

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 21/ 2012 OF 22ND MAY, 2012

BETWEEN

LANDMARK HOLDINGS LIMITED

AND

JOMO KENYATTA UNIVERSITY OF AGRICULTURE

AND TECHNOLOGY

Review against the decision of the Tender Committee of Jomo Kenyatta University of Agriculture and Technology in the matter of Tender No. JKUAT/43/ 2011-2012 for Proposed Construction of New Administration Block at Juja Campus.

BOARD MEMBERS PRESENT:

Mr. Joshua W. Wambua - Member, (in the Chair)
Mr. Sospeter Kioko - Member
Mr. Akich Okola - Member
Ms. Natasha Mutai - Member
Eng. Christine Ogut - Member

IN ATTENDANCE:

Mr. C.R. Amoth - Secretary
Ms. Pauline Opiyo - Secretariat
Ms. Judy Maina - Secretariat

PRESENT BY INVITATION:

Applicant – M/s Landmark Holdings Ltd

Mr. Harveer Sethi - C. E. O.

Mr. Erastus Gekandi - Quantity Surveyor

Procuring Entity – Jomo Kenyatta University of Agriculture & Technology

Mr. Patrick Lutta - Advocate

Mr. Elijah Moki - Advocate

Ms. Susan Lutta - Pupil

Mr. Lawrence Maruti - Pupil

Mr. Wakaba J. K. - Quantity Surveyor

Dr. Titus Kivaa P. M. - Quantity Surveyor

Ms. Susan Bukhali - Chief Procurement Officer

Ms. Hellen Karu - Estates Manager

Ms. Susan Kibue - Architecture

Interested Parties

Mr. Benard Chege - Advocate, Marimo Construction Co.

Ms. Yvonne Akinyi - Administrator, Marimo Construction Co.

Mr. Migwi Mich - Marimo construction Co.

Mr. Amos Muthee - Quantity Surveyor, Buildmore Construction Co.

Ms. Joyce Nyokabi - Quantity Surveyor, Buildmore Construction Co.

Mr. Elkanah Omuhaya - Office Administrator, Buildmore Construction Co.

BOARD'S DECISION

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

BACKGROUND OF THE AWARD

Invitation for Bids

The Jomo Kenyatta University of Agriculture and Technology in a Tender Notice advertised in the Daily Nation of 25th January, 2012, invited tenders for the Proposed Construction of JKUAT Administration Block - Tender No. JKUAT/ 43/2011-2012.

Closing/Opening

The date/time for closing/opening of tenders as stipulated in the Tender Document was 15th February 2012 at 11.30 a.m. Bidders were invited to attend and witness the opening of the tenders if they so wished. Tenders were received from 16 bidders and were recorded in a tender opening register as shown in the table hereafter.

Table 1 -Tender Opening Register

No.	Bidder's Name	Bid Price (Kshs.)	Bid Bond Provider
1	Mavji Construction Co. Limited	317,996,451.00	Not Indicated
2	Dinesh Construction Co. Limited	328,870,775.00	Incidental Insurance Co.
3	Marimo Construction Limited	274,994,115.00	Amaco Insurance Co.
4	Sichuan Huashi Enterprises Co.	283,074,513.00	No bid bond provided
5	Spion Construction Co.	254,203,930.00	Amaco Insurance Co.
6	Buildmore Co. Limited	288,084,860.00	Intra Africa Assurance Co.
7	Tulsi Construction Limited	280,732,905.00	Mayfair Insurance Co.
8	Italbuild Imports Limited	276,347,294.00	Imperial Bank Limited
9	The Devcon Construction Group Limited	338,970,450.38	Chase Bank
10	Skillman Construction Limited	271,099,445.00	Amaco Insurance Co.

11	Njama Company Limited	310,034,550.00	Equity Bank
12	N.K Brothers Limited	277,909,101.00	Intra Africa Assurance Co.
13	Thwama Building Services	290,000,000.00	Amaco Insurance Co.
14	Ernie Campbell & Co. Limited	286,747,114.00	Fidelity Shield Insurance Co. Limited
15	Landmark Holding Limited	248,508,565.00	APA Insurance Co.
16	Erick Okwaro Akech	Not Indicated	Not Provided

EVALUATION

Evaluation/Examination of bids was conducted in three stages namely preliminary, technical and financial evaluation.

Preliminary Evaluation

In view of Section 47(1) of the Public Procurement and Disposal Regulations (2006), the technical committee carried out preliminary evaluation for this tender to confirm whether or not the bidders provided all the required mandatory documents. The mandatory requirements as provided for in the tender advert and bid documents were as follows:

1. Proof of Work of similar magnitude and complexity undertaken in the last five years.
2. Documentation of the equipment and key personnel adequate for the specified types of works.
3. Audited accounts for the last 3years, and a letter of credit line from a reputable bank.
4. Proof of litigation History of the company (both court and arbitration cases).
5. Confidential Business Questionnaire.
6. Tax Compliance Certificate.
7. A copy of registration certificate with the Ministry of Public Works in category "B" and above.

8. A Bid Bond of a half percent (1/2%) of the tender sum in form of a Bank Guarantee from a reputable bank or an approved insurance company.

The preliminary evaluation was carried out the results recorded in a score sheet. During this stage of evaluation seven (7) bidders were rejected for various reasons. The rejected bidders were: Erick Okwaro Akech; Sichuan Huashi Enterprises Corp. East Africa; Mavji Construction Co. Limited; Ernie Campbell & Co. Limited; Skillman Construction Limited; The Devcon Group Limited and Thwama Building Services Limited.

The following nine (9) bidders passed the preliminary evaluation and proceeded to technical evaluation.

1. Marimo Construction Limited
2. Italbuild Imports
3. Spion Construction Company
4. Njama Company Limited
5. N.K Brothers
6. Tulsi Construction Limited
7. Buildmore Construction Co. Ltd
8. Landmark Holdings Limited
9. Dinesh Construction Company

Technical Evaluation

At this evaluation stage, the committee looked into the bidders' capacity to carry out the proposed project based on equipment, key personnel adequate for the specified types of works and similar magnitude and complexity undertaken in the last five years.

The nine firms were evaluated as indicated in attached document. All the nine (9) firms were accepted at this stage and therefore proceeded to financial evaluation.

Financial Evaluation

At this stage of evaluation, the committee analyzed the bills of quantities of the nine (9) responsive bidders based on the following main criteria:

1. The consistency in pricing
2. The cost per square metre on builder's work
3. Any arithmetic error
4. The completion period
5. The neatness of the bidder's pricing

The bidders were ranked based on submitted tender sums as shown in the table hereafter.

Table 2 - Ranking of Bidders based on Submitted Tender Sums

Rank	Bidder	Submitted Tender Sum (KSHS.)
1	Landmark Holdings Limited	248,508,565
2	Spion Construction Company	254,203,930
3	Marimo Construction Limited	274,994,115
4	Italbuild Imports	276,347,294
5	N.K Brothers	277,909,101
6	Tulsi Construction Limited	280,732,905
7	Buildmore Construction Company Limited	288,084,860
8	Njama Company Limited	310,034,550
9	Dinesh Construction Company	328,870,775

The Technical Evaluation Committee noted that the Quantity Surveyors' cost estimate for this project was **Kshs. 288,296,690.00**.

Bidders whose submitted tender sums fell outside $\pm 10\%$ range of the quantity surveyors' estimate were recommended for rejection based on industry practice and the current practice by the Ministry of Public Works.

The $\pm 10\%$ of the quantity surveyors' estimate for the project was calculated to range from Kshs. 259,467,021.00 to Kshs317,126,359.00.

The following three (3) bidders were rejected at this stage because their submitted tender sums were outside the above mentioned range:

1. Landmark Holdings Limited
2. Spion Construction Limited
3. Dinesh Construction Company

In accordance with Section 63(1) of the Act, the Evaluation Committee noted that among the six (6) remaining bidders, the following four (4) had arithmetic errors in their tender documents as tabulated below.

Table 3 - Correction of Arithmetic Error

No.	Bidders	Submitted Tender Sum (Kshs.)	Corrected Tender Sum (Kshs.)	Arithmetic Error (Kshs.)
1	Marimo Construction Limited	274,994,115.00	297,371,715.00	+22,377,600.00
2	Tulsi Construction Limited	280,732,905.00	280,682,505.00	-50,400.00
3	Njama Company Limited	310,034,550.00	309,637,750.00	-396,800.00
4	Buildmore Construction Co. Ltd	288,084,860.00	288,246,860.00	+162,000.00

The Procurement Department in liaison with the Project Quantity Surveyor wrote to the above four (4) mentioned bidders requesting them to accept or reject their arithmetic errors.

Two bidders, namely Marimo Construction Limited and Buildmore Construction Company Limited, submitted their feedback via letters dated 15th and 19th March, 2012 respectively and both bidders accepted their arithmetic errors.

4.0 Technical Committee Recommendation

The technical evaluation committee recommended award of Tender No. JKUAT/43/2011-2012 for Proposed Construction of New Administration Block at JKUAT Juja Campus to M/s Marimo Construction Limited at a total cost of Kshs. 274,994,115.00.

TENDER COMMITTEE DECISION

The JKUAT Tender Committee at its 96th meeting held on 16th April 2012 the Tender Committee approved award of Tender No. JKUAT/43/2011-2012 for proposed construction of new administration block at JKUAT Juja Campus to M/s Marimo Construction Limited at a total cost of Kshs 274,994,115.00.

The bidders were notified of the Tender Committee decision via letters dated 20th April, 2012.

THE REVIEW

The Applicant lodged this Request for Review on 22nd May, 2012 against the decision of the Tender Committee of Jomo Kenyatta University of Agriculture and Technology in the matter of Tender No. JKUAT/43/2011-2012 for the Proposed Construction of New Administration Block at Juja Campus.

The Applicant was represented by Mr. Erastus Gekandi, Quantity Surveyor while the Procuring Entity was represented by Mr. Patrick Lutta, Advocate. Other interested parties present were M/s Marimo Construction Company represented by Mr. Bernard Chege, Advocate; and M/s Buildmore Construction Company, represented by Mr. Amos Muthee.

The Applicant requests the Board for orders that:

- 1. That the Board allows the application and reviews to proceed outside the first 14 days from date of letter conveying the decision that the Applicant's tender was unsuccessful.**
- 2. The decision of the Procuring Entity not to award Tender No. JKUAT/43/2011-2012 - Proposed Construction of New Administration Block at JKUAT Juja Campus to the Applicant be annulled.**
- 3. The Board do substitute the decision of the Respondent and award TENDER to the applicant as the party with the lowest bid.**
- 4. In the alternative and without prejudice to the above the Board do cancel and nullify the award of the tender to any other Bidder**
- 5. That the costs of these proceedings be assessed by the Board and awarded to the applicant to be paid by the Respondent.**

At the commencement of the hearing, the Board on its own motion raised the issue as to whether or not it had the jurisdiction to hear the Application in light

of the fact that according to the Application, the Request for Review appeared to have been filed out of time.

The Procuring Entity submitted that the Applicant had filed the Request for Review out of time. It further submitted that whereas the letters of notification were dated 20th April 2012, the said letters were not signed and released to the successful and unsuccessful bidders until 27th April, 2012. It stated that the Successful Bidder collected its letter of notification on 27th April, 2012 when its agent had had gone to submit another tender. It further stated that none of the other bidders collected their letters of notification on 27th April 2012 which was a Friday. It argued that since 1st May was a public holiday, it forwarded the letters to the central registry on 2nd May, 2012. It averred that the notification letters were franked and dispatched on 3rd May 2012, and that it would take one day to get to the other bidders. It argued that by the 5th May 2012, the Applicant could have received its letter of notification if it collected it the same day from the post office. It further argued that with an allowance of another 2 days, the appeal window would have expired on 21st May 2012. It concluded that the Request for Review as filed on 22nd May 2012 was therefore out of time and urged the Board to dismiss the Request for Review.

The Successful Bidder, Marimo Construction Company Limited, associated itself with the submissions of the Procuring Entity with regard to the issue. It submitted that pursuant to Section 2(5) of the Interpretations of General Provisions Act, mailed letters should be received just within a day. It referred the Board to its decision in Application No. 31/2006 of 5th June 2006. In conclusion, it stated that based on the provisions of Regulation 73(2) (c) of the Public Procurement and Disposal Regulations, this Request for Review was lodged out of time.

In response, the Applicant submitted that both the Procuring Entity and the Successful Bidder had five days to file a Preliminary Objection once they were served by the Secretary to the Board. It stated that all documents presented to the Board by the Procuring Entity as evidence were internal. It argued that the letter dated 27th April 2012, as indicated in the register, could have been posted to anybody. It alleged that the Procuring Entity had breached Sections 67(1) and 67(2) of the Act by failing to notify all the bidders simultaneously.

The Applicant submitted that it had received the letter of notification on 10th May, 2012 and immediately wrote to the Public Procurement Oversight Authority (PPOA), with a copy to the Procuring Entity, informing them of the receipt of the letter and that they were not satisfied with the decision by the Procuring Entity not to award the Applicant the tender and it intended to appeal against the decision. In the letter to PPOA, the Applicant had also requested for the following:

- i) That the client (the Procuring Entity) avail the reports and reasons used in arriving at the decision.
- ii) That the award be halted pending the appeal.

Upon hearing the parties' submissions and examining the documents before it, the Board made the following findings:-

1. The tender notification was dated 20th April, 2012.
2. According to the Procuring Entity, the Successful Bidder collected the said letter of notification on 27th April 2012, when its agent had gone to submit another tender.
3. According to the internal dispatch register maintained by the Procuring Entity, the entry indicated that the letters of notification to other bidders

were dispatched to the registry on 27th April 2012 for onward transmission to the post office.

4. The Board noted that the envelope addressed to the Applicant was franked on 3rd May, 2012 by the Procuring Entity's registry.
5. The Board notes that the Procuring Entity did not submit any documentation to show when after franking the letters were actually posted.
6. The Board notes that the submission by the Applicant that it did not receive the letter of notification until 10th May, 2012 when it collected the said letter from the Post Office.
7. The Board further notes that upon receipt of the said letter of notification, the Applicant wrote a letter to PPOA on the same date requesting that the award be halted pending the filing of its Request for Review, considering that although the said notification letter was dated 20th April, it did not receive it until 10th May, 2012.
8. After hearing the submissions of the parties and consideration thereby, the Board finds that the burden of proof of when the letters of notification were posted lies with the Procuring Entity. The Procuring Entity has not discharged this burden of proof in view of the fact that it did not demonstrate the dates it posted the letters of notification.
9. Based on the date of receipt of the letter of notification by the Applicant, the appeal window started running on 11th May 2012 and expired on 24th May, 2012. The Board therefore finds that the Request for Review having been filed on 22nd May 2012 was within the appeal window. In this regard, the Board has jurisdiction to hear the Request for Review.

Accordingly, the Board proceeded to hear this Request for Review on its merit.

The Applicant has raised six grounds of review which the Board deals with as follows:

Ground 1

This ground is a generalized factual statement by the Applicant in which no specific breach by the Procuring Entity of the provisions of the Public Procurement and Disposal Act, 2005, hereafter referred to as "the Act", or the Public Procurement and Disposal Regulations, 2006, hereafter referred to as "the Regulations" have been cited. The Board therefore need not make any finding on it.

Grounds 2, 3, 4, 5 &6

These grounds have been consolidated because they raise similar issues relating to evaluation of tenders and award of contract.

The Applicant stated that it had submitted the lowest bid on 15th February 2012. It further stated that by a letter dated 20th April, 2012 and received on 10th May, 2012, it was notified that its bid was unsuccessful. It averred that the Procuring Entity handled the tender documents and processes irregularly and thereby resulting in the award of the contract to a party who did not have the lowest bid as required by law.

The Applicant alleged that the Procuring Entity failed to follow the procedures and criteria set out in the tender documents in violation of the provisions of Section 66 of the Act, which if followed would have obliged the Procuring Entity to award the Applicant the tender.

In conclusion, the Applicant submitted that the above decision was unfair and unprocedural.

In its response, the Procuring Entity stated that the evaluation of tenders was conducted by a technical committee comprising eight members who evaluated the tenders in three stages, namely; preliminary, technical and financial evaluation stages. It further stated that the technical committee carried out preliminary evaluation for this tender to confirm whether or not the bidders provided all the required mandatory documents in line with the tender advertisement and bid documents.

It submitted that seven (7) bids were rejected at the preliminary evaluation stage for various reasons while nine (9) firms including the Applicant proceeded to technical evaluation.

The Procuring Entity further submitted that at the technical evaluation stage, the evaluation committee looked into the bidders' capacity to carry out the proposed project based on equipment, key personnel adequate for the specified types of works of similar magnitude and complexity undertaken in the last five years. It stated that all the nine (9) firms passed this stage and therefore proceeded to the financial evaluation.

The Procuring Entity stated that at the financial evaluation stage, the evaluation committee analyzed the Bills of Quantities of the nine (9) technically responsive bidders based on the following main criteria: the consistency in pricing, the cost per square meter on builder's work, any arithmetic error, the completion period and the neatness of the bidder's pricing.

The Procuring Entity further stated that it then ranked the bidders as indicated in the table hereafter based on the bidders' submitted tender sums:

Table 4 – Ranking based on Submitted Tender Sum

Rank	Bidder	Submitted Tender Sum (Kshs)
1	Landmark Holdings Limited	248,508,565
2	Spion Construction Company	254,203,930
3	Marimo Construction Limited	274,994,115
4	Italbuild Imports	276,347,294
5	N.K Brothers	277,909,101
6	Tulsi Construction Limited	280,732,905
7	Buildmore Construction Company Ltd	288,084,860
8	Njama Company Limited	310,034,550
9	Dinesh Construction Company	328,870,775

It further submitted that the Project's Quantity Surveyors' cost estimate for this project was **Kshs. 288,296,690.00**.

The Procuring Entity averred that due to the magnitude and value of the proposed project, it had written to the Ministry of Public Works on 26th March, 2012 seeking guidance on the percentage of deviation for tender sums within which a tender may be considered both competitive and realistic. It stated that the Ministry of Public Works, in a letter dated 4th April 2012, advised that for projects estimated at below Kshs. 2,000,000,000/=, plus or minus ten percent ($\pm 10\%$) of the quantity surveyor's estimate was an appropriate variance within which a tenderer may competitively execute a project. It submitted that as a result of this advice by the Ministry of Public Works, it calculated the $\pm 10\%$ of the quantity surveyors' estimate to range between Kshs. 259,467,021.00 and Kshs 317,126,359.00. It stated that, arising out of this calculation, the following three (3) bidders were rejected at this stage because their submitted tender sums were outside the ($\pm 10\%$) range of the project quantity surveyors' estimate:-

1. Landmark Holdings Limited

2. Spion Construction Limited

3. Dinesh Construction Company

The Procuring Entity further stated that if the tender is annulled, the funds for the project would be returned to Treasury as the financial year comes to an end on 30th June 2012. It submitted that if this were to happen, the project will not be realized until the financial year 2014/2015 because it had not budgeted for the same in the coming financial year.

In conclusion, the Procuring Entity submitted that it had carried out an objective evaluation of the tender and made its decision without any bias for or against any of the bidders.

On its part, the Successful Bidder associated itself fully with the submissions of the Procuring Entity. It submitted that the tendering process was fair above board, transparent and no prejudice had been suffered by the Applicant. It alleged that the Request for Review was filed out of ill will, in bad faith and was malicious. It urged the Board to examine all documents before it and reject the Request for Review. It informed the Board that it had already issued the Procuring Entity with a Performance Bond. It stated that it had not signed a contract with the Procuring Entity. In conclusion, it urged the Board to dismiss the Request for Review with costs.

The Board has carefully examined the documents before it and the parties' submissions.

The Board notes from the Procuring Entity's Tender Report, Tender Committee Minutes and its written response to the Application under review, that the reason given for the disqualification of the Applicant's bid at Financial Evaluation stage, was that its tender sum was outside the $\pm 10\%$ range of the Quantity Surveyor's estimate.

The issue for the Board to determine, therefore, is whether the Procuring Entity evaluated the tenders in accordance with the evaluation criteria as set out in the Tender Document and in accordance with the provisions of Section 66 of the Act as read together with Regulation 50 with respect to Financial Evaluation.

The Board notes the provisions of Section 66 of the Act as follows:-

“66(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) –

(a) The criteria must, to the extent possible, be objective and quantifiable; and

(b) Each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.

(4) The successful tender shall be the tender with the lowest evaluated price.

(5)

(6)”

The Board further notes, the provisions under Regulation 50 as follows:-

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

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

(a) taking the bid price, as read out at the bid opening;

- (b) taking into account any corrections made by a Procuring Entity relating to arithmetic errors in a tender;*
 - (c) taking into account any minor deviation from the requirements accepted by a procuring entity under Section 64(2) (a) of the Act;*
 - (d) where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;*
 - (e) applying any discounts offered in the tender;*
 - (f) applying any margin of preference indicated in the tender documents*
- (3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66(4) of the Act.*

As the Board has already noted, the Applicant had passed the preliminary and technical evaluation stages and proceeded to Financial Evaluation where it was disqualified for having a tender sum outside the $\pm 10\%$ range of the Quantity Surveyor's estimate.

The Board notes from the Tender Evaluation Report minutes of the 2nd Evaluation Committee Meeting of 7th March, 2012 that, the Bills of Quantities of the nine (9) bidders who had proceeded to Financial Evaluation had been analyzed on the following main criteria:-

1. Consistency in pricing
2. The cost per square metre of builder's work
3. Any arithmetic error
4. The completion period
5. The neatness of the bidder's pricing

The Board also notes that it was at this meeting that the Quantity Surveyor's estimate of Kes 288,296,690.00 was tabled together with a recommendation that

bidders whose submitted tender sums fell outside the $\pm 10\%$ range of the Quantity Surveyor's estimate were to be rejected.

The Board further notes that the $\pm 10\%$ range of the Quantity Surveyor's estimate was calculated to range between Kes 259,467,021.00 to Kes 317,126,359.00, with the result that two bidders, namely, the Applicant and Spion Constriction Company, were recommended for rejection because their submitted tender sums, Kshs 248,508,565.00 and Kshs 254,203,930.00 respectively, were below the stated range and their bids were therefore considered unrealistic. Further, the Board notes that another bidder, Dinesh Construction, was also recommended for rejection because its submitted tender sum was above the stated range and was therefore considered not competitive.

The Board observes that the Evaluation Committee then proceeded to rank the remaining 6 (six) bidders pursuant to Regulation 50 based on the corrected tender sums with the following results:-

Table 5 - Ranking Based on Corrected Tender Sum

Rank Based on the Corrected Tender Sum	Bidder	Corrected Tender Sum (Kshs)
1	Italbuild Imports	276,347,294
2	N.K Brothers	277,909,101
3	Tulsi Construction Limited	280,682,505
4	Buildmore Construction Company Limited	288,246,860
5	Marimo Construction Limited	297,371,715
6	Njama Company Limited	309,637,750

The Board notes that the evaluation was then put on hold pending clarification to be sought on the following matters:-

i) That the Chief Procurement Officer seeks clarification with the Public Procurement Oversight Authority on the stage/point in the procurement process at which clarifications can be requested from the bidders as provided for in Section 62 and 63 of the Public Procurement and Disposal Act (2005).

ii) That the Quantity Surveyor submits to the committee, a formal document from the Ministry of Public Works indicating that bidders who fall outside the $\pm 10\%$ range of the Quantity Surveyor's cost estimate should be rejected.

iii) That the Chairperson of the committee contacts the Ministry of Public Works to seek clarification on the maximum deviation allowed between a bidder's submitted tender sum and the corrected tender sum (the arithmetic error).

iv) That the Chairperson also confirms with the Ministry of Public Works as to whether or not the rate for an item as provided by a bidder can be changed.

The Board further notes that the 3rd Evaluation Committee meeting resumed on 13th March, 2012 with the following clarifications tabled:-

i) That the Chief Procurement Officer confirmed that clarifications can be sought from the bidders at any point during the tender evaluation process as provided for in the Public Procurement Oversight Authority's manual on procurement of works.

ii) That the Chief Procurement Officer also confirmed that unit rate/cost of an item as submitted by a bidder cannot be altered during evaluation and in case of an arithmetic error in multiplication of the unit rate and the quantity to obtain the total amount, the unit rate shall govern.

iii) That the quantity surveyor reported to the committee that even though it was the industry and Ministry of Public Works practice to reject bids based on a (+) or (-) certain percentage variation e.g. 10% between the quantity surveyor's estimate and the submitted tender sum, the Ministry does not have a prior documented policy on the issue.

- iv) That the quantity surveyor also informed the committee that the Ministry of Public Works would however, provide written support for use of this evaluation criteria upon a written request by the University.
- v) That the evaluation committee noted that, as provided in the tender documents, the University was not bound to accept the lowest bidder.

Following these clarifications, the Board notes that the Evaluation Committee proceeded to further evaluate the bids and found that among the 6 remaining bidders, four had arithmetic errors in their bid documents as tabulated hereafter:-

Table 6 - Correction of Arithmetic Errors

No.	Bidders	Submitted Tender Sum (Kshs.)	Corrected Tender Sum (Kshs.)
1	Marimo Construction Limited	274,994,115.00	297,371,715.00
2	Tulsi Construction Limited	280,732,905.00	280,682,505.00
3	Njama Company Limited	310,034,550.00	309,637,750.00
4	Buildmore Construction Company Limited	288,084,860.00	288,246,860.00

Subsequently, it was agreed that the Procuring Entity writes to all four bidder requesting them to accept or reject in writing the arithmetic correction by 15th March, 2012.

From the minutes of the 4th Evaluation Committee meeting held on 20th March, 2012, the Board notes that only two bidders namely, Marimo Construction Limited (the Successful Bidder) and Buildmore Construction Co. had responded by 16th March 2012, accepting their arithmetic errors.

The Board further notes that the Evaluation Committee then proceeded to recommend that the tender be awarded to Marimo Construction Limited, the Successful Bidder, at its tender sum of Kshs 274,994,115.00.

The Board notes that the Tender Committee at its meeting of 16th April, 2012 concurred with the Evaluation Committee's recommendation and awarded the tender to Marimo Construction Limited at its tender sum. The Board further notes that the minutes of this Tender Committee meeting were signed by the Chairman on 28th May, 2012; and that the minutes provided for the Accounting Officer and the Vice Chancellor to sign as well. However, the minutes submitted to the Board were not signed by either signatory.

Arising out of the above observations from the Tender Evaluation Minutes, the Board makes the following findings:-

1. With regard to the Procuring Entity's decision to reject tenders whose bids were outside the $\pm 10\%$ range of the Quantity Surveyor's estimate, the Board has examined the Tender Documents and did not find therein an evaluation criteria stating that bidders whose tender sums were outside the $\pm 10\%$ range of the Quantity Surveyor's estimate were to be disqualified. The Board therefore finds that the Procuring Entity's application of this criterion to reject the Applicant's tender among others, amounted to the introduction of a new evaluation criteria and thus breached Section 66 of the Act.

Furthermore, the Board finds that there was no basis for the % thresholds above or below the Quantity Surveyor's estimate given the response received from the Ministry of Public Works that even though it was its practice to reject bids based on a + or - certain percentage variation e.g. 10% between the quantity surveyor's estimate and the submitted tender sum, the Ministry does not have a prior documented policy on the issue as stated

in Minute 4/4 of the 4th Evaluation Committee Meeting held on 20 March 2012.

The Board also finds that, the process of tabling the Quantity Surveyor's estimate only after the Financial Evaluation Committee had analyzed the Bills of Quantities and not reading it out first at the tender opening, was in itself not a transparent process.

The Board notes that at the hearing, the Procuring Entity went to great lengths to explain that the Applicant was disqualified because of the analysis noted in the Tender Report done by the Quantity Surveyor, Dr. Kivaa and Quantity Surveyor, Dr. Wakaba, and in particular that some of the rates were below market rate, yet this analysis was not referred to in the Tender Report as the basis for rejecting the Applicant's bid. What is clearly and consistently stated is that the bid was rejected because it fell outside the $\pm 10\%$ range of the quantity surveyor's estimate.

2. With regard to the Procuring Entity's decision to rank the tenders and award the tender at the tendered sum rather than the corrected tender sum, the Board finds that this decision breached Regulation 50 which states that the evaluated price of the tender shall be determined by taking the bid price as read out at bid opening and taking into account any corrections made by a Procuring Entity relating to arithmetic errors in a tender. Therefore, the Board finds that the Procuring Entity ought to have ranked the bids at the Financial Evaluation stage based on the corrected sums and not on the tendered sums and subsequently determined the lowest evaluated bidder based on the results of the ranking thus derived and awarded the tender accordingly in accordance with Section 66 of the Act and Regulation 50.

Based on the foregoing, the Request for Review succeeds, and the Board orders pursuant to Section 98 of the Act, that:-

- i) the award to the Successful Bidder is hereby nullified; and
- ii) the Procuring Entity re-evaluates the bids in accordance with the Tender Documents, the Act and the Regulations.

Taking into account the concern raised by the Procuring Entity that the funds for this tender under review will go back to the Treasury if the tender is not awarded by the end of this financial year, the Board directs that the Procuring Entity may re-evaluate the tenders in a timely manner so as to be able to award the tender in time to realize the project as scheduled.

There are no orders as to costs.

Dated at Nairobi on this 19th day of June, 2012



CHAIRMAN

PPARB



SECRETARY

PPARB