

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 16 /2016 OF 10TH MARCH, 2016

BETWEEN

UNIBEE CONSTRUCTION LIMITED.....APPLICANT

AND

ATHI WATER SERVICES BOARD.....PROCURING ENTITY

Review against the decision of the Athi Water Services Board (AWSB) Meeting No.12/2015-2016 held on 5th February, 2016, in the matter of Tender No. BADEA/AWSB/OWSP/GoK/01/2015 for Oloitoktok Water Supply and Sanitation Project: Rehabilitation and Augmentation of Oloitoktok Water Supply and Sewerage for Oloitoktok Town.

BOARD MEMBERS PRESENT

- | | |
|--------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Nelson Orgut | - Member |
| 3. Rosemary Gituma | - Member |
| 4. Hussein Were | - Member |

IN ATTENDANCE

- | | |
|--------------------|---------------|
| 1. Philemon Kiprop | - Secretariat |
| 2. Shelmith Miano | - Secretariat |

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PRESENT BY INVITATION

Applicant 16/2016 – Unibee Construction Ltd

1. Geoffrey Maina - Advocate
2. Francis Kabuchu - Legal Assistant
3. Kimondo J. Maina - Director
4. Mosses Muturi - Engineer

Procuring Entity – Athi Water Services Board

1. Charles Njuguna - Advocate
2. Gabriel Maina - Pupil
3. Rose Nyaga - Ag. CEO
4. Jones Mwinzi - SCM
5. Ann Gacheri - SPO
6. Simon Mwaniki - SCDO
7. Julius Serei - Engineer
8. Emily Kyalo - Legal
9. CeaserThure - Engineer, Runji & Partners
10. Teddy Gichaba - Engineer, Runji & Partners

Interested Parties

Applicant 17-2016 – Magic General Construction Ltd

1. George Kamau - Advocate

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2. Denis Juma - Advocate
3. Akoko Donald - QS
4. Teresa Wambui - Office Manager

Machiri Limited

1. Eng. J. M. Macharia - MD, Machiri Limited

THE BOARD'S DECISION

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

BACKGROUND OF AWARD

INTRODUCTION

The Government of Kenya, represented by Athi Water Services Board (AWSB) which is a state corporation under the Ministry of Water and Irrigation (MWI), received funding from the Arab Bank for Economic Development in Africa (BADEA) for implementation of the Rehabilitation of Water Supply and Sewerage for Oloitokitok Town Project. The Government of Kenya applied part of the proceeds from the fund for implementation of Oloitokitok Water Supply and Sanitation project.

Advertisement

The invitation for bids was published in the "The Standard" and "The Daily Nation" newspapers on 22nd October, 2015. The bids were to be

submitted on 3rd December, 2015 at 12 noon after a 40-days bidding period.

Pre-Bid Site Visit

A pre-bid site visit was conducted on 5th November, 2015 as specified in Clause 5.6 of the Instructions to Bidders.

Bid Closing/Opening

Out of the No.58 Firms that were provided with the bid documents, a total of 14 No. firms submitted their bids by the deadline for bid submission which was 3rd December, 2015 at 12.00 noon.

Announced Bid Prices

The read out bid price (as entered in the Form of Bid) for each bidder and as announced in the order of bid opening is shown in, Table 2.2 below.

No	Name of Firm	Bid Price as read out(Kshs)	Disc. (%)	Final Price	Ranking
1.	Yomason Contractors Ltd	980,392,212.35	Nil	980,392,212.35	13
2.	Machiri Limited	912,793,505.52	3%	887,173,642.75	8
3.	Abdulhakim Ahmed Bayusuf & Sons	875,555,937.47	12%	875,555,937.47	7
4.	Penelly Construction & Engineering Ltd	845,223,494.38	Nil	845,223,494.38	4

5.	Lee Construction Ltd	895,831,031.64	Nil	895,831,031.64	10
6.	Unibee Construction Ltd	679,738,830.15	Nil	679,738,830.15	1
7.	Zamawa Construction Co. Ltd	1,150,376,036	Nil	1,217,815,832	14
8.	Vaghjiyani Enterprises Limited	894,941,801*	Nil	894,941,801	9
9.	Javaland Contractors Ltd	732,399,907.00	Nil	732,399,907	2
10.	Telemart Ltd	853,885,591.78	Nil	853,885,591	5
11.	Njuca Consolidated Co. Ltd	924,354,671.36	Nil	924,354,671	12
12.	Newage Developers & Construction Co. Ltd	920,777,640.98	Nil	920,777,640	11
13.	Magic General Contractors	868,021,884.25	12.25 %	868,021,884	6
14.	NGM Company and Funan Contractors Ltd JV	838,044,823.68	Nil	838,044,823	3

Evaluation of Bids

PRELIMINARY EXAMINATION OF BIDS

The submitted Bids were examined to ascertain if all the required documentation had been submitted and if they were in compliance with the stipulated requirements of the Bid Documents.

Preliminary examination was aimed at determining Bids that were complete, valid and substantially responsive to the requirements of the Bid Documents and therefore were to be considered for further evaluation.

The following items were examined:-

- a) Eligibility
- b) Duly signed Letter of Bid [in the required format and duly signed by an authorised signatory]
- c) Duly signed/initialled pages of the bid where entries had been made as required in ITB Clause 20.2;
- d) Duly sealed Power of Attorney;
- e) Bid Security of the specified amount in the specified form and for the specified validity period;
- f) Duly filled-in and priced Bill of Quantities [basic completeness check only];
- g) Duly completed Qualification Information Form and required attachments, and any other supplementary material required to be completed and submitted by the Bidder as specified in the Bid Documents [basic completeness check only];
- h) Joint Venture Agreement in the case of a Joint Venture Bid;
- i) Details of proposed Sub-Contractor for Photovoltaic System

- j) No. of submitted Bid documents as required - one original Bid document and four matching copies organised in an orderly manner;
- k) Bid completed in the English language, as required; authorised foreign language translations for some of the requested documents were also checked.

Preliminary examination of the Fourteen (14) Bids that were received was carried out to determine if these were complete and responsive in accordance with the requirements of the Bidding Documents.

Eligibility

The examination revealed the following:-

- All Bidders were found to be from eligible countries;
- All Bidders were found to have no conflict of interest with the project as declared in their bid;
- All Bidders were duly registered legal entities as per the submitted registration documents.

Bid Security

Fourteen Bidders submitted their Bids accompanied with a Bid Security of 2% of the Bid Price as specified in the Bid Documents. However, Bidder No.7, Zamawa Construction Co. submitted an insurance bid security instead of an unconditional Bank Bid Security as specified in the bidding document. The Bidder was therefore disqualified.

Completeness of Bids

- The Bids were further examined for completeness to verify if: They were complete;

- Erasures, interlineations, additions or other changes made were initialled by the authorised signatory to the Bid.

All bids were found compliant.

Substantial Responsiveness of Bids

The Bids were examined for substantial responsiveness as required in the Bidding Document. The Bids were examined to verify whether they conformed to all the terms, conditions and specifications of the Bidding Document, without material deviation or reservation such as the following:-

- Any bidder objecting to bear required responsibilities and liabilities (i.e. performance guarantee, insurance coverage, etc.);
- Any bidder taking exception to critical provisions such as applicable laws, taxes and duties.

The following non-conformities were found:-

- Bidder No.7, Zamawa Construction Co. submitted an insurance bid security instead of an unconditional Bank Bid Security
- Bidder No. 9 did not attached a certificate of site visit and a power of attorney
- Bidder No. 10 did not submit a duly signed letter of bid and power of attorney
- Bidders No. 13, Magic General Contractors, submitted incomplete BoQs for Ablution Blocks – Pages 107 & 112 were missing.

The bidders were disqualified at this stage.

Results of Preliminary Examination

From the Preliminary Examination of Bids, the following Ten (10) out of Fourteen (14) bids received were determined to be materially responsive and therefore accepted for detailed qualification, evaluation and comparison of their Bids.

* Bidder N0. 2 provided a discount of 3% in this Letter of Tender giving a corrected Tender Sum of Kshs 890,475,606.97

** Bidder No. 3 submitted a Tender sum of Kshs 875,555,937.47 which included 12% discount in the BoQ summary. Therefore the corrected Tender sum was Kshs 1,060,904,651.00

DETAILED EVALUATION AND QUALIFICATION

General

The Ten (10) Bidders that passed the preliminary qualification criteria had their bids subjected to detailed evaluation.

Corrections of arithmetic errors and unconditional discounts

The Ten bidders (10) that passed to the preliminary examination state were checked for arithmetic errors in accordance with Clause 5.5 of the Instructions to Bidders to arrive at corrected bid prices.

All the Ten (10) bidders had computational errors.

4.10 Results of Detailed Examination / Evaluation of Bids

Bid S/N o.	Name of Bidder	Read out Price (KHz)	Corrected Bid Price (KHz)
1	Yomason Contractors Ltd	980,392,213.35	1,096,122,124.09

2	Machiri Ltd	887,173,642.75	890,475,606.97
3	Abdulhakim Ahmed Bayusuf & Sons	875,555,937.47	1,060,904,651.00
4	Penelly Construction & Engineering	845,223,494.38	869,719,747.63
5	Lee Construction Ltd	895,831,031.64	888,527,945.64
6	Unibee Construction Ltd	679,738,830.16	730,768,979.47
8	Vaghjiyani Enterprises Limited	894,941,801.00	1,187,612,575.01
11	Njuca Consolidated Co. Ltd	924,354,671.36	1,048,031,059.42
12	Newage Developers & Construction Co. Ltd	920,777,640.98	922,861,708.81
14	NGM & Funan Company Ltd	838,044,823.68	901,396,205.41

Post Qualification for a few bidders is sampled because of the long list

A) BIDDER NO. 6: UNIBEE CONSTRUCTION LTD

Post-qualification evaluation has been carried out to confirm the information for the bidder with the lowest price. Unibee Construction Ltd was selected as having submitted the lowest bid price and therefore it was subjected to a post-qualification evaluation in order to determine to the Employer's satisfaction that the bidder was substantially responsive and met the qualifying criteria specified in Section VIII, Evaluation and Qualification Criteria of the bidding document. Post qualification evaluation was carried out Pursuant to Section III of the

Evaluation and Qualification Criteria and in compliance to the ITBs clause 8.1.1

Eligibility

Criteria	Requirement	Proposed
Nationality	Nationality in accordance with ITB 8.1.1 (From Arab, African or African-Arab Contractors)	-The company is Kenyan -registered in 2010 Meets the criteria

Historical Contract Non-Performance

HISTORICAL CONTRACT NON-PERFORMANCE		
FACTOR	Requirement	Proposed
Sub-Factor History of Non-Performing Contracts	Non-performance of a contract did not occur within the last Five (5) years prior to the deadline for application submission, based on all information on fully settled disputes or litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the Dispute Resolution Mechanism under the respective contract, and where all appeal instances available to the bidder have been exhausted.	- The firm has no history of non-performance of contracts in the last five years Hence meets criteria
Pending Litigation	All pending litigation shall in total not represent more than Fifty percent (50%) of the Bidder's net worth and shall be treated as resolved against the Bidder.	- The firm has no pending litigation Hence meets criteria

Financial Situation

Financial Situation and Performance		Actual
FACTOR	Required	
Sub-Factor Historical Performance	Submission of audited balance sheets or if not required by the law of the bidder's country, other financial statements acceptable to the Employer, for the last Three [3] years to demonstrate the current soundness of the bidders financial position and its prospective long term profitability.	The firm has submitted audited accounts for 2010, 2011, 2012, 2013 & 2014 The statements show a profit making trend hence the firm is financially sound.
Average Annual Turnover	Minimum average annual turnover of Kshs. 600,000,000, calculated as total certified payments received for contracts in progress or completed, within the last Five (5) years.	The average annual turnover for the last five years is Kshs. 722,418,570.80
Financial Resources	The Bidder must demonstrate access to, or availability of, financial resources such as liquid assets, unencumbered real assets, lines of credit, and other financial means, other than any contractual advance payments to meet: (i) The following cash-flow requirement: The financial requirements to adequately fund the works for three months at any one given time. (Kshs. 150,000,000)	The firm has indicated to have a share capital of kshs.50,000,000 and retained earnings of kshs.30,000,000. They have further indicated that kshs.70,000,000 shall be obtained from financial institutions. However, no documentary proof is attached. The firm does not meet the criteria

Experience

Experience		Actual
Factor	Required	
General Experience	Experience under contracts in the role of contractor, subcontractor, or management contractor for at least the last Five [5] years prior to the applications submission deadline, and with activity in at least nine (9) months in each year.	The firm has demonstrated to be a main contractor/sub-contractor for the last five years mainly specializing in irrigation projects.
Specific Experience	(a) Participation as contractor, management contractor, or subcontractor, in at least one (1) contracts within the last Five (5) years, each with a value of at least Kenya Shillings Seven Hundred Million (700,000,000) or equivalent in a freely convertible currency, that have been successfully and substantially completed and that are similar to the proposed Works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section VI, Employer's Requirements.	<p>The firm has attached completion certificates for several projects. Some of the best with supporting evidence include:</p> <ul style="list-style-type: none"> i) Usueni Irrigation Project for NIB valued at kshs.104,030,784.43 (2012) ii) Wikithuki Irrigation Project for NIB valued at kshs.238,984,667.25 (2013) iii) Muringa Banan Irrigation Project for NIB valued at kshs.200,813,599.80 (2011) <p>However, none of the above projects is similar in terms of complexity, physical size & methods.</p> <p>The bidder does not meet the criteria</p>

<p>Specific Experience</p>	<p>b) For the above or other contracts executed during the period stipulated in 2.4.2(a) above, a minimum experience in the following key activities:</p> <p>(i) Laying of water pipe mains of Diameter meter 200mm of approximately 10km in length</p> <p>(ii) Laying of sewer pipes of Diameter meter 450mm for approximately 10km.</p> <p>(iii) Bulk earthworks excavations of 5000m³ per month.</p> <p>(iv) Concrete production of 500m³ per month</p>	<p>- Laying of water pipe mains of Diameter meter 200mm of approximately 10km in length</p> <ul style="list-style-type: none"> - Construction of 35 km pipeline for Mukuku Irrigation scheme - Construction of 20 km pipeline for Isinet Irrigation scheme - Length, type and Diameter meter of pipes not indicated - The bidder has not met the criteria <p>Laying of sewer pipes of Diameter meter 450mm for approximately 10km</p> <ul style="list-style-type: none"> - The firm has no experience at all in construction of sewers - The bidder has not met the criteria <p>Bulk earthworks excavations of 5000m³ per month</p> <ul style="list-style-type: none"> - Not indicated <p>Concrete production of 500m³ per month</p> <ul style="list-style-type: none"> - Not indicated <p>The bidder does not meet the criteria</p>
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The bidders do not meet the specific experience criteria

No.	Position	Total Experience (years)		Work (years)		Similar Works Experience (years)		Remarks
		Required	Assessed Number in Bid	Assessed Number in Bid	Required	Assessed Number in Bid		
1	Project Manager, Bsc. Civil Engineering, Registered with EBK or Equivalent	15	26	8	20	Registered; experience as site agent ; does not Meet criteria		
2	Site Agent (Bsc. Civil Engineering, Registered with EBK)	10	40	5	35	Registered; Meets criteria		
3	Assistant Site agent 1 (Bsc. Civil Engineering) Assistant Site agent 2. (Bsc. Civil Engineering)	7	36 15	3	30 Nil	Meet criteria 2 nd staff not proposed; criteria not met		

No.	Position	Total Experience (years)		Work Experience (years)	Similar Works Experience (years)		
			5				
4	At least 2 No. Construction Supervisors/ Measurement Engineers (Bsc. Civil Engineering or Equivalent)	8	3	8	5	5	Meet criteria 2 nd staff not proposed; criteria not met
5	1 No Graduate Surveyor (Bsc. Land Surveying)	12	2	12	>10		Qualifications not stated hence could not be fully assessed. Criteria not met
6	Foremen (OND in Civil Engineering)	21	5	21	0		Staff has Dip. In Building Construction; Criteria not met
7	Electro-Mechanical Engineer	14	3	14	10		Meets criteria

The bidder does not meet the personnel criteria

Equipment

The bidder has confirmed availability of the following equipment as per the requirement of the bidding document.

No.	Equipment Type and Characteristics	Minimum Number required	Required	Assessed Number in bid	Remarks
1.	Wheel loader	2.0m ³	1	2	Meets criteria
2.	Dump Trucks/Tipper 15t	15t	4	4	Meets criteria
3.	Batching Plant	15m ² /hr	1	0	Not proposed
4.	Agitator Premix concrete Trucks	4.5m ³	2	2	Meets criteria
5.	Compressor	5m ³ /min	2	2	Meets criteria
6.	Bulldozer	Caterpillar D6	1	2	Meets criteria
7.	Hydraulic Excavator	1.5m ³	2	3	Meets criteria
8.	Vibration Roller	10t	1	1	Meets criteria
9.	Generator	200KVA	1	1	Meets criteria
10.	Water Tanker/ Bowser	15m ³	1	0	Not proposed
11.	Water Pumps		2	5	Meets criteria

The bidder meets the equipment criteria; the two items not proposed can be addressed at negotiation.

Conclusion

From the evaluation of Financial Resources, General and Specific Experience, Personnel, and Equipment the firm was found **Not Qualified** to undertake the rehabilitation and augmentation Oloitokitok water supply and sanitation project.

BIDDER NO. 2: MACHIRI LTD

Post-qualification evaluation has been carried out to confirm the information for the bidder with the **Fifth lowest** evaluated Bid Price. Machiri Ltd was selected as having submitted the **Fifth lowest** evaluated bid price and therefore it was subjected to a post-qualification evaluation in order to determine to the Employer's satisfaction that the bidder is substantially responsive and meets the qualifying criteria specified in Section VIII, Evaluation and Qualification Criteria of the bidding document. Post qualification evaluation was carried out Pursuant to Section III of Evaluation and Qualification Criteria and in compliance to the ITBs clause 8.1.1

Eligibility

Criteria	Requirement	Proposed
Nationality	Nationality in accordance with ITB 8.1.1 (From Arab, African or African-Arab Contractors)	The firm was registered in Kenya in 18 th June 2009. All directors are Kenyan. The bidder meets the criteria

Historical Contract Non-Performance

HISTORICAL CONTRACT NON-PERFORMANCE		
FACTOR	Requirement	Proposed
Sub-Factor History of Non-Performing Contracts	Non-performance of a contract did not occur within the last Five (5) years prior to the deadline for application submission, based on all information on fully settled disputes or litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the Dispute Resolution Mechanism under the respective contract, and where all appeal instances available to the bidder have been exhausted.	The firm has no history of non-performing contracts. Meets criteria
Pending Litigation	All pending litigation shall in total not represent more than Fifty percent (50%) of the Bidder's net worth and shall be treated as resolved against the Bidder.	The firm has indicated it does have pending litigation with Nairobi City Water and Sewerage Company with respect to contract No NWSC/24/2011 Amounting Kshs 187,126,602.36. <i>They claim for extension of time payment</i> amounting Kshs 54,100,639. Average net worth is Kshs 367,541,000, hence litigation amount is approximately 15% of his net worth, hence less than the maximum allowable of 50%, Meets criteria.

Financial Situation

FACTOR		Financial Situation and Performance	
Sub-Factor		Required	Actual
Historical Performance	Financial	Submission of audited balance sheets or if not required by the law of the bidder's country, other financial statements acceptable to the Employer, for the last Three [3] years to demonstrate the current soundness of the bidders financial position and its prospective long term profitability.	The firm has attached financial statements of 2010, 2011, 2012, 2013 & 2014, which indicate the company is profitable. Meets criteria
Average Annual Turnover		Minimum average annual turnover of Kshs 600,000,000, calculated as total certified payments received for contracts in progress or completed, within the last Five (5) years.	The firm has indicated that its average annual turnover for the last five years at Kshs. 1,271,969,271 Meets criteria
Financial Resources		The Bidder must demonstrate access to, or availability of, financial resources such as liquid assets, unencumbered real assets, lines of credit, and other financial means, other than any contractual advance payments to meet: (i) the following cash-flow requirement: The financial requirements to adequately fund the works for three months at any one given time. (Kshs. 150,000,000)	The firm has attached evidence of financial resources. i) NIC Bank overdraft – up to kshs. 60,000,000 and Bank Guarantee – upto kshs. 400,000,000 (See letter attached) Bidder meets criteria

Experience

Experience		Actual
Factor	Required	Actual
General Experience	Experience under contracts in the role of contractor, subcontractor, or management contractor for at least the last Five [5] years prior to the applications submission deadline, and with activity in at least nine (9) months in each year.	<p>i) Improvement and expansion of sewerage facilities at JKIA valued at Kshs 773.1 million (2009).</p> <p>ii) Water supply and sanitation program for Nzoia cluster Phase II- Step I and II (Kakamega, Busia and Nambale) valued at Kshs 1.135Billion (2010).</p> <p>iii) Water supply and sanitation program for Nzoia cluster Phase II- Step I and II (Bungoma, Kitale and Webuye) valued at Kshs 1.724Billion (2010).</p> <p>iv) Rehabilitation and augmentation of water supply and sanitation work, Naivasha and Gilgil town valued at Kshs 249.5 Millions (2010).</p> <p>v) Rehabilitation of Sasumua Dam (damaged spillway) valued at Kshs 2.06 Billion (2010).</p> <p>vi) Construction of Gatharaini Trunk Sewer (Ruaraka) valued at Kshs 1.433 Billions (2012).</p> <p>vii) Construction of Kimira –Oluch Irrigation Scheme (Lot 1 &2) valued at Kshs 881.9 Millions (2012).</p> <p>viii) Relocation of water and sewerage facilities along Thika Road valued at Kshs 166.57 Millions (2012).</p> <p>ix) Extension of DN300mm water pipeline (Kirigiti to Kahawa West) valued at Kshs 187.1 Millions (2012).</p>

Specific Experience	(a) Participation as contractor, management contractor, or subcontractor, in at least one (1) contracts within the last Five (5) years , each with a value of at least Kenya Shillings Seven Hundred Million (700,000,000) or equivalent in a freely convertible currency, that have been successfully and substantially completed and that are similar to the proposed Works. The similarity shall be based on the physical size,	<p>x) Construction of Tailing Storage starter works for the Kwale mineral sand project at kshs.580,632,490. (2013)</p> <p>xi) Construction of Coffey demand Merilla barrage rehabilitation works valued at Kshs 232.1million (2013).</p> <p>xii) Rehabilitation/extension of Mombasa water supply works Lot 1 valued at Kshs. 942.1 million (2014)</p>
		<p>The contractor has indicated to have done the following projects:</p> <p>i) Improvement and expansion of sewerage facilities at JKIA valued at Kshs 773.1 million (2009).</p> <p>ii) Water supply and sanitation program for Nzoia cluster Phase II- Step I and II (Kakamega, Busia and Nambale) valued at Kshs 1.135Billion (2010).</p> <p>iii) Water supply and sanitation program for Nzoia cluster Phase II- Step I and II (Bungoma, Kitale and Webuye) valued at Kshs 1.724Billion (2010).</p> <p>iv) Rehabilitation of Sasumua Dam (damaged spillway) valued at Kshs 2.06 Billion (2010).</p> <p>v) Construction of Gatharaini Trunk Sewer (Ruaraka) valued at Kshs 1.433 Billions (2012).</p> <p>vi) Construction of Kimira –Oluch Irrigation Scheme (Lot 1 &2) valued at Kshs 881.9 Millions (2012).</p> <p>vii) Rehabilitation/extension of Mombasa water supply works Lot 1 valued at Kshs. 942.1 million (2014)</p>

	<p>complexity, methods/technology or other characteristics as described in Section VI, Employer's Requirements.</p> <p>b) For the above or other contracts executed during the period stipulated in 2.4.2(a) above, a minimum experience in the following key activities:</p> <p>(i) Laying of water pipe mains of Diameter meter 200mm of approximately 10km in length</p> <p>(ii) Laying of sewer pipes of Diameter meter 450mm for approximately 10km.</p> <p>(iii) Bulk earthworks excavations of 5000m³ per month.</p> <p>(iv) Concrete production of 500m³ per month</p>	<p>The bidder has met the criteria</p>
<p>Specific Experience</p>		<ul style="list-style-type: none"> - Laying of water pipe mains of Diameter meter 900mm of approximately 42km in length, 25km of DN200-300 4km of DN250 Ferrous Pipe and 12.5km of DN200 uPVC pipe - Laying of sewer pipes of Diameter meter 450to600mm for approximately 15km and 6.8km of DN600 - Bulk earthworks excavations of 8300m³ per month - Production of >5000m³ Per month - Concrete production of 600m³ per month - Production of >500m³ Per month <p>meets the criteria</p>

N o.	Position	Total Work Experience (years)		Similar Works Experience (years)		Remarks
		Required	Assessed Number in Bid	Required	Assessed Number in Bid	
1	Project Manager, Bsc. Civil Engineering, Registered with EBK or Equivalent	15	36	8	21	Registered Meets criteria
2	Site Agent (Bsc. Civil Engineering, Registered with EBK)	10	25	5	7	registered
3	Assistant Site agent 1 (Bsc. Civil Engineering) Assistant Site agent 2. (Bsc. Civil Engineering)	7	21 19	3	9 10	Meet criteria
4	At least 2 No. Construction Supervisors/ Measurement Engineers (Bsc. Civil Engineering or Equivalent)	5	6s	3	4 4	Meets criteria

5	1 No Graduate Surveyor (Bsc. Land Surveying)	5	19	2	6	Meets criteria
6	Foremen (OND in Civil Engineering)	5	6	5	6	Meets criteria
7	Electro-Mechanical Engineer	7	37	3	36	Meets criteria

The bidder meets personnel criteria.

Equipment

The bidder has confirmed availability of the following equipment as per the requirement of the bidding document.

No.	Equipment Type and Characteristics	Minimum Number required	Required	Assessed Number in bid	Remarks
1.	Wheel loader	2.0m ³	1	1	Meets criteria
2.	Dump Trucks/Tipper 15t	15t	4	4	Meets criteria
3.	Batching Plant	15m ² /hr	1	1	Meets criteria
4.	Agitator Premix concrete Trucks	4.5m ³	2	2	Meets criteria
5.	Compressor	5m ³ /min	2	2	Meets criteria
6.	Bulldozer	Caterpillar D6	1	1	Meets criteria
7.	Hydraulic Excavator	1.5m ³	2	2	Meets criteria
8.	Vibration Roller	10t	1	1	Meets criteria
9.	Generator	200KVA	1	1	Meets criteria
10.	Water Tanker/ Bowser	15m ³	1	1	Meets criteria
11.	Water Pumps		2	2	Meets criteria

The bidder meets the equipment criteria

Conclusion

From the evaluation of Financial Resources, General and Specific Experience, Personnel, and Equipment the firm was considered **Qualified** to undertake the rehabilitation and augmentation Oloitokitok water supply and sanitation project.

Analysis for Award of Contract

Companies that pass the Financial Resources, General and Specific Experience, Personnel, and firm's Equipment evaluation are:

No.	Bid No.	Contractor	Read out Bid Price (Ksh)	Corrected Bid Price (Ksh)	Deviation %	Ranking based on Price
1	2	Machiri Ltd.	887,173,642.75	890,475,606.97	0.4	2
2	3	Abdulhakim Ahmed Bayusuf & Sons.	875,555,937.47	1,060,904,651.00	21.2	1
3	8	Vaghjiyani Enterprises Limited.	894,941,801.00	1,187,612,575.01	32.7	3

According to the table above, it is noted that bidder No. 3 was the lowest, but with a deviation in price of 21.2%. This margin of deviation (above the contingency fund) was regarded as risky and would allegedly require all rates to be reduced by 21.2% (including some preliminary items e.g purchase of vehicles). However, bidder No. 2 with a deviation of 0.4% presents was said to represent little risk since a single BoQ item would be identified and amended in line with ITB clause 5.5.

In view of the above, the tender processing committee thus recommend that Machiri Ltd be awarded the tender at a contract sum of Kshs 887,173,642.75 (Eight Hundred and Eighty Seven Million, One Hundred and Seventy Three Thousand, Six Hundred and Forty Two and Seventy Five Cents Only) inclusive of all taxes.

Recommendations for Award of Contract

In accordance with the ITB 9.1, it was recommended that the bid by Machiri Ltd being the lowest evaluated bid, be awarded the contract for Rehabilitation and Augmentation of Oloitokitok Water Supply and Sanitation Project at a contract sum of Kshs 887,173,642.75 (Eight Hundred and Eighty Seven million One Hundred and Seventy Three Thousand Six Hundred and Forty Three and Seventy Five Cents Only) inclusive of all taxes,

THE TENDER COMMITTEE'S DECISION

The Procurement Entity's Tender Committee met on 29th February, 2016, deliberated on the agenda and awarded the tender to M/s Machiri Limited at a contract sum of Kshs 890,475,606.97 being inclusive of VAT and all other taxes.

REQUESTS FOR REVIEW

The Applicant M/s Unibee Construction Limited filed this Request for review No. 16 /2016 of 10th March, 2016 against the decision of the Athi Water Services Board (AWSB) challenging the award of Tender No. BADEA/AWSB/OWSP/GoK/01/2015 for Oloitoktok Water Supply and Sanitation Project: Rehabilitation and Augmentation of Oloitoktok Water Supply and Sewerage for Oloitoktok Town.

The Applicant sought the following orders:-

1. *That the decision of the procuring entity to award the tender to the successful bidder be nullified.*
2. *That the Procuring Entity be ordered to award tender No. BADEA/AWSB/OWSP/GoK/01/2015 to the Applicant.*
3. *That in the alternative and without prejudice to the request in (2) above, the Procuring Entity be ordered to evaluate the tender no. BADEA/AWSB/OWSP/GoK/01/2015 and award the said tender in compliance with the provisions of the Public Procurement and Disposal Act, The Public procurement and Disposal Regulations and the tender documents issued by the Procuring Entity.*
4. *That the costs of this review be awarded to the Applicant*
5. *Any other order as applicable that this Board may make.*

The Applicant in this Request for Review was represented by Mr. Geoffrey Maina, Advocate while the Procuring Entity was represented by

Mr. Charles Njuguna, Advocate. The successful bidder herein it's M/s Machiri Ltd was represented by Eng. J. M. Macharia, Managing Director.

THE APPLICANT'S CASE

The Applicant stated that it was the lowest evaluated Bidder since it was the lowest priced bidder among the bidders who had submitted their tenders and the Procuring Entity's recommendation was therefore in breach of the Act and the regulations. The Applicant submitted that the Procuring Entity failed to comply with the provisions of Section 52 of the Act which provides in mandatory terms that the tender document must provide for the procedure and criteria to be used in the evaluation of tenders. The Applicant further averred that the Procuring Entity breached provision of Section 66 (2) of the Act by failing to compare tenders using criteria provided for in the tender documents.

The Applicant further submitted that the Procuring Entity failed to apply provisions of Section 39(8) (b) and Regulation 28(2) of the Regulations as amended during evaluation and failed to carry out the tender evaluation with all due diligence.

The Applicant submitted that by the Procuring Entity electing to reject, ignore or disregard the statutory provisions in the evaluation, the procuring entity must have awarded the tender to a bidder who was not the lowest evaluated bidder thereby undertaking the tender in a manner

not beneficial to the Procuring Entity as the tender price of the Applicant was the lowest.

The Applicant stated that Procuring Entity was required to ensure that the procurement herein was done in compliance with the Act, the Regulations and any directions issued under the Act. Consequently, the Procuring Entity was required to evaluate the tender documents using the criteria set out in the tender documents. The Applicant further submitted that the Procuring Entity was further required to apply a criteria that was objective and quantifiable and was required by statute to express each criterion so that it was applied in accordance with the procedures taking into consideration price, quality and service for the purpose of evaluation. This, according to the Applicant, would ensure that the objectives envisaged under Section 2 of the Act were achieved.

The Applicant additionally stated that the Procuring Entity did not notify the Applicant of the outcome of the process as contemplated by the Act and regulations as it failed to state the reasons why the Applicant was unsuccessful. In so doing, argued the Applicant, the Procuring Entity breached the provisions of Sections 67 of the Public Procurement and Disposal Act, 2005 and Regulation 66 as read together with the tender documents.

PROCURING ENTITY'S RESPONSE

In response to the Applicant's request for review, counsel for the Procuring Entity submitted that the Applicant's bid was rejected after detailed evaluation for failing to satisfy the requirements of the tender document and did not rank as the lowest evaluated tender. The procuring entity averred that it did not breach the Provisions of Section 52 of the Act in that the project the subject of the tender was being financed by Arab Bank of Economic Development in Africa (BADEA) adding that the Specific Procurement Notice (SPN) and bidding documents were prepared in accordance with BADEA International Competitive Bidding Procedure and that in terms of Sections 6(1) and 7 (1) of the 2005 Act, the provisions of BADEA International Competitive Bidding Procedure were the once applicable in respect of the tender. The Procuring Entity argued that the tender document contained all necessary information and the Applicant did not raise any objection prior to bidding and that a complaint on the content of the tender document at this stage would be out of time in terms of the provisions of Section 167 (1) of the 2015 Act and without merit.

The Procuring Entity denied that it breached the provisions of Section 66 (2) of the Act and stated that it evaluated the tenders using the criteria set out in the tender document. It further denied any breach of the Provisions of Section 2 of the Act arguing that the allegations fell short of the requirements of Regulation 73 (2) and ought to be dismissed.

Counsel for the Procuring Entity therefore denied any breach of Sections 52, 66(2), 38(8)b and 11 of the Act and regulations 66 and 16.

On the second set of grounds raised by the Applicant, counsel for the Procuring Entity submitted that, simultaneously with the letter of award, it notified the Applicant vide a letter dated 3rd March 2016 that its bid was unsuccessful and the reasons thereof. The procuring entity further submitted that subsequent to the Applicant's inquiry, it advised the Applicant by a letter dated 11th March 2016 the specific reasons for the rejection of its bid. It averred that the Applicant had not suffered any prejudice, loss or damage in terms of Section 167 of the 2015 Act to warrant a request for review. The Procuring Entity also submitted that the Applicant was not entitled to be provided with the evaluation report.

In its summary counsel for the Procuring Entity denied any breach of Sections 44(3) and 45(2)e of the Act and urged the Board to dismiss the Request for Review with costs.

INTERESTED PARTY'S RESPONSE

Eng. J.M. Macharia, Managing Director of Machiri Limited submitted in person in response to the Request for Review. Eng Macharia stated that the interested party was the successful bidder and had been given a letter of award. He averred that as per clause 9 of the terms of the tender document, the notification of award constituted the formation of a contract and that

accordingly, the Board had no jurisdiction to entertain the request for review. He averred that upon notification the successful bidder accepted the award and accordingly a contract had already been formed.

The Interested Party submitted that the project the subject of the tender was being financed by Arab Bank of Economic Development in Africa (BADEA) and that the Specific Procurement Notice (SPN) and bidding documents were prepared in accordance with BADEA International Competitive Bidding Procedure. It argued that in terms of Section 6(1) and 7(1) of the 2005 Act the provisions of BADEA International Competitive Bidding Procedure were the ones applicable in respect to the tender and further argued that the said provisions were in conflict with the Provisions of the Act and the Regulations and accordingly the Board had no jurisdiction to entertain a challenge of acts done in accordance with the said provisions. It also argued that the Board had no jurisdiction to entertain the Applicant's complaints which ought to have been addressed by the Disputes Review Board set out under BADEA International Competitive Bidding Procedure as provided for in clause 9.6 of the Tender Document.

The Interested Party submitted that the Applicants' bid was not even the lowest priced bid as demonstrated in paragraph 4 of the statement in support of request for review. It added that the Applicant was properly notified that the bid was unsuccessful and the reason thereof. Under clause 9.3, added the Interested Party, the Procuring Entity was under no obligation to give reasons for the rejection of the tender arguing that even if

there was a breach of the Regulations, the Applicant had not suffered any prejudice to warrant a request for review since it was notified within time and had filed the request for review.

The Interested Party stated in conclusion that the Applicant's Request for Review was frivolous and without merit and ought to be dismissed.

THE APPLICANT'S REPLY

In a brief response to the submissions made by the Procuring Entity and the Successful bidder, counsel for the Applicant stated that in respect to the earthworks, it is the machinery that one has that show the capacity to do the excavation. It added that some of the works it had done included excavation of dams which required substantial excavation. It also stated that the Applicant's tender document demonstrated sufficient capacity in terms of personnel and equipment.

THE BOARD'S FINDINGS

The Board, has considered the submissions made by the parties and examined all the documents that were submitted to it and has identified the following issues for determination in this Request for Review:

- (i) *Whether the Procuring Entity failed to evaluate the tenders in accordance with the evaluation criteria set out in the tender document contrary to the provisions of Section 66 (2) of the Act.*

- (ii) *Whether the Procuring Entity failed to award the tender to the Applicant being the lowest evaluated bidder, in breach of the provisions of Sections 66 (4) of the Act.*
- (iii) *Whether the Procuring Entity failed to provide reasons as to why the Applicant's tender was unsuccessful in breach of the provisions of Regulation 66 (2) of the Regulations.*

The Board will now proceed to determine each of the issues framed for determination :-

1. **As to whether the Procuring Entity failed to evaluate the tenders in accordance with the evaluation criteria set out in the tender document contrary to the provisions of Section 66 (2) of the Act.**

The Board has perused the documents submitted to it and notes that the evaluation was carried out starting with preliminary evaluation where the Applicant's bid was among the ten (10) responsive bids out of the fourteen (14) bids received. The ten responsive bidders, including the Applicant, were subjected to detailed evaluation where the Applicant's bid was disqualified for failing to meet the criteria on financial resources, general and specific experience, personnel and equipment.

From the evaluation report the Board observed that at the detailed evaluation stage, the following factors were gauged: financial resource, General and specific experience, personnel and equipment and bidders

were required to meet a number of sub-factors which were enumerated for each of the sub-factors.

The Board observes that some of the REQUIREMENTS stated were subjective to warranty documentary tools/evidence that is definite in nature. The Board observes that such subjective requirement resulted in the tender processing committee assessing compliance using different documentary evidence for different bidders and hence the requirement for assessing on like to like basis was missed.

One example is as shown below:-

8.3.3. Financial Resources Requirement:

The Bidder must demonstrate access to, or availability of, financial resources such as liquid assets, unencumbered real assets, lines of credit, and other financial means, other than any contractual advance payments to meet:

- (i) the following cash-flow requirement: The financial requirements to adequately fund the works for three months at any one given time (Kshs. 150,000,000)

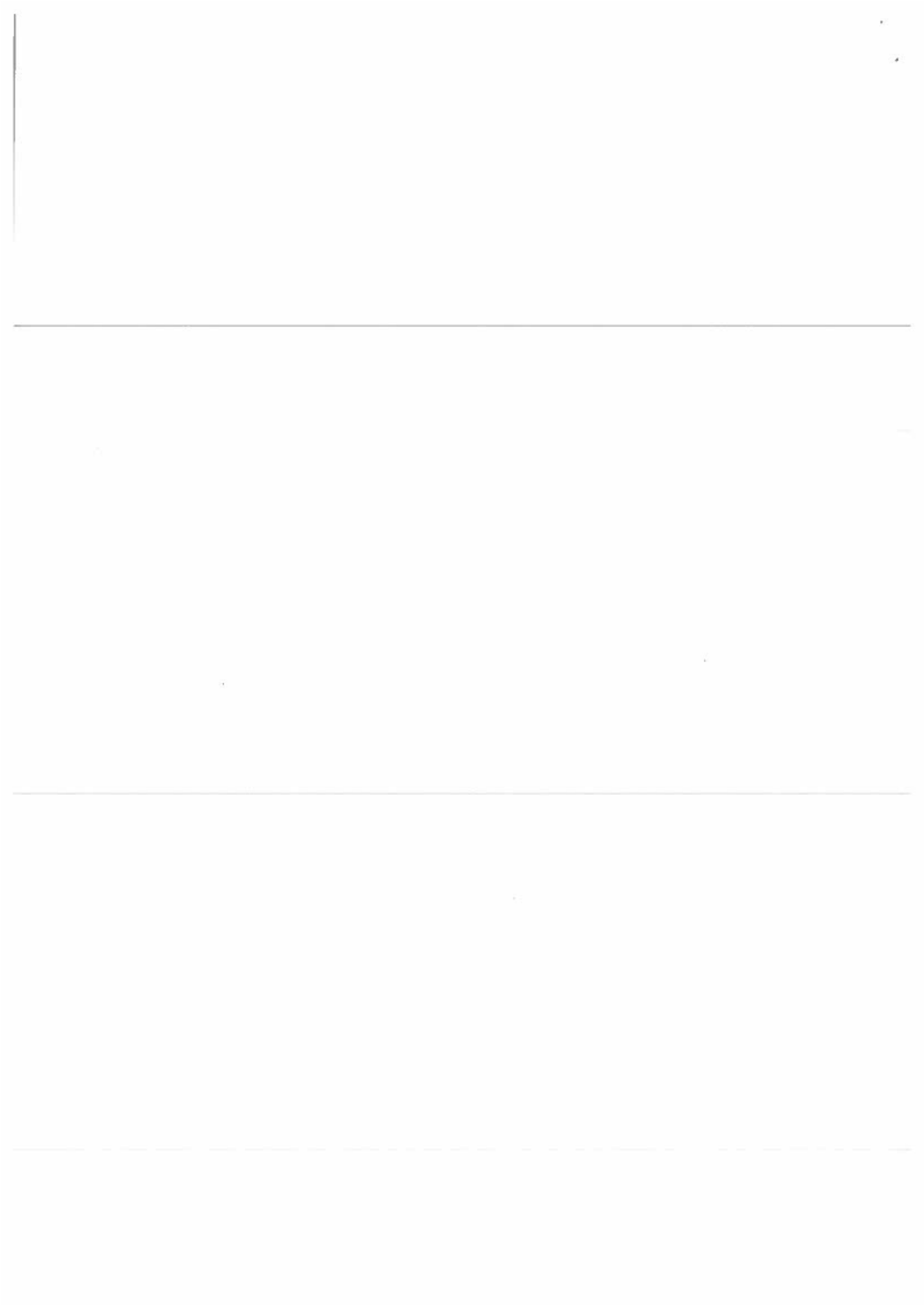
To demonstrate this requirement the Applicant provided various financial data for a period of 5 years, average annual turnover and financial statement and was declared as not meeting the financial resource criteria.

On the other hand the successful bidder was recommended on the basis of a letter of undertaking from NIC Bank. The same scenario is repeated for other factors. Another bidder, Messrs Vaghiyani Enterprises, attached a Line of credit with ABC Bank. The Board notes that there was nothing to prevent the Procuring Entity from directly seeking information from the bidders on the bidders' ability to access bank overdrafts of the required amount or to provide evidence of line of credit from a bank. The Board further notes that the Applicant provided a letter dated 1st December, 2015 from Equity Bank for a line of credit of Kshs 200 million. The Procuring Entity, in its submissions admitted that it did not notice the letter. The Board's view is that the Procuring Entity ought to have admitted and considered the Applicant's letter issued by Equity Bank the same way it admitted the NIC Bank and ABC Bank letters on lines of credit issued for the Successful Bidder and Messrs Vaghiyani Enterprises, respectively.

The Board notes that such subjective requirement must not be couched in mandatory terms rather must be assessed on the degree of compliance as the Board has observed in it's previous decisions.

The Board wishes to draw the procuring entity's attention to the requirements of Section 66 of the Act which states as follows:-

Section 66 "(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."

The Board finds and holds that the Procuring Entity failed to apply the evaluation criteria set out in the tender document in breach of Section 66 (2) of the Act. This ground of the request for review therefore succeeds.

2. As to whether the Procuring Entity failed to award the tender to the Applicant being the lowest evaluated bidder in breach of the provisions of Section 66 (4) of the Act.

The Board has noted in the first issue that the Applicant's bid was disqualified and did not proceed to financial evaluation and recommendation stages. The Board finds that the Applicant's bid could not therefore have been determined to be the lowest evaluated bid and awarded the tender in terms of Section 66 (4) of the Act. Section 66 (4) of the Act states that the successful tender shall be the tender with the lowest evaluated price. The Board therefore finds based on the above reasons that

the Applicant was not the lowest evaluated bidder. This ground of the request for review therefore fails and is disallowed.

3. As Whether the Procuring Entity failed to provide reasons as to why the Applicant's tender was unsuccessful, in breach of the provisions of Regulation 66 (2) of the Regulations

The Board notes that the Procuring Entity vide its letter dated 3rd March 2016 informed the Applicant that its bid was unsuccessful. No reasons were however given in the said letter stated why the Applicant's bid was unsuccessful. Following the Applicant's inquiry, the Procuring Entity vide its letter dated 11th March, 2016 gave five reasons for the disqualification of the Applicant's tender. The Board therefore finds that at first, the Procuring Entity failed to give reasons as to why the Applicant's bid was unsuccessful, an act which was clearly in violation of the Provisions of Regulation 66 (2) of the regulations as amended. However upon inquiry by the Applicant, the Procuring Entity provided the reasons. The Board finds that the reasons for disqualification of the Applicant's bid were provided, albeit late and the Applicant did not therefore suffer any prejudice since it was able to file its request for review on time.

This ground of the request for review therefore fails and is disallowed.

FINAL ORDERS

