

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 33 OF 2017 DATED 30TH MARCH, 2017

BETWEEN

CHINA GEZHOUBA GROUP COMPANY LIMITED.....APPLICANT

AND

MINISTRY OF WATER AND IRRIGATION.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

**STECOL CORPORATION (Formerly known
as Sinohydro Tianjin Engineering Company
Limited.....SUCCESSFUL BIDDER/INTERESTED PARTY**

Review against the decision of the Ministry of Water and Irrigation in the matter of Tender No. CP-1, PHASE 1, ICB NO: MWI / TMWDP-1/W001/2016-2017) In Relation To Civil Works for Construction of Thwake Multi-Purpose Water Development Program.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Mr.Hussein Were - Member
3. Mr. Peter B. Ondieki, MBS - Member
4. Mrs.Rosemary Gituma - Member

5. Neslon Orgut - Member

IN ATTENDANCE

1. Philemon Kiprop - Holding Brief for Secretary
2. Maureen Namadi - Secretariat

PRESENT BY INVITATION

Applicant - China Gezhouba Group Company Limited

1. G.M Nyaanga - Advocate, Anyoka & Co. Advocate
2. Yang Tao - MD
3. Zhao Tianinin - Marketing Manager
4. Moffat Karanja - Pupil

Procuring Entity - Ministry of Water and Irrigation

1. George M. Marete -HSCM
2. Rose A .O Nyakwana - PSC
3. Justus Jumbe - SPE

Interested Party -SinoHydro Tianjin Engineers Co. Ltd (STELCO Corp)

1. Waweru Gatonye - Advocate
2. Charles Gatonye - Advocate
3. Issack Abdulahi - Lawyer
4. Felyn Shikuku - Lawyer
5. Hafeng Zhang - Deputy Regional Manager
6. Stephen Musiu - Pupil

BOARD'S DECISION

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

BACKGROUND OF AWARD

1.0 INTRODUCTION

The Government of Kenya received financing from the African Development Bank (ADB) towards the cost of construction of the Thwake Multi-purpose Water Development Program Phase I and intended to apply part of the received amount for this loan towards payments under the contract for Civil Works for the construction of Thwake Multi-Purpose Dam and its associated works.

The Thwake Multi-purpose Water Development Program (TMWDP) comprises a multi-purpose dam for water supply, hydropower generation and irrigation development. Phase 1 engineering works comprises of construction of the 77m by 1.8km CFRD dam, associated river diversion works, service spillway and Road Bridge, emergency spillway, intake tower and access road works. The intake tower will include intake conduits for the Phase 2 powerhouse, Phase 3 water supply system and Phase 4 irrigation scheme.

The proposed location of the Thwake dam is one kilometre below the confluence of the Athi and Thwake Rivers, with the Athi River forming the border between Makueni and Kitui counties. The maximum normal water level in the proposed reservoir is at elevation El. 912 meters above

sea level (masl). The service spillway, the powerhouse (Phase 2) and the water treatment plant (Phase 3) are proposed to be located on the right bank of the Athi River in Makueni, whilst the emergency spillway is proposed to be located on the left bank of the river in Kitui Phase 1.

2.0 PROCUREMENT PROCESS

Ten Bid documents bearing a closing/opening date of 21st December, 2016 were dispatched to Prequalified Bidders and opened as planned by a Tender Processing Committee appointed by the Accounting Officer vide an Appointment Letter dated 16th December, 2016 with Ref. No.: MEWNR/STORES/4/5/VOL.II (51). Pre Bid Meeting was held on the 10th October, 2016 starting 10.00 am in Maji House and thereafter a site meeting on 11th October and 12th October as per site *Minutes of Pre Bid Meeting*.

Four (4) bids were received, in public on 21st December, 2016 in Maji House Nairobi, Staff Room starting 10:00am local time in the presence of bidders/representatives who chose to attend as per Bid Opening Register and Bid Opening Minutes; they were assigned a number in order of opening. The following information was read out during tender opening:-

- i. Name of bidder,
- ii. Bid Price,
- iii. The amount of Bid Security
- iv. The source of the Bid Security, and
- v. The date the Security will expire

The following table shows the list of Bids as opened and read out:

Opened Bids as Read out

BID No.	Nature of Firm	Name of Firm	Address	Country	BID PRICE	BID SECURITY		
						SOURCE	VALUE KSHS.	DATE OF EXPIRY
1.	Single	China Gezhouba Group Company Limited	Gezhouba Plaza, No.558 Liberation Road, Wuhan City, Hubei Province, P.R. China.	China	36,971,358,148.00	STANBIC BANK	600,000,000.00	18TH MAY 2017
2.	Single	China State Construction Engng. Corp. Ltd	Tel. +254 706424372 ; Email : zhang_ruiping@chinaconstruction.com	China	54,439,401,640.00	STANBIC BANK	600,000,000.00	13TH JUNE 2017
3.	Single	STECOL Corporation (Sinohydro Tianjin Engineering Co. Ltd)	No. 2 Rongyuan Road, HuayuanIndustrial	China	37,377,626,078.20	EQUITY BANK	600,000,000.00	28TH MAY 2017
4.	JV	CMC Yuksellnsaat A.S <i>in association with</i> CooperativaMuratori& Cementisti (CMC) &Yuskellnstaat A.S	No.05 Osborne Lane, EOH, Business oark, 2 nd Floor, Block A, Bedford ; Code : 2007, Jo'berg, South Africa. ;Tel. +27 11 6160919 Email : adriano.donadon@camera.com ;	South Africa	41,911,352,378.56 (Excluding VAT) 2% Discount (applied on all BOQ items except dayworks and provisional sums)	STANDARD CHARTERED BANK	600,000,000.00	18TH MAY 2017

3.0 EVALUATION OF BIDS

3.1 Evaluation Process/ Criteria

Evaluation of Bids was done as per the *Rules and Procedures for Procurement of Goods and Works, May 2008 Edition and Section 66 of the Public Procurement and Disposal Act, 2005 operationalized through Section 47-51 of the Public Procurement and Disposal Regulations 2006*; while the Evaluation Criteria used was drawn from the *Standard Bidding Document for Procurement of Works Section III: Evaluation and Qualification Criteria* that was issued to prequalified contractors.

The process was conducted in three stages namely:-

- i. Determination of Commercial responsiveness
- ii. Determination of Technical responsiveness
- iii. Detailed evaluation – correction of arithmetic errors and other Computations

3.1.1 Preliminary Examination of Bids

Preliminary examination of bids was carried out as per Section 2.48 of 'Rules and Procédures for Procurement of Goods and Works and Section 47 of the *Public Procurement and Disposal Regulations 2006*.

The purpose of preliminary examination was to identify and reject bids that were incomplete, invalid, or substantially non responsive to the bidding documents so as not to be considered further. The exercise was therefore to ascertain the substantial responsiveness of each bid to the conditions of the bidding documents. The following checks were carried out:

- a) **Verification:** Attention was directed towards deficiencies like validity of the bid, the joint venture agreement for firms associating, comparison

of all copies of the bid with the original and corrections made accordingly.

- b) **Eligibility:** Ensure that only prequalified firms submit bids; debarred firms don't participate; and that only firms that have a good working/business relationship with Kenya participate.

The team made reference to the African Development Bank's 'No Objection' Ref: AfDB/EARC/LTR/2015/11/031 dated 25 November 2015 and observed that Bidder 1 had not indicated likely participation of any of the debarred firms in the execution of the works contract. It was concluded that all the bidders met the eligibility criteria.

- c) **Bid Security:** Clause 19.1 of the Instruction to Bidders (ITB) required that each bidder furnish a bid security in the amount of KES. 600,000.000 (Kenya Shilling Six hundred million) or its equivalent in a freely convertible currency obtained from a reputable source. The security should be valid for one hundred and forty eight (148 =120+28) days.
- d) **Checks for the Completeness of Bid** was done to ensure that bids not offering all of the required items in the BOQs are flagged out. Also to ensure that erasures, interlineations, additions, or other changes made are initialed by the bidder. Checks were also done to ensure that pages were not missing in the original copy of the bid and its copies.
- e) **Substantial Responsiveness:** Major deviations to the commercial requirements were used as a basis for the acceptance/rejection of bids. The team checked to confirm whether bids were submitted in the required format; tender securities submitted were in the required

format, amount and validity period; the tender was signed by the person lawfully authorized to do so; the required number of copies of the tender were submitted; and that the tender was valid for the required period.

The Summary of results of preliminary examination was as is presented in Table 3.1 below:

Table 3.1: Preliminary Examination

BIDDER	VERIFICATION	ELIGIBILITY	BID SECURITY	COMPLETENESS OF BID	SUBSTANTIAL ¹ COMMERCIAL RESPONSIVENESS	ACCEPTANCE FOR DETAILED EXAMINATION
(a)	(b)	(c)	(d)	(e)	(f)	(g)
1	YES	YES	YES	YES	YES	YES
2	YES	YES	YES	YES	YES	YES
3	YES	YES	YES	YES	YES	YES
4	YES	YES	YES	YES	YES	YES

Conclusion of Preliminary Evaluation

The preliminary examination stage of bids was aimed at making sure that the bids received were substantially responsive. A substantially responsive bid is one that conforms to all the terms, conditions and specifications in the bidding documents without material deviations, reservation or omission. All the four bidders met the criteria of both Commercial and Technical Responsiveness (Preliminary Evaluation) and were recommended for detailed examination.

4.0 DETAILED EXAMINATION OF BIDS

Detailed examination of bids was carried out as per Section 2.49- 2.52 of the Rules and Procedures for Procurement of Goods and Works and Regulations 49-59 of the Public Procurement and Disposal Regulations, 2006.

After the preliminary bid evaluation stage, bids were taken through a detailed evaluation in order to select the bidder whose bid not only complied with the technical requirements in the bidding documents, but also offered the lowest price for the goods, work and/or related services to be procured. All bids considered as substantially responsive at the preliminary examination were examined in this phase.

4.1 Summary of Bill of Quantities (BOQ)

In order to determine whether the bidders were competitive and will be able to offer the required services, individual BOQs were compared against each other and the Engineers estimate. Comparison of the bids was undertaken to establish:

- a) Whether the bids were competitive,
- b) Whether the bids were reasonable
- c) Whether the bids were realistic; and
- d) Whether there was a possibility of frontloading

Key observations of personnel

- i. Five key experts of Bidder No. 1 did not meet the minimum qualifications - some of the key experts do not have the requisite expertise in dams and hydropower construction.
- ii. Ten key experts of Bidder No. 2 did not meet the minimum qualifications - do not have the requisite expertise in dam construction.
- iii. Thirteen key experts of Bidder No. 3 did not meet the minimum qualifications- most of the key staff lack the requisite expertise in CFRD projects.
- iv. Sixteen key experts of Bidder No. 4 did not meet the minimum qualifications- most of the key staff lack the requisite expertise required for the assignment.

The team concluded that Bidder 1 presented qualified staff for the assignment in comparison with the other bidders.

4.2 List of Key Equipment

Section III: Evaluation and Qualification Criteria; 2.4: Equipment required the Bidder to provide details of the proposed minimum items of equipment.

Construction equipment could be owned, purchased or leased. The bidders confirmed availability of the equipment through ownership and letters from dealers indicating that they will supply the equipment.

Key observations on requirement

Bidder No. 1: The Bidder has provided a list of most of the equipment as required, which are firm owned; there is however no ownership proof attached.

Bidder No. 2: the Bidder has proof that they own the equipment they have proposed for the project, however, they have not conformed to the set minimum number of equipment requirements in the bid document.

Bidder No. 3: the Bidder has given proof showing that a number of equipment will be leased as per a Lease Agreement dated 12th December, 2016, however no evidence/ proof of ownership from the Lessor was included in the bid.

Bidder No. 4: the Bidder has given forms indicating that he conforms to the required minimum number of equipment; he has also attached a list with Registration numbers of equipment it proposes to use, however, no evidence of ownership has been provided.

The team therefore concluded that Bidders 1, 3 and 4 had the requisite equipment's for the assignment and that the firm selected shall provide further proof of ownership or leasing during the negotiation stage.

Technical Specifications as per Employer's requirements

Bids were compared on technical aspects in line with the Employers Requirements as detailed in Part 2 of the Bid Documents; the following parameters were checked:

The following observations were made of the Technical Specifications as per the Employers requirements:

Observations: All firms substantially met the technical specifications level;

Bidder 1 met all the requirements as stated in the bid document

Bidder 2 met all the requirements except one, namely (f)

Bidder 3 did not meet six requirements, namely (c, f, g, j, k and p).

Bidder 4 met all the requirements except two, namely (g and j).4.8.1

Technical Proposal

Review of the Technical Proposal involved the technical aspects of the proposed methodology. All firms included an organization structure of the project's team headed by the Project Manager. All bidders provided detailed method statement consisting of the methodology they will use in carrying out project works and programs. The methodology from all

Bidders provided details of the organizational structure with their corresponding staffing teams. All methodology statements provided were found to be satisfactory. All firms attached a Construction Schedule that captured key activities and timelines in their bid. The schedules provided were found to be satisfactory.

4.8.2 Financial Position

All Bidders met the minimum Cash flow requirement of \$40 Million (USD) as per Section II: Evaluation and Qualification Criteria, Clause 2.2 of the Bid Document.

5.0 SUMMARY AND RANKING OF BIDDERS

The ranking of bidders according to the total evaluated price as per *Section 51(g) of the Public Procurement and Disposal Regulations, 2006* was as is tabulated in the table below:

5.0 Summary and Ranking of Bidders

Bid. No.	Total Bid Price (KES)	Rank	Comments
1.	36,971,346,444.00	1	Lowest Evaluated bidder
2.	54,439,382,467.00	4	4 th Lowest Evaluated bidder
3.	39,381,808,082.20	2	2 nd Lowest Evaluated bidder
4.	48,617,159,456.60	3	3 rd Lowest Evaluated bidder

6.0 RECOMMENDATION

The evaluation committee recommended that *Bidder No.1: M/S. China Gezhouba Group Company Ltd Of Gezhouba Plaza, No.558 Liberation*

*Road, Wuhan City, Hubei Province, P.R. China; Tel.: +254711939789; Email: longguobin@cggcintl.com being the lowest evaluated bidder; be invited for negotiation and considered for award of contract for Civil Works for Construction of Thwake Dam Embankment and Associated Works ICB NO: MWI / TMWDP-1/W001/2016-2017 at a total cost of *Kshs. 36,971,346,444.00.(Inclusive of taxes)* in line with *Section 2.46 of Rules and Procedures for Procurement of Goods and Works, May 2008 Edition, Revised July 2012 and Section 66(4) of the Public Procurement and Disposal Act 2005.**

7.0 TENDER COMMITTEE

The tender Committee in its meeting of 14th February, 2017 deliberated upon the evaluation report and altered the tender evaluation committee's report and recommendation as follows:-

- Bidder NO.1 -was not responsive
- The next bidder in ranking -STECOL Corporation (Sinohydro Tianjin Engineering Co. ltd)is approved “

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s CHINA GEZHOUBA GROUP COMPANY LIMITED of Gezhouba Plaza, No. 558 Liberation Road, Wuhan City, Hubei Province, P.R. China, email contact longguobin@cggcintl.com who appointed the firm of Dennis Anyoka Moturi & Co Advocates, to represent it in these proceedings.

During the hearing of the Request for Review, the Applicant was represented by Mr. G.M Nyaanga advocate while the procuring entity was represented by Mr. George Marete, Head of Supply Chain Management. The successful bidder M/s SinoHydro Tianjin Engineers Co. Ltd (STELCO Corp) was on the other hand represented by Mr. Waweru Gatonye Advocate. The 2nd Respondent though served did not enter any appearance nor participate in the proceedings.

The Applicant sought for the following orders:

- a) The Respondent's decision awarding TENDER NO. MEWNR/TMWDP-1/W001/2014-15 (LATER IDENTIFIED AS ICB NO: MWI / TMWDP-1/W001/2016-2017 to SinoHydro Tianjin Engineers Co. Ltd (STELCO Corp) or any other alleged successful bidder be set aside and annulled.*

- b) The Respondent's decision notifying the Applicant that it had not been successful in TENDER NO. MEWNR/TMWDP-1/W001/2014-15 (LATER IDENTIFIED AS ICB NO: MWI / TMWDP-1/W001/2016-2017 by way of the letter dated March 27, 2017 be set aside and annulled.*

- c) The Board be pleased to review all records of the procurement processes relating to TENDER NO. MEWNR/TMWDP-1/W001/2014-15 (LATER IDENTIFIED AS ICB NO: MWI /*

TMWDP-1/W001/2016-2017 and be pleased to substitute the decision of the Review Board for the decision of the 1st Respondent and award the Tender to the Applicant.

- d) The 1st Respondent be ordered to negotiate and sign a contract with the Applicant in accordance with the Tender and the decision of the Board.*
- e) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and*
- f) Such other or further relief or reliefs as this board shall deem just and expedient.*

The Board has considered the Request for Review dated 30th March, 2017 together with the statement in support of the Request for Review which was sworn by one Yang Tao.

The Board has also considered the 1st Respondent's Memorandum of Response which was filed on 11th April, 2017 and the subsequent Replying Affidavit which was signed by one George Marete on 18th April, 2017 in addition to the notice of preliminary objection dated 18th April, 2017, the Replying Affidavit sworn by Mr. Zhan Haifeng on 18th April, 2017 all of which were filed by the firm of M/s Waweru Gatonye & Company

Advocates on behalf of the successful bidder herein M/s Stelcol Corporation (formerly known as Sinohydro Tianji Engineering).

The Board has in addition to the above documents also looked at the original tender document, the tender evaluation report prepared by the procuring entity's tender evaluation committee in January, 2017 and all the correspondences and the other documents supplied to the Board by the procuring entity pursuant to the provisions of Regulation 74(3) of the Public Procurement and Disposal Regulations 2006.

PRELIMINARY ISSUE REGARDING THE 1ST RESPONDENT'S RESPONSE.

Before the commencement of the hearing of this Request for Review, the 1st Respondent filed a letter (notice) dated 11th April, 2017 indicating that it wished to withdraw its memorandum of response filed on 11th April, 2017 and instead rely on the Replying Affidavit sworn by Mr. George Marete on 18th April, 2017.

It is clear from the two documents that although the 1st Respondent was defending its initial position to award the tender to the successful bidder in the response filed on 11th April, 2017, the 1st Respondent however decided to change that position in the Replying Affidavit sworn by Mr. Marete on 18th April, 2017 where it now admitted that the award made by it to the successful bidder was made in error.

Counsel for the successful bidder however objected to this new turn of events and argued that the 1st Respondent had not sought leave to withdraw the initial response. Counsel for the successful bidder further contended that such leave was necessary in view of the contradictory positions taken by the 1st Respondent in the two documents. Counsel for the successful bidder however acknowledged that a party could not be prevented from withdrawing a response by written notice but maintained that even if this was the case, the Board had to look at the two documents in view of the peculiar nature of the positions taken by the 1st Respondent.

Mr. Nyaanga on behalf of the Applicant however opposed the position taken by Counsel for the successful bidder and submitted that the 1st Respondent was at liberty to withdraw any document filed by it including a pleading at any time so long as it filed a notice of withdrawal of such a document. He submitted that the election of what document to rely upon entirely lay with the party filing the document and further that such a party could not be denied the opportunity to withdraw a document filed by it. He therefore urged the Board not to deny the 1st Respondent the opportunity to withdraw the response filed on 11th April, 2017 which was not in any event an affidavit.

The Board has considered the submissions made by the parties and before it considers the issues framed for determination, the Board finds it necessary to first consider the issue of the 1st Respondent's decision to withdraw the memorandum of response filed by it on 11th April, 2017 and

instead rely on the replying affidavit filed on 18th April, 2017. As submitted by Counsel for the Applicant and as partly conceded by Mr. Gatonye, a party cannot be denied the opportunity to withdraw a response and rely on an affidavit since the election of what document to rely upon entirely belongs to it.

The Board will therefore not saddle the 1st Respondent with a memorandum of response and will allow it to rely on the document which it feels accurately represents it's case. The Board therefore deems the 1st Respondent's memorandum of response filed on 11th April, 2017 as withdrawn and directs that for the purposes of the record, the 1st Respondent's replying affidavit filed on 18th April, 2017 shall be deemed the procuring entity's response for the purposes of this Request for Review.

THE ISSUES

The Board has considered the submissions made by the parties and as submitted by Counsel for the successful bidder at page 3 of the successful bidder's written submissions, this Request for Review raises three issues namely:-

- (i) Whether the Board has jurisdiction to entertain the Request for Review herein by virtue of the provisions of Section 6(1) and (2) of the Public Procurement and Disposal Act (2005) which governed this procurement process.**

- (ii) Whether the Applicant has established sufficient grounds to warrant the orders sought in the Request for Review.
- (iii) Who should bear the costs of these proceedings.

ISSUE NO. I

Whether the Board has jurisdiction to entertain the Request for Review herein by virtue of the provisions of Section 6(1) and (2) of the Public Procurement and Disposal Act (2005) which governed this procurement process.

The first substantive issue which the Board will consider is whether the Board has the jurisdiction to hear and determine the Applicant's Request for Review by virtue of the provisions of Section 6(1) and (2) of the Public Procurement and Disposal Act 2005 which governed this procurement. This objection was raised by Counsel for the successful bidder in his notice of preliminary objection dated 18th April, 2017 and which was filed on the same day. Counsel for the successful bidder argued that since the procurement herein was funded by the African Development Bank (the ADB) the funds constituted a grant, and the Board did not therefore have jurisdiction to consider the Request for Review under the provisions of Section 6(1) & (2) of the Public Procurement and Disposal Act 2005.

He inter-alia relied on the decisions in the case of **Power Tecnicos Ltd -vs- Kenya Power and Lighting Company Ltd [2008 - 2010] PPLR 1073** and the case of **Okiya Omtatah Okoiti & 2 Others -vs- Attorney General and 3**

Others (2014) eKLR Petition No. 58 of 2014 to support the above submissions.

Counsel for the Applicant however opposed the successful bidder's preliminary objection on jurisdiction and stated that the provisions of Section 6(1) and (2) of the Public Procurement and Disposal Act only relate to the resolution of any conflict that may exist between condition imposed by a donor of funds and the provisions of the Act in which event the donor conditions would prevail.

He further submitted that the successful bidder had not demonstrated the existence of any conflict between the agreement entered into between the African Development Bank and the Government of Kenya and the provisions of the Act to warrant the application of the provisions of Section 6(1) and (2) of the Act.

He therefore urged the Board to dismiss the successful bidder's preliminary objection.

Mr. George Marete who appeared on behalf of the 1st Respondent did not however take any position on this issue but left it to the Board's determination.

The Board has considered the relevant provisions of the Act and the two decisions relied upon by Counsel for the successful bidder and finds that in none of the two cases cited above did the High Court hold that the Board does not have jurisdiction to hear a procurement dispute merely because

the funds to be used in the procurement are sourced from a grant or a loan given by a donor.

Sections 6 and 7 of the Act which speak for themselves 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) & (2)

“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.

The above provisions of the law only come into play when there is a conflict between the conditions imposed by a donor and the provisions of the Act. There is therefore no provision under Sections 6 or 7 of the repealed Act that states that donor funds which come in the form of a loan or grant are not subject to the scrutiny imposed by the Constitution or the procurement laws of this Country.

Contrary to the successful bidders contention, both the Board and the High Court have stated in several cases such as the case of **Webb Fountaine Group F2-LLC -vs- Kenya Revenue Authority (PPARB Appl. No. 27 of 2015)** that the provisions of Sections 6 and 7 of the Act do not oust the jurisdiction of the Board to hear and determine disputes arising from donor funds or loan.

The Board stated as follows in the case of **Webb Fountaine Group F2-LLC -vs- Kenya Revenue Authority (PPARB No. 27 of 2015)** where Counsel for the Applicant in this case represented the successful bidder then:-

“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 a mechanism for the resolution of a conflict in case of the existance 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 High Court gave the same interpretation to Section 6(1) & (2) of the Act in the case of **Okiya Omtata Okoiti & 2 Others -vs- Attorney General & 3 Others (2014) eKLR Petition No. 58 of 2014** where the Judge recognized

that the said Section relates to the resolution of conflict when he stated as follows:-

"This fact is undisputed and being so it follows that the terms and conditions of the loan as negotiated would be applicable in the event there is a conflict with The Public Procurement and Disposal Act. The issue that I must therefore address my mind to is whether there is a conflict between the terms of the loan with Exim Bank and the Provisions of the Public Procurement and Disposal Act. I am clear in my mind that there is no conflict at all. I say so because the Act has laid down procedures to be followed in Public Procurement of goods and services. In particular, it demands the use of open tendering in Procurement with set down procedures and requirements and matters which ought to be evaluated as well as the notification of successful parties and unsuccessful parties. I have already stated elsewhere above the conditions which the Government of Kenya had to satisfy before the financing of the SGR Project. They include the following; the finances required would be met by the Chinese Government and that the mode of Procurement of the SGR Project had to be in line with the conditions made by Exim Bank; i.e. the 4th Respondent had to be awarded the contract".

The above extract from the Court's judgment shows that the Provisions of Sections 6 and 7 of the Act were meant to resolve conflict and infact the Court used that word "conflict" in the above extract of the judgment. The Judge accordingly proceeded to determine whether there was any conflict

and found that there was none because the parties to the Memorandum of Understanding in the SGR Railway case had elected not to use the process of Public Procurement but instead opted to stay out of it.

This is unlike in the case now before the Board where the donor and the Government of Kenya opted not to pre-determine the party to award the tender/the contract to but chose to go through the route of Public Procurement leading to the procuring entity preparing an elaborate tender document that was subjected to competition which was open to bidders.

The position regarding the applicability of Section 6(1) and (2) of the Act in relation to donor funds was further clarified by the High Court in the recent case of **Republic -vs- The Public Administrative Review Board Exparte the Coast Water Services Board & Others JR HC (Milimani Commercial Court Application No. 119 of 2016)** where the Court held that the provisions of Sections 6(1) and (2) of the repealed Act did not automatically oust the jurisdiction of the Board in a donor funded project unless the party seeking to rely on the provisions of Section 6(1) and (2) of the Act could demonstrate the existence of a conflict between any of the provisions in which event the conditions imposed by the donor would prevail.

The Court made the following observations in the above decision which are relevant to the preliminary objection:-

“The question however is whether there was a conflict between the provisions of the Act and the conditions imposed by donors..... In my

view the [Review] Board's jurisdiction would only be ousted if the terms and conditions of the [financing] agreement expressly excluded the application of the repealed Act..... The [Review] Board in its decision found that neither party cited any specific provision of the repealed Act or the regulations made thereunder that they allege were in conflict with the World Bank Donor conditions... .. I agree with the [Review] Board that the dispute resolution procedure contemplated in the bidding documents is in relation to a dispute that arises after a contract has been entered into". [paras. 113 - 117]

The Board has looked at the tender document for this tender, the evaluation report prepared by the procuring entity in January, 2017, the African Development Bank Rules and procedures for procurement of goods and works and the examples of the alleged areas of conflict set out in the successful bidder's submissions as summarised at paragraphs 15 to 26 of Mr. Gatonye's submissions and in particular those set out at paragraph 21.

The Board notes from the tender evaluation report prepared in January, 2017, that the 1st Respondent's tender evaluation committee which comprised of Eng. Bernard Kabasuli, Eng Dominic O. Osoro, Musembi Munya, Tom Okello, Justus Jumbe, Angella S. Njue who were appointed by the accounting officer of the procuring entity Mr. Patrick Nduati Mwangi CBS in his letter dated 6th December, 2016 and which was placed before the Review Board by the 1st Respondent carried out a preliminary, technical and a financial evaluation of the tender resulting in a unanimous

recommendation to award the tender to the lowest evaluated bidder who in this case was the Applicant. This report and the recommendation for award was placed before The African Development Bank Group (donor) which considered it and in a letter dated 24th February, 2017 addressed to the accounting officer of the procuring entity, the Bank stated that it had gone through the evaluation report and gave it's "no objection" to the recommendation of the award being made to the Applicant in the following words:-

"The Bank has noted that the evaluation was done in line with the Bank's rules and procedures and grants its 'no objection' to the recommendation to award the contract for civil works for construction of Thwake Dam Embankment and Associated works to the lowest evaluated bidder M/s China Gezhouba Group Company Limited at a total cost of Kshs. 36,971,346,444.00 (Thirty Six Billion, Nine Hundred and Seventy One Million, Three Hundred and Forty Six Thousand, Four Hundred and Forty Four Shillings) inclusive of taxes".

There was thereafter no dispute of any nature until the 1st Respondent decided to award the tender to the second lowest evaluated bidder contrary to the evaluation committee's recommendation an act that resulted in a strong protest by Bank and in the filling of this Request for Review.

The Board has read the Request for Review, the responses placed before it and listened to the arguments made before it. The Board finds that the

only matter that was in issue between the parties was whether the 1st Respondent could award this tender both under the provisions of the Constitution, the Act, the tender document or the African Development Bank Group Rules and procedure for procurement of goods and works to a bidder other than the lowest evaluated bidder.

It is on this issue that the successful bidder needed to show that there was a conflict between the provisions of the Act, the tender document or the African Development Bank Group Rules and procedures for procurement of goods and services so as to invoke the provisions of Sections 6 and 7 of the Act to enable the Board resolve the conflict, if any.

The successful bidder did not do so but took the Board through a series of areas of possible differences in the said documents. The successful bidder did not however touch on the all important issue of the award criteria.

For all the foregoing reasons and based on the above findings, the successful bidder's preliminary objection fails and is hereby disallowed.

This therefore paves the way for the Board to determine the substantive dispute between the parties on the merits.

ISSUE NO. II

Whether the Applicant has established sufficient grounds to warrant the orders sought in the Request for Review and who should bear the costs of these proceedings.

The Applicant China Gezhouba Group Company Limited filed this Request for Review on 30th March, 2017 challenging the decision of the 1st Respondent, the Ministry of Water and Irrigation to award the tender for the civil works for the construction of Thwake Multipurpose for water development program -I/W00I/2016-2017 to M/s Sinohydro Tianjin Engineers Co. Ltd (STELCO Corp). It was not contested at the hearing of the Request for Review that both companies participated in the tender process the subject matter of this Request for Review and that both proceeded through the preliminary and the technical evaluation stages where both were determined to be technically qualified.

Both companies were then subjected to financial evaluation where the tender evaluation committee upon subjecting both financial proposals to financial evaluation under Regulation 50 of the Regulations arrived at the following evaluated prices for the two contestants:-

- a) The Applicant China Gezhouba Group Company Limited - Kshs. 36,971,346,444.00
- a) Synohydro Tianjin Engineers Co. Ltd (STELCO Corp) - Kshs. 39,381,808,082.20.

The tender evaluation committee in it's evaluation report prepared in January, 2017 then recommended that the tender in issue be awarded to the Applicant at the sum of Kshs. 36,971,346,444.00.

The 1st Respondent's accounting officer instead of awarding the tender to the Applicant as recommended by the tender evaluation committee and in

the “no objection” letter from the Bank and advice from the Honourable Attorney General instead awarded the tender to the second lowest evaluated bidder.

The Board finds that this was contrary to the provisions of the Act, the Regulations, the tender document and the African Development Bank Group Rules and practices for the procurement of goods and services. Under the provisions of Clause 35 of the tender document headed instructions to bidders and Section 66(4) of the Public Procurement and Disposal Act 2005 the tender ought to have been awarded to the lowest evaluated bidder.

Clause 35.1 of the tender document sets out the award criteria for this tender as follows:-

“35.1: subject to ITB 34.1, the employer shall award the contract to the bidder whose offer has been determined to be the lowest evaluated bid and is substantially responsive to the bidding document provided further that the bidder is determined to be qualified to perform the contract satisfactorily”.

Turning to the African Development Bank Group Rules and procedures for procurement of goods and works particularly to Rule 2.59 thereof appearing at page 22 of 47 of the said Rules and procedures, the Rule similarly expressly requires the procuring entity to award the tender to the lowest evaluated bidder. The said Rule 2.59 provides as follows:-

"2.59: The Borrower shall award the contract within the period of tender validity of bids, to the bidder who meets the appropriate standards of capability and resources and whose bid has been determined (i) to be substantially responsive to the bidding document and (ii) to be the lowest Evaluated Bid. A bidder shall not be required as a condition for award to undertake responsibility for work not stipulated in the bidding documents or otherwise to modify the bid as originally submitted".

While Section 66(4) of the Public Procurement and Disposal Act 2005 which is to the same effect as the above provisions provides as follows:-

Section 66(4):-

66. (1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).

(2)

(3)

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

(5)

(6)

As the Board has already stated, the 1st Respondent's tender evaluation committee evaluated this tender fully at the preliminary, technical and the

financial evaluation stages, a process that was concluded through the making of a recommendation for award.

In spite of this recommendation, the 1st Respondent's accounting officer in a letter dated 27th March, 2017 decided to award the tender to the successful bidder. The award to the successful bidder contradicts the recommendations of the tender evaluation committee. The Board finds this as untenable because it not only contradicts the award criteria set out in the tender document, the African Development Bank Group Rules and Practice for procurement goods and works but also those of both Section 66(4) of the Public Procurement and Disposal Act 2005 and Regulation 50 of the Regulations made thereunder.

The provisions of the law and the Regulations require that once the tender evaluation committee acts within the law, a tender committee (as it existed) under the old Act cannot act outside the recommendation of the tender evaluation committee and can only return the evaluation report back to the tender evaluation committee for further action but not make it's own independent award. The accounting officer of a procuring entity cannot also do that.

In the case of **Horsebridge Systems (E.A) Ltd vs The Central Bank of Kenya (PPARB No. 51 of 2012)** the Board stated this position as follows:-

"The Board further finds insofar as the evaluation committee acted within its mandate by evaluating tenders in accordance with the criteria set out in the tender document and pursuant to the provisions of Section 64 of the

Act, the tender committee exceeded its mandate as set forth in Regulation 11(1) (b) by rejecting the recommendation of the evaluation committee. There was no justifiable ground for directing that the bids of M/s Indra and M/s Engineered System Solutions be evaluated a fresh as the two bidders had failed to meet a mandatory requirement”.

A further important observation which the Board wishes to make is that when this Request for Review came up for hearing on 18th April, 2014 and in an interesting turn of events which the Board alluded to at the beginning of this decision, the procuring entity conceded to several breaches of the provisions of the Act, the tender document and the African Development Bank’s Rules and procedures of goods and works and in a replying affidavit sworn by one Mr. George Marete the Head of Procurement at the Ministry of Water and Irrigation, State Department of Irrigation of the 1st Respondent urged the Board to intervene.

The 1st Respondent admitted that the award of the tender to the alleged successful bidder was wrong. The admissions are contained in among others paragraphs 22, 23 and 24 of the said Affidavit of Mr. Marete he stated as follows:-

22. THAT the decision of the Accounting Officer to award the tender to Stecol Corp. being the second lowest bidder, was therefore so done outside his powers and against the express provisions of the Act, the Regulations and the Bank Rules and the procuring entity would find it difficult to implement (the decision) and therefore ought to be set aside

and the Honourable Board should take the necessary steps to correct the situation.

23. *THAT the African Development Fund's Rules and Procedures for Procurement of Goods and Works dated May 2008, state as follows:-*
Rule 2.59 "Award of Contract "states:

"The Borrower shall award the contract, within the period of the validity of bids, to the bidder who meets the appropriate standards of capability and resources and whose bid has been determined (i) to be substantially responsive to the bidding documents and (ii) to be the Lowest Evaluated Bid. A bidder shall not be required, as a condition of award, to undertake responsibility for work not stipulated in the bidding documents or otherwise to modify the bid as originally submitted".

24. *THAT the Accounting Officer was further required to provide reasons for the notifications of award for the unsuccessful bidders while notifying the successful bidder - which was not done in this case. Regulation 66(2) states:-*

"A procuring entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful".

The 1st Respondent by these admissions therefore disowned the successful bidder at the hearing.

On the nature of the reliefs sought and on the face of the 1st Respondent's changed position, Mr. Gatonye Counsel for the successful bidder stated at the end of his submissions that if the Board found that the process of awarding the tender to his client was flawed, it should then order for a retender but not order for a substitution of the award or make an order that the procurement process proceeds to conclusion. This contention was however strongly opposed by Counsel for the Applicant.

The Board has considered the successful bidder's request for a retender and finds it untenable firstly because the successful bidder did not have its own independent prayer requesting for a retender and secondly but most importantly because none of the parties faulted any criteria in the tender document. The only issue in contention and which the Board has commented on is that the 1st Respondent had contrary to the tender evaluation committee's recommendation awarded the tender to a party which was not the lowest evaluated bidder. It was held in the case of **JGH Marine A/S Western Marine Services Ltd. CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises -vs- The Public Procurement Administrative Review Board & 2 Others [2015] eKLR** that the Board can order for a retender if it finds that the tender document is defective. In this case however, the Board has looked at the tender document and has not found any defect in it and none of the parties pointed out any such defect during the hearing.

Finally on the issue that the Board should not substitute the award or direct that the 1st Respondent completes the procurement process, the tender evaluation committee's report shows that this tender underwent through all the stages of evaluation. The evaluation committee then made a recommendation of award to the lowest evaluated bidder, a recommendation that received a "no objection" letter from the donor, the African Development Bank Group.

The Board is aware of several decisions of the High Court such as the case of **Republic -vs- The Public Procurement Administrative Review Board, The Attorney General Exparte Numerical Machining Complex Limited [Nai HC JR No. 261 of 2015]** which states that where a tender has not gone through the entire process of evaluation including financial evaluation, then the Board should not order for a substitution of the award.

Unlike in the above decision where financial evaluation had not been carried out, in the particular case now before the Board, the tender has been fully evaluated and nothing prevents the Board from substituting the award or directing that the 1st Respondent completes the procurement process.

In conclusion, therefore the Board finds that the 1st Respondent's accounting officer acted in error and against public policy by directing that the tender the subject matter of this Request for Review be awarded to a firm whose evaluated tender sum was higher by Kshs. 2,410,461,638 over and above that quoted by the lowest evaluated bidder. This award cannot

therefore be justified and the Request for Review herein succeeds and the only remedy available to the Board is to annul it and make the following further orders in the interests of justice.

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, 2015 as read together with the provisions of Section 98 of the Public Procurement and Disposal Act 2005, the Board makes the following orders on this Request for Review:-

- a) The 1st Respondent's decision awarding Tender No. MEWNR/TMWDP-I/W001/2014-15 (Later identified as ICB NO: MW1/TMWDP-I/W001/2016-2017 for the construction of the Thwake Multipurpose Water Development Programme to Sinohydro Tianjin Engineers Co. Ltd (STELCO Corp) vide the 1st Respondent's letter dated 27th March, 2017 be and is hereby set aside and annulled.
- b) The 1st Respondent's decision notifying the Applicant that it had not been successful in Tender No. MEWNR/TMWDP-1/W001/2014-15 (Later identified as ICB No. MW1/TMWDP-1/W001/2016-2017 vide the 1st Respondent's letter dated 27th March, 2017 is also set aside and annulled.
- c) The Board hereby directs the 1st Respondent to issue a letter of award to the Applicant in respect of the subject tender and

complete the entire procurement process herein with the Applicant within Fourteen (14) days from today's date.

- d) On the issue of costs, the Board finds that this is a proper case to order that each party bears it's own costs of this Request for Review.

Dated at Nairobi this 19th day of April, 2017.



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CHAIRMAN
PPARB



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SECRETARY
PPARB

