

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 17 /2016 OF 10TH MARCH, 2016

MAGIC GENERAL CONSTRUCTION LTD.....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 - Chair
2. Nelson Orgut - Member
3. Rosemary Gituma - Member
4. Hussein Were - Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant 17-2016 - Magic General Construction Ltd

- | | | |
|------------------|---|----------------|
| 1. George Kamau | - | Advocate |
| 2. Denis Juma | - | Advocate |
| 3. Akoko Donald | - | QS |
| 4. Teresa Wambui | - | Office Manager |

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 Serci | - | Engineer |
| 8. Emily Kyalo | - | Legal |
| 9. Ceaser Ihure | - | Engineer, Runji & Partners |
| 10. Teddy Gichaba | - | Engineer, Runji & Partners |

Interested Parties

Unibee Construction Ltd

- | | | |
|--------------------|---|-----------------|
| 1. Geoffrey Maina | - | Advocate |
| 2. Francis Kabuchu | - | Legal Assistant |

3. Kimondo J. Maina - Director
 4. Mosses Muturi - Engineer
- 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:

1. Eligibility
2. Duly signed Letter of Bid [in the required format and duly signed by an authorised signatory]
3. Duly signed/initialled pages of the bid where entries had been made as required in ITB Clause 20.2;
4. Duly sealed Power of Attorney;
5. Bid Security of the specified amount in the specified form and for the specified validity period;
6. Duly filled-in and priced Bill of Quantities [basic completeness check only];
7. 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];
8. Joint Venture Agreement in the case of a Joint Venture Bid;
9. Details of proposed Sub-Contractor for Photovoltaic System

10.No. of submitted Bid documents as required - one original Bid document and four matching copies organised in an orderly manner;

11.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 NO. 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	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		
Sub-Factor	Requirement	Proposed
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 firm has no pending litigation

	<p>the Bidder's net worth and shall be treated as resolved against the Bidder. Hence meets criteria</p>
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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 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

Factor	Experience 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.	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	The firm has attached completion certificates for several projects. Some of the best with supporting evidence include: 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)

	<p>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>	<p>iii) Muringa Banan Irrigation Project for NIB valued at kshs.200,813,599.80 (2011)</p> <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</p>	<p>- Laying of water pipe mains of Diameter meter 200mm of approximately 10km in length</p> <p>- Construction of 35 km pipeline for Mukuku Irrigation scheme</p> <p>- Construction of 20 km pipeline for Isinet Irrigation scheme</p> <p>- Length, type and Diameter meter of pipes not indicated</p> <p>- The bidder has not met the criteria</p> <p>Laying of sewer pipes of Diameter meter 450mm</p>

<p>5000m³ per month.</p>	<p>for approximately 10km</p>
<p>(iv) Concrete production of 500m³ per month</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></p>	<p>Bulk earthworks excavations of 5000m³ per month</p> <ul style="list-style-type: none"> - Not indicated
<p></p>	<p>Concrete production of 500m³ per month</p> <ul style="list-style-type: none"> - Not indicated -
<p></p>	<p>The bidder does not meet the criteria</p>

The bidders do not meet the specific experience criteria

No. Position	Total Experience (years)	Work Similar Works Experience			Remarks
		Required	Assessed Number in Bid	Required Number in Bid	
1	15	26	8	20	Registered; experience as site agent ; does not Meet criteria
2	10	40	5	35	Registered; Meets criteria
3	7	36	3	30	Meet criteria

No. Position	Total Experience (years)	Work Experience (years)	Similar Works Experience (years)	2 nd staff not proposed; criteria not met
Assistant Site agent 2. (Bsc. Civil Engineering)			Nil	2 nd staff not proposed; criteria not met
4 At least 2 No. Construction Supervisors/ Measurement Engineers (Bsc. Civil Engineering or Equivalent)	8	3	5	Meet criteria
5 1 No Graduate Surveyor (Bsc. Land Surveying)	12	None	Nil	2 nd staff not proposed; criteria not met
	5	2	>10	Qualifications not stated hence could not be fully assessed. Criteria not met
6 Foremen (OND in Civil Engineering)	5	21	5	Staff has Dip. In Building Construction;
			0	

No. Position	Total Experience (years)	Work Experience (years)	Similar Works Experience (years)	
				Criteria not met
7	Electro-Mechanical Engineer	7	14	3 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
<p>Sub-Factor</p> <p>History of Non-Performing Contracts</p>	<p>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.</p>	<p>The firm has no history of non-performing contracts.</p> <p>Meets criteria</p>
<p>Pending Litigation</p>	<p>All pending litigation shall in total not represent more than Fifty percent</p>	<p>The firm has indicated it does have pending litigation with Nairobi City</p>

<p>(50%) of the Bidder's net worth and shall be treated as resolved against the Bidder.</p>	<p>Water and Sewerage Company with respect to contract No NWSC/24/2011 Amounting Kshs 187,126,602.36. They <i>claim for extension of time payment</i> amounting Kshs54, 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%,</p> <p>Meets criteria</p>
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Handwritten signature or stamp

Financial Situation

Financial Situation and Performance		
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

<p>Financial Resources</p>	<p>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:</p> <p>(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)</p>	<p>The firm has attached evidence of financial resources.</p> <p>i) NIC Bank overdraft - up to kshs. 60,000,000 and Bank Guarantee - upto kshs. 400,000,000</p> <p>(See letter attached)</p> <p>Bidder meets criteria</p>
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Experience

Factor	Experience 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>

vi) Construction of Gatharaini Trunk Sewer (Ruaraka) valued at Kshs 1.433 Billions (2012).

vii) Construction of Kimira -Oluch Irrigation Scheme (Lot 1 &2) valued at Kshs 881.9 Millions (2012).

viii) Relocation of water and sewerage facilities along Thika Road valued at Kshs 166.57 Millions (2012).

ix) Extension of DN300mm water pipeline (Kirigiti to Kahawa West) valued at Kshs 187.1 Millions (2012).

x) Construction of Tailing Storage starter works for the Kwale mineral sand project at kshs.580,632,490. (2013)

xi) Construction of Coffe demand Merilla barrage rehabilitation works valued at Kshs 232.1million (2013).

xii) Rehabilitation/extension of Mombasa water supply works Lot 1 valued at Kshs. 942.1 million (2014)

<p>Specific Experience</p>	<p>(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</p>	<p>The contractor has indicated to have done the following projects:</p> <ul style="list-style-type: none"> i) Improvement and expansion of sewerage facilities at JKIA valued at Kshs 773.1 million (2009). 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). 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). iv) Rehabilitation of Sasumua Dam (damaged spillway) valued at Kshs 2.06 Billion (2010). v) Construction of Gatharaini Trunk Sewer (Ruaraka) valued at Kshs 1.433 Billions (2012). vi) Construction of Kimira -Oluch Irrigation Scheme (Lot 1 &2) valued at Kshs 881.9 Millions (2012). vii) Rehabilitation/extension of Mombasa water supply works Lot 1 valued at Kshs. 942.1 million (2014)
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	<p>on the physical size, complexity, methods/technology or other characteristics as described in Section VI, Employer's Requirements.</p>	<p>The bidder has met 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</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>(ii) Laying of sewer pipes</p>	<p>meets the criteria</p>

	<p>of Diameter meter 450mm for approximately 10km. (iii) Bulk earthworks excavations of 5000m³ per month. (iv) Concrete production of 500m³ per month</p>
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No.	Position	Total Work Experience (years)		Similar Works Experience (years)		Assessed Number in Bid	Assessed Number in Bid	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			Meets criteria
					4			
					4			

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 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	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. .

THE REVIEW

The Applicant M/s Magic General Construction Ltd filed the Request for review No. 16 /2016 on 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 to the successful bidder.

The Applicant in this Request for Review was represented by Mr. George Kamau, Advocate while the Procuring Entity was represented by Mr. Charles Njuguna, Advocate. The successful bidder M/s Machiri Ltd was represented by Eng. J. M. Macharia it's Managing Director

The Applicant sought for the following orders:

- a) The decision of the Procuring Entity as communicated by the letter dated 3rd March, 2016 be substituted with a decision of the Board directing that the Tender No. CONTRACT NO BADEA/AWSB/OWSP/GOK-01/2015 for the Rehabilitation and Augmentation of Oloitoktok Water Supply and Sanitation Project be awarded to the Applicant.*
- b) The Procuring Entity be compelled to pay the costs to the Applicant arising from/and incidental to this Application.*
- c) The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.*

Both Counsel for the Applicant and the procuring entity made extensive submissions before the Board while the successful bidder filed a written response dated 24th March, 2016 and which was filed with the Board on the same day. Eng. J. M. Macharia in addition to filling the written response also made brief submissions before the Board.

The Applicant's case

It was the Applicant's case as contained in the Request for review, the supplementary grounds of review, the statement in support of the Request for Review and in the oral and the written submissions filed by Counsel that the procuring entity advertised the tender for the Rehabilitation and Augmentation of the Oloitoktok Water Supply and Sanitation project on 22nd October, 2015 with a closing/opening date of 3rd December, 2015.

Counsel for the Applicant stated that pursuant to the said advertisement, several bidders submitted their bids for the works and the bids later underwent examination and the evaluation process.

It was the Applicant's further case that on or about 3rd March, 2016 it received a letter dated the same date notifying it that its tender was **unsuccessful technically** which the Applicant produced as annexure "MGCI" to its Request for Review. The Applicant stated that it was however dissatisfied with the reason given in the letter since the reason given was vague and that on or about 10th March, 2016, the Applicant wrote to the procuring entity seeking to know the specific reason why its tender was considered **unsuccessful technically**. Counsel for the

Applicant stated that the procuring entity at first declined to provide the reason/reasons whereupon the Applicant wrote a second reminder to the procuring entity which this time responded and stated that the reason why the Applicant's tender had been adjudged as unsuccessful was because the Applicant had submitted an incomplete Bill of Quantities and was therefore disqualified during the preliminary examination of the bid and considered substantially unresponsive.

Counsel for the Applicant however faulted the reasons given by the procuring entity both in the first and the second letter and stated that it was not clear from a look at the two letters whether the Applicant had been declared unresponsive at the preliminary or at the technical evaluation stage. Counsel for the Applicant stated that a bidder under the law can only be eliminated at three stages namely, at the preliminary, technical or the financial evaluation stage.

Counsel for the Applicant further submitted that by stating that the Applicant's bid was technically unsuccessful, it meant that the procuring entity had undertaken preliminary evaluation and found the Applicant's bid substantially responsive and that it was therefore wrong for the Applicant to turn around and state that it had found the Applicant's bid non-responsive at the technical evaluation stage while this was a matter that should have been determined at the preliminary evaluation stage.

The Applicant submitted that issues of tender responsiveness are governed by the Provisions of Section 64 of the Act and Regulation 47 of the Regulations which lay out what the procuring entity which was whether

the Applicant had complied with all the mandatory requirements and whether the tender had been submitted in the required format, whether it was signed and whether the bidder had supplied enough copies of the tender document.

Counsel for the Applicant submitted that the Applicant had not been declared non-responsive for failing to comply with any of the above mandatory requirements on responsiveness and contended that the procuring entity's decision to consider whether two pages were missing from the Applicant's Bill of Quantities at the technical evaluation stage contravened the Provisions of Section 66 of the Act which prohibits the procuring entity from introducing or applying a criteria other than the criteria set out in the tender document while evaluating the Applicant's tender as the presence or absence of pages from the tender Bills of Quantities was not one of the evaluation criteria set out in the tender document.

Counsel for the Applicant further submitted that if the procuring entity had strictly adhered to the law, then it ought to have considered the issue of completeness of the Bill of Quantities at the financial evaluation stage by taking into account the parameters set out under Regulation 50 of the Regulations and applying them to the Applicant's Bill of Quantities.

While still addressing the Board on the issue of the stage at which the procuring entity ought to have considered the Bills of Quantities and the consequences that would follow if some pages had not been included, Counsel for the Applicant submitted while referring to clause 1.4 and 1.6 of

the preamble appearing at page 52 of the Blank tender document that the descriptions in the Bills of Quantities are stated to be for the purposes of identification only and do not supersede the description in the conditions of contract, specifications or drawings. He stated that even if there was a departure from the Bills of Quantities, this still left the Applicant with an obligation to abide by the contract once the Applicant was awarded the same in line with the specifications and the drawings.

He further argued that the separation of the works under the Bill of Quantities was for convenience in tabulating quantities in pricing but cannot subdivide the actual work and more importantly the whole of the works must be considered in pricing items under the Bills of Quantities.

It was the Applicant's further case that notwithstanding all the foregoing, Clause 1.6 of the preamble to the Bills of Quantities envisages a situation where a bidder could omit to insert a rate, price or a sum in the Bill of Quantities in which event the omitted rate, price or sum would not be paid for but would be deemed to be covered by other rates or prices inserted in the Bill of Quantities.

Further to the above submission, Counsel for the Applicant stated that where a bidder such as the Applicant fails to include a page in the Bill of Quantities then this can only amount to the bidder omitting a rate, price or sum from the contract Bill of Quantities and was therefore not a ground for declaring a bidder's bid as being non-responsive.

Mr. Kamau stated that the value of the omitted works was approximately 1.5 Million Kenya Shillings or thereabouts against its tender price of Kshs. 868,021,884.25 and that the decision to exclude the Applicant from proceeding further on account of the two missing pages in the Bills of Quantities resulted in the awarding of the subject tender to a bidder who had offered a higher tender price and would result into a loss of funds to the public and was therefore contrary to the Provisions of Section 2 of the Act and Article 227 of the Constitution.

On the issue of price, Counsel for the Applicant submitted that the Applicant was the lowest evaluated bidder as it had quoted a price of Kshs. 868,021,884.25 which was lesser than the sum of Kshs. 887,173,642.75 at which the tender was awarded to the successful bidder.

Counsel for the Applicant therefore urged the Board to allow the Applicant's Request for Review in terms of the prayers set out in the Request for Review.

The procuring entity's response

The procuring entity opposed the Applicant's case and relied on its written response together with both the written and the oral submissions made by Mr. Charles Njuguna learned Counsel for the procuring entity. It was the procuring entity's first line of submissions that the project the subject matter of this Request for Review was to be funded through funds received by the Government of Kenya from the Arab Bank of Economic Development in Africa (hereinafter referring to as BADEA) to the extent of

82.5% while the balance of the funds would come directly from the Government of Kenya. He referred the Board to an alleged financing agreement between the Government of Kenya and the said donor and submitted that in terms of the financing agreement, the procedure applicable was set out in the BADEA Guidelines and that by virtue of the Provisions of Sections 6(1) and 7(1) of the Provisions of the Public Procurement and Disposal Act 2005 including the Regulations made thereunder are ousted.

Mr. Njuguna stated that the guidelines provided for among other things the manner of tender preparation and approval, advertisement, bid opening, examination of bids, evaluation of bids, domestic preferences and award of contract. Counsel for the procuring entity further submitted under bullet 3 of the procuring entity's written submissions that any complaints by the bidders should have been addressed to the Disputes Review Board set out under BADEA International Competitive Bidding Procedures as provided for under Clause 9.6 of the tender document.

He stated that a reading of the BADEA guidelines and the provisions of the tender document would show the existence of a conflict between the said guidelines and the provisions of the Act and the Regulations made thereunder and that the conditions in the guidelines therefore ought to prevail.

He further submitted that the process of bid opening, evaluation and award of contract is provided for under Clause 4 of the BADEA guidelines and that under Clause 4-5 of the guidelines, the procuring entity was

required to ascertain among other things that Arithmetical computations are correct, the bids were substantially responsive to the bidding documents, that the tenders are accompanied by the required securities, that the tenders are properly signed and are otherwise generally in order. Counsel for the procuring entity further submitted that the procuring entity was required to reject any bid which was not substantially responsive.

Counsel for the Applicant submitted that the only reason why the Bid by the Applicant was rejected was because the bid submitted by the Applicant did not have pages 107 and 112 of the Bill of Quantities for Ablution Blocks. He referred the Board to pages 106 and 108 of the Bills of Quantities and stated that the closing figure at page 106 which was the opening figure at page 108 was the sum of Kshs. 292,300 demonstrating that the bidder had deleted page 107 of the Bills of Quantities.

He also referred the Board to pages 111 and 113 and stated that the closing and opening figures at the said pages was Kshs. 2, 589,970 respectively and stated that this was a demonstration that the bidder had deleted page 112 of the Bill of Quantities from it's bid that it had submitted to the procuring entity.

It was the procuring entity's case that by virtue of the two missing pages in the Bill of Quantities, the Applicant's bid did not conform to all the mandatory requirements in the tender document and cited the Provisions of Clause 5(2) (4) and 6(2) as a basis for that submission.

Counsel for the procuring entity buttressed his submissions on the issue of responsiveness by submitting that the Applicant's bid had been properly rejected in accordance with the Provisions of Section 64 of the Act as the Applicant's tender document had not complied with all the mandatory requirements in the tender document.

Turning to the issue of Section 66 of the Public Procurement and Disposal Act and Regulations 47, 49 and 50 of the Public Procurement and Disposal Regulations 2006, Counsel for the procuring entity submitted that the said Provisions of the Act and the Regulations were not applicable to this case since the examination and the evaluation of Bids all the way to the award of contract was governed by the BADEA guidelines for the procurement of goods and contracting for execution of works.

The successful bidder's case

In a brief response to the submissions made by Counsel for the Applicant, Eng. J. M. Macharia on behalf of the successful bidder fully associated himself with the submissions made by Counsel for the procuring entity and urged the Board to rely on the successful bidder's written memorandum of response. He stated that he trusted that the Board would consider the matter and give an appropriate decision since it was the specialised body created for determining this kind of disputes.

The Applicant's response to the procuring entity and the successful bidder's submissions.

In a brief response to the submissions made by Counsel for the procuring entity and by the successful bidder particularly on the application of the BADEA guidelines, Counsel for the Applicant reiterated that the Provisions of Section 6 and 7 of the Act did not oust the jurisdiction of the Board to hear the Request for Review. Counsel for the Applicant therefore stated that the Provisions of the Act the Regulations and the tender document were applicable to this case. He argued that the Applicant's case was based on a breach of the Provisions of the tender document and it did not therefore matter whether or not the BADEA guidelines were applicable or not.

Counsel for the Applicant finally submitted that the procuring entity's assertion that Sections 66 of the Act and Regulations 47, 49 and 50 were inapplicable was contradictory since Counsel for the procuring entity was also seeking to rely on the said Provisions of the law in some parts of his written and the oral submissions and cited Section 66 of the Act as one of the Provisions the procuring entity was relying upon.

He therefore urged the Board to allow the Request for Review as prayed.

THE BOARD'S DECISION

The Board has considered the Request for Review, the supplementary grounds of Review, the procuring entity's and successful bidder's written response and the oral submissions made before it together with the original

tender documents, the tender evaluation reports together with the other original documents supplied to the Board by the procuring entity.

It is clear from a totality of the examination of the submissions made and the documents placed before the Board by the parties that this Request for Review, all the grounds of review and the responses filed thereto can be consolidated into two issues namely:-

- i) Whether the Provisions of the Public Procurement and Disposal Act and the Regulations made thereunder are applicable to this procurement or the Procurement was entirely governed by the BADEA guidelines.
- ii) Whether the procuring entity breached the provisions of the Sections 64 and 66 of the Public Procurement and Disposal Act and Regulations 47, 49 and 50 of the Public Procurement and Disposal Regulations as contended in grounds 1, 2, 3, 4, 5, 6 and 7 of the Applicant's Request for Review.

ISSUE NO. 1

Whether the Provisions of the Public Procurement and Disposal Act and the Regulations made thereunder are applicable to this procurement or the Procurement was entirely governed by the BADEA guidelines.

On the first issue framed for determination, it was the procuring entity's case that the procurement the subject matter of this Request for Review was donor funded and that by virtue of the Provisions of Sections 6 and 7

of the Public Procurement and Disposal Act, the Provisions of the Act and the Regulations made thereunder were ousted.

Counsel for the procuring entity stated that in this particular case the examination, evaluation and the award of this tender was entirely governed by the BADEA guidelines and procedures pursuant to the financing agreement between the Government of Kenya and the Arab Bank of Economic Development in Africa (BADEA).

It was the procuring entity's further contention that any complaints by bidders should have been addressed to the disputes Review Board set up under the BADEA International Competitive Bidding procedures as provided for in clause 9.6 of the tender document.

The Applicant opposed the position taken by the procuring entity as already stated in the outline of the parties arguments in this decision. Counsel for the Applicant submitted that the subject procurement was guided by the Provisions of the Act, the Regulations and the tender document. He stated that even without looking at the BADEA guidelines, a look at the Provisions of the tender document, the Act and the Regulations demonstrated that the procuring entity had no basis in declaring the Applicant's tender as being non-responsive.

Counsel for the Applicant further submitted that whereas the procuring entity kept on insisting that the applicable instrument to this procurement were the provisions of the BADEA guidelines, there were several references by the procuring entity to the Provisions of the Act which

defeated its argument that the BADEA guidelines entirely governed this procurement.

The Board has considered the rival arguments made by the parties on this issue and finds that although the procuring entity referred the Board to a financing agreement between the Government of Kenya and BADEA, the procuring entity did not provide a copy of the said agreement to the Board. The Board has gone through the bundle of documents placed before it by the procuring entity and finds that the only document that suggested that part of the funds to finance the subject project would be from the proceeds of funds from BADEA was the no objection letter dated 17th February, 2016 where BADEA was informing the procuring entity that it had no objection to the award of the tender to the successful bidder and that its contribution towards the project would be 82.5% without tax.

In addition to failing to provide the financing agreement, the Board has additionally gone through the documents placed before it and was unable to trace the BADEA guidelines as part of the bundle of documents placed before it by the procuring entity.

In the absence of the financing agreement and the BADEA guidelines, the Board is therefore unable to ascertain the terms of the two documents and whether any of the provisions of the said documents is or are in conflict with any of the Provisions of the Act or the Regulations for the purposes of determining whether the said agreement and the guidelines oust or should prevail over the Provisions of the Act and or the Regulations.

In addition to the above findings, it is also clear from the no objection letter dated 17th February, 2016 that the contribution by BADEA towards the subject procurement was to the extent of 82.5% of the contract value without tax. The balance of 17.5% of the funding was to be provided by the Government of Kenya. This therefore implies that public funds would be utilised in carrying out the project.

The Board has previously held as demonstrated by the case of **Webb Fontaine Group F2 - LLC -vs- The Kenya Revenue Authority PPARB No. 27 of 2015** that where public funds are to be utilised in funding a project, then the Provisions of the Act and the Regulations made thereunder are applicable to the subject procurement.

Section 3 of the Public Procurement and Disposal Act 2005 defines Public funds as follows:-

“Public funds has the meaning assigned to it in the Exchequer and Audit Act and includes monetary resources appropriated to Procuring Entities through the budgetary process as well as extra budgetary funds, including grants and credits put at the disposal of procuring entities by foreign donors and revenues of Procuring Entities”.

The Board finds that from the definition of Public funds as set out in Section 3 of the Act, grants and credits are defined to be part of what constitutes public funds under the Provisions of the Act and the procuring

entity's contention which was supported by the successful bidder is not therefore correct.

The Board wishes to further state that subject to the terms of the financing agreement, the Board has jurisdiction to entertain disputes arising from a Procurement involving Public funds including negotiated grants and loans and that the Provisions of Sections 6(1) and 7(1) of the Public Procurement and Disposal Act 2005 only relate to the resolution of any conflict that may arise between the Provisions of the Act and the donor conditions. The Board while considering such cases will therefore consider each case based on it's own particular facts and circumstances.

These two Provisions of the Act stipulate as follows:-

Section 6(1)

"Where any Provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a Party, this Act shall prevail except in instances of negotiated grants or loans.

Section 7(1)

"If there is a conflict between this Act, the Regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a Procurement that uses those funds and no others.

(2) This Section does not apply if the donor of the funds is a Public Entity.

It is clear from a plain reading of Sections 6 and 7 of the Act that the said Provisions do not state that the Board does not have jurisdiction to hear and determine a Request for Review where the source of the funds is a negotiated grant or a loan. The two provisions of the Act however provide for the mechanism for the resolution of a conflict in case of the existence of such a conflict between the Provisions of the Act, the Regulations or any directions of the Authority and the conditions imposed by the donor of funds or a negotiated grant or loan in which event the condition by the donor would prevail.

The Board has also perused the Blank tender document headed **Appendix to Tender** which defines the Governing law for the purposes of this tender as the laws of the Republic of Kenya. It is a matter of public knowledge that The Constitution, The public procurement and disposal Act and the Regulations made thereunder form part of the body of the laws of Kenya.

On the contention that any complaints by the bidders should have been addressed to the Disputes Review Board set up under the BADEA international Competitive Bidding procedure, the Board has perused the Provisions of Clause 20 on claims, disputes and Arbitration appearing at pages 21 to 23 of the blank tender document and which falls under the general heading “**conditions of contract**” and finds that the clause deals with post award disputes arising after the award of the tender has been made and a contract entered into. The said Clause does not therefore deal

with disputes arising in the course of examination, evaluation and the award of the tender which is governed by the Provisions of the Constitution, the Act and the Regulations made thereunder together with the tender document.

Based on all the foregoing findings therefore, the Board finds that the Provisions of the Constitution save for parts III and XV of the Public Procurement and Asset Disposal Act No. 33 of 2015, the Provisions of the Public Procurement and Disposal Act 2005 and the Provisions of the Public Procurement and Disposal Regulations 2006 are applicable to the dispute now before the Board and the Board will therefore proceed to determine the substantive dispute before it based on the said Provisions of the law and the contents of the tender documents.

ISSUE NO. II

Whether the procuring entity breached the provisions of the Sections 64 and 66 of the Public Procurement and Disposal Act and Regulations 47, 49 and 50 of the Public Procurement and Disposal Regulations as contended in grounds 1, 2, 3, 4, 5, 6 and 7 of the Applicant's Request for Review.

On the second issue framed for determination, it was common ground during the hearing of this Request for Review and as has already been highlighted by the Board while setting out the respective parties cases that the Applicant was declared unsuccessful technically because pages 107 and 112 were missing from the Bill of Quantities forming part of it's tender document.

The question that the Board therefore needs to answer is whether it was proper for the procuring entity to declare the Applicant's tender as having been unsuccessful technically on account of the two missing pages in the Bill of Quantities.

The Board has considered the rival submissions made by the parties together with the blank tender document and tender document submitted to the procuring entity by the Applicant. The Board has also considered the evaluation report and finds that a total of 14 firms submitted their bids after which the procuring entity carried out a first preliminary examination of the bids to ascertain if all the required documentation had been submitted. During this first preliminary examination, eleven parameters were examined and the Applicant was determined responsive during this stage of examination.

Upon completion of the first preliminary examination, the procuring entity carried out a second preliminary examination to determine what it called substantial responsiveness. All the bids that had passed through the first Preliminary examination were subjected to this second stage and it is at this point that the Applicant's tender was declared non-responsive on the ground that the Applicant had submitted an incomplete Bill of Quantities and was not therefore subjected to the next stage of evaluation. Four other bidders were declared non-responsive and ten firms were recommended to proceed to the next stage of evaluation.

The Board has examined the blank tender document used in this procurement and finds that unlike the conventional tender documents

used in procuring the services of this nature, the tender document in this case did not explicitly provide for a criteria to be used in carrying out the preliminary evaluation of the tenders and did not provide a schedule of the mandatory requirements as is the norm. The tender document however set out in various clauses and parts of the documents several criteria that were relevant to the determination of the issue of the stage of examination and evaluation of the tender Bill of Quantities and the consequences of the omission of any item from the Bill of Quantities of particular significance and owing to the nature of the dispute before the Board are the contents of the Bill of Quantities and the preamble thereto. The preamble to the Bill of Quantities and the schedule of dayworks inter-alia provided as follows at clauses 1.1, 1.5 and 1.6.

1.1. These Bills of Quantities form part of the Tender documents and is to be read in conjunction with the conditions of contract, specifications and drawings.

1.5. The Bills of Quantities have been separated into portions of the works for convenience in tabulating quantities and in pricing. They are not intended to subdivide the actual works and the whole of works must be considered when pricing various items in the Bill of Quantities

1.6. A rate and price or lump sum shall be inserted in INK against each item in the Bills of Quantities and schedule of Dayworks whether quantities are stated or not. Items against which no rate, price or sum is entered by the Tenderer will not be paid for when executed, but will

be deemed to be covered by other rates or prices inserted in the Bills of Quantities.

It is clear from the above provisions of the tender document that the main emphasis in the Bills of Quantities was the issue of pricing which is an aspect that goes into the financial evaluation of the eventual price at which the tender would be awarded.

This fact is reinforced by the provisions of clause 5.5 of the tender document which set out how the eventual tender sum would be determined. The said clause 5.5 of the instructions to tenderers appearing at page 7 of the blank tender document provides as follows:-

5.5: The total tender sum entered in the Bills of Quantities and the Form of Tender shall be deemed to be the basis of the Tender. In cases of error of addition or extension and the consequent corrected tender sum is lower than the above total tender sum then the corrected tender sum shall be deemed to be the total tender sum upon which the Contract Agreement shall be based.

If the corrected tender sum is higher than the total tender sum, then the original total tender sum shall be deemed to be the total tender sum upon which the Contract Agreement shall be based. In case of errors the rates where such errors occur shall be altered accordingly to meet the Total Tender Sum.

Where the Engineer at his sole discretion considers that the items in which errors occur cannot be suitably altered the Engineer may then

alter any such rates that he deems to be applicable in order to meet the Total Tender Sum.

In addition to being a financial component of the tender, the Board also finds that based on the Provisions of Clauses 1.1, 1.5 and 1.6 of the preamble to the Bills of Quantities, the Bill of Quantities was a basic completeness check only and further that under Clause 1.6 of the preamble to the Bill of Quantities, the fact that a bidder had omitted to price some item this could not affect the substantial responsiveness of its tender.

Further under the provisions of clause 1.6 of the preamble to the Bills of Quantities the consequence of a bidder failing to indicate the rate, price or sum in the Bills of Quantities would be that such a bidder would not be paid for the omitted items when executed but those items would be deemed to be covered by other rates or prices inserted in the Bills of Quantities.

The Board therefore finds that the procuring entity acted in error in treating the issue of examination and the evaluation of the Bills of Quantities at the preliminary evaluation stage or as a criteria for determining the substantial responsiveness of the Applicant's Bid. An examination and an evaluation of the rates, prices or the sums in the Bill of Quantities ought to have been done at the financial evaluation stage and the omission of an item from the Bill of Quantities including missing pages ought not to have resulted in a bidder being declared unsuccessful technically.

The Board therefore holds that the procuring entity ought not to have declared the Applicant's bid as unsuccessful on that ground and ought to have evaluated the price set out in the Applicants Bill of Quantities at the financial evaluation stage and if it found that the Applicant had omitted to price any items then the said items ought to have been deemed to have been covered by the rates or prices inserted in the Bills of Quantities.

In addition to the above findings, the Board has examined the manner in which the procuring entity carried out the financial evaluation of the tenders which made it to the financial evaluation stage and finds that there were glaring defects in the way the entire exercise was carried out.

One illustration of the glaring defects was the manner of evaluation and the award of the tender to the successful bidder. The tender opening minutes, the tender processing committee minutes and those of the tender committee show that during the tender opening, the price indicated as having been read out at the tender opening was Kshs. 912,793,505.52. The tender processing committee evaluated that price and arrived at the final price of Kshs. 887,173,642.72 and recommended to the tender committee that the tender be awarded to the successful bidder at that price.

A perusal of the evaluation report under the heading "**analysis for award of contract**" shows that the figure indicated as having been read out at financial opening for the successful bidder was Kshs. 887,173,642.75 while the corrected bid price was Kshs. 890,475,606.97. A perusal of the form of tender and the minutes of the tender opening however show that this was not factually correct. The tender processing committee also appeared to

have substantially altered the tender prices submitted by two other bidders namely; M/s Abdulhakim Ahmed Bayusuf and sons Ltd from the sum of Kshs. 875,555,937.47 to Kshs. 1,060,904,651.00 and that by Vaghjiyani Enterprises Limited from the sum of Kshs. 894,941,801 to the sum of Kshs. 1,187,612,575.01.

The alleged new figures were calculated and arrived at on the basis of the analysis of award which was worked out as follows:-

No.	Bid No.	Contractor	Read our 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

The tender processing committee observed as follows after carrying out the analysis:-

According to the above table, it is noted that bidder no. 3 is the lowest but with a deviation (above the contingency fund) is regarded as risky and will require all rates reduced by 21.2% (including sum preliminary items e.g purchase of vehicles). However bidder no. 2 with a deviation of 0.4%

presents little risk since a single Bill of Quantities item will be identified and amended in line with ITB Clause 5.5.

The result of this action by the procuring entity was that the third bidder's bid price was escalated by over Kshs. 292,670,774.01 under the guise of deviations which the procuring entity appeared to have equated to correction of errors. This in turn resulted in the final figures awarded to the bidders varying from the offers as submitted in the form of tender.

While the Board appreciates that a procuring entity can correct errors and minor deviations, the Board respectfully finds that the action by the procuring entity went against the letter and the spirit Regulation 50 of the Public Procurement and Disposal Regulations 2006 which the procuring entity was bound to comply with.

The Board finds that under Regulation 50, a procuring entity can only correct a minor deviation but not alter the substance of a tender. A deviation of Kshs. 292,670,774.01 cannot be described as a minor deviation but a significant substantive correction.

The Board has also examined the entire tender document and finds that nowhere in the said document did the procuring entity provide for a financial criteria for determining the percentage of deviation or using it in escalating prices for other bidders. All that the procuring entity was required to do was to take the prices submitted in the forms of tender and apply the relevant criteria set out under Regulation 50 of the Regulations.

The procedure used by the procuring entity is therefore in the Boards view uncertain and leaves room to the possibility of arbitrariness and it is in order to eliminate such a possibility that the law recognizes the supremacy of the form of tender.

The Board has severally upheld the supremacy of the form of tender. In the case of **Alfatech Contractors Ltd -vs Kenya National Highways Authority (PPRBA NO. 38 of 2009)** the Board stated the importance and the primacy of the form of tender in any tender process in the following words:-

"The Board holds that the form of tender is the document which the offer is communicated to specified employer. It is the offer that the procuring entity would consider and either accept or reject. The Board finds that the form of tender is a very vital document which communicates every essential information, based on which a contract is created. In this case the Applicant did not fill in the Form Tender the name of the procuring entity, in its name as the addressee nor did it fill in the date. Consequential the Board finds that these omissions were serious and hence the procuring entity was right in disqualifying the Applicant at the Preliminary Evaluation Stage".

This ground of the Applicant's Request for Review therefore succeeds and is allowed.

The Board finally wishes to state that a look at the evaluation report in this particular case contains obvious errors which would have been avoided had the tender processing committee and the tender committee acted

diligently and in accordance with the law and the criteria set out in the tender documents. This lack of diligence has in effect caused a delay in the implementation of this project which is of great public importance.

While the Board will not allow the Provisions of the law to be flouted the Board is also alive to the need to complete this procurement within the shortest possible period of time and will therefore endeavour to strike a balance between the above two objectives in it's final determination.

FINAL ORDERS

In view of all the foregoing findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act No. 33 of 2015 the Board makes the following orders on this Request for Review.

- a) The Applicant's Request for Review dated 10th March, 2016 be and is hereby allowed.
 - b) The procuring entity's decision awarding the tender the subject matter of the Request for Review to the successful bidder be and is hereby annulled.
 - c) The procuring entity's decision declaring the Applicant's tender as unsuccessful as communicated vide the procuring entities letter dated 3rd March, 2016 is hereby set aside and annulled and the procuring entity is directed to subject the Applicant's tender to financial evaluation alongside those of the three bidders who made it to the financial evaluation stage.
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- d) The procuring entity shall complete the re-evaluation process including the making of the award of the subject tender within Fourteen (14) days from the date hereof and shall inform and provide the secretary of the Board with the evidence of compliance with the Board's orders within Fifteen (15) days from today's date.
- e) The Board hereby directs that in carrying out the financial re-evaluation exercise, the procuring entity shall Act in strict compliance with the provisions of Section 66(4) of the Act and within the parameters set out under Regulation 50 of the Public Procurement and Disposal Regulations 2006.
- f) In view of the nature of the orders made above, each party shall bear it's own costs of this Request for Review.

Dated at Nairobi this 30th day of March, 2016.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

