

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 33/2014 of 6th AUGUST, 2014

BETWEEN

IOT-H YOUNG CONSORTIUM.....Applicant

AND

KENYA PIPELINE COMPANY LIMITED.....Procuring Entity

Review against the decision of Kenya Pipeline Company Limited in the matter of Tender SU/QT/784N/13 EPC Tender for Construction of Additional White-Oils Storage Tanks and Accessories at Pump Station 10 (Nairobi Terminal).

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

- | | |
|-----------------------|-----------------------------------|
| 1. Mr. Stanley Miheso | - Holding Brief for the Secretary |
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2. Ms. Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant - IOT - H Young Consortium.

1. Njoroge Regeru - Advocate
2. Wilson Mwihuri - Advocate
3. Puneet Shamsbery - Operation Director
4. Kimani A. G - Representative

Procuring Entity - Kenya Pipeline Company Limited

1. Gloria R. Khafafa - Senior Legal Officer
2. Nancy Rono - Senior Procurement Officer
3. Maureen Mwenje - Procurement

Interested Party

1. Geoffrey Imende - Advocate, Mohammed Muigai Advocates
2. Guto Mogere - Advocate, Mohammed Muigai Advocates
3. Kelly Malenya - Legal Assistant, Mohammed Muigai Advocates

BOARD'S DECISION

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

BACKGROUND OF AWARD

The EPC tender for construction of additional white-oils storage tanks and accessories at Pump Station 10 (Nairobi terminal) was re-advertised in the Kenya Pipeline Website and in the Business Daily Newspaper on Monday 28th April 2014, and the Standard Newspaper of 26th April 2014.

The Tender closing date was 16th May 2014.

Fourteen firms purchased the tender document. However, only eleven bidders/consortia responded.

The following tender requirements for each bidder were read out and recorded:

1. Separate Technical and financial bids.
2. Copy of valid KRA tax compliance certificate for local bidders.
3. Copy of certificate of incorporation.
4. Tender security of USD 150,000
5. National Construction Authority certificate.
6. Site visit certificate.
7. Agreement between tenderer and local company

EVALUATION

PRELIMINARY EVALUATION

The preliminary evaluation was performed to ensure that the bidders met the mandatory requirements listed below, as detailed under Clause 1.3 of the tender document.

The Tender Processing Committee also evaluated the local partners against the requirements detailed under Clause 3.2.2 (f) of the tender document. Failure to submit any one of the requirements led to disqualification.

RESULTS ON MANDATORY REQUIREMENTS (CLAUSE 1.3)

No	Lead Partner	Certificate of Incorporation of the company	Valid KRA tax compliance certificate (for local firms)	Original Tender Security of USD, 150,000- must be valid for 150 days from closing date	Signed Declaration form	Certificate of Tenderer's Site Visit	Local Partnership Agreement	National Construction Authority (Local Firms)	Statement on any current litigation or arbitration proceedings
1	Lampac Technologies	Business License Reg. No 620105000000367 (3-1)	Not applicable	KCB Valid up to 20 th October 2014	Provided	Provided	Local Partnership with: Aegis Construction Ltd.	Not applicable	Provided – No Litigation
2	Parasa	Letter of Association provided.	Not applicable	BNL Valid up to 23 rd November 2014	Provided	Provided	MOU with: 1. Abe-Tec 2. Mavji Kanji	Not applicable	Provided – No Litigation
3	CPECC	Business License 10000000000098 (4-14)	Not applicable	CFC Stanbic 30 th November 2014	Provided	Provided	MOU with Empro	Not applicable	Provided – No Litigation
4	Vijay Tanks & Vessels	Certificate of Incorporation 1430 of 1969	Not applicable	Standard Chartered valid up to 23 rd October 2014	Provided	Provided	Consortium Agreement with M/s Weldcon	Not applicable	Provided – No Litigation
5	Prashanth	Certificate of Incorporation No.11-51410	Not applicable	Chase Bank valid up to 23 rd October 2014	Provided	Provided	MOU with Nyoro Construction	Not applicable	Provided – No Litigation
6	Mahathi	Certificate of Incorporation U45209AP2010P TC 070448	Not applicable	I&M Bank valid up to 12 th October 2014	Provided	Provided	MOU with Seyani Bros.	Not applicable	Provided – No Litigation
7	Chicon	C. 13944	Provided and Valid	APA Insurance Valid up to 01 st November 2014	Provided	Provided	100% Kenya owned	NCA Letter	Provided – No Litigation
8	IoT	Certificate of Registration 11-102222	Not applicable	Explico Insurance Valid up to 29 th November 2014	Provided	Provided	Partnership Agreement with H. Young	Not applicable	Provided but have Litigations
9	JGH – WMS JV	1. JGH - AS196,891 2. WMS – CH-C-1857	Not applicable	Spar Nord Valid up to 23 rd October 2014	Provided	Provided	Partnership with Magic General Contractors	Not applicable	Provided – No Litigation
10	CPP	Business License 130000100001893	Not applicable	APA Insurance Valid up to 31 st October 2014	Provided	Provided	MOU with Tisco Construction	Not applicable	Provided – No Litigation
11	Petrojet	Article of Association provided	Not applicable	I&M Bank valid up to 20 th October 2014, an extension provided	Provided	Provided	Pre-Bid Agreement	Not applicable	Provided – No Litigation

RESULTS ON EVALUATION OF LOCAL FIRM/PARTNER (CLAUSE 3.2.2(F))

No	Lead Partner	Local Partner	Certificate of Incorporation of the company	Valid KRA tax compliance certificate (for local firms)	National Construction Authority	Undertaking to abide by the Public Procurement and Disposal Act, 2005	Sections of the work to be executed by the local firm	Relevant experience	Financial capability (1 year Accounts)	Human Resource	Availability of equipment
1	Lampac Technologies	Aegis Ltd	C. 94069	Valid	No. 010333	Not Provided	Provided	Provided	Provided	Provided	Provided
2	Parasa	1. Abe-Tec 2. Mawji Kanji	1. C. 129107 2. C. 52244	1. Valid 2. Valid	1. No. 027500 2. NCA Letter	1. Provided 2. Provided	1. Provided 2. Provided	1. Provided 2. Not provided	1. Provided 2. Provided	1. Provided 2. Not provided	1. Provided 2. Provided
3	CPECC	Empiro	C. 161907	Valid	NCA Letter	Provided	Provided	Provided	Provided	Provided	Provided
4	Vijay Tanks & Vessels	Weidcon	C. 113847	Valid	No. 035416	Provided	Provided	Provided	Provided	Provided	Provided
5	Prashanth	Nyoro Construction	C. 25710	Valid	No. 029901	Provided	Provided	Provided	Provided	Provided	Provided
6	Mahathi	Seyant Bros	C. 58447	Valid	No. 020318	Provided	Provided	Provided	Provided	Provided	Provided
7	Civicon	Civicon	C. 13944	Valid	NCA Letter	Provided	100% Local	Provided	Provided	Provided	Provided
8	IOT	H. Young	C. 2424	Valid	NCA Letter	Provided	Provided	Provided	Provided	Provided	Provided
9	JGH - WMS	Magic General Contractors	C. 28235	Valid	NCA Letter	Provided	Provided	Provided	Provided	Provided	Provided
10	CPP	Tisco Const. Ltd.	CPPR/2010/22312	Valid	No. 000329	Provided	Provided	Provided	Provided	Provided	Provided
11	Petrojet	1. Linksoft 2. Simmond 3. Mellech	1. C. 65108 2. CPR2010/16329 3. C102325	1. Valid 2. Valid 3. Valid	1. NCA Letter 2. NCA Letter 3. NCA Letter	1. Provided 2. Provided 3. Provided	1. Provided 2. Provided 3. Provided	1. Provided 2. Provided 3. Provided	1. Provided 2. Provided 3. Provided	1. Provided 2. Provided 3. Provided	1. Provided 2. Provided 3. Provided

RESULTS ON MANDATORY REQUIREMENTS

The following three bidders did not fulfil the requirements and were deemed non-responsive and are disqualified from further evaluation.

1. Lanpec Technologies Ltd/ Aegis Construction Ltd
2. Paresa SPA / ABE-TEC & Mavji Kanji & Brothers
3. Mahathi Infra Services Ltd/ Seyani Brothers

The following eight (8) bidders qualified for the detailed technical evaluation:

1. CPECC/ Empro Electrical And Mechanical Engineers Co Ltd
2. Prashanth Projects/ Nyoro Construction
3. IOT Infrastructure & Energy Services Ltd/ H Young
4. ~~Vijay Tanks & Vessels (P) Ltd/ Weldcon~~
5. Civicon Ltd
6. China Petroleum Pipeline Bureau/ Tisco Construction Ltd
7. ~~Josh Gram-Hanssen A/S Western Marine Service Ltd / Magic General Contractors Petrojet/ Linksoft Communications, Sintmond & Mellech.~~
8. Petrojet/ Linksoft Communications, Sintmond & Mellech.

DETAILED TECHNICAL EVALUATION

The detailed technical evaluation was carried out as per Clause 3.26 of the Tender Document, which states that all responsive bidders shall be evaluated and scored against the criteria provided in the tender document. This criterion is summarized as follows:-

Summary of Evaluation Criteria and Scoring

Item	Criteria	Marks
1	Experience and Past Performance	20
2	Tank Design	10
3	Financial Capability	9
4	Qualifications and Experience of Key Personnel	17
5	Construction Plant and Equipment	15
6	Draft Programme and Methodology of Works	24
7	Environmental Impact Assessment (EIA)	5
	TOTAL	100

In accordance with Clause 3.26 only tenderer's who score at least 50% in each of the seven (7) evaluation categories and attain an overall score of 75% shall qualify to have their financial submissions opened and evaluated.

The summary of the technical scores are tabulated here below.

Summary of the Detailed Evaluation

No.	Bidder	Criteria							TOTAL (100 marks)
		Experience and Past Performance (20 marks)	Tank Design (10 marks)	Financial Capability (9 marks)	Qualifications and Experience of Key Personnel (17 marks)	Construction Plant and Equipment (15 marks)	Draft Programme and Methodology of Works (24 marks)	Environmental Impact Assessment (EIA) (5 marks)	
1	CPECC/ EMPRO ELECTRICAL	20	10	8	13	8	20	4	83
2	PRASHANTH PROJECTS/ NYORO CONSTRUCTION	20	10	9	17	14.75	24	4	98.75
3	IOT INFRASTRUCTURE & ENERGY SERVICES LTD/ H YOUNG	20	10	8	16	14	22	3	93
4	VIJAY TANKS & VESSELS (P) LTD/ WELLDICON	20	10	9	15	10	24	3	91
5	CIVICON LTD	0	10	8	17	15	16	5	71
6	CHINA PETROLEUM PIPELINE BUREAU/ TISCO CONSTRUCTION LTD	20	10	8	15	12.5	24	5	94.5
7	JOSH GRAM-HANSEN A/S - WESTERN MARINE SERVICE LTD / MAGIC GENERAL CONTRACTORS	10	10	6	6.5	6	16	3	57.5
8	PETROJET/ LINKSOFT COMMUNICATIONS, SINTMOND/MELLECH	20	10	9	3.5	0	18	3	63.5

CONCLUSION

Based on the evaluation carried out, the following companies were disqualified from further evaluation:

1. Lanpec Technologies Ltd/ Aegis Construction Ltd
2. Paresa SPA / ABE-TEC & Mavji Kanji & Brothers
3. Mahathi Infra Services Ltd/ Seyani Brothers
4. Civicon Ltd
5. Josh Gram-Hanssen A/S - Western Marine Service Ltd / Magic General Contractors.
6. Petrojet/ Linksoft Communications, Sintmond & Mellech

RECOMMENDATION

The Tender Processing Committee invited the Tender Committee to consider inviting the following bidders for financial bid opening:

1. CPECC/ Empro Electrical And Mechanical Engineers Co Ltd
2. Prashanth Projects/ Nyoro Construction
3. IOT Infrastructure & Energy Services Ltd/ H Young
4. Vijay Tanks & Vessels (P) Ltd/ Weldcon
5. China Petroleum Pipeline Bureau/ Tisco Construction Ltd

TENDER COMMITTEE APPROVAL

The tender committee in its meeting number TCM 42-2013/2014 held on 12th June, 2014 approved the following 5 bidders to proceed to the financial opening:

1. CPECC/ Empro Electrical And Mechanical Engineers Co Ltd
2. Prashanth Projects/ Nyoro Construction
3. IOT Infrastructure & Energy Services Ltd/ H Young
4. Vijay Tanks & Vessels (P) Ltd/ Weldcon
5. China Petroleum Pipeline Bureau/ Tisco Construction Ltd

FINANCIAL OPENING

The financial bids were opened on 13th June, 2014 and witnessed by representatives of the bidders and the Tender Opening Committee. The tender prices read out during tender opening as tabulated below:-

Tender Opening Bids

No.	Tenderer's Name	Tender Price (USD)
1.	CPECC/ Empro	52,838,496.48
2.	Prashanth Projects Ltd/ Nyoro Construction	53,033,112.00
3.	IOT Infrastructure & Energy Services Ltd / H. Young (E.A) Ltd.	52,943,031.00
4.	Vijay Tanks & Vessels (VTV)/ Weld-Con Ltd.	50,681,167.00
5.	China Petroleum Pipeline Bureau (CPP)/ Tisco Construction Ltd.	57,745,062.00

FINANCIAL EVALUATION

Financial Evaluation was carried out as per Clause 3.26.2 of the tender document. In the Table below are the summaries of the corrected

financial proposals submitted by the bidders.

Corrected Comparison of Bids (Costs in USD) - Summary

ITEM DESCRIPTION	CPECC/ Empro	Prashanth/ Nyoro	IOT/ H. Young	VTV/ Weld-Con	CPP/ TISCO
PART 'A' - Preliminary and General Works	5,791,040.00	5,087,000.00	7,297,929.00	4,931,302.00	1,504,641.00
PART 'B' - Design Engineering and Other Services	1,594,000.00	2,860,000.00	3,375,908.00	665,475.00	2,657,334.00
PART 'C' - Supply of Materials	21,356,890.00	26,445,000.00	19,024,298.00	20,435,617.00	21,987,147.00
PART 'D' - Construction	12,538,190.00	6,960,000.00	11,613,049.00	13,552,968.00	18,770,275.00
PART 'E' - Training and Development	54,000.00	50,000.00	57,330.00	40,000.00	236,804.00
PART 'F' - Factory Acceptance Tests	75,360.00	160,000.00	122,890.00	93,420.00	98,128.00
TOTAL FOR ITEM 'A-F'	41,409,480.00	41,562,000.00	41,491,404.00	39,718,782.00	45,254,329.00
10% Contingency	4,140,948.00	4,156,200.00	4,149,140.40	3,971,878.20	4,525,432.90
TOTAL (Plus Contingency)	45,550,428.00	45,718,200.00	45,640,544.40	43,690,660.20	49,779,761.90
Add 16% VAT	7,288,068.48	7,314,912.00	7,302,487.10	6,990,505.63	7,964,761.90
GRAND TOTAL (B)	52,838,496.48	53,033,112.00	52,943,031.50	50,681,165.83	57,744,523.80
Tender Price at Tender opening USD - (A)	52,838,496.48	53,033,112.00	52,943,031.00	50,681,167.00	57,745,062.00
Variance USD - (A-B)	0.00	0.00	-0.50	1.17	538.20

AWARD CRITERIA

Award of the tender, pursuant to Clause 3.27.1 of the Tender Document, was based on Quality and Cost Based Selection with the Technical and Financial scores subjected to weights of 0.7 and 0.3 respectively. The financial score was then computed using the following formula:

The lowest bid price, X, shall attract 100% score in Financial Evaluation. Any other bid price, Y shall attract a Financial Score = (Lowest bid price(X)/bid price (Y))*100%

The bidder's final score shall be the summation of the weighted

technical and the financial scores. The bidder with the highest Total weighted score will be recommended for award.

Applying the formula yielded the following results:

Total Weighted Scores

No	Bidder	Technical Score	Weighted Technical Score	Financial Bid (USD) Inclusive of contingency and VAT	Weighted Financial Score	Total Weighted Score
1.	CPECC/ Empro	83.00	58.10	52,838,496.48	28.78	88.88
2.	Prashanth/ Nyoro Construction	98.75	69.13	53,033,112.00	28.67	97.79
3.	IOT/ H. Young (EA) Ltd	93.00	65.10	52,943,031.50	28.72	93.82
4.	Vijay Tanks & Vessels/ Weld-Con Ltd	91.00	63.70	50,681,165.83	30.00	93.70
5.	CPP/ Tisco	94.50	66.15	57,744,523.80	26.33	92.48

Notes: The bidder with the highest Total weighted score is the partnership between ~~M/s Prashanth Projects Ltd/ Nyoro Construction Ltd~~ with a total weighted score of 97.79%.

RECOMMENDATION

The Tender Processing Committee recommended award of the tender for Construction of Additional White-Oil Tanks and Accessories at Pump Station 10 to the partnership of M/s Prashanth Projects Ltd/ Nyoro Construction Ltd for USD 53,033,112.00, inclusive of 10% Contingency and 16% V.A.T.

TENDER COMMITTEE DECISION

The Tender Committee in its meeting number TCM 4-2014/2015 held on 30th July, 2014 awarded the EPC tender for construction of additional white-oils storage tanks and accessories at Pump Station 10 (Nairobi terminal) to M/s Prashanth Projects Ltd/ Nyoro Construction Ltd for USD 53,033,112.00, inclusive of 10% Contingency and 16% V.A.T.

The Tender committee also directed that due diligence be carried out on the contractor.

THE REVIEW

The Request for Review was lodged by M/s IOT-H Young Consortium (Applicant) on 6th August, 2014 against the decision of Kenya Pipeline Company Limited in the Matter of Tender No SU/QT/784N/13 for EPC contract for construction of additional White-Oils Storage Tanks and Accessories at Pump Station 10 (Nairobi Terminal).

The Applicant requested the Public Procurement Administrative Review Board (hereafter referred to as the Board) to review the decision of the Procuring Entity and sought the following orders:

- 1. A finding and a declaration that the Prashanth/ Nyoro JV did not score the minimum 50% mark in the Financial Capability category.*
- 2. A finding and a declaration that the Prashanth/ Nyoro JV did not score the minimum 50% mark in the Experience and Past Performance category.*
- 3. A finding and declaration that the purported score of 98.75% given by the Respondent to the Prashanth/ Nyoro JV is incorrect and unjustifiable.*
- 4. An Order setting aside the said purported score of 98.75%.*
- 5. A finding and declaration that the Prashanth/ Nyoro JV having failed to qualify at the technical evaluation stage; it should not have been allowed to proceed to the financial evaluation stage.*

6. *An order that the award by the Respondent of Tender No. SL/QT/784N/13 to the Prashanth/ Nyoro JV nullified, revoked, cancelled and/or set aside.*
7. *An order that Tender No. SL/QT/784N/13 be and is hereby awarded to the IOT-H-Young Consortium.*
8. *In the alternative to prayer (g) above, an order that the evaluation of the said Tender do proceed with the participation of only those tenderers who duly qualified at the technical evaluation stage and that the Tender be awarded accordingly.*

The Applicant raised a total of 16 issues in support of it's Request for Review. These grounds for Review run from page 1 to 8 of the Request filed on 6th August, 2014.

The Applicant in it's submissions dated 26th August, 2014 however consolidated the grounds raised at pages 1 to 8 of it's Request for Review and summarised them into 6 issues which were all addressed by the parties to the Request for Review. The issues framed for determination appear as item 1.6 (a) to (f) in the Applicant's Submissions.

The parties to this Request for Review filed several documents in support and or opposition to the Request for Review whose summary the Applicant set out in the Applicant's summary of documents dated 27th August, 2014 and they were as follows:-

1. The Request for Review, the Statement of Facts and accompanying documents dated and filed on 6th August, 2014.

2. The Applicant's Reply to the Respondent's Response dated and filed on 26th August, 2014.
3. The Applicant's Reply to the Interested Party's Response dated and filed on 27th August, 2014.
4. The Replying affidavit by Eng. Joseph Schwartzman sworn and filed on 26th August, 2014.
5. The further Affidavit by Eng. Joseph Schwartzman sworn and filed on 26th August, 2014.
6. The further Replying Affidavit sworn by Eng. Joseph Schwartzman sworn and filed 27th August, 2014.
7. The affidavit filed by Mary Macharia sworn and filed on 26th August, 2014.
8. The Applicant's written submissions dated and filed on 26th August, 2014.

RESPONDENT'S PLEADINGS AND DOCUMENTS

1. The Procuring Entity's Response to the Request for Review and Statement of Facts dated and filed on 12th August, 2014.
2. The affidavit by Sospeter Mwakoma sworn on 12th August, 2014 and filed on the same day.
3. The affidavit of Nicholus Gitobu sworn on 12th August, 2014 and filed on the same day.
4. The Further Affidavit by Nicholus Gitobu sworn on 21st August, 2014 and filed on 22nd August, 2014.
5. The Respondent's submissions dated and filed on 26th August,

2014.

6. The Respondent's list of authorities dated and filed on 25th August, 2014.

INTERESTED PARTY'S PLEADINGS AND DOCUMENTS

1. The Replying Affidavit sworn by Nadathur Ammal Bharath sworn on 25th August, 2014 and filed on the same day.
2. The Interested Party's Response to the Request for Review and Statement of Facts dated and filed on 25th August, 2014

The Board has perused all the documents and has considered all the arguments made before it and has determined that the following are the issues for consideration in this Request for Review.

- (i) Whether the Request for Review was time barred and whether the Board therefore has the jurisdiction to hear and determine the same.*
- (ii) Whether the successful bidders met the financial criterion on the financial capability in order to enable them be awarded the tender.*
- (iii) Whether or not the successful bidders had the requisite experience of successful design and construction of petrol storage tanks in Engineering construction (EPC) contract.*
- (iv) Whether the successful bidder breached the provisions of the tender document by providing false misleading and or inaccurate information in it's tender document.*
- (v) Whether the Applicant attempted to influence the outcome of the*

tender through correspondence.

(vi) Whether the Applicant is entitled to the prayers sought in the Request for Review.

The Applicant, the Procuring Entity and the successful bidder appeared through their respective advocates at the hearing of the Request for Review. The Applicant was represented by Mr. Njoroge Regeru together with Mr. Wilson Mwihuri, the Procuring Entity by M/s Gloria Khafafa while the successful bidders was represented by Mr. G. Imende, Guto Mogere and Kelly Malenya. Mr. Regeru, M/s Khafafa and Mr. Imende however presented arguments on behalf of the Applicant, the Procuring Entity and the successful bidders respectively.

All the parties argued the Request for Review on the basis of the issues framed by the Applicant and which have already been set out above.

The Board has considered the said issues, the documents filed by the parties as set out in page 16 and 17 above the oral and the written submissions made by the parties and will now proceed and determine each of the issues framed for determination.

1. Whether or not the Applicants Request for Review is time barred.

The Procuring Entity in paragraph 2 of it's Request for Review urged the Board to find that the Applicant's Request for Review was bad in law and ought to be dismissed with costs as it offends the mandatory Provisions of Regulation 73 of the Public Procurement and Disposal Regulations (2006) relating to time when an applicant ought to file a Request for Review. The Procuring Entity based it's objection on the

alleged fact that the Applicant's Request for Review was premised on alleged breaches that occurred during the preliminary and Technical Evaluation stages whose results were communicated to all the bidders on 6th June, 2014.

It was the Procuring Entity's contention that the Applicant's substantive arguments were centred around the successful bidders lack of experience and non disclosure of litigation history which requirement according to the Procuring Entity were addressed at the Preliminary and Technical Evaluation stages and which process was concluded on 6th June, 2013 and the results thereof notified to the bidders on 13th June, 2014.

The Procuring Entity further submitted that the Applicant had expressly admitted receipt of the notification in paragraph 11.5 at page 13 of 20 of the Request for Review. The Procuring Entity also asserted that Applicant's representatives were present when each of the tenderers financial bids were opened and read out to all the bidders.

The Procuring Entity further stated that the Applicant's Counsel was present before the Board when the Board heard the Request for Review in Application No. 26 of 2014 (Civicon Ltd -vs- KPC) and argued that the Applicant had waived it's client's right to question the findings of Preliminary and the technical evaluation which were the subject matter of the complaint in Request for Review No. 26 of 2014.

The Procuring Entity therefore argued that the Applicant ought to have filed this Request for Review by 17th June, 2014 and that by failing to do so the Procuring Entity's Request for Review filed before the Board was therefore filed out of time and was filed in contravention of the

mandatory provisions of Regulation of The Public Procurement and Disposal Regulations (2006).

On his part Mr. Njoroge Regeru who appeared on behalf of the Applicant opposed the preliminary objection. He argued that the Preliminary Objection was raised in contravention of the Provisions of Regulation 77 (i) of the Regulations which required that a party seeking to raise a Preliminary Objection ought to have filed it at least 5 days from the time of being notified of the Request for Review and ought to have paid the requisite fees when filling the Preliminary Objection and serve it at least a day before the hearing. It was the Applicant's further submission that such an objection must set out the grounds upon which it is based and that the Procuring Entity's Preliminary Objection as contained in the Memorandum of Response did not meet the requirements of Regulation 77 (i) of the Regulations and could therefore not be entertained as a Preliminary Objection.

Counsel for the Applicant argued that under the Provisions of Regulation 73(2) of the Regulations an applicant had the right to file a Request for Review within Seven (7) days either of:-

- (i) The occurrence of the breach complained of where the Request for Review is made before the making of an award or,
- (ii) The notification under Section 67 or 83 of the Act.

Counsel for the Applicant therefore argued that under the provisions of Regulation 73 (2) a tenderer may choose to challenge any decision made by a Procuring Entity in a Procurement process at any point before the award is given or choose to challenge the entire process upon being

notified that a tender was unsuccessful as provided for under Regulation 73 (2) (c) (ii) of the Regulations.

The Applicant relied on the case of **Republic -vs- Elman (1996) EA** and the legal text of **Maxwell on the interpretation of statutes (12th Edition)** for the propositions that where the language of a statute is plain and only admits one meaning. He urged the Board to interpret the statute in a way that gives the statutory provision its ordinary meaning and that where an Act of Parliament is to be construed, the Board ought to construe it according to the intention expressed in the Act itself and if the words of the statute are precise and un-ambiguous no more would be necessary to expound those words since the words alone do in such a case best declare the intention of the lawmaker.

The Applicant finally submitted that in a nutshell the objection by the Procuring Entity lacks merit and should be dismissed on the grounds which he summarised as follows:

- a) The Procuring Entity had failed to file the Preliminary objection within a period of five (5) days before the hearing on 27th August, 2014 pursuant to the Provisions of Regulation 77 (i) of the Regulations.
- b) The Procuring Entity had failed to file the Preliminary Objection setting out the grounds on which the Preliminary Objection was based contrary to the Provisions of Regulation 77 (2) of the Regulations.
- c) The Procuring Entity had failed to serve the Preliminary Objection at least one day to the hearing contrary to the Provisions of

Regulation 77 (2) of the Regulation.

- d) That the Procuring Entity failed to pay the mandatory fees as detailed in the fourth schedule of part II of Regulation 77 (6).

The Applicant referred the Board to the decision in **Cavalier Security Ltd =vs= Kenya Power and Lighting Company Ltd (2008 -2011) (2008-2010) PPLR 844** in support of the proposition that a party who had filed an Objection contrary to the Provisions of Regulation 77 was not entitled to be heard on the Preliminary Objection.

The Applicant in response to the Procuring Entity's response stated that the Procuring Entity was being selective and pointed to the letter dated 31st July, 2014 advising it of the final outcome.

It was the Applicant's position that it's Request for Review was based on the letter dated of 31st July, 2014 which is the letter that advised it of the final decision and was the basis of the notification that it's bid was unsuccessful under the Provision of Section 67 of the Act which relates to notification. The Applicant therefore submitted that under the Provisions of the Act, the Applicant was entitled to choose the stage at which to lodge the Request for Review and that the Applicant could not be accused of delay in lodging the Request for Review upon the notification of the final outcome which was communicated on 31st July, 2014.

Mr. Imende on behalf of the successful bidder associated himself with the submissions made by M/s Gloria Khafafa on behalf of the Procuring Entity but did not address the Board on the issue of the Applicant's Request for Review being filed out of time. His submissions were

largely confined to the merits of the Request for Review which the Board will address under the other remaining issues depending on the Board's decision on the first issue.

The Board has considered the documents submitted before it and the arguments made by the advocates representing all the parties to this Request for Review on the issue of whether the Applicants Request for Review was filed out of time.

The first issue that the Board must determine is whether the Procuring Entity's Preliminary Objection was filed in contravention of the Provisions of Regulation 77 of the Public Procurement and Disposal Regulations 2006 and was therefore incompetent *ab initio*.

The Board finds that the objection on time touches on the issue of jurisdiction namely whether the Board has the jurisdiction to hear and determine a Request for Review touching on issues arising at the Preliminary and technical evaluation. An issue of jurisdiction can be raised at any stage of the proceedings namely at the beginning, in the course of the hearing of the main Request for Review if it arises or even for the first time on appeal.

The Board further finds that though no separate notice of Preliminary Objection was filed, the Procuring Entity gave notice in paragraph 1 of its Memorandum of Response that it would raise a Preliminary Objection under the provisions of Regulations 73 (2) (a) and 73 (2) (c) of the Public Procurement and Disposal Regulations. The Applicant therefore had notice of the intended objection and the Board therefore finds that the Applicant did not suffer any prejudice.

The Board has looked at the entire provisions of the Act and the Regulations and there is no provision in the Act or the Regulations which prohibit a party from raising an objection particularly touching on the issue of jurisdiction where the notice of such an objection is contained in a memorandum of response.

Turning to the merits of the Preliminary Objection, the Board finds that the Procuring Entity's Preliminary Objection was based on the contention that the Applicant had knowledge of the results of the preliminary and technical evaluation at least from as early as 12th June 2013.

The Board has perused the Request for Review and it is clear from the description on page 1 of the Request for Review that what the Applicant is challenging is the Procuring Entity's decision dated 31st July 2014 where the Procuring Entity declared the Applicant's tender as unsuccessful. The Applicant was therefore successful at the Preliminary and the Technical evaluation stages. The Applicant could not therefore have any basis for a complaint at that point. In any event under the Provisions of Regulation 73(2) of the Regulations which the Board has had occasion to look at an applicant is at liberty to file a Request for Review within seven (7) days either of the occurrence of the breach complained of where the Request is made before the making of an award or within seven days from the date of notification under Section 67 or 83.

It was not in dispute that the letter of notification under challenge was served on the Applicant and the Applicant filed its Request for Review on 6th August, 2014. The Request for Review was therefore filed within

seven (7) days from the date of notification that its tender was unsuccessful.

The Board therefore finds and holds that the objection by the Procuring Entity that the Request for Review filed on 6th October, 2013 was filed out of time therefore lacks merit and is hereby dismissed.

ISSUE NO. 2

~~Whether M/s Prashant/Nyoro joint venture met the financial criteria stipulated in the tender document~~

The Applicant argued that the Interested Party did not fulfil the financial threshold set out in paragraph 3.26.1 appearing at page 24 of the tender document which required a tenderer to attain at least 50% in each of the Seven (7) evaluation categories and attain an overall score of 75% in order to qualify to have its financial submission opened and evaluated.

The Applicant produced uncertified copies of audited accounts from the Indian Ministry of Foreign Affairs for the years 31st March, 2009 to 31st March, 2012 which appear at pages 205 to 240 of the Request for Review and an affidavit sworn by one SAURABH SHYAM SHAMSHERY an advocate practising in the Supreme Court of India who had obtained the accounts and argued on the basis of the said accounts that the Applicant did not attain the financial threshold set out in clause 3.26.1 which required a bidder to show that it had managed to provide a financial turnover of USD 20 Million during one year between April 2009 to April 2014.

According to the statement of accounts annexed to the Applicant's Request for Review the successful bidders financial turnover during the

years 2009, 2010 and 2011 was as follows:-

Financial year ending	Annual financial turn over in Indian Rupees	Exchange Rate to the US Dollar on 31 st March of each year	Annual Financial Turnover in US\$ Equivalent
31-Mar-2009	223,947,919	50.8761	4,401,830
31-Mar-2010	116,496,337	44.8281	2,598,735
31-Mar-2011	343,868,135	44.6823	7,695,847
31-Mar-2012	315,751,968	51.0109	6,189,892

The Applicant further argued that both the Procuring Entity and the successful bidders did not produce any evidence in their responses to prove that the successful bidders had achieved the required threshold of USD 20 Million over the previous 5 years.

The Applicant therefore contended that in view of the Provisions of Section 112 of the Evidence Act, it was incumbent upon the Procuring Entity to produce such evidence in it's response to the Request for Review since the matter in contention, namely the successful bidders financial position was a fact that was specially within the interested Party's knowledge and that the burden of proving or disproving that fact was upon it Counsel for the Applicant relied on the decision in the case **ABN AMRO Bank =vs= Le Monde Foods Limited (Civil Application No. 15 of 2002** in support of this proposition.

Both the above two parties stated that it would be improper for them to produce such information because of the possibility that other tenderers commercial interest would be jeopardised if the Board ordered a fresh re-evaluation or a retender on account of the contents of the information in their tenders having been disclosed to their opponents.

~~On the applicability of the Evidence Act, both M/s Khafafa and Mr. Imende asked the Board to be guided by the provisions of Regulation 86 of the Regulations which states that the Board was not bound to observe the strict rules of evidence while considering a matter before it and that the reference to the Provisions of the Evidence Act by the Applicant was improper.~~

In answer to the above submissions, learned Counsel for the Applicant reiterated that the Proceedings before the Board were adversarial in nature and that where a party had raised an issue, it was incumbent upon the responding party to produce evidence to contest the allegation. The Applicant contended that the Provisions of Section 44 and Regulation 86 could not and did not take away the need to produce evidence and that it would be improper if the Board looked at the original tender documents and other documents submitted to it as proposed by the Procuring Entity and the successful bidders since this would amount to an ambush. The Applicant urged the Board to find that the documents which the Procuring Entity and the successful bidders were seeking to have the Board look at were documents which were not contained in any of the responses and were therefore not supplied to Counsel for the Applicant and his client.

The Board has considered the rival submission made by all the parties in support and or opposition to the second issue as framed. The first question that immediately falls for consideration is whether the Board can look at the confidential documents supplied to it pursuant to the Provisions of Section 44 (3) of the Act.

Section 44 of the Act prohibits a Procuring Entity or any of its employees or agent of a Procuring Entity or a member of the Board or committee from disclosing any information set out in Section 44 (1). Section 44 (4) criminalizes the production of such information. Section 44 (2) and (3) of the Act however sets out several exceptions to this requirement one of which is that the Provisions of subsection (2) of the Act do not apply where the disclosure is for the purposes of a review under part VII of the Act or an investigation under part VIII for the purposes of carrying out an investigation under Section 15 of the Act.

Section 44 (3) also permits a bidder such as the Applicant to be provided with a summary of the evaluation report and comparison of the tenders proposals or quotation including the evaluation criteria.

The Board therefore holds on the basis of Section 44 that it is obliged to look at the original tender and other documents while considering a Request for Review in order to interrogate whether the Procuring Entity complied with the evaluation criteria or the Provisions of the Act and the Regulations.

The Board's holding on this issue is supported by the court of Appeal decision in the case of Kenya Pipeline Company Limited =vs= H-young Procurement Review Board and Another Civil Appeal No. 145 of 2011 where the court stated as follows as far as the Board's powers are concerned.

"The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with".

"Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it".

This position was reiterated by the Honourable Justice Mumbi Ngugi in the case of **Rich Productions -vs- Kenya Pipeline Company Ltd and the Public Procurement Oversight Authority (PPOA) Constitution Petition No. 173 of 2014** where she stated as follows in holdings number 68 and 69.

68. I have not heard any demonstration of the unconstitutionality of the acts of the 1st respondent. It appears to have complied with the requirements of the Public Procurement and Disposal Act, and to have answered satisfactorily the concerns of the institution charged with the mandate to oversee public procurement. More importantly, it cannot be open to a party which has not participated in a procurement process to then lodge a constitutional reference that in effect asks the Court to enter into the mandate of the 2nd respondent at the behest of a party that has not qualified under the provisions of the relevant statute.

69. This would result in undermining institutions such as the 2nd respondent which are established by law, and it would be contrary to the express provisions of the Constitution at Article 159 which enjoin the Court, in the exercise of judicial authority, to promote alternative forms of dispute resolution.

If the legislature did not intend that the Board looks at the original tender and other documents then there would be no need for the requirement that the Procuring Entity supplies the original tender documents, the evaluation reports and all the other original documents to the Board under Section 44(3) of the Act.

What the Applicant ought to have done was to seek for a summary of the evaluation reports which it is legally entitled to upon request before the filling or during the hearing of the Request for Review in order to ascertain whether the successful bidders met the financial criteria.

The Board therefore holds that it has jurisdiction to look at all the original tender document and has done so. The Board has particularly perused pages 84 to 175 and 178 -1912 and has confirmed that the successful bidder (Prashanth projects Ltd) provided the following audited accounts relating to the years 2009 to 2014.

Financial Year ending	Annual Financial Turnover (Indian Rupees)	Exchange Rate to the US Dollar (Average)	Annual Financial Turnover (US\$)
31-Mar-2009	223,948,148.00	50.8761	4,401,834.02
31-Mar-2010	116,489,148.00	44.8281	2,598,574.29
31-Mar-2011	344,443,505.00	44.6823	7,708,723.70
31-Mar-2012	315,751,968.00	51.0109	6,189,892.12
31-Mar-2013	178,432,641.00	54.2850	3,286,960.32
31-Mar-2014	3,293,431,372.00	60.0593	54,836,281.56

Nyoro construction limited the local partner on the other hand produced audited accounts for the year ended 31st December, 2012 which shows a turnover of 2.2 Billion for 2011 and Kshs. 2.45 Billion for 2012.

It is clear from the Provisions of Clause 3.26.1 that a tenderer only ought to have demonstrated a financial threshold of a turnover of USD 20

Million and a local contractor ought to have provided accounts for 1 year.

The audited accounts for the successful bidder (Prashanth project) for 2014 was Indian Rupees 3,298,431,372 which converted to USD 54,836,281.56.

The Board notes the significant rise in the turnover during that year but observes that the evaluation committee is the body best suited to evaluate and award tenders and having been satisfied that the bidder met the requirement it was within the Procuring Entity's right to award the tender to the successful bidders.

This ground of Review therefore fails and is dismissed.

ISSUE NO. 3

Whether the Prashanth/Nyoro J V had the Requisite experience of successful design and construction of Petroleum storage tanks in an Engineering Procurement Construction (EPC) contract.

The Applicant argued that the successful bidders did not demonstrate that they had the requisite experience to carry out the tender the subject matter of this dispute.

The Applicant's argument was based on the grounds that the successful bidder (Prashanth Projects Ltd) had not demonstrated that it had the

financial capacity to carry out a project of that magnitude and stated that the Successful bidder had on the basis of the accounts produced by the Applicant and which the Board has already referred to were incapable of enabling the successful bidder carry out such a project.

The Applicant further based its submissions on the email correspondence between it and Essar Projects appearing at pages 249 and 250 of the Request for Review in support of the contention that the Applicant did not have the necessary experience.

According to the Applicant the letter at page 249 (the email response by Essar) was a confirmation that the Interested Party Prashanth Projects did not have the requisite experience and that the successful bidder had provided false information on the issue of past experience. The Applicant urged the Board to find that some of the said projects were done in Syria which was engaged in Civil war and that this made it unlikely for the Applicant to have done projects there. The Applicant produced extracts from various media sources to show that there is war in Syria.

Both Counsels for the Procuring Entity and the successful bidders contended that the only evidence that could prove experience were completion Certificates which the successful bidders had provided.

The Board has considered all the documents and the rival submissions made by the parties on this issue. The Board finds that under criteria 3.26.1 the criteria for the award of marks on experience and past

performance was the production of documentary proof in the form of copies of completion certificates from the bidders clients and any other documentary evidence showing that the bidder had constructed tanks to AP/650 and that the projects were carried out in an EPC (turnkeys) approach.

The Board has looked at the original tender documents and finds that the successful bidder (Prashanth Projects Ltd) provided a certificate of completion from Essar Oil Refinery Project at Vadinar, Gujarat dated 19th March, 2014 with 6 Tanks with a capacity of 30,000m³ and two acceptance certificates from Homs Refinery Company No. 632 and 246 dated 21st June, 2011 and 3rd March, 2009 respectively for 2 Tanks each with a capacity of 40,000m³. The successful bidder was therefore given 20 marks. The Board therefore finds that the successful bidder therefore met the requirement on experience based on the contents of the original tender document.

It is notable from the email appearing at page 249 of the Request for Review that the email does not state that the successful bidder did not carry out the projects but it was asking the addressee (the Applicant) to provide copies of the completion certificates for confirmation.

The Applicant did not provide evidence to show when and in which side of Syria there was civil war since war per-se may not prevent a party from going on with projects. The Applicant ought to have proved that the war affected the successful bidders ability to carryout any particular project referred to by the successful bidders in their tender.

This ground of Review therefore fails.

ISSUE 4

Whether successful bidders provided false and misleading information in the tender documents and whether the Applicant attempted to influence the outcome of the tender process through correspondences.

The Applicant argued on the basis of the Daily Nation Newspaper dated 19th June, 2014 appearing at page 204 of the Request for Review and the judgment of the Supreme Court of India in with petition 1589 of 2009 that the successful bidders (Prashanth Project) had failed to disclose in its list of litigation history that it was blacklisted/debarred from carrying out any HPCL contracts in India. The Applicant argued that the disclosure of this information was mandatory and having failed to do so the successful bidders should have been disqualified.

The Procuring Entity and the successful bidders however opposed the Applicant's position by stating that clause 3.2.1 (f) appearing at page 8 of the tender document only required that bidders disclose and supply evidence of current litigation or arbitration proceedings in which they are parties. They further stated as at the date the successful bidders tender for this project was submitted there was no pending litigation or arbitration to which they were parties and that the successful bidders were therefore entitled to tender for the project. The Procuring Entity in any event stated that the Applicant had admitted that the successful bidder (Prashanth projects Ltd) was placed on holiday/debarred/blacklisted upto February 2010.

The Board has perused the Provisions of clause 3.2.1 (f) and finds that that clause only required a tenderer to provide details of current

litigation or arbitration proceedings in which the tenderer is involved in as a party. The Clause is clear that the disclosure relates to the current proceedings in which a bidder is a Party. Upon the successful party's blacklisting/debarment being lifted in February 2010 then it cannot be said that there was any pending litigation at the time the successful bidder tendered for this project.

This ground for Review therefore also fails.

OBSERVATION

The Board has noted that the Applicant and the successful bidder (Prashanth Projects Ltd) wrote to the Procuring Entity at various stages while the process of evaluation was going on. These letters appear at pages 241 -242 of the Request for Review and the letter dated 21st June, 2014 which appears at pages 307 to 308. The first letter is by the Applicant, while the second letter was by the successful bidder.

It is against the law for bidders to communicate to a Procuring Entity in order to influence the outcome of a tender while the process of evaluation is going on. The procuring Entity however stated that the said letters which were addressed to the Procuring Entity's Managing Director were never forwarded to the evaluation committee which did not therefore take them into account while evaluating the tenders.

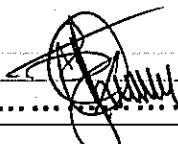
CONCLUSION

In view of all the above reasons and in exercise of the powers conferred upon the Board by Section 98 of the Act the applicant's Request for Review therefore fails and is hereby dismissed.

The Board however orders that each party bears it's own costs of this Request for Review in view of the fact that each party was partly successful and in view of the above observation by the Board.

Dated at Nairobi this 2nd day of September, 2014.


.....
CHAIRMAN, PPARB


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for: SECRETARY, PPARB

