

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 28/2009 OF 5TH AUGUST, 2009

BETWEEN

**VICTORY
CONSTRUCTION COMPANY LIMITED.....APPLICANT**

AND

**MINISTRY OF REGIONAL
DEVELOPMENT AUTHORITIES..... PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Ministry of Regional Development Authorities dated the 23rd day of July, 2009 in the matter of Tender for the Construction of Major Civil Works, Kimira-Oluch Smallholder Farm Improvement Project- Tender No. MRDA/KOSFIP/001A/2007-2009 and KOSFIP/001B/2007-2008.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Mr. Sospeter Kioko	-	Member
Eng. C. A. Ogut	-	Member
Amb. C. M. Amira	-	Member
Ms. Joshua Wambua	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Kerina A. Rota	-	Secretariat
Mr. Gilbert Kimaiyo	-	Secretariat

PRESENT BY INVITATION

Applicant, Victory Construction Company Ltd

Mr. Oyatta David	-	Advocate, Nyawara & Co. Advocates
Mr. Nyawara Joshua	-	Advocate, Nyawara & Co. Advocates
Mr. Amritdal Suri	-	Director
Mr. Jasbir Suri	-	Director

Procuring Entity, Ministry of Regional Development Authorities

Mr. Charles Mwanda	-	Director
Mr. William O. Ogola	-	Ag. Deputy Director
Mr. David N. Oyosi	-	Deputy Secretary
Mr. Nelson K. Korir	-	Project Manager, Kimira Oluoch Smallholder Irrigation Project
Eng.B.J. Magero	-	Project Engineer, Kimira Oluoch Smallholder Irrigation Project
Ms. R.Ogwago	-	Project Officer, Kimira Oluoch Smallholder Irrigation Project
Mr Gyavira Omondi	-	R.E Kimira Oluoch Smallholder Irrigation Project.

Interested Candidates -M/s Sinohydro/Machiri Co. Ltd

Mr. Chen Wu Qing	-	Deputy Regional Manager
Mr. Hu Hongchao	-	Business Manager
Eng. George Ogola	-	Engineer
Eng. Thuo J. Ng'ang'a	-	Engineer

BOARD'S DECISION

Upon hearing the representations of the parties and upon reading the documents before it, the Board decides as follows: -

BACKGROUND OF AWARD

The Government of Kenya, through the Ministry of Regional Development Authorities, engaged in the tender in question following the Loan Agreement signed between the Republic of Kenya and the African Development Fund on 14th July 2006, for financing implementation of Kimira-Oluch Smallholder Farm Improvement Project in Nyanza Province of Kenya. In accordance with the Loan Agreement, Article VI, Section 6.02, the procurement of works and goods were to be carried out using *ADB Rules of Procedure for Procurement of Goods and Works*. Subsequently the procurement of the Civil Works in question were carried out using the International Competitive Bidding (ICB) procedures of the said rules and had the involvement of the Bank throughout the process.

Procurement Process

The Procurement process for the tenders for Construction of Major Civil Works for Kimira-Oluch Smallholder Farm Improvement Project commenced with the publication of the General Procurement Notice (GPN) in the UN Development Business Magazine No. 687 of 30th September 2006.

Pre-qualification

The Specific Procurement Notice for invitation for Pre-qualification of firms to construct the Major Civil Works for the Project was advertised in two (2No.) local Newspapers with wide circulation i.e. the Daily Nation Newspaper of 16th July, 2007 and the East African of 23rd July, 2007.

Ten (10No.) firms purchased the pre-qualification documents out of which, the following seven (7No.) firms responded when the tender closed/opened on 30th August, 2007.

Bid No.	Name of Firm	Firm's Address
1.	Spenco Kenya Ltd	P. O. Box 14294-00800- Nairobi Kenya
2.	Victory Construction Co. Ltd	P. O. Box 45329- 00100 Nairobi Kenya.
3.	China Metallurgical Group Corporation	P.O. Box No. 11 Gaoliangqiao Xiejie, Haidian District, Beijing , P.R. China 100081
4.	Diacons Kenya Ltd	P.O. Box 30459-00100 Nairobi, Kenya
5.	H - Young and Company (East Africa) Ltd	P. O. Box 30118-00100GPO Nairobi, Kenya.
6.	Kundan Singh Construction Ltd.	P.O. Box 15018 -00509 Nairobi Kenya.
7.	Sino Hydro Corporation Ltd and Machiri Ltd Joint Venture	P. O. Box 244446 - 00100 - Nairobi Kenya.

Out of the seven firms which submitted their pre-qualification applications, only six firms were successful. These were:-

No.	Name of Firm	Firm's Address
1.	Spenco Kenya Ltd	P. O. Box 14294-00800- Nairobi Kenya
2.	Victory Construction Co. Ltd	P. O. Box 45329- 00100 Nairobi Kenya.
3.	China Metallurgical Group Corporation	P.O. Box No. 11 Gaoliangqiao Xiejie, Haidian District, Beijing, P.R. China 100081
4.	H - Young and Company (East Africa) Ltd	P. O. Box 30118-00100GPO Nairobi, Kenya.
5.	Kundan Singh Construction Ltd.	P.O. Box 15018 -00509 Nairobi Kenya.
6.	Sino Hydro Corporation Ltd and Machiri Ltd Joint Venture	P. O. Box 244446 - 00100 - Nairobi Kenya.

The African Development Bank granted "No Objection" to the six pre-qualified firms on 21st October, 2008. On the same date, the Bank also gave "No Objection" to the tender documents.

Invitation to Tender

The six (6No.) pre-qualified firms were invited on 28th October, 2008 to bid. All the firms purchased the tender documents.

Bid Opening

The Tenders closed on 6th January, 2009 at exactly 12.00 Noon and were opened immediately thereafter in the presence of bidders' representatives who chose to attend.

The particulars of the firms which submitted their tenders are as shown in tables 1 and 2 below

Kimira Lot 1

1. Sinohydro Corporation Ltd /Machiri Ltd Joint Venture
2. H-Young & Co (E.A.) Ltd
3. Victory Construction Company Ltd
4. China Metallurgical Group Corporation

Oluch Lot 2

1. Sinohydro Corporation Ltd /Machiri Ltd Joint Venture
2. H-Young & Co (E.A.) Ltd
3. Victory Construction Company Ltd
4. China Metallurgical Group Corporation

Evaluation of Bids

The evaluation commenced with the appointment of the Evaluation Committee on 30th January 2009. The Ministerial Tender Committee (MTC) adjudicated on the tenders and given budgetary constraints on the Major Civil Works recommended the award of the Contracts to M/s Victory Construction Ltd on 25th March 2009, but at enhanced Performance Guarantee at 25% because of apparent poor performance records as evidenced by the Due Diligence performed on all the bidding firms by the Procuring Entity.

The MTC's awards were communicated to the ADB for "No Objection" as required on 27th March 2009. As per Clause 3.39.1 and Appendix IV, section 2.4(d), of the ADB), the Procuring Entity, on 28th April 2009, on realizing that the bid validity period and bid securities may expire

before conclusion of the procurement process, requested the bidders to extend their bid validity and bid securities periods for 50 days. Bidder No.s 1 and 2 extended both bid validity period and security upto 25th June, 2009 as required.

It may be noted that M/s Victory Construction Ltd vide letter, dated 4th May 2009, and extended their bid validity period upto 25th June 2009. However, the firm failed to extend the Bid Security which was lapsing on 2nd June 2009 contrary to Clause 15 of the ITB.

On 4th May 2009, the Bank vide letter ref. SAN.1/IOM/AM/2009/02/01 noted some omissions as regards responsiveness of the bids submitted by the M/s Victory Construction Ltd, which constitute material deviations but may have been overlooked by the Procuring Entity. The Bank requested the Ministry to respond to the issues. The omissions were:

- The Bidder's bid was signed by a signatory not authorised by the Power of Attorney contained in the bid document.
- The Bidder's neither submitted a copy of Certificate of Incorporation in its bid nor confirmed in writing that the originally submitted Pre-qualification information remains essentially correct as at the date of bid submission.

The Bank further observed that the award need not be guided by budgetary allocation, but by capability of the firm to perform, responsiveness of the bids and cost.

In view of these new developments, the Procuring Entity decided to re-evaluate the Tenders. In this regard, the bids were re-evaluated taking into consideration the omissions raised by the Bank. MTC re-adjudicated on the tenders and awarded the contracts on 4th June 2009 to M/s Sinohydro Corporation Ltd/ Machiri Ltd at tender sums of **Kshs 1,396,134,224.54** and **Kshs 1,543,670,027.48** for Kimira Lot 1 and Oluch Lot 2, respectively being lowest evaluated. This was communicated to the Bank for "No Objection" on 10th June 2009 as required.

The Bank vide letter dated 16th June 2009 accepted the re-evaluation report and MTC's recommendation for award. However, the granting of "No Objection" was subject to confirmation by the Government that it will meet the shortfall of Kshs 790,595,463.02 in the budget from the loan proceeds of Kshs 2,149,208,400.00 for the civil works.

On the same letter, the Bank granted the Procuring Entity "No Objection" to extend the bid validity and security period by a further 90 days as had been requested by the Procuring Entity vide letter dated 15th June, 2009.

Subsequently the Procuring Entity requested the tender participants to extend their bid validity and bid security period upto 23rd September

2009. M/s Victory Construction Company failed to extend the Bid Security alongside the bid validity period as required contrary to Clause 15 of ITB.

In fulfilment of the Banks requirement that the Government provides a commitment letter before granting "No Objection" to the Tenders awards, the Government through the Ministry of Finance, vide letter dated 6th July 2009, confirmed Its commitment to provide the additional funds required for execution of the contracts for the construction of Major Civil Works in Kimira and Oluch irrigation schemes.

Following submission of this commitment, the Bank granted "No Objection" to award the two contracts to M/s Sinohydro Corporation Ltd /Machiri Ltd Joint Venture on 10th July 2009.

Subsequently, on 23rd July 2009, the Procuring Entity notified all the bidders, who had participated in the tenders on the outcome of the tenders.

THE REVIEW

This Request for Review was lodged by Victory Construction Ltd on 5th August, 2009 against the decision of the Ministry of Regional Development Authorities in the matter of tender No. MRDA/KOSFIP/001A/2007-2009 and KOSFIP/001B/2007-2008.

The Applicant was represented by Mr. Oyatta David, Advocate, Nyawara & Co. Advocates, while the Procuring Entity was represented by Mr. Charles Mwanda , Director, Ministry of Regional Development Authorities.

The Applicant had raised seven grounds of Appeal and urged the Board to make the following orders

1. The decision of the Procuring Entity to award the tender to Sinohydro Corporation Limited/Machira Limited be set aside and nullified.
2. The Applicant be declared the winner.
3. The Procuring Entity be directed to award the contract to the Applicant.

At the commencement of the hearing, the Applicant withdrew ground six.

GROUND 1, 2, 3 and 4: Breach of Section 66(4) of the Public Procurement and Disposal Act, 2005 and Regulation 50 of the Public Procurement and Disposal, Regulations, 2006.

These grounds have been consolidated because they raise similar issues regarding whether or not there was a breach of section 66(4) of the Act and Regulation 50 of the Public Procurement and Disposal Regulations, 2006.

The Applicant submitted that the Procuring Entity acted illegally and/or arbitrarily by awarding the contract to the Successful tenderer. It stated that the award was contrary to the declared outcome of the Tender results opened on 6th day of January, 2009 and was in breach of Section 66(4) of the Public Procurement and Disposal Act, 2005 and Regulation 50 of the Public Procurement and Disposal, Regulations, 2006.

It stated that it had provided all the information that was required by the Procuring Entity in the prequalification stage and in addition answered all queries that were raised by the Procuring Entity.

It submitted that the Procuring Entity sought for clarification on the signature appended on its bid, which was different from the specimen signature earlier provided to the Procuring Entity on the Power of Attorney. It stated that, it replied to the query and informed the Procuring Entity that the signature in question was of a person authorized by the firm to sign for the company. In this regard, it stated that this clarification was satisfactory and cleared the issue of the difference between the signature earlier provided on the Power of Attorney and the different signature that appeared on its bid.

It stated that the other issue that the Procuring Entity had raised with the Applicant was on the extension of the bid validity period and the bid security which it argued it had clarified in writing to the Procuring Entity.

It stated that, having been pre-qualified by the Procuring Entity as communicated vide the Procuring Entity's letter dated October, 24th 2008, it then submitted its bid in accordance with the invitation by the Procuring Entity, and the bids were opened on the January 6th January, 2009.

It contented that, during the announcements of the prices quoted by the various bidders, its bid price was the lowest.

The Applicant stated that on 29th July, 2009 it was shocked to receive a letter from the Procuring Entity, dated July 23, 2009 notifying it that its bid was unsuccessful and that the tender had been awarded to M/S. Sino hydro Corporation Limited/Machiri Limited Joint Venture.

In conclusion, it stated that having tendered the lowest priced bid, the tender ought to have been awarded to it. By failing to award the tender to it, the Procuring Entity breached Section 66(4) of the Act which states that:

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

In response, the Procuring Entity stated that it did not act illegally and/or arbitrarily by awarding the tender to the successful tenderer, namely MS/Sinohydro Corporation Limited/Machiri Ltd. Joint Venture. It submitted that it followed the Act, and the procedures as set out in the Loan Agreement and the Instruction to Bidders (ITB) in the bidding

documents in making the award. It stated that on 6th January, 2009 during the opening of the tenders, only the name of the Bidder, Bid Price and Bid Security, (form and manner) were read out loudly to the bidders' representatives present, as required under Clause 3.40.1 of the ADB rules of Procedure for procurement of Goods and Works. It further stated that the awards were arrived at after full evaluation process which included; determination of responsiveness to the bidding document-preliminary examination, examination of bids for completeness, confirmation of provision of the relevant guarantee and securities, checking whether the documents had been properly signed, checking whether the bids were otherwise generally in order, a detailed examination and comparison of bids, among others.

The Procuring Entity denied breach of Section 66(4) of the Act and Regulation 50(3) of the Regulations, which are in conformity with ADB rules at Clause 3.40.1. which states in part, that :

"The award shall be made to the bidder whose bid has been determined to be the lowest evaluated cost bid which shall not necessarily be at the lowest offered price and which meets the appropriate standards of capability and financial resources".

The Procuring Entity stated that the Applicant's bid failed on the following grounds:-

- (i) That the Applicant's signed by a signatory not authorized by the Power of Attorney contained in the bid document. This was

contrary to Clause 4.3(a) and 18.2 of the bid document which states in part that:

“The original and all copies of the bidshall be signed by a person or persons duly authorized to sign on behalf of the bidder, pursuant to subclauses 4.3(a) ...”

- (ii) That the Applicant did not submit copies of Certificate of Incorporation in its bid nor confirmed in writing that the originally submitted Pre-qualification information remained essentially correct as at the date of bid submission. This was contrary to the requirement under Clause 4.2 of the ITB which states that:

“In the event that pre-qualification of potential bidders has been undertaken, only bids from pre-qualified bidders will be considered for award of Contract. These qualified bidders should submit with their bids any information updating their original pre-qualification applications or, alternatively, confirm in their bids that the originally-submitted pre-qualification information remains essentially correct as of the date of bid submission. The update or confirmation should be provided in Section III”

- (iii) That the Applicant failed to extend its bid security, when it was requested to do so vide the Procuring Entity's letter of June 25, 2009.

In conclusion, the Procuring Entity requested the Board to find that the Applicant's bid was disqualified appropriately and that the Award made to the successful bidder was in line with the requirements of the Act and the bid documents.

The Board has carefully examined the documents presented before it and considered the submissions of the parties.

The Board summarizes the issues to be determined as follows:

- i) Whether the Applicant's bid was properly signed, considering the requirements of the IDB document on Power of Attorney in signing of the bids;
- ii) Whether or not the Applicant's bid was responsive to the requirement of submitting a Certificate of Incorporation;
- iii) Whether or not the Applicant extended the bid validity period and the bid security, in line with the requirements of the Procuring Entity; and
- iv) Whether the Procurement was governed by the ADB rules or the Public Procurement & Disposal Act 2005 or the Exchequer & Audit (Public Procurement Regulations 2001).

The Board notes that the Procuring Entity first pre-qualified bidders on the tender for construction of major civil works for Kimira-Oluch Smallholder Farm Improvement Project. The project is financed through

a Loan Agreement signed between the Government of Kenya and the African Development Fund on July 14, 2006. The Board further notes that, the provisions of Article 6, Section 6.02 of the Loan Agreement states as follows:

“Works and goods necessary for the execution of the project shall be procured in accordance with the Rules of Procedure for Procurement of Goods and Works of the Fund adopted by the Fund on July 15, 1996 as amended on November 10, 1999”

The Board further observes that after the prequalification, the prequalified bidders submitted their bids. After the evaluation, the Ministerial Tender Committee awarded the tender to Victory Construction Ltd. It then sought for a “No Objection”, from ADB, in line with the requirements of Clause 2.10.1 of the ADB Rules.

The Board observes that, on 4th May, 2009 the ADB wrote a letter to the Procuring Entity reference: OSAN.1/IOM/AM/2009/02/1, highlighting some omissions with regard to the responsiveness of the bids submitted by MS/Victory Construction Ltd, which constituted material deviations, but which may have been overlooked by the Procuring Entity. The said omissions in question were:

- i) That the Applicant’s bids were signed by a signatory not authorized by the Power of Attorney contained in the earlier document submitted to the Procuring Entity. This was contrary to clause 4.3(a) and 18.2 of the bid document, which stated in part;

“ The original and all copies of the bid.....shall be signed by a person or persons duly authorized to sign on behalf of the bidder pursuant to sub-clause 4.3(a)”

- ii) That the bidder neither submitted a copy of Certificate of Incorporation in its bid nor confirmed in writing that the originally submitted pre-qualification information remained essentially correct at the date of submission. This was contrary to the requirement of Clause 4.2 of the ITB, which Provided as follows:-

“In the event that pre-qualification of potential bidders has been undertaken, only bids from pre-qualified bidders will be considered for award of Contract. These qualified bidders should submit with their bids any information updating their original pre-qualification applications or, alternatively, confirm in their bids that the originally-submitted pre-qualification information remains essentially correct as of the date of bid submission. The update or confirmation should be provided in Section III.”

The Board has examined the Applicants Bids and found that they were signed by a person who did not have Power of Attorney, which was contrary to the requirements of Clause 4.3(a) and 18.2 of the bid document. Although the Procuring Entity in its treatment of this omission, seem to have regarded it as minor deviation, the ADB did not view such an omission as minor deviation and on the basis of this,

denied the Procuring Entity a "NO Objection" when the Applicant's bid was recommended to the Bank. In this regard, the Procuring Entity's attempt of treating the issue as casual or oversight, as the case may be, was overturned by the bank which to the contrary, treated the deviation as major. This was in line with the Bid document and hence the Procuring Entity's recommendation to the bank was not approved.

Taking into consideration the above observations and findings the Board holds that the Applicant's bids were disqualified appropriately because they were not signed in line with the requirements of the bid documents, as far as the Power of Attorney is concerned.

After examining the bid documents, the Board finds that the Applicant did not submit its certificate of Incorporation together with its bid. Further, the Applicant did not also confirm to the Procuring Entity that its Certificate of Incorporation as submitted during the Pre-qualification was still valid as required under the Tender Document. In this regard the Board rules that the disqualification of the Applicant's bid was in order.

With regard to the validity period and the Bid security, the Board notes that the Procuring Entity, on April 28, 2009, wrote a letter to all the bidders, asking them to extend their bid validities and bid security periods for 50 days. Both Sinohydro Corporation Ltd/Machiri Ltd Joint Venture and H-Young and Co. (E.A.) Ltd respectively extended their bid

validity periods and securities up to June 25, 2009 as required. The Applicant vide its letter of May 4, 2009 extended its bid validity period up to June 25, 2009 but did not extend the bid security, which was lapsing on June 2, 2009. During the hearing, the Applicant adduced evidence to the Board that the bid security had been extended by the Bank, but the Procuring Entity denied ever receiving it. The Applicant was also not able to prove that it had delivered the extended Bid security to the Procuring Entity.

On the question of extension of Bid Security, the Board holds that the Applicant did not adduce evidence to prove that it had forwarded the Bank's extended Bid security to the Procuring Entity.

In the Circumstances, taking cognisance of all the above, the four grounds of Appeal fail.

Grounds 5 and 7 are mere statements, which are not backed by any breach of the Act and the Board needs not make any findings.

During the hearing, the question of whether this tender was falling within Section 6 or 7 of the Public Procurement and Disposal Act, 2005 was raised.

The Applicant argued that since the Project was partly financed through a loan from the ADB and that the Government of Kenya was providing a portion of the funds, Section 6(3) (b) of the Act should apply.

In response, the Procuring Entity submitted that, the ADB/ Regulations were to apply, in accordance with of Section 6(1) of the Public Procurement and Disposal Act, 2005.

The Board has considered the submissions of the parties and examined the relevant Sections of the Act and the Loan agreement signed by GOK and the ADB on 4th July, 2006.

Based on this agreement the Project funding was to be as follows:-

- (i) ADB was to lend the Government of Kenya from the resources of the fund, an amount in US Dollars not exceeding the equivalent of twenty two million nine hundred and seventy eight thousand nine hundred and ninety two units of Account (UA 22,978,992).

- (ii) The Government of Kenya was to source for funds to meet the difference of Kshs.296,271,505.54.

The Board notes that this Procurement process was advertised on 30th September, 2006 in the UN Development Business Magazine No. 687. This is the date when the Procurement Process commenced. The Public Procurement & Disposal Act 2005 was operationalized on 1st January, 2007. The Board further notes that Section 3(1) and (2) of the 3rd Schedule of the Act, states as follows:-

Section3 (1)

“Procurement proceedings commenced before this Act comes into operation shall be continued in accordance with the law applicable before this Act comes into operation.

(2) A procurement proceeding commences for the purpose of subparagraph (1) when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.

From the foregoing, the procurement is governed by the Exchequer & Audit (Public Procurement) Regulations, 2001.

Regulation 5 of the Exchequer and Audit Regulations, 2001 states as follows:

“To the extent that these regulations conflict with an obligation of the Government under or arising out of an agreement with one or more other states or with an international organization, the provisions of that agreement shall prevail “.

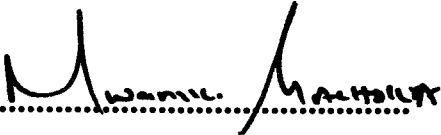
In view of the above information, the Board finds that the ADB Rules on the Procurement prevail.

In the circumstances, the Board holds that the ADB was right in making a declaration that the deviations that were treated as minor by the Procuring Entity were major. Therefore, ADB acted within its powers when it refused to give a "No Objection" to the decision made by the Procuring Entity.

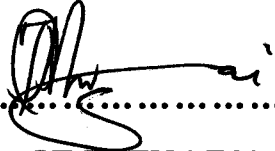
Taking into consideration all the above matters and findings, it is clear that all the grounds raised by the Applicant have failed. Accordingly, the Request for Review is hereby dismissed.

The Procuring Entity may proceed with the tender.

Dated at Nairobi on this 28th day of August, 2009


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**CHAIRMAN
PPARB**


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For

**SECRETARY
PPARB**