

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 48/2009 OF 3rd NOVEMBER, 2009

BETWEEN

MARITIME & TRANSPORT BUSINESS SOLUTIONS B. V. APPLICANT

AND

THE PRIVATIZATION COMMISSION.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Privatization Commission dated the 21st day of October, 2009 in the matter of Transaction Advisory Services for Privatization of Approved Kenya Ports Authority Projects (Development of Berths 11 - 14, Privatization of Stevedoring Services, Eldoret Inland Container Depot)

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Mr. Sospeter Kioko	-	Member
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Maritime & Transport Business Solutions B. V

- Mr. Mohammed Nyaoga - Advocate, Mohammed Muigai Advocates
Mr. Muthomi Thiankolu - Advocate, Mohammed Muigai Advocates
Ms. Kivuva Majorie - Intern - Lawyer, Mohammed Muigai
Advocates
Mr. P. V. Eulem - Chief Executive Officer

Procuring Entity, Privatization Commission

- Mr. Kiragu Kimani - Advocate, Hamilton Harrison & Mathews
Advocate
Mr. Amol Hannington - Pupil, Hamilton Harrison & Mathews
Advocate
Mr. Solomon Kitungu - Chief Executive Officer
Mr. Solomon Muturi - Transaction Manager
Mr. Wycleffe Temedi - Finance & Administration Manager
Mr. Kuria K. Waithaka - Legal Affairs Manager
Mr. David Ngarama - Transaction Manager
Mr. Joseph A. Njagi - Procurement Officer

Interested Candidates

- Mr. David Mwaura - Advocate, CPCS Consortium
Ms. Wambui Kuria - Advisory Manager, CFC Stanbic Bank
Ms. Beatrice Njeru - Legal Manager, CFC Stanbic Bank
Mr. Aleem Karmali - Transactions Manager, Pricewaterhouse
Coopers
Mr. Ngure Mwaniki - Managing Director, M. A. Consulting

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information in all documents before it, the Board decides as follows: -

BACKGROUND

The Procuring Entity advertised for an Expressions of Interest (EOI) for Transaction Advisory Services for implementation of the Privatization Programme (specifically for the three approved Kenya Ports Authority projects - Development of Berths 11-14, Eldoret Container Terminal and Outsourcing of Stevedoring Services) in both the Nation and Standard newspapers of Friday, 29th May 2009. The EOIs were opened on 30th June 2009 in the presence of representatives from PricewaterhouseCoopers, M.A. Consulting, CB Richard Ellis Ltd and RSM Ashvir.

An Evaluation Committee evaluated the EOIs on 6th and 7th July 2009 in line with Section 80 of the Public Procurement and Disposal Act, 2005 (herein after "the Act"). The Evaluation Committee in line with Section 81 of the Act shortlisted the following four consortia and recommended that they be invited to submit Proposals.

- i) PricewaterhouseCoopers, Portia Management Services Ltd, DentonWildeSapte LLP and Hamilton Harrison & Mathews
- ii) CPCS Transcom Limited, Centre for Development Consultants Ltd, CB Richard Ellis Kenya, Standard Investment Bank and Mboya & Wangong'u Advocates

iii) Maritime and Transport Business Solutions (mtbs), M. A. Consulting Group, Maxcad Consulting Engineers, Norton Rose LLP and Anjarwalla & Khanna (A&K)

iv) HPC Hamburg Port Consulting GmbH and SEREFACO Consultants Limited

The Request for Proposal (RFP) document was forwarded to the four shortlisted/pre-qualified Consortia on 17th August 2009. The deadline for submission of both the Technical and Financial proposal was 16th September 2009 at 2.30 p.m.

Following requests for clarification of the RFP document by some of the qualified Consortia, the Commission in a letter dated 28th August 2009 invited all the qualified Consortia for a tour of KPA and to a Bidders' Conference on Wednesday, 2nd September 2009.

The tour and bidders conference were held as scheduled and all the four prequalified Consortia were represented. During the tour and conference, the bidders requested for an extension of the deadline for submission of proposals. The request was granted and the deadline extended to 25th September 2009, at 12.00 p.m. It was also agreed that bidders would submit requests before 11th September 2009, for specific information that they would require.

Communication on the extension of the submission deadline for the proposals was sent out to all bidders vide a letter dated 9th September 2009

TENDER CLOSING/OPENING

The Request for Proposal was closed/opened on 25th September 2009 at 12.00 p.m. All the four qualified bidders submitted their proposals which were opened by the Commission in the presence of representatives of the four bidders as well as a representative of Kenya Ports Authority (KPA).

EVALUATION

A Technical Evaluation Committee to evaluate the Technical Proposals was appointed by the Executive Director/Chief Executive Officer of the Privatization Commission. Representatives from KPA and the Ministry of Transport were nominated by respective institutions following a request by the Privatization Commission. The Technical Evaluation Committee was chaired by Mr. Wycliffe Temesi, the Finance and Administration Manager of the Commission.

The Evaluation Committee adopted the Evaluation Criteria in the RFP document as indicated in the table below.

	Item/Variable	Marks
1	The Firm's experience (20)	
	(A) General experience.	15
	(B) Experience in relevant assignments	5
2	Adequacy of the proposed workplan and approach to respond to the TORs (30)	
	(A) Methodology	20
	(B) Work plan	10
3	The qualification and experience of the personnel proposed for the assignment (50)	
	(A) Qualification and experience	30
	(B) Local experience	15
	(C) Team Leader	5
	Total score	100

During the Evaluation of the Technical Proposals, the Evaluation Committee made the following observations:

- i) One Consortium had submitted supplementary information after the deadline for submission and the Committee rejected the information.
- ii) HPC Hamburg Port Consulting GmbH Consortia was not responsive to the Terms of Reference (TOR) and the Committee noted the following:
 - a) The Consortia did not submit some CVs for some key personnel such as the Human Resource Expert.
 - b) The Consortia only had local staff/experience in one area.
 - c) The Consortia lacked relevant and adequate experience necessary to undertake the assignment.
- iii) PricewaterhouseCoopers (PwC) Consortia was not responsive to the TORs as the Consortia had a number of disclaimers that substantially limited their scope of work.

The results of the Technical Evaluation were as follows:

TECHNICAL EVALUATION RESULTS FOR TRANSACTION ADVISORY SERVICES FOR THE PRIVATIZATION OF APPROVED KENYA PORTS AUTHORITY PROJECTS					
	Item/Variable	Marks	SCORE		
		(%)	CPCS ¹	MTBS ²	HPC ³
1	The Firm's experience (20)				
	(A) General experience.	15	12.38	14.00	6.42
	(B) Experience in relevant assignments	5	4.00	4.67	2.50
2	Adequacy of the proposed workplan and approach to respond to the TORs (30)				
	(A) Methodology	20	15.95	17.82	12.46
	(B) Work plan	10	7.83	9.17	5.67
3	The qualification and experience of the personnel proposed for the assignment (50)				
	(A) Qualification and experience	30	23.79	26.58	18.25
	(B) Local experience	15	12.92	10.75	3.50
	(C) Team Leader	5	4.83	5.00	3.83
	Total score	100	81.70	87.98	52.63

Notes on the table:

(i) CPCS - CPCS Transcom Limited, Centre for Development Consultants Ltd, CB Richard Ellis Kenya, Standard Investment Bank and Mboya & Wangong'u Advocates.

(ii) MTBS - Maritime and Transport Business Solutions (mtbs), M. A. Consulting Group, Maxcad Consulting Engineers, Norton Rose LLP and Anjarwalla & Khanna (A&K).

(iii) HPC - HPC Hamburg Port Consulting GmbH and SEREFACO Consultants Limited.

As set out in the RFP document, only bidders who scored 75% would proceed to the next evaluation stage. M/s CPCS Consortium and Maritime and Transport Business Solutions consortium scored 75% and above and were invited for the opening of their financial bids.

FINANCIAL EVALUATION

The opening of the Financial Proposals was held on Monday, 12th October 2009 at 2.30 p.m. at the Privatization Commission offices in the presence of the representatives of the two Consortia.

The tabulated below is the breakdown of the costs as read out during the Financial bids opening meeting.

No.	Consortia	Remuneration + Reimbursables (Kshs)	Taxes (Kshs)	Grand Total (Kshs)
1	CPCS Consortium	85,674,531.00	22,135,168.00	107,809,698.00
2	mtbs Consortium	113,544,593.00	28,386,148.00	141,930,741.00

The Evaluation Committee reviewed and analyzed the Financial bids and noted the following:

- (i) The Committee noted that the Financial Proposal by the mtbs Consortium offered two discounts:
 - a) One time Commercial discount of 15%; and
 - b) Fiscal discount on submission of with-holding-tax certificate by the client (the bidder gave a fiscal discount of Kshs.6,540,000.00 at the preparatory stage and a fiscal discount of Kshs.7,630,000.00 at the implementation).

- (ii) The Evaluation Committee noted that mtbs Consortium did not indicate the Value Added Tax (VAT) amount in their Financial Bid although it indicated the with-holding tax calculated at 20%. The proposal quoted Section 6(6) of the V.A.T. Act, (Cap. 476, laws of Kenya) which provides that tax on services imported into Kenya shall be payable by the person receiving the taxable service, the client. **mtbs Consortium therefore argued that V.A.T. is "reversed" and not part of the contract.**

- (iii) The Committee deliberated on this and noted that V.A.T. will be an additional cost to the client, who has no output V.A.T. to offset the V.A.T. expenses on this project and should therefore be reflected as part of the contract price/sum (overall cost). The Financial Bid for the other Bidder included V.A.T. as required in the Request for Proposals (RFP) document.

During the bidders Conference held on 2nd September 2009 and attended by representatives of all the pre-qualified bidders, among other things the bidders sought to know the taxes applicable to consultancy work in Kenya and especially for non-residents. The Commission notified bidders that for non-resident firms both Value Added Tax (V.A.T.) of 16% and withholding tax which varies from country to country, are applicable. V.A.T. and 5% withholding tax are also applicable to resident firms.

- (iv) The Committee further noted that the mtbs Consortium financial proposal indicated that their Contract Price was exclusive of any taxes, duties, fees etc outside the Netherlands. **It noted further that the order price shall be increased to include the amount of the taxes, duties, fees to be levied on it.**
- (v) The Committee calculated the VAT payable by the mtbs Consortium as follows and included this in the contract price.

V.A.T at preparatory stage

$$= 16\% * \text{Kshs.65,692,311} = \text{Kshs.10,510,769.76}$$

V.A.T at implementation stage

$$= 16\% * \text{Kshs.71,941,799} = \text{Kshs.11,510,687.84}$$

**Total V.A.T. applicable to the mtbs financial bid totaled
Kshs.22,021,457.60**

- (vi) The Committee further noted that the calculations for the withholding tax calculations by the mtbs Consortium was erroneous as shown below:

With- holding tax at preparatory stage

$$= 20\% * \text{Kshs.65,692,311} = \text{Kshs.13,138,462.20} \text{ and not } \text{Kshs.13,638,066} \text{ as appearing in the mtbs Consortium Financial Proposal.}$$

With- holding tax at implementation stage

$$= 20\% * \text{Kshs.71,941,799} = \text{Kshs.14,388,359.80} \text{ and not } \text{Kshs.13,748,082.00} \text{ as appearing in the mtbs Consortium Financial Proposal.}$$

The table below shows the revised cost of the mtbs Consortium financial bid that took account of the above corrections.

A. PREPARATORY STAGE		AMOUNT (Kshs)
RENUMERATION		65,692,311.00
Discount (15%)		9,853,847.00
		55,838,464.00
TAXES		
Withholding Tax	20%	13,138,462.20
Vat-On Gross Amount	16%	10,510,769.76
		23,649,231.96
Discount		6,540,000.00
		17,109,231.96
Reimbursables		5,253,800.00
SUBTOTAL		78,201,495.96
B. IMPLEMENTATION STAGE		
Remuneration		71,941,799.00
Discount		(10,791,270.00)
		61,150,529.00
TAXES		
Withholding Tax	20%	14,388,359.80
Vat-On Gross Amount	16%	11,510,687.84
		25,899,047.64
Discount		7,630,000.00
		18,269,047.64
Reimbursables		5,471,800.00
SUBTOTAL		84,891,376.64
TOTAL COST		163,092,872.60

The Summary of the cost for the two bidders was therefore as shown below:

No	Consortia	Remuneration + Reimbursables (Kshs)	Taxes (Kshs)	Grand Total (Kshs)
1	CPCS Consortium	85,674,531.00	22,135,168.00	107,809,698.00
2	mtbs Consortium	113,544,593.00	49,548,279.60	163,092,872.60

In compliance with Section 62 (1) and (2) of the Act, mtbs Consortium was notified of the above revisions and clarifications vide a letter dated 13th October 2009. In response to the letter by the Commission, mtbs Consortium in a letter dated 14th October 2009, presented an argument that was contrary to the facts stated in their Financial Proposal and which materially and substantially altered the original Financial Proposal by claiming that the Contract sum was inclusive of the V.A.T. yet in the Financial Proposal they had categorically stated that **VAT is "reversed" and not part of the contract.** The original Financial proposal had further indicated that their Contract Price was exclusive of any taxes, duties, fees etc outside the Netherlands and that **the order price shall be increased to include the amount of the taxes, duties, fees to be levied on it.**

The evaluation committee stated that the argument by mtbs Consortium contravened Section 62(2) of the Public Procurement and Disposal Act, 2005 as it changed the substance of the tender. It was noted that the RFP document in Section 10.6 required that the total contract amount in the Financial proposal inclusive of taxes and reimbursables be used for ranking the received Financial proposal. The same section provided the scoring for the lowest cost proposal which would be awarded 20 points while other proposals would be awarded proportionate points as per the formulae set out in the same section of the RFP.

The Evaluation Committee evaluated the Financial bids taking into account the above revisions and in accordance with the procedures and criteria set out in Section 10.6 of the RFP document and as per Section 82 of the Act, and Regulation 50 of the Public Procurement and Disposal Regulations, 2006 (hereinafter "the Regulations"). In particular, the evaluated bid prices took into

account corrections made by the Evaluation Committee relating to errors and deviation from the requirements set out in the RFP and acceptable to the client.

The summary of the Evaluation Results was as follows:

No.	Consortium	Technical score (%)	Financial score (%)	Overall score (%)	Ranking
1	CPCS Consortium	65.36	20.0	85.36	1
2	mtbs Consortium	70.38	13.22	83.60	2

In line with Section 10.7 of the RFP document, the Evaluation Committee recommended to the Privatization Commission Tender Committee that the Consortium of: CPCS Transcom Limited, Centre for Development Consultants Ltd, CB Richard Ellis Kenya, Standard Investment Bank and Mboya & Wangong'u Advocates; be awarded the Contract for Transaction Advisory Services for the Privatization of approved Kenya Ports Authority Projects at a cost of Kshs.107,809,698.00 inclusive of taxes.

TENDER COMMITTEE DECISION

The Privatization Commission Tender Committee at its meeting No. CTC/12/2009 held on 21st October 2009 discussed, the application for authority to procure Transaction Advisory Services for Privatization of Kenya Ports Authority projects. The Tender Committee approved the recommendation by the Evaluation Committee to award the Tender to the Consortium comprising of CPCS Transcom Limited, Centre for Development Consultants Ltd, CB Richard Ellis Kenya, Standard Investment Bank and Mboya & Wangong'u Advocates at a Contract price of **Kshs.107,809,698** that was inclusive of taxes.

The Procuring Entity sent out Letters of notification to the successful and unsuccessful bidders on 21st October 2009.

THE REVIEW

The Request for Review was filed on 3rd November, 2009 by Maritime & Transport Business Solutions B. V. At the hearing the Applicant was represented by Mr. Mohammed Nyaoga, Advocate, the while the Procuring Entity was represented by Mr. Kiragu Kimani, Advocate. The Interested Candidate CPCS Consortium was represented by Mr. David Mwaura, Advocate.

The Applicant has prayed for the following orders:

- (a) The decision of the Procuring Entity that its Proposal was unsuccessful, and communicated to the Applicant vide the Procuring Entity's letter of 21st October 2009, be annulled;
- (b) The Procuring Entity be directed to declare the Applicant's Proposal as the successful proposal and to enter into negotiations and contract with the Applicant in accordance with sections 83 to 85 (inclusive) of the Act;
- (c) The Procuring Entity be directed to pay the Applicant the costs of and incidental to these proceedings; and
- (d) Such other or further orders and or directions as the Honourable Board shall deem just and expedient.

The Request for Review raises eight grounds of review which we deal with as follows:

Grounds 1 - 8 , Breach of Section 2 (a), (b) , (c) , (d) (e) Section 82, 83, 84, 85 and Regulation 50

The Applicant raised eight grounds of appeal which it argued together. The Applicant stated that the Procuring Entity evaluated its financial proposal in a manner inconsistent with;

- a) Sections 2(b), (c), (d) and (e) and 82 of the Public Procurement and Disposal Act 2005 ("the Act");
- b) Regulation 5 of the Public Procurement and Disposal Regulation, 2006, ("the Regulations");
- c) Section 6 (6) of the Value Added Tax Act; and
- d) Clause 10:7 of the Request for Proposal

It submitted that after technical proposals, two bidders, one of whom was the Applicant qualified for financial evaluation. It averred that its technical score was better than that of the successful bidder by a margin of 6.28 points.

The Applicant stated that taking into consideration the marks garnered by it at technical evaluation; the financial proposal; the evaluation criteria set out in Clauses 10.4 and 10.6 of the Request for Proposal; and the Provisions of Section 82(5) of the Act, its proposal should have been declared the successful proposal.

The Applicant stated that the Procuring Entity sent a letter dated 13th October 2009 alleging a non-existent anomaly in its Financial Proposal. It argued the

revisions and corrections of its Financial Proposal by the Procuring Entity was not justifiable. It argued that in making the revisions and corrections the Procuring Entity grossly and unjustifiably inflated the actual cost of its Financial Proposal.

The Applicant further submitted that on 14th October 2009, it wrote to the Procuring Entity to confirm that its Financial proposal was inclusive of all local taxes and that any applicable taxes would be payable from its bid price. It argued that the Procuring Entity refused to reverse the revisions and corrections and instead declared that the proposal was unsuccessful.

The Applicant cited Section 6(6) of the Value Added Tax Act which provides that tax on services imported into Kenya, shall be payable by the person receiving the taxable service. It argued that by inviting firms resident outside Kenya, which included the Applicant to bid for consultancy services, the Procuring Entity was seeking to import services into Kenya.

The Applicant further argued that by requiring bidders to indicate VAT chargeable in the Financial Proposals, the Procuring Entity was seeking to procure services illegally as it was procuring the services in a manner inconsistent with an Act of Parliament.

The Applicant also cited Regulation 50 and stated that that Regulation only permits Procuring Entities to make corrections of arithmetic errors in tender documents and to take into consideration minor deviations from the requirements as stipulated in Section 64 (2) of the Act. It argued that the omission of VAT in the Financial Proposal was not an arithmetic error within the meaning of Regulation 50. It argued that Regulation 50 could not be

interpreted in a manner that would infringe Section 6(6) of the VAT Act and it relied on Section 31(b) of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya that provide that no subsidiary legislation shall be inconsistent with the provision of an Act.

In conclusion, the Applicant submitted that in view of the manner the evaluation was done, the Procuring Entity failed to observe the objectives of the Public Procurement and Disposal Act, 2005 as set out in Section 2.

In response, the Procuring Entity submitted that the objective of the tender was to involve the private sector with the aim of enhancing the overall competitiveness of the port of Mombasa through provision of quality and efficient port services.

The Procuring Entity submitted that the Request for Review was frivolous and offended Section 93 (2) (d) of the Act. It argued that the Applicant had failed to specify the particulars of the sections of the Act that were breached.

The Procuring Entity stated that the allegation that it breached Clause 10.7 of the Request for Proposal had no basis. It argued that once the Tender Committee had made its award, it was the duty of Chief Executive Officer to issue the award notification.

On the allegation that it altered the Applicant's Financial Proposal and therefore unjustifiably inflated the actual cost, the Procuring Entity stated that the correction was done in good faith and for good reasons. It argued that the correction was to bring out the true value of that proposal in order to ensure fairness in the ranking of the bidders.

The Procuring Entity averred that following request for clarification of the Request for Proposal document by the bidders, it invited all the qualified bidders for a bidder's conference to address questions and clarification on various issues. The bidder's conference was held on 2nd September 2009 and one of the issues that arose was the taxes applicable on consultancy work in Kenya by non-residents. It stated that bidders were notified that for non-residents, both Value Added Tax of 16% and withholding tax which varies from country to country was applicable. It also clarified that 5% withholding tax was applicable to resident firms. It also stated that at that meeting the bidders requested for extension of deadline for submission of proposals which was granted and the deadline was extended to 25th September 2009.

The Procuring Entity stated that by 11th September 2009, it received additional requests for information and clarification. As a result, it issued a letter dated 17th September 2009 addressed to all the bidders. It stated that in answer to question number 5 in the letter for clarification, it informed the bidders that consultancy services in Kenya are subject to value added tax at 16% and withholding tax.

It further stated that during evaluation, it noted that the Applicant's Financial Proposal indicated that its contract price was exclusive of any taxes, duties, fees outside the Netherlands. It stated that it also noted that the calculation for the withholding tax by the Applicant were erroneous. It averred that the Evaluation Committee noted that VAT would be an additional cost to it and that it had no output VAT to offset VAT expenses on the project. It further noted that the successful bidder had included VAT as was required in the Request for Proposal. Accordingly, the Evaluation Committee having

considered the errors presented in the Applicant's financial proposal revised and corrected the errors accordingly. The Procuring Entity submitted that the errors were communicated to the Applicant pursuant to Section 63(3) of the Act and that the Applicant had two choices namely;

- a) to accept the correction; or
- b) to reject it whereupon it's tender would be rejected.

It argued that the Applicant's response by its letter dated 14th October, 2009 indicating that its price was all inclusive, was a rejection of the correction and therefore it had no choice but to reject the tender.

The Procuring Entity stated that it used the formula set out in Clause 10.6 of the Request for Proposal document to rank the bidders, followed the criteria set out therein and also did evaluation in accordance with Regulation 50 of the Regulations and Section 82 of the Act. It stated that the successful bidder had the highest overall scores compared to the Applicant.

On the issue of the VAT, the Procuring Entity responded as follows;

1. Even if it accepted for arguments sake that VAT was not applicable, the same position would apply to the Financial Proposal by the successful bidder and the position would not change as the successful bidder would still remain the lowest evaluated.
2. That two of the main objectives of the Act as set out in section 2 is to maximize economy and efficiency, promote competition and ensure that the competitors are treated fairly.

It argued that there is nothing in the VAT Act or any Act of Parliament to stop a Procuring Entity to pass to the bidders a tax that is charged in order to maximize economy and efficiency.

3. The tender involved foreign and Kenyan firms and the taxes were included to promote competition and ensure that bidders were treated fairly.
4. The Applicant stated clearly in its bid that its Financial proposal did not include VAT and that such tax was not payable.
5. That bid by the Applicant was not responsive as it did not include all taxes.
6. Clause 10.6 of the RFP clearly states that the total contract amount in the Financial Proposal inclusive of taxes and reimbursables were to be used for ranking the Financial Proposals. It stated that the bid data sheet clearly stated that the taxes were to be specified based on the breakdown of the consulting costs. It further stated that Clause 8.6 stipulated that the financial proposal was to include local taxes, duties, fees and levies relating to assignment imposed under law pertaining to permanent residents of Kenya.
7. Section 6(6) of the VAT Act sets out from whom the tax authority will collect the tax chargeable. It stated that this was logical as it would be easy to recover the tax from the Kenyan firm receiving the service than the foreign firm providing the service which is not resident in Kenya. It

averred that under section 6(7) of the VAT Act the Commissioner is given power to appoint by notice the tax payable where the supplier is normally resident out of Kenya.

8. There was nothing wrong with the Procuring Entity instructing the bidders to include VAT in their bids as this was meant to maximize economy and efficiency, promote competition and ensure that all bidders are treated equally.

On the issue of correction of errors, the Procuring Entity submitted that it acted in accordance with sections 63 as read with 64 of the Act. It argued that failure to include tax was an oversight that could be corrected without affecting the substance of the tender. It argued that the withholding tax by the Applicant was corrected downwards and that VAT was calculated in accordance with Clauses 8.6, 10.4, and 10.6 and the bid data sheet in the Request for Proposal.

The Procuring Entity submitted that if the Applicant's arguments are accepted, it would mean that the Procuring Entity would have produced two tender documents for local bidders and another for foreign firms. It argued that this would not have promoted fairness. In any case, it argued that both the successful bidder and the Applicant had local components in the consortia.

In conclusion, the Procuring Entity submitted that the Applicant had offered a higher price and even if the tax element was removed in the evaluation, the successful bidder would still emerge with the highest combined score.

On its part, the successful candidate associated itself with the submissions of the Procuring Entity. It stated that the corrections by the Procuring Entity were

done to ensure fairness and that the Applicant would not have won whether the taxes were included or not.

The Board has carefully considered the submissions of the parties and considered all the documents that were presented before it.

The Board noted that the issues that arise for determination is how the Value Added Tax was handled at the financial evaluation stage and its impact on the tender evaluation process.

To determine that issue it is important to set out the clauses that dealt with V.A.T in the Request for Proposal document. These were clauses 8.6, 10.4 and 10.6 which states as follows:

CLAUSE 8.6

"The financial proposal should include:-

- i) All domestic and international costs associated with the assignment including staff remuneration and reimbursable expenses, which should be expressed in Kenya Shillings;*
- ii) Local taxes, duties, fees and levies relating to the assignment imposed under law pertaining to permanent residents of Kenya;*
- iii) Any commissions and gratuities to be paid to other associates in relation to the assignment;*
- iv) The financial Proposal must remain valid after submission for the duration indicated in the Data Sheet, and should be submitted in the format shown on Appendix III (3A to 3C)"*

CLAUSE 10.4

Bidders who will have received the qualifying marks for the Technical Proposals (75%) shall be notified on the date when the Financial Proposals will be opened. The Weighting given to the technical and financial proposals will be 80% and 20% respectively.

CLAUSE 10.6

Financial Proposal

The total contract amount in the financial proposal inclusive of taxes and reimbursable will be used for ranking the received financial proposals inclusive of taxes and reimbursable will be used for ranking the received financial proposals.

The lowest cost proposal will be awarded 20 points. Other cost proposals will be awarded proportionate points as per formulae:

Lowest Cost Proposal x 20

Other Proposal's Cost

*Overall Ranking: the overall ranking will be computed as follows:
0.8 x points score on technical proposal + points score on financial proposal. The bidder with the highest overall score shall be considered to be the winner"*

The Board further noted that on 2nd September 2009 a Bidders Conference was held and various issues arose for clarification. Question No.17 and the response of the minutes of that meeting read as follows:

Question :

What are the specific taxes applicable to consultancy work in Kenya and especially for firms that are non-residence firms?

Response:

- ***For resident firms,***
 - ***16% VAT***
 - ***5% with-holding tax***
- ***Non-residents firms;***
 - ***16% VAT***
 - ***20% with-holding tax - for countries without a Double Tax Treaty/Agreement (DTT) with Kenya.***
- ***Examples of those with DTT tax are: UK 12.5%; India 17.5%;Germany 15%, and Canada 15%***
- ***Kenya has no DTT with Netherlands and therefore, the with-holding tax rate is 20% .***

On 17th September 2009, the Procuring Entity sent a letter to all the bidders addressing various issues arising for clarification sought by the bidders and question No.5 was as follows;

“Q5 Which taxes are applicable for the Financial proposal? Please specify exactly.

A: Consulting services in Kenya are subject to Value Added Tax (VAT) at 16% and withholding tax. However, the Consultant may seek independent tax advise professional tax advisory terms.”

The Board has noted that after Technical Evaluation only two bidders qualified for financial evaluation. These were, Maritime and Transport Business Solutions (mtbs) consortium consisting of M. A. Consulting Group; Maxcad Consulting Engineers; Norton Rose LLP; and Anjarwalla and Khanna which is the Applicant and CPCS Transcom Ltd consortium consisting of Centre for Development Consultants Ltd; CB Richard Ellis Kenya; Standard Investment Bank; and Mboya and Wang'ong'u Advocates, the successful candidate.

It is clear that there is no complaint at all on how the technical evaluation process was conducted. The bone of contention is how the Procuring Entity conducted the Financial Evaluation. To the Applicant, it was done in a manner that contravened section 2 and 82 of the Public Procurement and Disposal Act, 2005 and Section 6(6) of the Value Added Tax. The said Sections provide as follows:

Section 2

The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives –

- (a) To maximize economy and efficiency;***
- (b) To promote competition and ensure that competitors are treated fairly;***
- (c) To promote the integrity and fairness of those procedures;***
- (d) To increase transparency and accountability in those procedures; and***
- (e) To increase public confidence in those procedures.***
- (f) To facilitate the promotion of local industry and economic development.***

Section 82

- (1) *The procuring entity shall examine the proposals received in accordance with the request for proposals.***
- (2) *For each proposal, the procuring entity shall evaluate the technical proposal to determine if it is responsive and, if it is, the procuring entity shall assign a score to the technical proposal, in accordance with the procedures and criteria set out in the request for proposals.***
- (3) *For each proposal that is determined, under subsection (2), to be responsive, the procuring entity shall evaluate and assign a score to the financial proposal, in accordance with the procedures and criteria set out in the request for proposals.***
- (4) *If the request for proposals provides for additional methods of evaluation, the procuring entity shall conduct such methods in accordance with the procedures and criteria set out in the request for proposals.***
- (5) *The successful proposal shall be the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4).***

Section 6(6) of the Value Added Tax

Tax on services imported into Kenya shall be payable by the person receiving the taxable service.

Before dealing with the issue of how the Financial Evaluation was conducted, it is important to set out how the two bidders who qualified for financial evaluation dealt with the question of VAT.

The Applicant in its Financial Proposal stated as follows at the summary of costs:

“Local taxes

Withholding tax (20% of gross amount)

VAT (reversed VAT applicable)”

The Applicant's financial proposal also stated as follows:

“Clause e. Taxes

Our offer includes with-holding tax (WHT), and assumes that the Client will timely issue the appropriate WHT Certificates (or other documentary evidence) required by the Consultant for eventual re-substitution of the WHT by the Tax Authority in Consultant's Country.

It is our understanding that reverse VAT is payable and Section 6 (6) of the VAT Act provides that tax on services imported into Kenya shall be payable by the person receiving the taxable service, the Client. VAT is therefore “reversed” and not part of this Contract.

The Contract Price is exclusive of any other taxes, duties, fees, etc. outside the Netherlands as indicated above. Should for any reason this

undertaking have no force or effect, it is agreed that the order price shall be increased to include the amount of the taxes, duties, fees, etc to be levied on it.

The Board has further noted that on 13th October 2009 the Procuring Entity wrote to the Applicant informing it that the Evaluation Committee had noted anomalies in the summary of costs and had adjusted the figures. The Procuring Entity requested the Applicant to confirm the corrections. The Applicant replied by a letter dated 14th October 2009 and stated as follows;

"Dear Mr. Kitungu,

We acknowledge receipt of your letter, dated 13th October 2009 with reference PC/I/07.

Please note that in our offer (Forms 3A, 3B) the Contract Price is Kshs. 141,930,741. This amount is inclusive of all local taxes as per the specification in the RFP for this Project. We have estimated the taxes payable to our best possibility but naturally accept that under an "all - inclusive Contract", in the event that the actual taxes payable under this Project differ from our estimation, that these would be payable from the stated Gross Contract Price of Kshs. 141,930,741.

Concerning the revised table 3B in your letter we cannot comment as the meaning of the two columns is not clear to us.

In case you have any further questions please do not hesitate to contact us.

Yours Sincerely,

Paul van Eulem

Director "

On the part of the successful candidate, the Board has noted that this Bidder included the item on VAT in its Financial Proposal and quoted a VAT sum of Kshs. 22, 135, 168.

The Board has further noted that at the Financial Evaluation stage figures for the Applicant were adjusted to include VAT. The Procuring Entity thereafter sent a letter dated 13th October 2009 requesting the Applicant to confirm the corrections. That letter is the genesis of the dispute that is before the Board.

As the Board has already observed the Request for Proposal in Clauses 8.6, 10.4 and 10.6 required bidders to quote VAT. The same question was raised at the Bidders Conference held on 2nd September 2009 and the bidders were advised to include VAT at the rate of 16%. It is also not in dispute that upon further clarification from bidders a letter dated 17th September 2009 was sent to all bidders advising them that consulting services in Kenya are subject to Value Added Tax at 16%.

In its bid, the Applicant stated categorically that VAT was not payable. It relied on Section 6(6) of VAT Act that state that for services being imported into Kenya it is the importer of the service who is liable to pay tax. Though the Applicant wrote the letter dated 14th October 2009 referred to above, it is clear that its position is that VAT was not payable.

The Board has carefully considered Section 6(6) of the VAT Act. It is clear that the said section states that for services being imported to Kenya, the person importing the service is liable to pay tax. The issue that arises is whether the Procuring Entity was wrong by requiring bidders to quote VAT. In the Board's view that question can be answered as follows:-

Firstly, the Value Added Tax Act Cap 476 gives the Kenya Revenue Authority, the power to levy and collect tax on goods delivered in, or imported into Kenya and on certain services supplied in or imported into Kenya and for connected purposes. When one looks at Section 6(6) of the VAT Act carefully it is clear that the section places the burden of paying the tax on services imported to Kenya by the person receiving the taxable services. To the Board, this is a logical thing as it would be difficult for the Revenue Authority to deal with a defaulting person who is not resident in Kenya. However, there is nothing in the VAT Act that prevents the person paying the tax from passing it to the person who is providing the service, as the Procuring Entity did in this tender.

Secondly, even if the Board is wrong in its interpretation of Section 6(6) of the VAT Act, it is not in dispute that the Applicant in this tender was a Consortia which include foreign based firms and local firms.

The local firms were the following;

- (i) M. A. Consulting Group
- (ii) Maxcad Consulting Engineers
- (iii) Anjarwalla & Khanna Advocates

Being members of the Consortia, the local firms were providing services and certainly do not enjoy any protection under Section 6(6) of the VAT Act. The

Consortia is not a body that is registered as a resident outside Kenya. It is a group of firms consisting both foreign and local firms. That being the case, the Procuring Entity was right when it required the bidders to include VAT in their bid documents as this was an international tender open to both the local and international bidders who were free to form a consortia.

The Board has further considered the objectives of the Public Procurement and Disposal Act, 2005 as provided in section 2 (b) and it stipulates as follows;

"2(b) To promote competition and ensure that bidders were treated fairly.

(e) To promote integrity and fairness of those procedures"

If the Board were to uphold the argument by the Applicant, it would mean that the Procuring Entity would have produced two tender documents; One for local bidders with a clause on VAT and another for foreign bidders excluding VAT. This would not promote fairness or competition as foreign firms would enjoy favourable terms over the local firms.

The requirement by the Procuring Entity for bidders to include VAT was meant to ensure there was fair competition between the bidders. If by doing so there was a conflict between Section 6(6) of VAT Act and the Public Procurement and Disposal Act, 2005, then the later would prevail in view of section 5(1) which provide as follows:

"If there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, in matters relating to

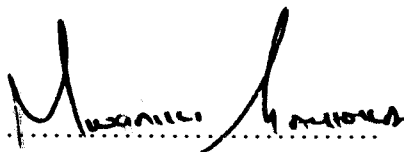
procurement and disposal, this Act or the regulations made under this Act shall prevail."

Finally on this issue of VAT the Board finds that since the Applicant had not quoted VAT in its Financial Proposal, it failed to comply with a mandatory requirement. Therefore, it ought to have been disqualified and should not have been evaluated further. It was not necessary for the Procuring Entity to correct the bid by including VAT.

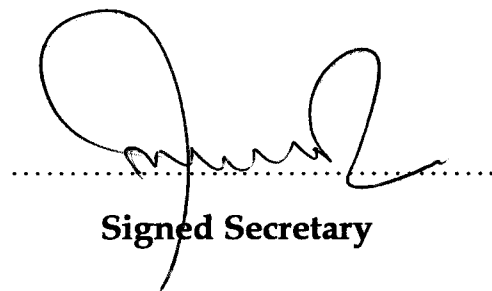
In any event, the Board has noted that whether the VAT was included or not, the Applicant would not have scored the highest combined score. As the Board has stated severally procurement is a competition governed by clear rules. Bidders must comply with all the requirements of a tender. If a bidder fails to comply on clear requirements, it will only have itself to blame when it is knocked out of the race. In this particular instance, the Applicant was advised at the Bidders Conference on 2nd September 2009 and by the letter dated 17th September 2009 that quoting VAT was a mandatory requirement. It failed to do so upon seeking advice and it can only blame itself for the failure to comply with a clear requirement.

Taking all the above matters into consideration, all the grounds of appeal fail and the Request for Review is hereby dismissed. There is no order as to costs. The procurement process may proceed.

Dated at Nairobi on this 3rd day of December, 2009



Signed Chairman



Signed Secretary