

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 92 OF 2017 OF 13TH OCTOBER, 2017

BETWEEN

BAM INTERNATIONAL BV.....APPLICANT

AND

KENYA AIRPORTS AUTHORITYPROCURING ENTITY

Review against the decision of the Kenya Airports Authority in the matter of Tender No. ICB NO: KAA/ES/MIA/617/C the Rehabilitation of Airside Pavements and AGL System at Moi International Airport, Mombasa.

BOARD MEMBERS

- | | |
|-----------------------|----------|
| 1. Paul Gicheru | Chairman |
| 2. Rosemary Gituma | Member |
| 3. Peter Bitu Ondieki | Member |
| 4. Nelson Orgut | Member |

IN ATTENDANCE

- | | |
|--------------------|-------------|
| 1. Philemon Kiprop | Secretariat |
| 2. Everlyne Abuga | Secretariat |

Present By Invitation

Applicant – Bam International BV

1. G.M. Nyaanga -Advocate
2. Eric Van Zuthem - Representative

Procuring Entity–Kenya Airports Authority

1. Paul Chege - Advocate
2. Judy Chepkor - Procurement Officer
3. Bernard Bosire -Procurement Assistant
4. Margaret Muraya -Ag. G M, Procurement
5. Moses Njoroge - Clerk
6. Katherine Kisila - Corporation Secretary

INTERESTED PARTIES

1. J.M Mburu - Advocate
2. John Mwangi - Advocate
3. Frederic Murin - Cost Estimate Engineer, Sogea Satom/Razel
BER JV
4. Gladys Toroitich - Administrative Secretary, China State
Construction Corporation.

BOARD'S DECISION

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

BACKGROUND OF AWARD

1. Designs and Tender Documentation

In order to improve the capacity of Moi International Airport (MIA) to provide for natural growth in traffic and improve the efficiency of operations, KAA is rehabilitating facilities (aircraft pavement and AGL upgrade) at MIA using funds received from the World Bank and French Development Agency (AFD) under the Kenya Transport Sector Support Project.

The design and preparation of the tender document for the habilitation of Airside Pavements and Airfield Ground Lighting (AGL) at Moi International Airport was carried out by M/s APEC Consultants.

INVITATION AND SUBMISSION OF BIDS

1.1. Invitation

The bids were advertised on 13th January 2017 in the Standard newspaper and on 16th January 2017 in the Daily Nation newspaper. The bid was also advertised in the dg-markets website.

Three (3) Addendums and (3) clarifications of the bids documents were issued during the tender period.

1.2. Submission of bids

Following a pre-bid meeting held on 10th February 2017, and responses to bidders' queries, bids were returned and opened on 4th April 2017.

The following Eight (8) bids were received as at the submission deadline of 11:00am on 4th April 2017 East Africa Time (EAT).

Table 1 – Summary of Bids received as read out including discounts

No.	Name and Address	Amount
1.	M/S China State Construction Engineering Corporation ltd	Kshs. 5,319,111,303.20
2.	M/S 77 Insaat- Metag JV	Kshs. 7,028,154,379.02
3.	M/s Al Naboodah Contracting Company LLC	Kshs. 11,601,621,528.71
4	M/s Sinohydro Corporation Ltd	Kshs. 6,697,780,136.00
5	M/s Strabag International GMBH	Kshs. 9,794,969,274.29
6	M/s China National Aero Technology International Engineering Corporation	Kshs. 10,380,626,100.35
7	M/s Sogea Satom and Razel- Bec JV	Kshs. 7,008,241,516.59
8	M/s Bam International bv	Kshs. 6,536,185,386.92

2. EVALUATION OF BIDS

2.1. Evaluation against Preliminary and Qualification requirements

Bids were evaluated against the criteria set out in the bidding documents and evaluation guidelines. The criteria covered the following:

2.1.1. Preliminary evaluation requirements

The bid was checked for responsiveness to the Bid requirements to verify:

- i) Legal Registration
- ii) Power of Attorney
- iii) The bid was properly signed.
- iv) The bid is valid for at least 120 days.
- v) The bid bond is valid for 148 days

2.1.2. Qualification requirements

The bid was checked for responsiveness to the Bid requirements to verify:

- i) Nationality
- ii) Conflict of Interest
- iii) Agency Ineligibility
- iv) Government owned entity
- v) Eligibility criteria and social and environmental responsibility
- vi) Agency policy – corrupt and fraudulent practices

2.1.3. Historical contract non-performance

The bid was checked for responsiveness to the Bid requirements to verify:

- i) History on non-performing contracts
- ii) Financial capabilities
- iii) Average annual turnover

2.1.4. Experience

The bid was checked for responsiveness to the Bid requirements to verify:

- i) General experience
- ii) Specific experience
- iii) Agency Ineligibility

2.1.5. Environmental, Social, Health and Safety (ESHS) Qualification

The bid was checked for responsiveness to the Bid requirements to verify:

- i) ESHS Certificate
- ii) ESHS Documentation
- iii) ESHS Experience
- iv) Specific ESHS knowledge transfer specific experience
- v) ESHS Personnel

2.1.6. Personnel

The bid was checked for responsiveness to the Bid requirements to verify personnel requirements as set out in the tender document page 37 and 38.

No.	Qualification Criteria	Compliance Requirements	Documentation FORMS	Bidder 1	Bidder 2	Bidder 3	Bidder 4	Bidder 5	Bidder 6	Bidder 7	Bidder 8
e.	Bid Bond Validity 148 days	Bidder to indicate validity	Form of bid security	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
1. Eligibility											
	Nationality	Nationality in accordance with EL1 1.1 and 1.2	Form ELI – 1.1 and 1.2 with attachments	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Conflict of interest	No- conflicts of interests as described in ITB 4.2.	Letter of Bid	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Agency Ineligibility	Not having been declared ineligible by the Bank as described in ITB 4.3.	Statement of Integrity (appendix to Letter of Bid)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Government Owned Entity	Compliance with conditions of ITB 4.3	Forms ELI – 1.1 and 1.2, with attachments	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Eligibility criteria and social and Environment responsibility	Statement of integrity	Section V	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Agency policy – corrupt and fraudulent practices	Declaration to allow AFD to inspect their record and allow for auditing	Section VI	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Historical Contract Non-Performance											

	History of non - performing contracts	Non-performance of a contract did not occur within the last five (5) years	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Financial capabilities	(i) The Bidder shall demonstrate that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
		(ii) The Bidders shall also demonstrate, to the satisfaction of the Employer, that it has adequate sources of finance	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
		(iii) The audited balance sheets or, if not required by the laws of the Bidder's country, other financial statements	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Average Annual Turnover	Minimum average annual construction turnover of US\$ 82 million.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2.4	Experience											
	General Experience	Experience under construction contracts in the role of prime contractor, JV member, subcontractor, or management contractor for at least the last 5 years, starting 1st January 2011 <i>Note: Must Provide Reference Proof From Client</i>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
4.2(a)	Specific Experience	(i) A minimum number of Similar contracts specified below that have been satisfactorily and substantially completed in a developing country or similar not in Bidder's own country as a prime contractor, joint venture member management contractor or sub-contractor between 1 st January 2006 and application submission deadline: 4 contracts, each of minimum value US\$ 35million; <i>Note: Must Provide Reference Proof From Client</i>	Yes	Yes	No	Yes	No	Yes	No	Yes	Yes	Yes
			Form EXP - 4.1	Form EXP - 4.2(a)	Form EXP - 3.4	Form EXP - 3.1, with attachments	Form EXP - 2					
			Form EXP - 4.1	Form EXP - 4.2(a)	Form EXP - 3.4	Form EXP - 3.1, with attachments	Form EXP - 2					

5.2	ESHS Documentation	Availability of in-house policies and procedures acceptable to the Employer for ESHS worksites management	Form ESHS & supporting documentation	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
5.3	ESHS Experience	Experience of 2 construction contracts over the last 5 years, where major ESHS measures were carried out satisfactorily and in compliance with International standards.	Form EXP-ESH S	Yes	Yes	No	No	Yes	Yes	No	Yes
5.4	Specific ESHS Knowledge Transfer Specific Experience	Experience of one (1) construction contract over the last five (5) years in which the ESHS knowledge transfer to a local partner or the ESHS capacity building of the Employer's country staff was carried out satisfactorily	Form EXP-ESH S with supporting	Yes	Yes	No	No	Yes	Yes	No	Yes
5.5	ESHS Personnel	The Bidder must demonstrate that it has the key personnel as permanent staff for at least two (2) years that meet the following requirements: - Environmental expertise: a minimum of five (5) years of experience in designing and monitoring ESHS worksites Management measures. - Health & Safety expertise: a minimum of five (5) years of experience in designing and monitoring ESHS worksites management Measures.	Form PER 2 Form PER 2	Yes	Yes	Yes	Yes	No	Yes	Yes	No

Personnel											
	Availability of Suitable Technical personnel	Total Work Similar Experience (years)	In Similar Works Experience (years)								
f.	Project Manager:	20Years	15years	Yes	Yes	No	Yes	No	Yes	Yes	Yes
g.	Construction Manager/ Deputy Project Manager: BSc.	15	10	Yes	Yes	No	Yes	No	No	Yes	Yes
h.	Site Agent:	15	10	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
i.	ESHS Manager:	10	5	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
j.	Site Engineer:	8	6	Yes	Yes	No	Yes	Yes	No	Yes	Yes
k.	Site Engineer:	8	6	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
l.	Site Surveyor:	8	6	Yes	Yes	No	Yes	Yes	No	Yes	Yes
2.6	Equipment type & characteristics	Minimum number required									
m.	D8 Type Bulldozer with Ripper	4		Yes	Yes	No	Yes	No	No	Yes	Yes
n.	Pulvimixers	2		Yes	Yes	No	Yes	No	No	Yes	Yes
o.	Asphalt Milling Machine	3		Yes	Yes	No	Yes	No	No	Yes	Yes
p.	Steel Wheeled Roller, 18t	3		Yes	Yes	No	Yes	No	No	Yes	Yes
q.	Vibrating Roller, 18-20t	3		Yes	Yes	No	Yes	No	No	Yes	Yes
r.	Pneumatic-Tyred Roller. 18t-20t	4		Yes	Yes	No	Yes	No	No	Yes	Yes

s.	Water Tankers, 15m ³	8		Yes	Yes	No	Yes	No	No	Yes	Yes
t.	Bitumen Distributor, 6000 litres	4		Yes	Yes	No	Yes	No	No	Yes	Yes
u.	Concrete Batching plant 100t/hr	1		Yes	Yes	No	Yes	No	No	Yes	Yes
v.	Asphalt Batching Plant, 150t/hr	1		Yes	Yes	No	Yes	No	No	Yes	Yes
w.	Asphalt Pavers	4		Yes	Yes	No	Yes	No	No	Yes	Yes
x.	Reinforcement Machine	1		Yes	Yes	No	Yes	No	No	Yes	Yes
y.	Underground services tracer	2		Yes	Yes	No	Yes	No	No	Yes	Yes
z.	wheel front end loader	2		Yes	Yes	No	Yes	No	No	Yes	Yes
aa.	Single drum duck foot roller	4		Yes	Yes	No	Yes	No	No	Yes	Yes
bb.	Vacuum tanker (exhauster vehicle)	2		Yes	Yes	No	Yes	No	No	Yes	Yes
cc.	Cranes-50m	2		Yes	Yes	No	Yes	No	No	Yes	Yes
dd.	Compactors 3 – 4 KW	6		Yes	Yes	No	Yes	No	No	Yes	Yes
ee.	Dumpers 15 – 30 CM	10		Yes	Yes	No	Yes	No	No	Yes	Yes
ff.	Mobile concrete mixers & related vibrators, etc 300 – 500 litres	3		Yes	Yes	Yes	Yes	No	No	Yes	Yes
gg.	Water bowsers 2000 litres	4		Yes	Yes	No	Yes	No	No	Yes	Yes
hh.	Compressors 80 – 100 HP	4		Yes	Yes	No	Yes	No	No	Yes	Yes
ii.	Generating sets 5 – 20 KVA	5		Yes	Yes	No	Yes	No	No	Yes	Yes
jj.	Cranes – mobile 5 ton	3		Yes	Yes	Yes	Yes	No	No	Yes	Yes

kk.	Mechanical broom with exhauster system	2		Yes	Yes	Yes	Yes	No	No	Yes	Yes
ll.	Joinery Machinery Complete Sets	1		Yes	Yes	Yes	Yes	No	No	Yes	Yes
mn.	Metal Fabrication Complete Sets	2		Yes	Yes	Yes	Yes	No	No	Yes	Yes
nn.	Painting machine assembly	2		Yes	Yes	Yes	Yes	No	No	Yes	Yes
oo.	Mobile flood lights	6		Yes	Yes	No	Yes	No	No	Yes	Yes

2.2.1. Preliminary bidders overall Responsiveness

Table 4 – summary of Preliminary Responsiveness

	Bidder 1	Bidder 2	Bidder 3	Bidder 4	Bidder 5	Bidder 6	Bidder 7	Bidder 8
Responsiveness	Yes	Yes	No	No	No	No	Yes	No

2.3. Reasons For Non- Responsiveness

2.3.1. Bidder 3:- M/s Al Naboodah Contracting Company LLC

a. Specific experience

- The bidder submitted only one contract against the requirement of four (04) and no references from clients.
- The bidder did not provide references from clients on AGL.

b. ESHS Personnel

- The standard form PER-2 was not filled which gives details of ESHS Key personnel

c. Personnel

- Project manager- Bidder did not provide professional registration details.
- Construction manager/Deputy Project manager- details on qualifications and registration were not provided.
- Site engineer- Civil Eng- Bidder did not provide professional registration details.
- Site engineer -Elect Eng- Bidder did not provide professional registration details.
- Site supervisor- bidder provided a diploma holder rather than a degree holder.

d. Equipment Type & Characteristics

- The documents provided as proof of ownership for most of the owned equipment did not demonstrate ownership.
- The bidder did not provide proof of ownership for mobile floodlight sets, Generators and compressors.

2.3.2. Bidder 4- M/s Sinohydro Corporation Ltd

a. Specific Experience.

- The bidder provided three (3) contracts that meet the specific experience and threshold of USD 35Million against the requirement of four (4).
- The bidder did not fill form EXP 4.2(b) and therefore did not demonstrate experience in specialized works for slope with

geotextiles and stone filled gabions and ground stabilization with geo-textiles, geopipes (French drains) and filling.

b. ESHS Transfer of Knowledge.

- The bidder failed to fill the standard form EXP-ESHS on specific ESHS knowledge transfer.

2.3.3. Bidder No 5-M/s Strabag International GMBH

a. Financial capabilities

- The bidder did not fill form FIN- 3.4 to demonstrate adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments.

b. Specific Experience.

- The bidder did not fill form EXP 4.2(b) on all the specialized works as required.

c. Personnel.

- Project Manager- Bidder did not demonstrate minimum general and specific experience of 20 and 15 years respectively, and did not demonstrate professional registration.
- Construction Manager/Deputy Project manager- Bidder did not demonstrate minimum general and specific experience of 15 and 10 years respectively and did not demonstrate professional registration.

d. Equipment type & characteristics

- The bidder did not provide the required number of equipment and proof of ownership.

2.3.4. Bidder 6- M/s China National Aero Technology International Engineering Corporation

a. Personnel.

- Construction Manager/Deputy Project Manager- Bidder did not demonstrate minimum specific experience of 10 years.
 - Site Agent- The bidder did not provide a specific person for this key function.
 - Site Engineer-(Civil & Electrical) The bidder did not provide a specific person for this key function.
 - Site surveyor- The bidder did not provide a specific person for this key function.
 - ESHS Manager- The bidder did not provide a specific person for this key function.
- b. Specific experience-Project
- The bidder has provided one contract that meets the threshold of USD35Million against the requirement of four contracts.
- c. Equipment type & characteristic.
- The bidder did not provide documents to demonstrate ownership or lease of the required equipment.
 - The bidder did not meet the required quantities on most equipment.

2.3.5. Bidder 8- M/s Bam International BV

- a. ESHS Personnel
- The bidder provided only one (01) ESHS personnel against a requirement of two (02).
- b. Equipment Type & characteristic.
- The bidder did not provide documents to demonstrate ownership or lease of the required equipment.

2.4. Technical Evaluation

Summary of detailed technical evaluation Observations

Bidder 1-M/S China State Construction Engineering Corporation Ltd

- The bidder did not provide the local recruitment procedure and deployment to comply with ESHS- Part D-Local labor and relations with local communities.
- The bidder did not provide a plan on transport, accommodation and meals for the local employees to comply with ESHS- Part D-Local labor and relations with local communities.
- The bidder did not submit standard schematic drawings, catalogue sheets, diagrams, schedules, performance charts, illustrations and other standard descriptive data for Airfield Ground Lighting system (AGL) as per requirements under technical specifications Part B: Electrical AGL Works - Section 3.5.
- The Bidder did not submit product data designs, product certificate & qualification data as per requirements under technical specifications Part B Section 25.1.14

Bidder 2-M/S 77 Insaat- Metag JV

- The bidder did not provide a plan for transport, accommodation and meals for the local employees to comply with ESHS- Part D-Local labor and relations with local communities.
- The bidder did not submit standard schematic drawings, catalogue sheets, diagrams, schedules, performance charts, illustrations and other standard descriptive data for Airfield Ground Lighting system (AGL) as per requirements under technical specifications Part B: Electrical AGL Works - Section 3.5.

- The Bidder did not submit product data designs, product certificate & qualification data as per requirements under technical specifications Part B Section 25.1.14

Bidder 7-M/s Sogea Satom and Razel- Bec JV

- The bidder did not provide a plan for transport, accommodation and meals for the local employees to comply with ESHS- Part D-Local labor and relations with local communities.
- The bidder did not give an outline of the arrangement and organization of works to comply with works requirements section IV Technical Proposal item (f).

The Evaluation Committee noted that bidders' number 1 and 2 did not submit the technical requirement for AGL, an integral part of the scope of work. The Committee deems these omissions to be substantial deviations from the requirements of the Bidding Documents and accordingly concludes that the two bids are non-responsive.

With regard to Bidder number 7, the Evaluation Committee considers the omissions highlighted in section 4.5.6.3 above not to constitute material deviations from the work requirements. The bid is therefore eligible for financial evaluation as detailed below.

2.5. Financial Evaluation

2.5.1. Arithmetic Errors

There were no arithmetic errors on the bid document, see attached Appendix 4.

2.5.2. Bidder 7 Comparison With Engineers Estimates

- The bid price compared well with the engineers estimate with an overall variance of seven (7%) percent (see section 4.6.3)

- The analysis of the bill items confirmed that the bid is balanced and is not front loaded.
- The details of this analysis is per the table below
- Therefore the bid was found to be fully responsive to the financial evaluation requirements

3. CONCLUSION AND RECOMMENDATION

Based on the results of the technical evaluation, the Evaluation Committee established that the bid by M/s Sogea Satom and Razel- Bec JV is substantively responsive both technically and financially, and deems the bid to be competitive. The Evaluation Committee therefore recommends that the tender for Rehabilitation of Airside Pavements and AGL System at Moi International Airport be awarded to M/s Sogea Satom and Razel- Bec JV at their bid price of Kshs. 7,008,241,516.59 (Seven Billion, eight million, two hundred forty one thousand five hundred and sixteen fifty nine cents) which includes 10% Contingencies of Kshs. 499,304,753.25; 10% variations of Kshs. 549,235,228.57 and 16% VAT of Kshs. 966,654,002.29.

4. PROFESSIONAL OPINION

The Ag.General manager (Procurement & Logistics) in its professional opinion dated 5th May, 2017 stated that the procurement process was conducted as per the AFD guidelines and submission of the evaluation report to the Bank for a 'No Objection' is recommended the Accounting Officer approved as recommended on 5th May, 2017.

THE REVIEW

The Request for Review was lodged by M/s Bam International BV; the above-named Applicant which requested the Public Procurement Administrative Review Board (herein after referred as the Board) to review the decision of the Kenya Airports Authority in the matter of Tender No. KAA/ES/MIA/617/C the Rehabilitation of Airside Pavements and AGL System at Moi International Airport, Mombasa.

The Applicant sought for the following orders:

- a) The Respondent's decision disqualifying the Applicant from further participation in the tender ICB NO. KAA/ES/MIA/617/C communicated via its letter dated 2nd October 2017 and reiterated via another dated 10th October 2017 be set aside and annulled.*
- b) The Board be pleased to review all records of the procurement process (including the evaluation thereof) relating to tender ICB NO. KAA/ES/MIA/617/C and do order the Respondent to re-admit and restore the Applicant's tender and to fully evaluate it in accordance with the tender document, the law, and the Constitution of the Republic of Kenya.*
- c) The Respondent be ordered not to award the said tender ICB NO. KAA/ES/MIA/617/C to any person or entity prior to re-admission and full evaluation of the Applicant's tender.*
- d) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and*

e) Such other or further relief or reliefs as this board shall deem just and expedient.

During the hearing of the Request for Review, the Applicant was represented by Mr. G. M. Nyaanga advocate from the firm of M/s Dennis Anyoka Moturi & Company Advocates while the Procuring Entity was represented by Mr. Paul Chege Advocate from the firm of M/s Amolo & Gacoka & Company advocates. The interested party herein M/s Sogea Satom/Razel BEC JV was represented by Mr. J. M. Mburu Advocate from the firm of M/s J. M. Mburu & Company Advocates.

One other interested party namely the firm of M/s China state construction Corporation appeared at the hearing of the Request for Review through M/s Gladys Toroitich who opted not to make any submissions before the Board.

The advocates who appeared for the Applicant, the Procuring Entity and the interested party Sogea Satom/Razel BEC JV made extensive submissions before the Board and referred to the documents filed with the Board in support or in opposition to the Request for Review.

By way of documents, the Applicant relied on the Request for Review dated 12th October, 2017, the statement signed by Eric Van Zuthem together with all the documents annexed to the said statement. The Procuring Entity on its part relied on the statement of response dated 19th October, 2017 which was signed by M/s Margaret Muraya the Procuring Entity's Ag. General Manager (Procurement & Logistics) together with the

bundle of documents which the Procuring Entity filed with the Board on 19th October, 2017. In addition to the above documents the Procuring Entity also provided the Board with all the original tender documents submitted to it by all the bidders together with the evaluation reports and other correspondences it is required to submit to the Board under the provisions of Regulation 74(3) of the Public Procurement and Disposal Regulations which are still in force.

The interested party Sogea Satom/Razel BEC JV on the other hand relied on the Replying Affidavit/statement sworn by Mr. Christophe Mitridati on 30th October, 2017.

The Board has considered the oral submissions which were made before it and all the documents which were placed before it in this Request for Review and determines from a totality of the said submissions and documents that this Request for Review raised the following issues for determination:-

THE ISSUES

- a) Whether the letter of notification dated 2nd October, 2017 issued by the Procuring Entity to the Applicant notifying it of the outcome of its tender complied with the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act, 2015.**
- b) Whether the Applicant approached the Board with clean hands.**

- c) **Whether the Procuring Entity's decision to declare the Applicant's tender as non-responsive as contained in the Procuring Entity's letter dated 2nd October, 2017 was proper.**
- d) **What orders should the Board make in this Request for Review.**

The Board will now proceed to consider and determine each of the four issues framed above on the basis of the evidence and the submissions made before it.

ISSUE NO. I

Whether the letter of notification dated 2nd October, 2017 issued by the Procuring Entity to the Applicant notifying it of the outcome of its tender complied with the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act, 2015.

The first issue framed for determination was raised by the Applicant.

Mr. G. A. Nyaanga advocate for the Applicant started off his submission on this issue by stating that the Applicant was one of the bidders who submitted its tender to the Procuring Entity in respect of tender No. ICB No. KAA/ES/MIA/617/C for the rehabilitation of Airside pavements and AGL System at the Moi International Airport Mombasa.

It was the Applicant's further case that it received two letters dated 2nd October, 2017 from the procuring Entity. The Applicant stated that in the first letter which it produced as annexure 4 to the Request for Review the Procuring Entity was requesting the Applicant to extend the tender validity and the Bid Security validity period from 2nd October, 2017 to 4th

December, 2017 while in the second letter the Procuring Entity informed the Applicant that its tender was unsuccessful for the reasons set out in the said letter.

Counsel for the Applicant submitted that the second letter which in his view looked like a letter of notification that the Applicant's tender was unsuccessful did not meet the requirements of Section 87(3) of the Public Procurement and Asset Disposal Act in that the letter did not disclose that the procurement process herein had been completed and who the successful bidder was.

Counsel for the Applicant stated that the failure to disclose the particulars of the successful bidder contravened the express provisions of the law and that the failure to disclose that the process of evaluation was complete created the impression that the process was ongoing which in turn made the Applicant draft the Request for Review as if the procurement process herein was still alive.

Counsel for the Applicant therefore urged the Board to find that the Procuring Entity had contravened the provisions of Section 87(3) of the Act.

On his part Mr. Paul Chege advocate for the Procuring Entity opposed the first ground of review as set out in the first issue set out above and stated that the issue had not been specifically set out as a ground of complain in the Request for Review and that the issue was being raised for the first time during the hearing of the Request for Review. He stated that had the issue been raised in the Request for Review, the Procuring Entity would have

made sufficient arrangements to respond to it. Mr. Chege stated notwithstanding his first observation and even if the Board examined and came to the conclusion that the letter of notification did not disclose who the successful bidder was, such an omission was not fatal since it could not affect the final outcome of the procurement process. He further stated that a letter of notification informing bidders of the outcome of their tenders comes at the end of the evaluation process after tender documents have been submitted and after evaluation and the award process have been completed and that as such, the letter of notification does not therefore affect a bidder's chances of being successful in a tender process.

Mr. Chege further argued that the only remedy that the Board can grant to the Applicant if it were to uphold this ground of objection is to order the Procuring Entity to issue a proper notice to the Applicant but not to annul or set aside the evaluation and the award processes.

Counsel for the Procuring Entity consequently argued that the Applicant had not demonstrated what prejudice it had suffered as a result of the alleged defect in the letter of notification dated 2nd October, 2017.

Mr. J. M. Mburu advocate for the interested party also opposed the first ground of challenge and fully associated himself with the submissions made Counsel for the Procuring Entity.

Mr. Mburu stated that the purpose of a letter of notification under the provisions of Section 87(3) of the Act was to inform both the successful and the unsuccessful bidders of the outcome of their tenders and the purpose of

disclosing the particulars of who the successful bidder and the reasons why a bidder was unsuccessful in any procurement process was so as to enable a bidder who was dissatisfied with the reasons given by a procuring entity to challenge the outcome of the procurement process before the Board.

Counsel for the interested party further submitted that in the instant case, the Applicant had been able to file its Request for Review within the statutory period of fourteen (14) days and had not therefore suffered any prejudice.

Both Counsel for the Procuring Entity and Counsel for the interested party therefore urged the Board to dismiss this ground of the Applicant's Request for Review.

In a brief response to the submissions made by Counsel for the Procuring Entity and Counsel for the interested party, Counsel for the Applicant stated that contrary to the submissions made by Counsel for the Procuring Entity, the Applicant had specifically cited the provisions of Section 87 of the Act as one of the Sections pursuant to which this Request for Review had been instituted. He therefore stated that this was not a new issue since both the Procuring Entity and the interested party who had been served with the Applicant's Request for Review had notice of it.

He further argued that the provisions of Section 87(3) were enacted for a purpose and that the Review Board being the body that was created for the purposes of regulating and enforcing the provisions of the Act, it had the

primary function of ensuring that the provisions of the said Act including the provisions of Section 87(3) of the Act have been complied with.

On the issue of prejudice, Counsel for the Applicant submitted that the purpose of a letter of notification to an unsuccessful bidder who is a candidate in a tender process is so as to guide it as to what grounds of review it should raise and what prayers it should seek. Counsel for the Applicant stated that his client had suffered prejudice in the case before the Board which was occasioned by the letter dated 2nd October, 2017 because the said letter had created the impression that the tender process in question was still ongoing. The Applicant stated that as a result of the wrong impression given, the Applicant had prepared its Request for Review on the presumption that the process was ongoing and that was the reason why the Applicant had sought for an order of readmission into the procurement process.

The Board has considered the submissions made by the parties and has also perused the letter of notification dated 2nd October, 2017 notifying the Applicant that its tender was unsuccessful. The Board finds that under the provisions of Section 87 of the Act, the law requires that upon the conclusion of the evaluation of the tenders submitted to it, the Procuring Entity is required to notify both the successful and the unsuccessful tenderers of the outcome of their tenders.

Under the provisions of Section 87(3) of the said Act, the law specifically requires that when a person submitting the successful tender is notified of

the outcome of its tender the Accounting Officer of the Procuring Entity shall also notify in writing all other persons submitting tenders that their tenders were not successful disclosing the successful tenderer as appropriate and the reasons thereof.

It is clear from a reading of the said provision of the Act that the Procuring Entity is therefore required to disclose the particulars of the successful tenderer in its letter of notification.

A reading of the letter of notification dated 2nd October, 2017 which was send out to the Applicant notifying it of the outcome of its tender and which was produced as annexure 5 to its Request for Review however shows that the Procuring Entity gave reasons for the Applicants disqualification but did not disclose the particulars of the successful bidder. The further evidence placed before the Board and which is contained in the evaluation report and the letters of notification sent out to all the bidders show that the Procuring Entity had completed the entire evaluation process by 2nd October, 2017 and was therefore in possession of the particulars of who the successful bidder in the tender process in question was. This fact is further fortified by the letter of notification marked as annexure number CN1 which was annexed to the Replying Affidavit sworn by Mr. Christophe Mitridati on behalf of the interested party.

It is the Board's view based on the above evidence that the Procuring Entity should have disclosed to the Applicant who the successful bidder in

this tender process was. Such disclosure would have enabled the Applicant know that the procurement process herein had been concluded.

The Board therefore finds based on the above evidence that the Procuring Entity *prima-facie* failed to comply with the provisions of Section 87(3) of the Act by failing to disclose to the Applicant who the successful bidder was when such particulars were within its knowledge.

Having found that the Procuring Entity contravened the provisions of Section 87(3) of the Act, the only other issue which the Board needs to determine is the effect of a Procuring Entity's failure to comply with the provisions of Section 87(3) of the Act on notification on the overall procurement process.

As the Board has held on several occasions, the purpose of a letter of notification issued under the provisions of Section 87 of the Act is to inform the unsuccessful bidders of the reasons for their disqualification so as to enable them challenge the grounds of disqualification in the event that they are unsatisfactory. An Applicant seeking to rely on the Procuring Entity's failure to properly notify it of the outcome of its tender must therefore demonstrate that he has suffered prejudice as a result of the Procuring Entity's failure to issue it with a proper letter of notification.

One of the Board's decision which supports this position is the case of **Orad Limited and Glosec Solutions Limited (JV) –vs- Kenya Electricity Generating Company Ltd (PPARB 91 of 2017)** where the Board held that a bidder who was seeking to rely on the Procuring Entity's failure to comply

with the provisions of Section 87 of the Act must demonstrate what prejudice it has suffered.

The Board has examined the full circumstances of this case and finds that notwithstanding the Procuring Entity's failure to disclose the particulars of who the successful bidder was, the Applicant was able to file a substantive Request for Review challenging the reasons given by the Procuring Entity for declaring its tender as being non responsive.

The Board further notes that the Applicant was able to state and challenge the said reasons during the hearing and was not handicapped in any way.

During the hearing of the Request for Review, Counsel for the Applicant indicated to the Board that his client was prejudiced because at the time it prepared the Request for Review it did so on the assumption that the procurement process herein was still ongoing and that it only learnt that the tender in question had been awarded to the interested party when the interested party served it with the Replying Affidavit dated 30th October, 2017 where it had annexed the letter of award. Counsel for the Applicant further stated that as a result of the Procuring Entity's failure to disclose to it the particulars of the successful bidder, the only substantive relief sought by the Applicant was for an order of readmission into the evaluation process.

The Board has examined the above ground of prejudice and finds that the same is not enough to warrant a declaration that the entire procurement process herein was flawed firstly because the failure to issue a proper

notification cannot nullify or void the process of submission, the tender evaluation and the award of a tender.

As rightly submitted by Counsel for the Procuring Entity, notification occurs at the tail end of an evaluation process and any defect in the letter of notification cannot affect the outcome of an evaluation of a tender since the only remedy that would be available to a bidder if the Board found that the letter of notification was improper would be to order that a fresh letter of notification be issued.

Secondly on the above issue, there are several steps which Counsel for the Applicant would have taken after learning that the procurement process herein had been concluded. One such step would have been to apply for leave to amend the Request for Review to raise any new ground of challenge or to seek for any appropriate relief arising from the letter of award.

Where a party has an opportunity to amend its pleading to bring up any new issue arising from the course of the proceedings before the Board, such a party cannot claim or be deemed to have suffered prejudice.

In view of all the foregoing findings, the Board therefore holds that although the Procuring Entity did not strictly comply with the provisions of Section 87(3) of the Act on notification, the Applicant did not nonetheless suffer any prejudice as a result of the said failure.

ISSUE NO. II

Whether the Applicant approached the Board with clean hands.

The second issue which was framed for determination was raised by Counsel for the Procuring Entity as a ground for denying the Applicant relief. It was the Procuring Entity's case that an Applicant who approaches the Board for relief must do so with clean hands.

It was however the Procuring Entity's case that the Applicant in this case had not come before the Board with clean hands because it had tried to influence the evaluation process by writing a letter dated 28th September, 2017 to the Procuring Entity in which it sought to influence the outcome of the evaluation. Mr. Chege advocate for the Procuring Entity stated that the Applicant had on that date written to the Procuring Entity informing it that the Applicant had reviewed its tender documents and had noted that the forms marked as Exp - 4.2 (b) for the references of its AGL subcontractor were not filed out presumably due to the pressures of compiling the final documents at the time of submission. In its said letter, the Applicant apologized for the error and indicated that its specialist subcontractor for the works was ADB SAFEGATE which was a primary supplier of such facilities worldwide. The Applicant therefore enclosed and forwarded corrected forms to the Procuring Entity to replace those which it had already submitted in order to assist the Procuring Entity in evaluating its tender.

Counsel for the Procuring Entity submitted that the letter dated 28th September, 2017 amounted to canvassing or an interference with the evaluation process since the letter in question was written between the date when the tender closed namely on 4th April, 2017 and 27th September, 2017 when the evaluation of the tenders was completed.

Counsel for the Procuring Entity further submitted that the Act and the Regulations prohibited a bidder from canvassing or interfering with the evaluation process and that interference was one of the grounds on the basis of which a Procuring Entity could disqualify a bidder from proceeding further with an evaluation process. He further submitted that a bidder who had engaged in such an unlawful conduct was not entitled to any relief from the Board and that the Board should decline to grant the Applicant any relief on this ground.

In response to the allegation of canvassing, Counsel for the Applicant denied the allegation and stated that he had looked at the letter referred to by Counsel for the Procuring Entity and noted that the Procuring Entity had received the Applicant's letter dated 28th September, 2017 on 3rd October, 2017 which was a day after the Procuring Entity notified the Applicant that its tender was unsuccessful. He therefore stated that the said letter could not have influenced the procurement process since the process had been completed by the time the said letter was received by the Procuring Entity.

Counsel for the Applicant additionally submitted that the letter of 28th September, 2017 was of no effect because it did not constitute one of the grounds on the basis of which the Applicant's tender had been declared as non-response and urged the Board to dismiss the Procuring Entity's objection to the Applicant's Request for Review based on this ground.

Mr. Mburu advocate for the interested party did not make any submissions on the second issue framed for determination.

The Board has considered the submissions made by the parties and has also looked at the contents of the letter dated 28th September, 2017 written by the Applicant to the Procuring Entity.

The Board finds that the law prohibits bidders or the employees of a Procuring Entity from interfering with an evaluation process.

The Board however holds that a party seeking to rely on canvassing or interference with a procurement process must demonstrate that the actions of the party against whom the allegation of interference has been made have actually interfered with the evaluation process.

The uncontroverted evidence placed before the Board in this matter shows that the letter dated 28th September, 2017 which was written by the Applicant to the Procuring Entity was received by the Procuring Entity on 3rd October, 2017. Both the letter of notification of award issued to the interested party and the notification issued to the Applicant show that the tenders which were the subject matter of this Request for Review had been

fully evaluated and an award made to the successful bidder by 2nd October, 2017.

The only logical conclusion is therefore that the letter dated 28th September, 2017 and the further information the Applicant supplied to the Procuring Entity in the said letter did not influence the evaluation of the Applicant's tender because the letter and the further information were received after the said process had been concluded.

The Board further wishes to observe that under the provisions of Section 176(1) (d) & (g) of the Act, the law prohibits any bidder from unduly influencing or inappropriately influencing an evaluation process and criminalizes such actions.

The allegation made by Counsel for the Procuring Entity against the Applicant is therefore criminal in nature and the only way that the Board can rely on such conduct to deny an applicant relief is if the person alleging the commission of such unlawful act places before the Board evidence to show that a bidder has either been convicted or has been debarred or otherwise found culpable of the alleged conduct. The Board is therefore reluctant to act on an allegation of unlawful criminal conduct in the absence of the requisite legal evidence to support it.

The Board considered a similar allegation in the case of **Baraki International Ltd -vs- Kenya Urban Roads Authority (PPRB 84 of 2017)** where a similar allegation had been leveled against a bidder and stated as follows on the level of proof required to establish such an allegation:-

“Finally the Board wishes to state that even if the Procuring Entity had produced any of the evidence referred to above, the Board as a responsible statutory body would not have deemed the allegation of canvassing which is criminal in nature as having been proved unless the Procuring Entity had placed before it evidence of a criminal conviction or a decision given by the Director General of the Public Procurement Regulatory Authority debarring the tenderer in question from participating in any procurement proceedings within the Republic of Kenya”.

The Board has also looked at the two reasons for the Applicant’s disqualification and finds that the Applicant was not disqualified from the evaluation process on the ground of interference with the said process.

The Board wishes to observe that where a bidder attempts to canvass or influence an evaluation process, the option open to the Procuring Entity is to immediately disqualify such a bidder from the process once the act of interference comes to the notice of the Procuring Entity. The Procuring Entity cannot therefore overlook the issue and continue with the evaluation process and later raise the issue when a Request for Review is filed before the Board.

Based on all the above findings, the Board therefore holds that the Procuring Entity did not sufficiently prove the allegation of canvassing or interference.

The Board will not therefore decline to consider the other issues raised by the Applicant or refuse to grant the Applicant any relief it may be entitled to on the basis of the above allegation.

ISSUE NO. III

Whether the Procuring Entity's decision to declare the Applicant's tender as non-responsive as contained in the Procuring Entity's letter dated 2nd October, 2017 was proper.

Turning to the third issue framed for determination, Counsel for the Applicant submitted that in its letter of notification dated 2nd October, 2017 which it produced as annexure 5 to its Request for Review, the Procuring Entity declared the Applicant's tender as non-responsive for two reasons namely:-

- (i) That the Applicant provided only one (01) ESHS personnel against a requirement of two (02).
- (ii) That the Applicant did not provide documents to demonstrate ownership or lease of the required equipment.

Counsel for the Applicant stated that the two reasons on the basis of which the Applicant's tender had been declared as non-responsive were not factually correct and that the Applicant's tender had therefore been wrongly declared as non-responsive.

On the first reason why the Applicant's tender had been declared as non-responsive, Counsel for the Applicant referred the Board to clause 5.5 appearing at page 37 of the tender document and stated that the said clause

required a bidder to demonstrate that it had the key personnel as permanent staff for at least two (2) years that meet the two requirements set out under that clause. He further submitted that there was no mention of what number of personnel would be required against each of the two requirements.

While referring to the Applicant's original tender document headed "Technical Proposal", Counsel for the Applicant stated that the Applicant had provided a site organizational chart which demonstrated that the Applicant had met the criteria set out in the tender document.

Counsel for the Applicant stated that under the ESHS requirement, the Applicant had provided for a manager and under the manager it had provided for two supervisors, one public relations person, one medical officer, 5 people as members of its ESHS team, two local environmental assistants and a medical assistance team of four people all making a total of 15 ESHS people. It was the Applicant's case that the above number of people surpassed the number of 2 people that the Procuring Entity alleged were required by the tender document.

Counsel for the Applicant further submitted that the Applicant provided CVs of all the personnel and urged the Board to find that the Procuring Entity invalidly declared the Applicant's tender as non-responsive on this ground.

On the second reason for disqualification, namely that the Applicant did not meet the requirement on equipments, Counsel for the Applicant

referred the Board to the requirement at page 39 of the tender document and stated that what a bidder was required to do was to demonstrate that it had the 29 key equipments listed in page 39 of the tender document by filling in the form EQU in Section IV appearing at page 60 of the tender document. He further submitted that form EQU was designed by the Procuring Entity and all that a bidder was required to do was to provide adequate information by filling in the form to demonstrate that it had the capability to meet the requirements for the key equipment listed in Section III relating to the evaluation and qualification criteria.

Counsel for the Applicant further submitted that all that a bidder was required to do was to fill in the form providing the information set out in the form and that there was no requirement or criteria in the tender document stating that a bidder was to provide any documents to show that it owned, rented, leased or specially manufactured the equipments in question.

Counsel for the Applicant stated on the basis of the EQU forms which it had produced and annexed to its Request for Review as bundle number 2 that it had filled in all the forms showing that it had met the requirement on equipments.

Counsel for the Applicant added that the Procuring Entity's decision to declare the Applicants tender as unsuccessful on the ground that it did not provide documents to demonstrate ownership of the equipments was contrary to the provisions of Section 80(2) of the Act which stipulated that a

Procuring Entity could only carry out an evaluation and comparison of tenders using the procedures and the criteria set out in the tender document and that no other criteria was to be applied.

It was the Applicant's further case that clauses 28 and 29 appearing at page 16 of the tender document and clause 30 appearing at page 17 of the said document provided for an important guidance. He stated that clauses 28, 29 and 30 of the tender document dealing with deviations, reservations, omissions, determination of responsiveness and non-material, non-conformities demonstrated that a tender submission which was returned to the Procuring Entity is not required to be full proof and that omissions and reservations were allowed so long as a tender was substantially responsive. He further submitted that the tender document itself therefore allowed for flexibility and that the reasons given by the Procuring Entity were immaterial and flimsy. He stated that if the Procuring Entity was in doubt or that if there was any issue in the Applicant's tender document that needed to be clarified, the Procuring Entity ought to have sought for clarification from the Applicant which it did not do.

Based on all the above reasons, Counsel for the Applicant urged the Board to find that the Applicant's tender was wrongly declared as non-responsive and restore it back to the evaluation process.

Mr. Chege advocate for the Procuring Entity opposed the submissions made by Counsel for the Applicant and stated that the Applicant's tender was rightly declared as non-responsive for the two reasons set out in the

letter of notification dated 2nd October, 2017. On the first reason for disqualification, namely that the Applicant only provided one instead of two ESHS personnel, Counsel for the Procuring Entity while referring to the provisions of clause 5.5 appearing at page 37 of the tender document stated that there were two sets of qualifications which had been set out in that clause. He stated that the first qualification that was required under that clause was for at least one environmental expert and the second one was for at least one health and safety expert making the total number of those required two. He stated that for each of this requirement, a bidder was required to fill in form PER 2 whose format was provided for in the tender document demonstrating those qualifications.

Counsel for the Procuring Entity stated that instead of submitting two or more forms PER 2, the Applicant only provided one form PER 2 with regard to occupational safety and health but did not provide a form with regard to environmental expertise. He stated that based on the above omission the first reasons on the basis of which the Applicant's tender was declared as non-responsive was valid.

Turning to the second reason given by the Procuring Entity namely that the Applicant did not demonstrate that it has the key equipments set out in the tender document, Counsel for the Procuring Entity referred the Board to page 39 of the tender document setting out the said requirement and submitted that what the Applicant ought to have done in order to comply with that requirement was to demonstrate ownership of the equipment in question and that this could not be demonstrated by just ticking that part

of form EQU headed "owned" appearing at page 60 of the tender document. He further stated that the use of the word "demonstrate" in the tender document required a bidder to provide documentary evidence to show that it either owned or had acquired the equipment it intended to use in performing the tender either by way of lease or any other form that would confer permanent or temporary ownership rights on the Applicant.

Counsel for the Procuring Entity further submitted that the position would have been otherwise if the Procuring Entity had required the use of any other word such as "state" in which event no documents of ownership of the equipment would have been required.

He additionally stated that there was no way a bidder could demonstrate that it owned the equipment listed in page 39 of the tender document without producing documentary evidence to demonstrate such ownership. He stated that the Procuring Entity had made this requirement based on past experience whereby tenderers give false information creating the impression that they are in possession of the necessary machinery in order to win a tender but fail to mobilize the machinery on site once they are awarded the tender.

Counsel for the Procuring Entity therefore urged the Board to find that the second reason given by the Procuring Entity for declaring the Applicant tender as non-responsive was also valid.

On the issue of deviations and non-conformities, Counsel for the Procuring Entity submitted that the criteria on personnel qualification set out under

clause 5.5 appearing at page 37 of the tender document and that on equipments appearing at page 39 of the said document were both mandatory requirements and were not peripheral as the Applicant stated. He submitted that none of the two requirements could therefore be termed as minor deviations or non-conformities and urged the Board to disregard the submissions made by Counsel for the Applicant on the basis of clauses 28, 29 and 30 of the tender document.

He finally urged the Board to find that the Applicant's tender was rightly declared as non-responsive based on the two reasons.

Mr. J. M. Mburu advocate for the interested party Sogea Satom/Razel BEC JV associated himself with the submissions made by Counsel for the Procuring Entity and stated that the Applicant's tender had rightly been declared as non-responsive for failing to meet the two requirements set out in the tender document.

Counsel for the interested party further submitted that unlike the Applicant which failed to demonstrate that its tender was responsive, the interested party which was eventually declared as the successful bidder met all the requirements set out in the tender document and provided all the documentary evidence required by the Procuring Entity to support of its tender submission.

Counsel for the interested party further submitted that under the provisions of Section 79(1) of the Public Procurement and Asset Disposal Act, a Procuring Entity was empowered by law to prepare a tender

document setting out eligibility and mandatory requirements which every bidder was required to meet.

He further submitted that pursuant to the provisions of Section 79(1) of the Act, the Procuring Entity set out the eligibility criteria in clauses 4.6, 35.1 and ITB 35 and 37 which required a bidder to provide evidence of eligibility to the Procuring Entity. He additionally stated that under the provisions of Section 80(2) of the Act, the Procuring Entity could only evaluate the tenders submitted to it using the evaluation criteria set out in the tender documents and that no other criteria was permissible.

On the two reasons for the Applicant's disqualification, Counsel for the interested party stated that the two were mandatory requirements of the tender and that the Applicant had failed to establish that it had met the two requirements. He stated that under the provisions of clause 5.5 at page 37 of the tender document, the Applicant was required to demonstrate that it had the key personnel mentioned in that clause as permanent staff for at least two (2) years. He further stated that clause 5.5 required a bidder to fill in two forms PER-2 forms which implied that more than one person was required. He further stated that the use of the word key personnel in clause 5.5. of the tender document meant that the document envisaged more than one person.

On equipments, Counsel for the interested party submitted that it was not enough for the Applicant to fill in the EQU forms but that it was a mandatory requirement of this tender that a bidder provides documentary

evidence of ownership of the equipment listed in page 39 of the tender document. It was the interested party's case that the only way in which a bidder could demonstrate ownership of equipment was through the production of documents of ownership which the Applicant had failed to do.

Counsel for the interested party therefore urged the Board to find that by failing to meet the two requirements set out above, the Applicant had failed to meet the criteria on responsiveness as set out in Section 79(1) of the Act and further that under the provisions of Section 80(1) the Act, the tender evaluation committee appointed by the Procuring Entity's Accounting Officer had rightly declared the Applicant's bid as non-responsive.

In a short responsive to the submissions made by Counsel for the Procuring Entity and Counsel for the interested party, Counsel for the Applicant stated that he had carefully listened to the submissions made by the advocates for the two parties and had observed that they were trying so hard to justify certain provisions in the tender document which could only mean that those provisions were either ambiguous or did not exist. He stated that this was contrary to the provisions of Section 80(3) of the Act which provides that every criteria contained in a tender document shall to the extent possible be objective and quantifiable and that the criteria shall be expressed so that it is applied in accordance with the procedures taking into consideration price, quality, time and service for the purposes of

evaluation. He stated that an objective criteria is one that ought be easily understood by every bidder.

He reiterated that there was no stipulation in the tender document that required a bidder to provide two ESHS personnel under the provisions of clause 5.5 of the tender document.

He finally urged the Board to determine the issue of the Applicant's eligibility on the basis of the documents submitted by the Applicant to the Procuring Entity but not on the basis of nay extrinsic evidence.

The Board has considered the submissions made before it by all the parties and has also carefully examined the contents of the original tender document submitted by the Applicant to the Procuring Entity in a bid to determine whether the Applicant's tender was rightly declared as non-responsive on the grounds set out by the Procuring Entity in its letter of notification dated 2nd October, 2017.

Owing to the central nature of this issue, the Board wishes to state that under the provisions of the Public Procurement and Asset Disposal Act, the Board is empowered by law to examine the entire procurement process in order to determine whether a bidder's bid was rightly declared as non-. The Board wishes to further observe that while making a consideration of the said issue, the Board is bound to look and strictly adhere to the criteria and the procedure set out in the tender document and no extrinsic evidence is permitted.

Section 80(2) of the Act which is relevant to the consideration of the above issue provides as follows:-

80.(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory Instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

The above legal position has been stated in a number of decided cases and one such case is the High Court decision in the case of JGH Marine A/s Western Marine Services Ltd, CNPC North East Refining & Chemical Engineering Co. Ltd/Pride Enterprises –vs- The Public Procurement Administrative Review Board, Civicon Ltd and Kenya Pipeline Company Ltd (Nai HC Judicial Review Misc. Application No. 137 of 2015) where the High Court held that a Procuring Entity was bound to apply the criteria and the procedures set out in the tender document while evaluating a bidder's tender and that no extrinsic evidence, criteria or procedure was permissible.

The Board has maintained the above position in several decisions given by it as illustrated by among other cases the decision in the case of Richardson Company Ltd –vs- The Registrar High Court of Kenya [2008 – 2010] PPLR page 232] where the Board held as follows:-

“The Board has examined the tender documents and noted that the financial evaluation parameters were not set out in the tender documents. At the hearing, the Procuring Entity stated that those parameters are set out in the International Financial Reporting Standards (IFRS). However the tender documents did not provide that those parameters or the IFRS would apply. As the Board has held severally, a Procuring Entity can only use the criteria set out in the Tender Document for Evaluation”.

The Board will therefore proceed to consider and determine whether the two reasons given by the Procuring Entity for declaring the Applicant’s tender as non-responsive are valid and whether there are any other reasons or basis to support the decision arrived at by the Procuring Entity.

It is common ground that the Applicant’s tender was declared non-responsive on two principle grounds namely that the Applicant provided only one (01) ESHS personnel against a requirement of two (2) and secondly that the Applicant did not provide documents to demonstrate ownership of the required equipments.

The Board has examined the criteria set out at pages 37 and 39 of the tender document covering the two requirements. The said pages 37 and 39 of the tender documents provide as follows:-

Page 37

5.5	ESHS Personnel	The Bidder must demonstrate that it has	Must meet requirement	Must meet requirement	N/A	N/A	
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		the key personnel as permanent staff for at least two (2) years that meet the following requirements:					
		-Environmental expertise: a minimum of five (5) years of experience in designing and monitoring ESHS worksites management measures.					Form PER 2
		-Health & Safety expertise: a minimum of five (5) years of experience in designing and monitoring ESHS worksites management measures.					Form PER 2

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Equipment

The Bidder must demonstrate that it has the key equipment listed hereafter:

No.	Equipment Type and Characteristics	Minimum Number Required
1	D8 Type Bulldozer with Ripper	4
2	Pulvimixers	2
3	Asphalt Milling Machines	3
4	Steel Wheeled Roller, 18t	3
5	Vibrating Roller, 18-20t	3
6	Pneumatic-Tyred Roller. 18t-20t	4
7	Water Tankers, 15m ³ with allowance for bowsing	8
8	Bitumen Distributor, 6,000 litres	4
9	Concrete Batching plant 100t/hr	1
10	Asphalt Batching Plant, 150t/hr	1

11	Asphalt Pavers with electronic level control adjustable to minimum width of 3 m but possible expansion to 25m	4
12	Reinforcement bar bending & cutting machinery all sizes	1
13	Underground services tracer	2
14	Diesel engine four wheel drive articulated wheel front end loader 300 HP and above	2
15	Single drum sheep foot roller	4
16	Vacuum tanker (exhauster vehicle)	2
17	Cranes - 50m boom with over 20 tonnes capacity system	2
18	Plate Compactors 3 - 4 KW	6
19	Dumpers 15 - 30 CM	10
20	Mobile concrete mixers & related vibrators, etc 300 - 500 litres	3
21	Water bowsers 2000 litres	4
22	Compressors 80 - 100 HP	4
23	Generating sets 5 - 20 KVA	5
24	Cranes - mobile 5 ton	3
25	Mechanical broom with exhauster system	2
26	Joinery Machinery Complete Sets	1
27	Metal Fabrication Complete Sets	2
28	Painting machine assembly complete (minimum at any given time before any markings can commence)	2
29	Mobile flood lights sets complete with own generator	6

The Bidder shall provide further details of proposed items of equipment using Form EQU in Section IV, Bidding Forms.

The Board finds that although the tender document was not in the traditional format which classifies certain requirements as preliminary mandatory requirements and others under the Technical Evaluation parameters, it is however clear from the wording used at pages 37 and 39 that the requirements that a bidder demonstrates that it has the requisite ESHS personnel capability and the requisite number of equipments set out at page 39 of the tender documents are mandatory in nature. The

mandatory nature of these requirements is evidenced by the use of the words “shall” and “must” which are usually used in a tender document to indicate that a particular requirement in the tender document is mandatory.

The Board has examined all the arguments put before it by Counsel for the parties and finds that none of the three advocates who made submissions before the Board disputed that the requirements set out at pages 37 and 39 of the tender document were mandatory. What was however in contention was the interpretation of the said provisions of the tender document.

The Board has examined the provisions of clause 5.5 of the tender document and finds that the document required a bidder to provide information to establish that it met the ESHS personnel requirement set out in the tender document by submitting details that would go to establish that it had a person or people who were competent to provide Health Safety and Environmental expertise.

The Board has perused the Applicant’s original tender documents and finds that the Applicant only submitted one PER 2 form which listed one Mr. Hugo Da Silva Braga Montera as the person who was to provide health and Safety expertise. The Applicant did not however fill in a PER -2 form setting out the details of who the Environmental expert would be.

During the hearing of the Request for Review, Counsel for the Applicant submitted that the Applicant provided and attached an organogram setting out the employees it would deploy in this project.

The Board has examined the said organogram against the requirement set out in the tender document and finds that the criteria in the tender document specifically required a bidder to fill in the PER – 2 form for each requirement but not to provide an organogram. The Board therefore finds that the organogram which was submitted by the Applicant as part of its tender document cannot substitute the requirement to fill in forms PER –2 that the ESHS personnel.

In the absence of proof that the Applicant submitted a PER-2 from giving the particulars of the person or persons who would provide environmental expertise, the Board finds and holds that the Applicant did not meet this requirement and that its tender was rightly declared as non-responsive on this ground.

On the second ground for disqualification, the Board has considered the requirement on equipment appearing at page 39 of the tender document and finds that the tender document required a bidder to demonstrate that it has the key equipment set out at page 39 of the tender document.

The Board has further considered the submissions made by all the parties on the nature of the documentation that was required to be provided by a to establish that a bidder had the key equipment listed in page 39 of the tender document and finds that contrary to the submissions made by Counsel for the Procuring Entity and the interested party, the tender document did not contain any specific requirement or criteria requiring a

bidder to submit the evidence of ownership of the equipment set out in page 39 of the tender document.

The Board wishes to state that what the Procuring Entity required bidders to do was to fill in forms EQU appearing at page 60 of the tender document setting out the relevant information. As the Board has already stated, where a Procuring Entity desires that a bidder meets a certain requirement then it must specifically set out that requirement as a criteria in the tender document.

Having therefore determined that form EQU was sufficient for the purpose, the Board will now proceed to determine whether the EQU forms contained in the tender document and which were reproduced by the Applicant as annexure 2 to its Request for Review met these requirement.

The Board has examined all the EQU forms submitted by the Applicant to the Procuring Entity and has compared them against the requirements set out in the tender document and the comparison is summarized in the following table:-

No.	Equipment Type and Characteristics	Minimum Number Required	Extract from Applicants FORM EQU equipment
1	D8 Type Bulldozer with Ripper	4	'Note that we will not use this equipment during the project '
2	Pulvimixers	2	'Note we will not use a PULVIMIXER but a PUG MILL'
3	Asphalt Milling Machines	3	2 Model W500 and W2100DC
4	Steel Wheeled Roller, 18t	3	3

5	Vibrating Roller, 18-20t	3	2 Model 3412 Sinle drum compactor roller and BW 2191092011
6	Pneumatic-Tyred Roller. 18t-20t	4	2
7	Water Tankers, 15m ³ with allowance for bowsing	8	4
8	Bitumen Distributor, 6,000 litres	4	non
9	Concrete Batching plant 100t/hr	1	1
10	Asphalt Batching Plant, 150t/hr	1	1
11	Asphalt Pavers with electronic level control adjustable to minimum width of 3 m but possible expansion to 25m	4	3
12	Reinforcement bar bending & cutting machinery all sizes	1	1
13	Underground services tracer	2	2
14	Diesel engine four wheel drive articulated wheel front end loader 300 HP and above	2	2
15	Single drum sheep foot roller	4	non
16	Vacuum tanker (exhauster vehicle)	2	2
17	Cranes – 50m boom with over 20 tonnes capacity system	2	2
18	Plate Compactors 3 – 4 KW	6	6

19	Dumpers 15 – 30 CM	10	10
20	Mobile concrete mixers & related vibrators, etc 300 – 500 litres	3	3
21	Water bowsers 2000 litres	4	4
22	Compressors 80 – 100 HP	4	4
23	Generating sets 5 – 20 KVA	5	5
24	Cranes – mobile 5 ton	3	3
25	Mechanical broom with exhauster system	2	2
26	Joinery Machinery Complete Sets	1	1
27	Metal Fabrication Complete Sets	2	2
28	Painting machine assembly complete (minimum at any given time before any markings can commence)	2	2
29	Mobile flood lights sets complete with own generator	6	6

It is clear from the above table that the Applicant did not comply with the requirements on the type and the number of equipments in as far as the equipments listed under items 1, 2, 3, 5, 6, 7, 8 11, and 15 were concerned.

The Applicant either failed to offer any equipment under these heads or offered a lesser number of equipments than those required at page 39 of the tender document.

In view of the above finding the Board therefore has no other option but to hold that the Applicant did not also meet the requirement on equipments

set out at page 39 of the tender document and was therefore rightly declared as non-responsive on this second ground.

As the Board has stated above, the Board is under a duty in law to examine the entire evaluation process in a bid to determine whether a bidder was rightly declared as non-responsive. The Board has examined all the documents placed before it and notes that bidders were required to set out the references of their subcontractors which were to be filled in forms EXP 4.2(b). The Board notes that in its letter dated 28th September, 2017 addressed to the Procuring Entity and which the Board has already referred to while considering the second issue framed for determination, the Applicant admitted this omission and sought to provide the Procuring Entity with additional forms containing the right particulars.

In its said letter dated 28th September, 2017, the Applicant stated as follows:-

Dear Sir

With reference to our letter earlier this week ref no. EA-LT-GE/17.0131, dated 20th of September 2017, we have been reviewing our tender documents and noted that the forms EXP-4.2(b) for the references of our AGL sub contractor were not filled out, presumably due to the pressure of compiling the final documents at the time of submissions. We apologise for this error. As can be seen from other parts of our submissions our proposed specialist subcontractor for these works is ADB SAFEGATE a primary supplier of such facilities worldwide and thus our capability of

executing these works is demonstrated and known. However to assist your continued evaluation of our bids, we enclose the following corrected forms for addition if you wish to our submission replacing the equivalent incomplete forms. We confirm the balance of our tender, particularly the total price is unaffected by this correction.

Yours

BAM International

Eric Van Zuthem

Area Director

Encl – Forms EXP 4.2(b) for sub –contractors experience, pages 1-27

Copy - Mrs. Margaret Muraya, Ag.Gm (Procurement & Logistics).

The effect of the Board's findings on the above issue is therefore that the Applicant did not meet the mandatory tender requirements on personnel, equipments and sub-contract references and accordingly the Board finds and holds that the Applicant was rightly declared as non-responsive for failing to meet the above requirements of the tender document.

ISSUE NO. IV

What orders should the Board make in this Request for Review.

In view of the Board's findings and determinations under issue number (III) above, the Board holds that the Applicant's Request for Review fails and the same is disallowed in terms of the following final orders:-

FINAL ORDERS

In view of all the above 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, 2015 the Board makes the following orders on this Request for Review.

- a) The Applicant's Request for Review dated 13th October, 2017 and which was filed with the Board on 13th October, 2017 in respect of tender number ICB No. KAA/ES/MIA/617/C Kenya Transport Sector for the rehabilitation of Airside Pavements and AGL System at Moi International Airports, Mombasa be and is hereby dismissed.
- b) The Procuring Entity is therefore at liberty to proceed with the procurement process herein.
- c) Since all the parties were partly successful on the three issues framed for determination, the Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 3rd day of November, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB