act are in law separate legal persons and are entitled to own shares and be considered as shareholders in their own right.

The principle flowing from corporate personality is now well settled and it follows the holding of the House of Lords in the case of **Salomon -vs- Salomon (1987) Ac 78** where the House of Lords held that a Company is in law a separate legal person.

The above decision has been followed severally as demonstrated by the court of appeal's decision in the case of **Victor Mabachi & Another -vs- Nurturn Bates Ltd (Nai CA No.; 247 of 2005)** where the court of appeal held that a company as a body corporate is a person *juridicae*, with a separate independent identity in law distinct from its shareholders, directors and agents.

Based on the above decisions H. Young Holdings Limited and Kamase Holdings Limited are therefore shareholders in their own right and the Applicant joint venture was not therefore under a duty as stated by Counsel for the procuring entity to show who the shareholders of the said companies were since the said companies which are shareholders in the companies

forming the Applicant joint venture were entitled to be considered as shareholders in their own right for the purposes of determining the issue of preference.

Turning to the two decisions relied upon by Counsel for the procuring entity namely, the case of **Guo Dong -vs- Multi Win Trading (E.A) Limited and 6 Others (Nai HC Misc. Appl. No. 264 of 2015)** and the case of **Tatu City Limited & 3 Others -vs- Stephen Jennings & 6 Others (Nai HCC No. 46 of 2015)**. The Board has read through the said decisions and finds that the court rightly held that Directors who hold nil shares in a company cannot be considered as shareholders in the company. The Board however finds that the two decisions are distinguishable from the present case in that the companies in the Applicant joint venture have distinct shareholders which hold specified shares in the said companies in addition to the Directors who hold nil shares in the said companies. The procuring entity was therefore duty bound to consider the said shareholding and determine whether the Applicant joint venture was entitled to preference.

On the issue of the remaining shareholders of H. Young & Company (East Africa) Limited and Gibb Africa Limited, namely Mr. Watson Anderson Murigo and Gibbal Holdings Limited, counsel for the Applicant submitted that Mr. Muringo was a Kenyan Citizen while Gibbal Holdings Limited was registered in Mauritius with its address as suite 308 St. James Court St. Denis Street Port Louis Mauritius.

According to the available evidence, Mr. Murigo holds 0.4% of the shareholding in H. Young & Company (East Africa) Limited while Gibbal Holdings Limited which is admittedly registered in Mauritius holds 40% of the shareholding in Gibb Africa Limited.

Based on the above evidence which was placed before the Board, it is clear that both members of Applicant joint venture are Citizen Contractors who hold over 51% of the shares.

The Board also finds as already stated earlier in this decision that the Applicant joint venture attained a total score of 82.54% at the technical evaluation stage which was above the technical evaluation pass mark of a minimum of 80% which a bidder was required to attain at the technical evaluation stage in order to proceed to the financial evaluation stage.

During the course of the hearing of this Request for Review, counsel for the procuring entity submitted that the Applicant joint venture did not submit any evidence to show that Mr. Watson Anderson Murigo was a citizen of the Kenya. The Board has perused the tender document and the Replying/further affidavit of Paul Murage and particularly paragraph 6 thereof and finds that although the deponent of the said affidavit deponed that Mr. Watson Anderson Murigo hold 52, 083 shares representing 0.4% of the shareholding in H. Young & Company (East Africa) Limited, he did not however produce any identification documents to show the Citizenship of the said Mr. Watson Anderson Murigo.

The Board is however of the view that such evidence would not have made any difference since the majority shareholder in the said company M/s H. Young Holdings Limited which holds 12,447,917 shares which is an equivalent to 99.6% of the shares holds shares which are way above the 51% threshold required by the Provisions of Section 86(2) of the Public Procurement and Asset Disposal Act 2015.

The same situation applies in the case of Gibb Africa Limited where the majority shareholder Kamase Holdings Limited which is registered in Kenya holds 600,000 shares which is an equivalence of 60% shares while Gibbal Holdings Limited which is registered in Mauritius holds 400,000 shares which is equivalent to 40% shareholding in Gibb Africa Limited. The said shareholding by Kamase Holdings Limited therefore also entitles Gibb Africa Ltd to the benefit of preference under Section 86(2) of the Act the Nationality status of M/s Gibbal Holdings Limited notwithstanding

Both H. Young Company (East Africa) Ltd and Gibb Africa Limited therefore qualify as Citizen Contractors which is defined under the provisions of Section 2 of the Public Procurement and Asset Disposal Act No.33 of 2015 as a person or a firm wholly owned and controlled by persons who are Citizens of Kenya.

The Board therefore holds based on the above findings that both Companies in the Applicant joint venture fulfilled all the requirements that entitled them to be granted the 20% preference on their tender price of Kshs.10, 877, 774, 478.02 under the Provisions of Section 86(2) of the Public Procurement and

Asset Disposal Act No. 33 of 2015. This therefore entitles the Applicant joint venture to a preference of approximately Kshs.2, 177, 554, 895.60 which was to have been applied to the Applicant joint venture's tender sum and having failed to apply the preference in favour of the joint venture, the procuring entity acted in error and its decision cannot stand.

Turning to the successful bidder in this case, Mr. George Kamau Advocate who appeared on behalf of the successful bidder in these proceedings conceded that the successful bidder is a foreign company and is not entitled to the benefit of the preference scheme. The Board has perused the successful bidder's original tender document and finds that the successful bidder is registered in China and has its domicile on the 29<sup>th</sup> Floor, Zhi Di Plaza No. 89 Wu Si Road Fuzhou in China. The successful bidder was and is not therefore entitled to the benefit of the preference scheme under section 86 (2) of the Act.

Before concluding this decision and this being one of the first cases that has come before the Board on the issue of preference, the Board wishes to emphasize that unlike in the repealed Act where the issue and the percentage margin of preference was largely governed by the Regulations, the Provisions of the new Act and more particularly Section 86(2) thereof has incorporated the requirement for granting preference to local contractors into the substantive law. The said provision is couched in mandatory terms. The Board is of the view that Parliament must have taken this deliberate step in order to give effect to the provisions of Article 227 of the Constitution and the objectives of procurement as set out under Section 3 of the new Act both of

which bind state organs and public entities to promote local industry, sustainable development and protection of the environment and the promote of citizen contractors.

A state organ or a procuring entity which fails to inquire into the issue of preference and accord preference where it is due therefore breaches both the Provisions of the Constitution and the Act and the Board being a creature of statute will not hesitate to intervene to correct the situation and ensure that the objectives of procurement as set out in the Constitution and the Act are met.

The Board finally wishes to observe that the provisions of the new Act on preference are fairly straight forward and it is regrettable that the procuring entity failed to give effect to the law thereby unnecessarily delaying the implementation of this project. Such a delay would have however be avoided if the procuring entity's tender processing committee had complied with the law particularly Section 86(2) of the Act which is couched in strong but mandatory terms. The use of the words for the "**avoidance of doubt**" in Section 86(2) of the Act can only imply the importance and the emphasis which the law has now elevated the objective of promoting the local industry together with the benefits that accrue with it.

The upshot of all the foregoing findings is therefore that the Applicant consortium Request for Review is allowed on the terms set out in the following final orders:-

### **FINAL ORDERS:-**

In the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act No.33 of 2015, the Board makes the following orders and findings on this request for review:-

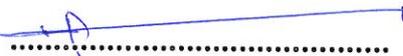
- (a) The Applicant's request for review dated 8<sup>th</sup> July 2016 and which was filed with the Board on the same day is hereby allowed.
  
- (b) The decision of the procuring entity made on 29<sup>th</sup> June 2016 awarding Tender Number KenHA/1220/2016 for the Construction of the Garsen-Witu-Lamu (C112 Road) to the successful bidder herein is hereby annulled and set aside.
  
- (c) The Board finds and holds that the Applicant joint venture is entitled to a preference of 20% on its tender sum for the purposes of the evaluation and award of the subject tender.
  
- (d) The Board further finds and hold that the successful bidder herein is not entitled to benefit of the margin of preference prescribed under Section 86(2) of the Act for the purposes of evaluation and award of the subject tender.
  
- (e) The procuring entity is hereby ordered to re-evaluate the financial proposal submitted to it by Applicant joint venture to the extent of according and incorporating the 20% preference to the tender price submitted by the Applicant joint venture for purposes of the award of the tender

(f) Owing to the urgency and the public interest involved in this procurement process, the procuring entity is directed to carry out and complete the financial re-evaluation exercise directed in (e) above and make an award of the subject tender to the lowest evaluated tenderer upon applying the margin preference as directed in (e) above within seven (7) days from the date of this decision.

(g) For the purposes of ensuring that the Board's orders have been complied with, the procuring entity shall file the financial re-evaluation report setting out the outcome of the re-evaluation and the award process with the secretary of the Review Board on or before 3<sup>rd</sup> August 2016.

(h) In view of the nature of the orders made above the Board orders that each party shall bear its own costs of this request for review.

Dated at Nairobi on this 26<sup>th</sup> day of July, 2016.



CHAIRMAN  
PPARB



SECRETARY  
PPARB

