

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 18/2015 OF 24TH MARCH, 2015

BETWEEN

CIVICON LTD..... APPLICANT

AND

KENYA PIPELINE COMPANY LTD.....PROCURING ENTRY

JGH MARINE A/S WESTERN MARINE SERVICES LTD

CNPC NORTHEAST REFINING & CHEMICAL ENGINEERING CO.

**LTD/PRIDE ENTERPRISES.....1ST INTERESTED PARTY/SUCCESSFUL
BIDDER**

Review against the decision of the Tender Committee of the Kenya Pipeline Company Ltd dated 17th March 2015 in the matter of Tender No. SU/QT/786N/14 for EPC Tender for the construction of an Aviation Fuel Depot at Jomo Kenyatta International Airport, Nairobi (Greenfield), Contract No. SU/QT/786N/14.

BOARD MEMBERS PRESENT

- | | |
|--------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Eng Weche Okubo | - Member |
| 3. Rosemary Gituma | - Member |
| 4. Nelson Orgut | - Member |

IN ATTENDANCE

- | | |
|-------------------|---------------|
| 1. Philip Okumu | - Secretariat |
| 2. Shelmith Miano | - Secretariat |

PRESENT BY INVITATION

APPLICANT- 18- 2015 CIVICON LTD

- | | |
|-----------------------|-----------------|
| 1. G. M. Nyaanga | Advocate |
| 2. Njuguna John Kamau | Advocate |
| 3. Duncan Wachira | Lawyer |
| 4. Joseph Kahari | Advocate |
| 5. Arit Path | Senior Engineer |

PROCURING ENTITY- KENYA PIPELINE CO. LTD

- | | |
|---------------------|---------------|
| 1. Gloria Khafafa | Legal Officer |
| 2. Andrew Birir | Engineering |
| 3. Sospeter Mwakoma | Engineering |
| 4. N. Gitobu | P. Manager |
| 5. Catherine Kiboi | Procurement |

INTERESTED PARTY

- | | |
|-------------------|-------------------------------------|
| 1. Mutuma Kibanga | Advocate |
| 2. Julius Masinde | Marketing Officer, Mahathi I EA Ltd |
| 3. Abdidahman | Senior Engineer, Technofab |
| 4. Evans Anang'a | Quantity surveyor, Tata project |

BOARD'S DECISION

Upon hearing representations of 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

Introduction

KPC has been experiencing operational constraints at Embakasi (PS9) due to the small size of the Issuing Storage facilities. In addition the Kenya Airports Authority is undertaking an expansion project of the JKIA in order to meet future demand and to maximise the utilisation of existing airport resources.

Advertisement

The subject tender for the EPC contract for construction of an aviation fuel depot at JKIA Nairobi (Greenfield) was advertised in the Company's website, and the *Daily Nation* and the *Standard* newspapers on Friday 14th November, 2014.

Closing/Opening:

The tenders were closed/opened on 16th February, 2015 and seventeen (17) bidders/consortia had submitted their bids which underwent Preliminary Evaluation.

The following 17 firms/consortia responded:-

1. Litwin SA/Ekium/Stellar Builders Ltd
2. Vijay Tanks & Vessels (P) Ltd/Weld-Con Ltd
3. Sichuan Hongda Petroleum & Natural Gas Engineering Co. Ltd/Tisco Construction Co. Ltd
4. Paresa SPA/Center Star Company Ltd
5. Offshore Infrastructure Limited/ Mellech Engineering & Construction Ltd
6. Farab International (FZE)/ Magic Contractors Ltd
7. China Wu Yi/ China Petroleum Engineering/Marson Integrated
8. Civicon Limited/Sinopec
9. China Petroleum Engineering & Construction Corporation/Empro Electrical & Mechanical Engineers Company Limited
10. Technofab Engineering Limited/ Plancon
11. 4D Engineering S.R.L. (Italy)/ Mayira Limited (Kenya)
12. Mahathi Infra Services Private Ltd/ Seyani Brothers & Co. (K) Ltd
13. China Jiangxi International Kenya Limited/ Xinjiang Petroleum Investigation Design & Research Institute Co. Ltd/ Pinnie Agency Ltd
14. China Petroleum Pipeline Bureau (CPP)/ Nyoro Construction Company Ltd
15. Tata Projects Limited/ Landmarks Holdings Limited
16. Chemie-Tech LLC/ M/s Nariana Enterprises Limited

17.JGH Marine A/S/Western Marine Services Ltd/ CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises Limited

EVALUATION

The following three firms did not fulfil the mandatory requirements and were deemed non-responsive and disqualified from further evaluation:-

1. Litwin SA/Ekium/Stellar Builders Ltd;
2. Farab International (FZE)/ Magic Contractors Ltd;
3. China Jiangxi International Kenya Limited/ Xinjiang Petroleum.

Fourteen (14) firms qualified to proceed to the next stage of Technical evaluation. The following two firms did not achieve the 75% overall pass mark and 50% in each of the evaluation criteria

1. China Wu Yi/ China Petroleum Engineering/Marson Integrated
2. 4D Engineering S.R.L. (Italy)/ Mayira Limited (Kenya).

Twelve (12) firms eventually qualified to proceed to the next stage of financial bid-opening.

The Results of the Preliminary and Technical Evaluation were communicated to all the bidders on 11th March 2015.

The results of the Technical Evaluation were read out at the financial bid-opening of 13th March, 2015 and were as follow:-

S/N	TENDERERS/PARTNERS	TENDER AMOUNT (USD)	FINANCIAL SCORE (%)	TECHNICAL SCORE (%)	OVERALL SCORE
1	WELDCON & VIJAY TANKS	134,404,691.59	50.93	91.00	78.98
2	SICHUANG HONGDA PETROLEUM & TISCO	75,980,543.01	90.09	82.25	84.60
3	PARESSAR & CENTRE STAR LTD	115,959,853.22	59.03	75.50	70.56
4	OFFSHORE INFRASTRUCTURE LTD & MELLECH	73,909,611.00	92.62	90.00	90.79
5	CIVION LTD & SINOPEC	68,454,567.28	100.00	86.25	90.38
6	CPEC & EMPRO MECHANICAL & ELECTRICAL ENGINEERING	76,548,005.60	89.43	92.00	91.23
7	TECHNOFAB ENGINEERING & PLANCON LTD	89,977,140.00	76.08	90.00	85.82
8	MAHATHI & SEYANI BROTHERS	83,034,858.00	82.44	90.75	88.26
9	CHINA PETROLEUM PIPELINE BUREAU & NYORO	77,014,625.00	88.89	86.50	87.22
10	TATA PROJECTS & LANDMARK HOLDINGS	78,989,887.00	86.66	89.00	88.30
11	CHEMIE –TECH & NARIANA	90,448,944.00	75.68	89.00	85.00
12	JGH/WMS/CNPCNE JV & PRIDE ENTREPRISES	78,995,147.54	86.66	98.50	94.95

The Tender Processing Committee recommended the award of the EPC tender to the partnership of JGH Marine A/S/Western Marine Services Ltd/ CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises Limited for USD 78,995,147.53 inclusive of 10% contingency and 16% VAT.

THE TENDER COMMITTEE'S DECISION

The Tender Committee meeting of 17th March 2015 deliberated on the Financial Evaluation Report and made the award to the partnership of JGH Marine A/S Western Marine Services Ltd/ CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises Limited for USD 78,995,147.53 inclusive of percentage contingency fee and all taxes.

Letters to both the successful and unsuccessful bidders were sent to all the tenderers on 18th March, 2015.

REQUEST FOR REVIEW

This Request for Review has been filed by M/s Civicon Limited of P.O. Box 99491-80107 Mombasa, who appointed the firm of Kahari & Kiai Advocates to represent them in the matter of Tender No. SU/QT/786N/14 for EPC Tender for the construction of an Aviation Fuel Depot at Jomo Kenyatta International Airport, Nairobi (Greenfield), Contract No. SU/QT/786N/14.

The Applicant requested the Board for the following orders:-

- a) *The Respondent's decision awarding Contract No. SU/QT/786N/14 to the alleged successful bidder be and is hereby set aside and nullified.*
- b) *The Respondent's decision notifying the Applicant that it had not been successful in Contract No. SU/QT/786N/14 by way of the letter dated 18th March 2015 be set aside and nullified.*
- c) *The Board be pleased to review all records of the procurement process (particularly the financial evaluation thereof) relating to Contract No. SU/QT/786N/14 and do substitute the decision of the Review Board for the decision of the Respondent and award the Tender to the Applicant.*
- d) *The Respondent be ordered to negotiate and sign a contract with the Applicant in accordance with the Tender and the decision of the Board.*
- e) *Further and/or in the Alternative and without prejudice to any of the other prayers sought herein the Review Board do direct the Respondent to undertake fresh financial evaluation of all bids received in strict adherence to the Tender, the Act and the Regulations and award Contract No. SU/QT/786N/14 to the highest competitive bidder.*
- f) *Further and in the alternative, the entire tender process be nullified and the Respondent be ordered to re-tender afresh.*

- g) *The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and*
- h) *Such other or further relief or reliefs as this board shall deem just and expedient.*

The Applicant was represented by Mr. G. M. Nyaanga, Mr. Njuguna John Kamau and Mr. Joseph Kahari Advocates while the Procuring Entity was represented by M/s Gloria Khafafa advocate. The successful bidder/the Interested Party on the other hand was represented by Mr. Mutuma Kibanga.

The Board has considered all the documents submitted to it by the parties and more particularly:-

- (i) The Request for Review filed by the Applicant herein which is dated 24th March, 2015 and which was filed on the same day.
- (ii) The response filed by the Procuring Entity with the Board on 2nd April, 2015 and which is dated 1st April, 2015.
- (iii) The Replying Affidavit which was sworn by one Sospeter Mwakoma on behalf of the Procuring Entity together with all the annextures thereto.
- (iv) The further Supporting Affidavit/statement sworn by Amit Patel dated 10th April, 2015 and which was filed with the Board on the same day.

- (v) The Replying Affidavit sworn by Mr. Andreas Gottrup on behalf of the successful bidder on 8th April, 2015 and which was filed with the Board on the same day.
- (vi) The Applicant's written submissions and which were filed with the Board on 13th April, 2015.
- (vii) The written submissions which were filed by the Procuring Entity on 13th April, 2015 together with the list of authorities and copies of the attached authorities.

The Board has also considered the original tender documents and the evaluation reports which were supplied to it by the Procuring Entity and has also heard and considered the submissions made before it by all the parties who appeared before it.

It is the view of the Board that although the parties to this Request for Review filed a number of voluminous documents and made elaborate submissions which the Board will set out in summary, this Request for Review raises the following issues which the Board has framed for determination:-

- 1. Whether the Applicant's Request for Review is incompetent under the Provisions of Regulation 73 of the Public Procurement and Disposal Regulations 2006.**

2. Whether or not the Procuring Entity contravened the Provisions of Article 227 of the Constitution, Sections 2, 34, 52, 53, 62, 63, 66, 67, 82 and 98 of the Public Procurement and Disposal Act by awarding the subject tender to a tenderer who was not the lowest evaluated tenderer under the Provisions of Section 66(4) of the Act.

The Board will therefore now proceed to examine and make a decision on the two issues framed by it for determination in this Request for Review.

ISSUE NO. 1

Whether the Applicants Request for Review is incompetent under the Provisions of Regulation 73 of the Public Procurement and Disposal Regulations 2006.

Counsel for the Procuring Entity took up objection to the Applicant's Request for Review arguing that the Board did not have jurisdiction to hear the same on the ground that it had been filed out of time. The basis for this objection was that the results of the technical evaluation had been communicated to the bidders on 11th March, 2015 and that the Applicant therefore had notice that its technical bid was unsuccessful at least by 13th March, 2015 when it received the said letter. Counsel for the Procuring Entity therefore argued that in terms of Regulation 73 (2) (c) (ii) of the Regulations, the Applicant's Request for Review was time barred and the Board did not have the jurisdiction to hear the same since it was not filed within Seven (7) days from 13th March, 2015.

Counsel for the Applicant however resisted this submission and stated that the Applicant received notice that its tender was unsuccessful on 19th March, 2015 and filed this Request for Review on 24th March, 2015 which was a period of six days from the date of receipt of the notification from the Procuring Entity. He therefore urged the Board to find that its Request for Review had been filed in compliance with the Provisions of Regulation 73 and that it should further find that it has jurisdiction to hear and determine the Request for Review.

Counsel for the successful bidder did not make any submissions on the Preliminary Objection but chose to confine himself to the merits of the Request for Review.

The Board has heard and considered the submissions made by both parties regarding the issue of jurisdiction. The Board has also had occasion to peruse the Applicant's Request for Review with all the other documents filed in this case. It is plain from the letter dated 11th March, 2015 which was sent to the Applicant by the Procuring Entity that it was advising the Applicant that its technical proposal had been successful and was inviting the Applicant to attend the opening of the financial proposals on 13th March, 2015. The Board therefore finds that there was nothing in that letter which the Applicant could reasonably be expected to challenge since what the letter was doing was to inform the Applicant that it was successful in the technical evaluation. A successful party cannot therefore be expected

to file a Request for Review before the Board since such an eventuality would look unusual and out of place.

Quite to the contrary, paragraph 9 of the Applicant's Request for Review shows that what the Applicant was actually challenging was the letter dated 18th March, 2015 which advised the Applicant that it's tender was not successful as the Applicant did not, in the Procuring Entity's view, attain the highest total weighted score but attained a composite score of 90.38%

The Applicant produced this letter at page 371 of it's Request for Review while the Procuring Entity produced the same letter as part of the annexed bundle marked as annexure 11 of it's documents. The significance of this letter is that it conveyed the final outcome of the tender, namely the result of the technical and the financial results to the Applicant and the Applicant was therefore at liberty to challenge the outcome of this final result. The notification of 11th March, 2015 however only dealt with the issue of technical evaluation but not the financial outcome of the tender.

The Provisions of Regulation 73 of the Regulations which the Procuring Entity relied upon stipulates a follows:-

Regulation 73

1. A Request for Review under the Act shall be made in For RB 1 set out in the Fourth Schedule to these Regulations.
2. The request referred to in paragraph (1) shall:-

- a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations.
- b) be accompanied by such statement as the applicant considers necessary in support of its request:
- c) be made within Seven (7) days of :-
 - (i) the occurrence of the breach complained of where the request is made before the making of an award: or;
 - (ii) the notification under Sections 67 or 83 of Act;”

The above requirements of Regulation 73 (2) (ii) clearly provide that an Applicant can therefore bring its Request for Review within Seven days from either the date of the occurrence of the breach complained of where a request is filed before the making of an award of tender or within Seven (7) days from the date of notification under Sections 67 or 83 of the Act.

As the Board has already stated, the Applicant in this Request for Review opted to file it's Request for Review after being notified that it's tender had been unsuccessful vide the letter dated 18th March, 2015. It was therefore within the Applicant's right to institute this Request for Review which was filed six (6) days after notification.

The Board has previously had occasion to consider a similar situation in the case of **IOT – Hyoung Consortium -vs- Kenya Pipeline Company Ltd (PPRAB 33 OF 2014)** where it held that an Applicant can lodge it's Request for Review either upon becoming aware of a breach or upon receiving the letter of notification that it's tender was unsuccessful.

In view of all the foregoing factors and circumstances, the Board finds that the Applicant's Request for Review was therefore filed within time and the Procuring Entity's objection to the Applicant's Request for Review is therefore disallowed.

ISSUE NO. 2

Whether or not the Procuring Entity contravened the Provisions of Article 227 of the Constitution and Sections 2, 34, 52, 53, 62, 63, 66, 67, 82 and 98 of the Public Procurement and Disposal Act by awarding the subject tender to a tenderer who was not the lowest evaluated tenderer under the Provisions of Section 66(4) of the Act.

Counsel for the Applicant started off his submissions on this issue by stating that the Applicant had participated in the tender the subject matter of the Request for Review which had a submission date of 16th February, 2015 at 10.00 a.m. and was valid for a period of 120 days from the date of opening. He stated that the tender consisted of two parts namely the technical and the financial proposal.

The Applicant submitted that its tender underwent both the technical and the financial evaluation and attained a total score of 86.25% in the technical evaluation.

Counsel for the Applicant further submitted both from the bar and in his written submissions that when the financial bids were opened the respective bidders attained the following marks:-

S/N	TENDERERS/PARTNERS	TENDER AMOUNT (USD)	FINANCIAL SCORE (%)	TECHNICAL SCORE (%)	OVERALL SCORE
1	WELDCON & VIJAY TANKS	134,404,691.59	50.93	91.00	78.98
2	SICHUANG HONGDA PETROLEUM & TISCO	75,980,543.01	90.09	82.25	84.60
3	PARESSAR & CENTRE STAR LTD	115,959,853.22	59.03	75.50	70.56
4	OFFSHORE INFRASTRUCTURE LTD & MELLECH	73,909,611.00	92.62	90.00	90.79
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8	MAHATHI & SEYANI BROTHERS	83,034,858.00	82.44	90.75	88.26
9	CHINA PETROLEUM PIPELINE BUREAU & NYORO	77,014,625.00	88.89	86.50	87.22
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12	JGH/WMS/CNPCNE JV & PRIDE ENTREPRISES	78,995,147.54	86.66	98.50	94.95

Based on the above financial scores Counsel for the Applicant submitted that the Applicant was the lowest evaluated bidder and the Applicant ought to have been awarded the tender being the bidder which had scored the lowest evaluated price. He stated that the price differential between the bidder who had been awarded the Tender M/s JGH MARINE A/S WESTERN MARINE SERVICES LTD CNPC NORTHEAST REFINING & CHEMICAL ENGINEERING CO. LTD/PRIDE ENTERPRISES LTD and the Applicant was approximately the sum of US\$ 10,000,000 which translated to approximately the sum of Kenya Shillings One Billion. The Applicant therefore stated that having submitted a bid which was the lowest evaluated bid, the citizens of the Republic of Kenya stood to lose a total figure of approximately Kenya shillings One Billion over and above the lowest price as a result of the Procuring Entity's action.

Counsel for the Applicant further submitted that by attaining a technical score of 86.25%, the Applicant had demonstrated its ability to perform the contract since the Procuring Entity also conceded that the Applicant had attained the requisite marks in the technical evaluation and that is why it was invited to attend the opening of the financial proposals.

Counsel for the Applicant consequently submitted on the basis of all the foregoing facts and circumstances that the Procuring Entity had breached the Provisions of Section 2, 34, 52, 53, 62, 63, 66, 67, 82 and 98 of the Public Procurement and Disposal Act. He stated that the Procuring Entity's action failed to:-

- (i) To maximise economy and efficiency.
- (ii) To promote competition and ensure that all the competitors were treated fairly.
- (iii) To promote the integrity and fairness of those procedures and
- (iv) To increase public confidence in those procedures.

While elaborating further on the method used, Counsel for the Applicant submitted that there was a clear distinction between an open tender and a request for proposal and that the two methods of Procurement are exclusively governed by different Provisions of the Act. As regards open tenders, Counsel for the Applicant stated that these are governed by the Provisions of Sections 50 to 71 of the Act and that the criteria for award was to the lowest evaluated bidder and that there was no other criteria for award of an open tender. The Applicant's advocate stated that Counsel for the Applicant had looked at the Black law dictionary and it says that the price connotes the amount of money or other consideration arising for or given in exchange for something as the cost at which that something is bought.

In its further Supporting Affidavit/Statement sworn at Nairobi on 10th April, 2015 and particularly to paragraph 5 thereof, Mr. Amit Shah on behalf of the Applicant stated that he had looked at the entire technical evaluation report and that it was clear to him that the same was flawed and deliberately manipulated to achieve a predetermined outcome. He further submitted that the report was subjective and was not an objective assessment of bids because the composition of the evaluation committee

did not include a Civil Engineer or a representative of Civil Engineering, an EIA expert or an Environmental Engineer or a representative on instrumentation, control and automation among other issues of a technical nature which he set out at paragraph 5 (c) (i), (ii), (iii), (iv), (v) and (vi).

He reiterated that the Procuring Entity did not properly evaluate the Applicant's bid and unjustifiably denied the applicant 12.25 marks which should have been awarded to it. He further stated that if these factors and marks had been taken into account, the Applicant would have attained a minimum of 98.4% marks and not the 86.5% marks that it had been awarded.

In answer to the Applicant's submissions on the issue of the Procurement method, Counsel for the Procuring Entity conceded when she first appeared before the Board and thereafter that the Procurement method used in this tender was that of an open tender.

She argued that Regulation 16 of the Regulations was clear as it gives a choice in open tender where you determine the winning bidder using the lowest evaluated bid and the key word there is evaluated not the definition of price. Counsel for the Procuring Entity submitted that in an open tender, the Procuring Entity had a choice to go for either the least or a weighted score depending on how much weight was to be given to the technical scores.

In her submission on the issue of price, Counsel for the Procuring Entity stated that it's decision was arrived at after weighing the ability of the

bidders through the assignment of marks to ascertain each bidder's technical and financial capability and thus select the most suitable candidate who provided the best compromise between price and quality in the manner set out in the tender document.

On the scores assigned to the Applicant, the Procuring Entity did not contest that the Applicant attained a score of 86.25% while it attained a score of 100% marks in the financial evaluation.

While commenting on the other issues raised by Counsel for the Applicant, Counsel for the Procuring Entity submitted that the Applicant was aware of the contents of the tender documents and ought to have complained or sought clarification at the outset. Counsel for the Procuring Entity submitted that it was therefore too late in the day for the Applicant to raise any complaint on the process and the outcome.

Counsel for the Procuring Entity additionally submitted that the evaluation report indicated that the tender processing committee evaluated the financial bids in strict compliance with the Provisions of clause 3.26.2 of the tender document and that all bids were examined for competences and accuracy.

On the issue of the time for evaluation, Counsel for the Procuring Entity submitted that the bid document provided for a maximum amount of time during which evaluation may be carried out and completed and that the Procuring Entity did not err. She stated that a properly constituted KPC

tender committee met on 17th March, 2015 deliberated on the financial evaluation report and awarded the same to the winning bidder.

Counsel for the Procuring Entity finally submitted on the basis of it's response that the Procuring Entity had demonstrated that it's tender document placed due emphasis on both economy and efficiency by ascribing marks to both the technical and the financial capabilities of the bidder and had therefore complied with the Provisions of the Constitution and the Act on efficiency, economy, transparency, accountability, integrity and fairness of the procedures and therefore urged the Board to dismiss the Applicant's Request for Review as no breach of the law had been demonstrated.

Mr. Mutuma Kibanga for the successful bidder while relying on the Replying Affidavit sworn by Mr. Andreas Gottrup on 8th April, 2015 associated himself with the submissions made by Counsel for the successful bidder. He denied that the evaluation had been skewed in favour of his client as suggested by the Applicant and further submitted that a reading of Section 66 of the Act leaves no doubt that what the law requires is not the lowest financial bid but rather it is the lowest evaluated price. He stated that technical evaluation was part and parcel of determining what the lowest evaluated price was and that the successful bidder had emerged with the best technical proposal and the best technical and financial score at the end of the exercise.

Counsel for the successful bidder further submitted that the Applicant's project Manager was aware of the contents of the tender document and the manner of scoring and if he felt that the tender document was unfair in any respect he had every opportunity to raise that point and that this was not done. He referred the Board to page 33 of 96 of the tender document which he stated conformed specifically with Section 66 (2) of the Act.

On the issue of price, Counsel for the successful bidder submitted that the price quoted by his client was not exaggerated as stated by the Applicant and reiterated the fact that his client had scored a total of 98.50% on the technical score which showed that it was best suited to perform the tender as it knew precisely what was to be done and therefore no money would be lost on the part of the Procuring Entity.

Counsel for the successful bidder finally urged the Board to uphold the tender awarded to his client and dismiss the Applicant's Request for Review with costs.

In reply to the submissions made by Counsel for the Procuring Entity and the successful bidder, Counsel for the Applicant disputed the submission by Counsel for the Procuring Entity that an open tender could be awarded to anyother bidder other than the lowest evaluated bidder under the Provisions of Section 66(4) of the Act. He stated that the law on this issue was clear and needed no interpretation.

He drew a distinction between the highest combined technical and financial score and stated that this was only applicable under the

parameters of a Request for Proposals found under Section 82 (5) of the Act and not to an open tender which is governed by a different set of laws.

He submitted that to transpose the Provisions of a Request for Proposals into an open tender would expressly violate and would be in breach of the law.

He urged the Board to find that the Public stood to lose a total of approximately Kenya Shillings One (1) Billion as a result of the mix up of the Procurement method and urged the Board to award the tender to his client which had passed the technical evaluation and therefore demonstrated its ability to perform the tender.

The Board has considered the submissions made by the parties on the second issue and finds that it was not in dispute in this Request for Review that the tender the subject matter of this Request for Review was an open tender. This fact was admitted by Counsel for the Procuring Entity in her submissions and by Counsel for the successful bidder. The Board has looked at the advertisement which was placed in the Standard and the Daily Nation Newspapers of 14th November, 2014 and finds that the advertisement was for an open tender. The Board has also perused both the technical and the financial evaluation reports and finds that a technical and financial evaluation were both carried out but at the end of the said exercise, the Procuring Entity combined the percentages attained by the various bidders in the technical and the financial scores in order to come up with a winner.

The Board has perused the tender opening register, the technical and the financial proposals which are dated 16/2/2015, 12/03/2015 and 16/3/2015 respectively and finds that the technical proposals for all bidders were evaluated. At the conclusion of the said exercise, the Applicant was found to have attained at least 50% in each category and an overall score of 86.5% which was above the 75% mark required under clause 3.26.1 (i) of the tender document for an Applicant to proceed for financial evaluation.

The financial evaluation report which was signed by all the members of the evaluation committee on 16/3/2015 shows that the Applicant was the lowest evaluated bidder and was awarded 100% having offered the lowest price of USD 68,454,567.28.

The Board does not therefore have any doubt that this tender was evaluated in its entirety but what the Procuring Entity proceeded as earlier stated, was to aggregate the scores in the technical and the financial scores in order to arrive at the successful bidder after completing the process of evaluation.

The Applicant argued that such an aggregation could only be done if the tender in question was a Request for Proposals but not an open tender where the winner can only be the bidder which had attained the lowest evaluated price under the provisions of Section 66 (4) of the Act.

The only question which the Board therefore has to decide under this issue is whether it was open for the Procuring Entity to award the tender to

anyother bidder other than that provided for under Section 66 (4) of the Act.

The Public Procurement and Disposal Act 2005 provides for various methods which a Procuring Entity can use while advertising for goods and services. These methods which a Procuring Entity can use are; an open tender, a restricted tender, a direct Procurement, a Request for Proposals, a Request for Quotations and a Low Value Procurement Procedure.

These Procurement methods are governed by the Provisions of Section 50 to 71, 73, 74, 75, 76 to 87, 88 to 89, 90 to 91 and 92 of the Act respectively.

In the Request for Review before the Board, the Procuring Entity elected to use the open tendering method in procuring the particular services from the bidders. The Procuring Entity diligently proceeded with both the technical and the financial evaluation but when it reached the stage of awarding the tender, the Procuring Entity elected to do so under the Provisions of Section 82(5) of the Act which is applicable to Requests for Proposals. Section 82 (5) of the Act and which is relevant to Requests for Review before the Board provides as follows:-

Section 82 (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 under subsections (2) and (3) and the

results of any additional methods of evaluation under subsection (4)".

The Board has looked at the Provisions of the Act and finds that the Procuring Entity erred in law in the manner in which it acted in awarding the tender as this expressly contravened the provisions of the law on open tendering which is set out in Sections 50 all the way to Section 71 of the Act.

The criteria for an award of tender where the method used is open tendering is set out under the Provisions of Section 66 (4) of the Act which expressly provides as follows:-

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

In the case of **Landor Associates -vs- Kenya Power and Lighting Company Ltd (PPRB Application No. 42 of 2000)**, the Board held that where the Procuring Entity had adopted a particular method, then the eventual award should be made under the Provisions of the law governing that method but not that applicable to another method.

During the hearing of the Request for Review, both Counsel for the Procuring Entity and Counsel for successful bidder submitted that the Applicant's Project Manager was aware of the contents of the tender document and the manner of scoring and ought to have complained if the

Applicant found that the contents of the tender document were unfair or they alternatively ought to have sought for clarification.

The Board however takes the view that this would not have cured the defect in the declaration of the winner since the declaration was done in contravention of the law. It is now a well established principle of law that any action done in contravention of the express Provisions of the law cannot be cured. As the Board has already observed this was an open tender and a winner had to be declared in accordance with the Provisions of Section 66(4) of the Act and any defect in complying with the law cannot be cured by the contents of the tender document or a party's acquiescence to the same. In the case of the **Kenya Airways Limited -vs- Satwart Singh Flora (Nai CA No. 54 of 2005)** the Court of Appeal held that any action prohibited by a statute would be against Public Policy and that a party who had breached the Provisions of the law could not benefit from such an action. The court also held that any contract or transaction arising from such a breach was illegal and was unenforceable.

Turning to the issue of price, the tender price presented by the Applicant in this case was the sum of USD 68,454,567.28 while the successful bidder gave a price of USD 78,995,147.54. This represented a price differential of approximately 10,000,000 USD which is an equivalent of approximately One Billion Kenyan Shillings. By using the wrong method therefore the Public stood to suffer a loss of One Billion Kenya Shillings which is a colossal amount of money.

The Procuring Entity in paragraph 7 of its written response and in paragraph 9 of the Replying Affidavit sworn by Sospeter Mwakoma sought to point out certain shortcomings in the Applicant's bid which revolved around its technical and financial ability to deliver this project.

The Board is however of the respectful view that the Procuring Entity evaluated both the technical and the financial proposals by the applicant and awarded it a total of 86.25% and 100% respectively. The technical score was above the pass mark of 75% required for a party to proceed to financial evaluation and thus the invitation by the Procuring Entity to the Applicant to attend the financial opening of the bid. The Board therefore agrees with the Applicant's submissions that it has the ability to undertake the project which is the subject matter of this Request for Review.

One of the prayers which the Applicant sought in this Request for Review as prayer C was for an order that the Board be pleased to review all records of the Procurement process particularly the technical evaluation and thereafter to substitute the decision of the Review Board for the decision of the Procuring Entity and award the Tender to the Applicant.

The Board has previously exercised this power in a number of cases where the facts and the law were clear. In the case of **Horsbridge Network Systems (E.A) Ltd -vs- The Central Bank of Kenya [PPARB No. 65 of 2012]** which was a case relating to an open tender which had gone through both a technical and financial evaluation, the Board declared the Procuring Entity's purported termination of the procurement process illegal and

substituted the same by awarding the tender to the lowest evaluated bidder as required by the law.

In the more recent case of **Com Twenty One Ltd -vs- The Comptroller of State House and MFT Technology Solution Ltd (PPARB No. 45 of 2014)** the Board substituted the decision of the Procuring Entity which had awarded the subject tender to a tenderer who was not qualified and awarded the same to the lowest evaluated bidder in accordance with the Provisions of Section 66 (4) of the Act. The Procuring Entity had similarly carried out an evaluation but failed to take into account that the party earlier awarded the tender had not complied with the Provisions of the **National Construction Authority Act**.

The Board has not and will not hesitate to substitute a decision of the Procuring Entity where the circumstances of any particular case warrants it.

In view of this fact and in view of the urgency in the nature of the project involved and in the further public interest involved in upholding the Provisions of the Act and particularly Section 66 (4) of the Public Procurement and Disposal Act 2005, the Board finds that this is a proper case for the Board to intervene under the Provisions of Section 98 (c) of the Act and notes that other than the above considerations, the Board's action will also save time and public cost in carrying out another process when it is clear that both the technical and the Financial evaluation were properly carried out and that the mistake only arose in failing to comply with the

provisions of the Act regarding the declaration of the successful winner under the law.

The Board wishes to state that this is a power that is expressly conferred on the Board by the Provisions of Section 98 (c) of the Act and has exercised it albeit sparingly when the case before it is a straight forward case of a Procuring Entity failing to act in accordance with the law. As the Board has already observed the Procuring Entity proceeded properly and evaluated both the technical and the financial proposals which were placed before it and determined that out of all the bidders who submitted their tenders to, it was the Applicant which offered the lowest tender price leading to a saving of approximately One Billion of tax payers money.

FINAL ORDERS

In view of all the above findings and in exercise of the powers conferred upon it by the Provisions of Section 98 of the Act, the Applicant's Request for Review is therefore allowed and the Board makes the following orders on this Request for Review:-

- a) That the Respondent's decision awarding the tender for an EPC Tender for the construction of an Aviation Fuel Depot at the Jomo Kenyatta International Airport Nairobi (Greenfield) to the successful bidder M/s Tender JGH MARINE A/S WESTERN MARINE SERVICES LTD CNPC NORTHEAST REFINING & CHEMICAL ENGINEERING CO. LTD/PRIDE ENTERPRISES LTD be and is hereby annulled.

- b) In exercise of the powers conferred upon it by the Provisions of Section 98 (c) of the Act, the Board hereby substitutes the decision of the Procuring Entity to award the subject tender to the successful bidder and awards the same to the Applicant Civicon Limited on the ground that the Applicant was the lowest evaluated bidder under the Provisions of Section 66 (4) of the Public Procurement and Disposal Act 2005.
- c) The Procuring Entity is hereby directed to issue a letter of award and conclude the Procurement process including signing a contract with the Applicant within 15 days from today's date.
- d) In view of the orders made above, the Board directs that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 21st day of April, 2015.



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CHAIRMAN
PPARB



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SECRETARY
PPARB

