

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 34 OF 2017 DATED 13TH APRIL, 2017

BETWEEN

COMARCO CONSTRUCTION COMPANY LTD.....APPLICANT

AND

NATIONAL MUSEUM OF KENYA.....PROCURING ENTITY

Review against the decision of the National Museums of Kenya in the matter of Tender No. NMK/FJ/115/2016 In Relation to the Tender for the Construction of Section Sea Wall Protection for Fort Jesus World Heritage, Mombasa.

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 - Cormaco Construction Company Limited

1. Alphonse Muema Mbindyo - Advocate,

Procuring Entity - National Museum of Kenya

1. Samuel Keengwe -Advocate
2. Mumbi Githongori - Advocate
3. Kemunto Mouti - Lawyer
4. Danson Karui - Procurement
5. Isaiah Nyaega - Legal Officer
6. Francis Ndungu - Engineer,Coperk Consultants

Interested Party - Yangguang Property Design & Manufacture Ltd

1. George Kamau - Advocate
2. Sylvia Waiganjo - Advocate
3. David Maingi - Representative
4. Lui Wagude - Representative

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

INTRODUCTION

1.0 SCOPE OF WORK

The works to be carried out comprised of:-

- Construction of 200 meters of quay structure (reinforced concrete wall) at a water depth of 5.0 meters based on the existing parent resistant outcrop.

- Fence over the wall superstructure for safety, security and control of access.

1.2 TENDER INVITATION

Tenders for the proposed works were advertised in the Daily Nation and The Standard newspapers on 21st December 2016. There was a mandatory pre-bid site visit on 10th January 2017.

1.3 OPENING RESULTS

The tender closure/ opening was as scheduled and received bids on 26th January 2017 at 12.00pm were opened immediately thereafter. The opening was also witnessed by bidders' representatives who chose to witness.

Twenty-four (24) firms bought the bid documents and twenty three (23) firms sent their representatives for the pre-bid site visit in Mombasa. Eight (8) returned their bids. Therefore the eight bids were opened, read out and registered for evaluation.

Their results are as shown in Table 1 below:-

Table 1: Tender Opening Results, tender security amount and provider.

Bidder No	Bidder	Tendered Amount (Kshs)	Tender security 2%
1	Centurion Engineers and Builders Ltd	555,023,624.00	Intra Africa Assurance; Ksh.12,000,000.00
2	Muloil Gateway Joint Venture	596,405,935.00	Kenindia Assurance; Ksh.11,960,000.00
3	Southern Engineering Co. Ltd	590,041,503.00	Diamond Trust Bank; Ksh.20,000,000.00
4	Comarco Construction	461,305,406.10	Mayfair Insurance; Ksh.10,000,000.00
5	Majimaji Logistics Ltd	571,883,613.40	First Community Bank; Ksh.12,000,000.00

6	EpcO Builders Ltd	580,149,369.14	Mayfair Insurance; KSh.12,000,000.00
7	Sea-tech Ltd	478,621,054.00	Ksh.10,000,000.00
8	Yangguang Property Design & Manufacture Ltd	497,641,850.00	AMACO Ltd; Ksh.9,952,837.00

2.0 EVALUATION CRITERIA

The evaluation was carried out in the following stages:

3.1 Preliminary Examination - Compliance with Mandatory Requirements

In accordance with the requirements of the conditions of tendering, only substantially responsive tenders were to be subjected to detailed evaluation. For the purpose of this tender, a responsive tender was one which conforms to all the requirements of the tender as contained in the advertisement and qualification requirements, without material deviations and reservations. If a tender was not substantially responsive, it was to be rejected as per clause 23 of the instructions to tenderers.

Any bidder who failed in any of the above parameters was considered **non-responsive and was not subjected to further evaluation.**

Table 2: Preliminary Evaluation

Table 2: Preliminary Evaluation-parameter												
Key: ✓ - Responsive X - Not Responsive												
Bid No	Name	a	b	c	d	e	f	g	h	i	j	Remarks
1	Centurion Engineers and Builders Ltd	✓ Valid	✓ Provided	✓ Filled	✓ Valid	✓ Attained	✓ Filled	✓ Filled	✓ Some Experience	✓ Provided	✓ Attended	Responsive
2	Muloil Gateway Joint Venture	✓ Valid	✓ Provided	X Tender validity of 90 days only	✓ Valid	✓ Attained	✓ Filled	✓ Filled	✓ Some Experience	✓ Provided	✓ Attended	Not Responsive
3	Southern Engineering Co. Ltd	✓ Valid	✓ Provided	✓ Filled	✓ Valid	✓ Attained	✓ Filled	✓ Filled	✓ Some Experience	✓ Provided	✓ Attended	Responsive
4	Comarco Construction	✓ Valid	✓ Provided	✓ Filled	✓ Valid	X Not Attained	✓ Filled	✓ Filled	✓ Some Experience	✓ Provided	✓ Attended	Not Responsive

5	Majimaji Logistics Ltd	✓ Valid	✓ Provided	X Tender validity of 90 days only	✓ Valid	✓ Attained	✓ Filled	✓ Filled	X No experience	✓ Provided	✓ Attended	Not Responsive
6	Epc Builders Ltd	✓ Valid	✓ Provided	X Tender validity of 90 days only	✓ Valid	✓ Attained	✓ Filled	✓ Filled	X No experience	✓ Provided	✓ Attended	Not Responsive
7	Sea-tech Ltd	✓ Valid	✓ Provided	X Tender validity of 90 days only	✓ Valid	✓ Attained	✓ Filled	✓ Filled	X No experience	✓ Provided	✓ Attended	Not Responsive
8	Yangguang Property Design & Manufacture Ltd	✓ Valid	✓ Provided	✓ Filled	✓ Valid	✓ Attained	✓ Filled	✓ Filled	✓ Some Experience	✓ Provided	✓ Attended	Responsive

The following five (5) bidders were not responsive to the mandatory requirement; hence they are disqualified from any further evaluation:

Bidder No. 2 M/S Muloil – Gateway Joint Venture

- Bidder gave their tender validity as 90 days instead of the requisite 120 days (See Appendix V – Request for Clarification).

Bidder No. 4 M/S Comarco Construction

- Bidder has not attained an average turnover of KSh.500 million over three (3) years period as indicated in their audited accounts provided. Their indicated combined average turnover was Kshs. 253,627,679.80 which was below the mandatory minimum threshold.

Bidder No. 5 M/S Majimaji Logistics Ltd

- Bidder gave their tender validity as 90 days instead of the requisite 120 days (See Appendix V – Request for Clarification).
- Bidder has not carried out any marine works as per their past experience provided.

Bidder No. 6 M/S EpcO Builders Ltd

- Bidder gave their tender validity as 90 days instead of the requisite 120 days (See Appendix V – Request for Clarification).
- Bidder has not carried out any marine works as per their past experience provided.

Bidder No. 7 Sea-tech Ltd

- Bidder gave their tender validity as 90 days instead of the requisite 120 (See Appendix V – Request for Clarification).
- Bidder has not carried out any marine works as per their past experience provided.

After the Preliminary evaluation the bidders listed below met all the parameters considered under the preliminary evaluation and were subjected to detailed technical evaluation.

Bidder No. 1 M/S Centurion Engineers and Builders Ltd

Bidder No. 3 M/S Southern Engineering Co. Ltd

Bidder No. 8 M/S Yangguang Property Design & Manufacture Ltd

3.2 Detailed Examination for Qualification for Award Of Contract

After the mandatory conditions, the bidders who were responsive to the mandatory condition were required to demonstrate the capability to carry out the works if awarded.

In accordance with clause 2.2 of the instructions to the bidders, the bidders were required to provide evidence for eligibility of award of the tender by satisfying the employer of their eligibility and adequacy of resources to effectively carry out the subject contract. Consequently, the bidders are required to meet the following criteria for which scores are awarded:-

1. Details of work of similar nature in progress; and names and addresses of clients who may be contacted for further information on these contracts.
2. The qualifications and experience of key personnel proposed for administration and execution of the contract, both on and off site, a statement by each of the key staff that they shall be available for the Contract.
3. Essential plant and equipment proposed for use in carrying out the works. Only reliable plant in good working order and suitable for the work required of it shall be listed. The following shall be minimum required plant:

4. A draft Program of Works in the form of a bar chart with major milestones and site organization chart.
5. Audited accounts for the main contractor or JV for the years 2015, 2014 and 2013 or other evidence of financial capacity to carry out the proposed works, such as a letter of undertaking from a reputable bank located in Kenya.
6. Company particulars such as copies of certificates of incorporation, VAT registration, Tax Compliance, Statutory Registration documents etc.
7. Sequential Page numbering.

The Pass mark shall be 75% = 4462

Summary of observations from table 3 above

As per evaluation criteria in the conditions of contract, the minimum marks for qualification is **4462**

The Bidder No. 1 M/S Centurion Engineers and Builders Ltd did not meet the minimum qualifying marks to proceed to financial evaluation. This bidder attained marks **2402** only

The following two (2) bidders satisfied all the technical criteria and attained the minimum pass mark. They are to proceed to financial evaluation

Bidder No. 3 M/S Southern Engineering Co. Ltd: Marks Attained - **4518**

Bidder No. 8 M/S Yangguang Property Design & Manufacture Ltd: Marks Attained - **4724**

4.0 FINANCIAL EVALUATION

4.1 DETAILED FINANCIAL ANALYSIS

M/S Yangguang Property Design & Manufacture Ltd, Their tender sum is Kenya Shillings Four Hundred and Ninety Seven Million, Six Hundred and Forty One Thousand, Eight Hundred and Fifty (Kshs.497,641,850.00) only;The bid is 10.0% below the engineer's estimate and contains a negligible arithmetic error to the bidder's disadvantage.

M/S Southern Engineering Co. Ltd P.O. Box 84162-80100, Mombasa.

- The bidder submitted the second lowest substantially responsive bid.
- Their tender sum is Kenya Shillings Five Hundred and Ninety Million, Forty One Thousand Five Hundred and Three (Kshs.590,041,503.00) only;
- The bid is 5.7% above the engineer's estimate

5.0 RECOMMENDATION

In view of the foregoing analysis, the bid by M/S Yangguang Property Design & Manufacture Ltd, P.O. Box 14765-20100, Nakuru having been determined to be substantially responsive to the terms and conditions of the bid and being the first lowest evaluated responsive bid is hereby recommended for award of this tender at their tendered amount of Kenya Shillings Four Hundred and Ninety Seven Million, Six Hundred and Forty One Thousand, Eight Hundred and Fifty (Kshs.497, 641,850.00) only.

PROFESSIONAL OPINION

The Principal Procurement officer noting the User comments, the Evaluation report and the New Public Procurement & Asset Disposal Act 2015 and Accounting Officer approved award to M/S Yangguang Property Design & Manufacture Ltd, P.O. Box 14765-20100, Nakuru having been determined to be substantially responsive to the terms and conditions of the bid and being the first lowest evaluated responsive bid is hereby

recommended for award of this tender at their tendered amount of Kenya Shillings Four Hundred and Ninety Seven Million, Six Hundred and Forty One Thousand, Eight Hundred and Fifty (Kshs.497,641,850.00) only.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s **Cormaco Construction Company Limited**; the above named Applicant of Post Office Box Number 94081 - 80107 Mombasa who appointed the firm of A.M. Mbindyo & Company Advocates to represent it in this proceedings challenging the decision of the National Museum of Kenya given on 17th March, 2017 or thereabout in the matter of Tender No. NMK/FJ/115/2016 for the Construction of Section Sea Wall Protection for Fort Jesus World Heritage, Mombasa.

During the hearing of the Request for Review, the Applicant was represented by Mr. Alphonse Mbindyo Advcoate while the procuring entity was represented by Mr. Samuel Keengwe Advocate. The successful bidder M/s Yangguang Property Design & Manufacture Ltd was on the other hand represented by Mr. George Kamau Advocate.

The Applicant sought for the following orders:

- a) The Respondents decision awarding TENDER NO. NMK/FJ/115/2016 to the alleged successful bidder be and is hereby set aside and nullified.*
- b) The Respondents decision notifying the Applicant that he had not been successful in TENDER NO. NMK/FJ/115/2016 by way of the letter dated 17th March 2017 be set aside and nullified.*
- c) The Board be pleased to review all records of the Procurement process (particularly the alleged technical evaluation) relating to tender No.*

TENDER NO. NMK/FJ/115/2016 and establish what Criteria was used and if not according to the law and tender document, annul the results of such an evaluation and declare the Applicant the Successful bidder and award the tender to the applicant towards negotiating and signing a contract with the Applicant as per the tender and Boards decision.

d) The Respondent be ordered to pay the costs of and incidental to these proceedings.

e) Such other or further relief as the board may deem just and expedient.

The Board has considered the Request for Review dated 31st March, 2017 together with the affidavit/the statement in support of the request for Review and all the responses filed in opposition thereto. The Board has also considered the original tender documents submitted by the bidders in this tender process, the evaluation report and all the documents supplied to it by the procuring entity pursuant to the provisions of Regulation 74(3) of the Public Procurement and Disposal Regulations 2006.

Upon consideration of the above documents and the submissions made by the parties, the Board finds that the Applicant's Request for Review raised the following three issues which it will determine after taking into account the submissions of the parties made in support or in opposition to each issue:-

THE ISSUES

- i) Whether or not the Applicant's Request for Review was filed out of time contrary to the provisions of Section 167 of the Public Procurement and Asset Disposal Act 2015 thereby depriving the**

Board of the jurisdiction to hear and determine the Applicant's Request for Review.

ii) If the Board has the jurisdiction to hear and determine the Request for Review, whether the notification served on the Applicant that its tender was unsuccessful complied with the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act 2015 and if not what are the consequences of such failure.

iii) If the Board has the jurisdiction to determine the Request for Review whether or not the Applicant was rightly declared as non-responsive at the preliminary evaluation stage for having failed to comply with a mandatory requirement under this tender.

The Board will now proceed and determine each of the three issues in the order in which they appear above:-

ISSUE NO. I

Whether or not the Applicant's Request for Review was filed out of time contrary to the provisions of Section 167 of the Public Procurement and Asset Disposal Act 2015 thereby depriving the Board of the jurisdiction to hear and determine the Applicant's Request for Review.

The issue as to whether the Board has the jurisdiction to hear and determine the Applicant's Request for Review arose during the course of the proceedings and was raised by Mr. George Kamau advocate who appeared on behalf of the successful bidder. Mr. Kamau submitted that as Counsel for the successful bidder, he had come to know from the state of the pleadings and the notification issued to the Applicant that the Applicant's tender was declared unsuccessful when this Request for Review came up for hearing and could not raise the issue earlier or by way of a preliminary objection

because the successful bidder was not privy to the relevant information at any time prior to entering an appearance and before having a glimpse of the documents filed herein.

He nonetheless argued that an issue of jurisdiction could be raised at any time before or in the course of the proceedings and that once raised the Board was under an obligation to consider and determine the issue of jurisdiction.

Turning to the objection itself, Counsel for the successful bidder submitted that he had perused the letter of notification dated 17th March, 2017 and which was produced by the Applicant as annexure JA1(a) to the affidavit/the statement sworn by Mr. James Amwayi in support of the Applicant's Request for Review which informed the Applicant that its tender was unsuccessful.

Counsel for the Applicant therefore submitted based on the information on the letter of notification that the Applicant ought to have filed its Request for Review within 14 days from the date of service of the letter of notification and that the Request for Review which was filed on 5th March, 2017 was filed outside the period of 14 days provided by law. He therefore urged the Board to strike out the Applicant's Request for Review.

Mr. Samuel Keengwe advocate who appeared on behalf of the procuring entity did not take any position in the matter but Mr. Alphonse Muema Mbindyo who appeared on behalf of the Applicant opposed the successful bidder's objection on jurisdiction and submitted that the objection was being taken too late in the day and that it was neither contained in any notice of preliminary objection nor was it supported by any evidence.

Mr. Mbindyo submitted based on the averment at paragraph 9 of the supporting affidavit/statement of James Amwayi and annexures JA1(b) annexed to the said affidavit/statement that the Applicant received the letter of notification dated 17th March, 2017 on 28th March, 2017 and that it's Request for Review which was filed on 5th March, 2017 was therefore filed within time and ought not to be struck out.

He therefore urged the Board to dismiss the Applicant's objection on that ground.

The Board has considered the submissions made by all the parties and finds that whereas it is true as submitted by Counsel for the successful bidder that an objection on jurisdiction can be taken up at any time before or during the hearing of a Request for Review, the Board however wishes to reiterate that where a party raises an objection challenging the jurisdiction of the Board to hear and determine a Request for Review, then the burden of proof lies on the party alleging the lack of jurisdiction which must produce evidence in support of the objection.

The Board however notes that in the circumstance of this case, Counsel for the successful bidder did not produce any evidence to show if and when the letter of notification to the Applicant informing it that it's tender was unsuccessfully was served. The successful bidder did not also file a notice of preliminary objection and sprang this issue, which is fundamental issue for the first time during the hearing. This in itself was unprocedural since the raising of the objection at the hearing did not accord the Applicant adequate notice of the objection to enable it prepare to face the objection.

In any event the Applicant through it's Managing Director Mr. James Amwayi stated under oath in paragraph 9 of the Applicant's supporting

affidavit sworn on 31st March, 2017 that the Applicant was served with the letter of notification dated 17th March, 2017 on 28th March, 2017 an averment that was not challenged by the procuring entity or the successful bidder by means of any other evidence. This being the only evidence placed before the Board therefore, the Board accepts the Applicant's averment that it was served with the letter of notification informing it that its tender was unsuccessful on 28th March, 2017 and that counting the number of days starting from the next day which was 29th March, 2017, the Applicant's Request for Review which was filed on 5th April, 2017 was filed 8 days from the date of service of the notification upon it.

The Board therefore finds and holds that the Applicant's Request for Review dated 31st March, 2017 was filed within time and the Board has the jurisdiction to hear and determine the same.

ISSUE NO. II

If the Board has the jurisdiction to hear and determine the Request for Review, whether the notification served on the Applicant that its tender was unsuccessful complied with the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act 2015 and if not what are the consequences of such failure.

The second issue for determination arose from the Applicant's contention that the procuring entity breached the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act 2015 in that the letter of notification dated 17th March, 2017 informing the Applicant that its tender was unsuccessful did not contain the reasons why the Applicant's tender was unsuccessful and did not also give the name of the successful bidder. Counsel for the Applicant referred the Board to the letter of notification

marked as annexure JA1(a) which was annexed to the affidavit/the statement of James Amwayi sworn on 31st March, 2017 and stated that the letter of notification which spoke for itself did not contain the said particulars.

Mr. Mbindyo submitted that the said letter of notification was therefore defective and contrary to the law and that the Board should find that the procuring entity had breached the provisions of the Act.

Mr. Samuel Keengwe advocate who appeared on behalf of the procuring entity however strongly opposed the position taken by Counsel for the Applicant and stated that he did not see anything wrong with the letter of notification dated 17th March, 2017. He stated that the tender document required any bidder who was dissatisfied with the contents of a letter of notification to seek clarification from the procuring entity within Fourteen (14) days from the date of receipt of the letter of notification. He consequently submitted that if the Applicant wanted to know the reasons why it was unsuccessful or the particulars of the successful bidder, then it ought to have sought for clarification from the procuring entity within fourteen (14) days from the date of service of the letter of notification, a step he stated the Applicant did not take.

Counsel for the procuring entity further asserted that the Act did not prescribe the form which a letter of notification ought to take and maintained that the letter of notification issued by the procuring entity was proper.

To illustrate his submission that bidders who were dissatisfied with the contents of a letter of notification ought to have sought for clarification, Counsel for the procuring entity referred the Board to an example of one of

the bidders who participated in this tender namely M/s Southern Engineering Co. Ltd which had sought for clarification as required by the tender document. The said letter which is dated 27th March, 2017 was produced by the procuring entity as exhibit No. NMK (4a) to it's response.

To further fortify his position, Counsel for the procuring entity submitted that the use of the words "as appropriate" in Section 87(3) of the Act implied that the requirements to give reasons or name the successful bidder were not mandatory and that it was therefore the duty of a bidder who required more information to seek it from the procuring entity.

Counsel for the procuring entity therefore urged the Board to dismiss the Applicant's Request for Review with costs.

Mr. Kamau advocate on behalf of the successful bidder associated himself with the submissions made by Counsel for the procuring entity on this issue but qualified his submissions by stating that even if the Board found that the letter of notification issued by the procuring entity to the Applicant was defective, the defect was not fatal to the outcome of the tender process as the same could not invalidate the process or the outcome of the evaluation. He further submitted that a letter of notification was only meant to inform a bidder about the outcome of it's tender and give the reasons and the name of the successful bidder so as to enable the aggrieved unsuccessful bidder challenge the process in the event that it was dissatisfied. He stated that in the circumstances of the case now before the Board, the Applicant did not demonstrate what prejudice it had suffered as a result of any defects in the letter of notification.

He therefore urged the Board to dismiss this ground of review.

In a short response to the submissions made by Counsel for the procuring entity and Counsel for the successful bidder, Counsel for the Applicant reiterated his earlier submissions and reiterated that the letter of notification issued to the Applicant was defective and that the position taken by Counsel for the procuring entity was entirely incorrect particularly in so far as he stated that the use of the words "as may be appropriate" connoted that the requirements of Section 87(3) of the Act were not mandatory. He stated that it was mandatory to serve a letter of notification containing the reasons why the Applicant was unsuccessful and the particulars of the successful bidder if the evaluation process were complete.

Counsel for the Applicant however conceded that a defective letter of notification was not fatal to the evaluation process and could not affect the evaluation of a tender and any recommendation of award made thereafter.

The Board has considered the rival submissions made by the parties regarding the issue of notification and for the purposes of clarity, the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act provide as follows:-

"87(3) When a person submitting the successful tender is notified under subsection (1), 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 reasons thereof."

Contrary to what Counsel for the procuring entity stated the Board finds that the provisions of Section 87(3) of the Act are straight forward and the said Section requires that where a letter of notification is issued after an award of a tender has been made, a procuring entity to include in any

notification addressed to any bidder whose tender was unsuccessful the reasons why the tender was not successful and to also disclose the particulars of who the successful bidder was.

The Board notes that in this particular case the evaluation process was concluded and the recommendation of award made on 10th February, 2017 while the letter of notification to the Applicant is dated 17th March, 2017. The letter of notification was therefore written after the conclusion of the evaluation process and the reasons and the name of the successful bidder were therefore known to the procuring entity. The procuring entity was therefore under an obligation to disclose these particulars to the Applicant and it was not therefore proper for Counsel for the procuring entity to rely on the words “as is appropriate” in Section 87(3) of the Act to imply that the requirement in the said Section is not mandatory.

The Board wishes to clarify that the use of the words “as is appropriate” in Section 87(3) of the Act envisages a situation where a letter of notification is issued before the tender undergoes through the entire process of evaluation such as in a Request for Proposals otherwise known as the “two envelope system” of evaluation where it is necessary to inform a bidder that he has been unsuccessful after evaluation at a particular stage such as at the technical evaluation stage and it is where this happens that a procuring entity may not disclose the particulars of a successful bidder as the successful bidder would not yet be known at the stage of notification.

Where the process is concluded however such as is the case now before the Board, an unsuccessful bidder is entitled to know as a matter of right the reasons why it’s tender was unsuccessful and the particulars of who the successful bidder was.

Based on the above requirements and looking at the letter of notification dated 17th March, 2017, the Board finds that the letter of notification is defective as it does not give the reasons why the Applicant's tender was unsuccessful and does not disclose who the successful bidder was.

As to whether the defect is however fatal to the evaluation process or can result in the nullification of the award made to the successful bidder, the Board has previously held that the fact that a letter of notification of an award since the purpose of a letter of notification is to inform a bidder of the outcome of it's tender so as to enable the unsuccessful bidder challenge the award if it feels aggrieved by the decision of a procuring entity. The Board further finds that in the circumstances of the case now before the Board the Applicant was able to lodge it's Request for Review and was able to ascertain the reason why it's tender was unsuccessful and addressed this issue appropriately.

The Board therefore finds and holds that although the letter of notification issued to the Applicant by the procuring entity was defective, such defect was not fatal and further that the Applicant did not suffer any prejudice as it was able to file it's Request for Review within time.

ISSUE NO. III

If the Board has the jurisdiction to determine the Request for Review whether or not the Applicant was rightly declared as non-responsive at the preliminary evaluation stage for having failed to comply with a mandatory requirement under this tender.

On the main ground around which this Request for Review was fought, it was admitted by all the advocates who appeared before the Board that the Applicant M/s Camarco Construction Company Limited which was bidder

NO. 4 was disqualified from proceeding for further evaluation at the preliminary evaluation stage on the ground that the bidder had not attained an average turnover of Kshs. 500 Million per year over three (3) years as indicated in its audited accounts which were produced as part of its tender document since its combined average turnover was Kshs. 253,627,679.80.

It was conceded by all parties to this review that the requirement that a bidder demonstrates that it had attained an average turnover of Kshs. 500 Million per year over a period of three (3) years was a mandatory requirement.

The only contest between the parties to the review was therefore whether the Applicant fulfilled this requirement or not.

Counsel for the Applicant submitted that the Applicant its tender in joint venture with another Company known as Cormaco Supply Base (EPZ) Limited and that the combined total revenue for the two companies was in excess of Kshs. 500 Million for three years. It was the Applicant's case that the procuring entity had however conveniently failed to take the combined total revenue of the two companies into account while evaluating its tender and urged the Board to look at the audited accounts appearing at pages 178 to 282 of the Applicant's tender document and more particularly at pages 185, 218, 242, 257, 275 and 280 which the Applicant stated clearly demonstrates that it had attained the required average turnover of Kshs. 500 Million per year for the period between 2014-2016.

Counsel for the procuring entity however disputed the Applicant's assertion and maintained that the Applicant had not met the mandatory requirement as to the minimum annual turnover for over three years (2014-2016). The procuring entity produced an excerpt of the joint venture combined average

annual turnover as annexure NMK5 and stated that the Applicant had indicated the following turnover for the three years:-

- a) 2014 – Kshs. 115,379,771.64
- b) 2015 – Kshs. 282,927,635.10
- c) 2016 – Kshs. 362,575,632.65

This according to the procuring entity indicated an average annual turnover of Kshs. 254,294,346.46 which did not add upto the average minimum turnover of Kshs. 500 Million per year over a period of three years.

Counsel for the procuring entity therefore urged the Board to find that the Applicant was rightly declared as non-responsive at the pursuant to the preliminary evaluation stage provisions of Section 79 of the Public Procurement and Asset Disposal Act.

Counsel for the successful bidder associated himself with the submissions made by Counsel for the procuring entity but did not comment on the particulars of the amounts of turnover referred to by the parties.

The Board has considered the submissions made by the parties and as earlier stated, it was not in dispute that the requirement that a bidder demonstrates that it had attained an average annual turnover of at least Kshs. 500 Million over three (3) years period was a mandatory requirement. The only issue in contention was however whether the Applicant complied with this mandatory requirement.

Both the Applicant and the procuring entity came up with tabulation to demonstrate their varied positions but the Board is of the view that in order to establish whether the Applicant attained this requirement, the Board has to examine the documents incorporated by the Applicant into it's tender

document since the Board cannot rely on any other extrinsic matters to determine the correct position.

The Board has examined the documents appearing at pages 178 to 282 of the Applicant's original tender documents together with the excerpt of the joint venture combined average annual turnover for Comarco Supply Base (EPZ) Limited and Comarco Construction Company Limited.

Upon going through three scenarios; namely the financial position as set out in the excerpt of the joint venture containing the annual combined turnover, the turnover for Comarco Construction Company Limited and the audited accounts of the combined joint venture, the Board has established that the said documents indicate the following annual figures and averages:-

- a) Source; from the attached excerpt of the combined turnover of the joint venture partners.

Year	AMOUNT (KSHS)
2014	115,379,771.64
2015	282,927,635.10
2016	362,575,632.65
Average	253,627,679.80

- b) Extract from the Applicant's financial statement (Accounts).

Year	Amount (Kshs.)
2014	94,080,417
2015	50,516,600 (This statement is referred to as a draft)
2016	490,323,847
Average	211,640,288

c) Extract from the combine statements of Comarco Supply Base (EPZ) Limited and Comarco Construction Company Limited

Year	Amount (Kshs.)
2014	134,972,602
2015	509,525,874
Average for 2 years	322,249,238
Average for 3 years	214,832,825

It is evident from the above that looked at from any of the three (3) scenarios, the Applicant fell far short of establishing that it had an average annual turnover of at least Kshs. 500 Million over the last three years.

The best that the Applicant could establish was an annual average turnover of Kshs. 253,627,679.80 per year which is contained in the exert of the schedule of the combined turnover of the joint venture partners. It is based on the figures in this excerpt that the procuring entity declared the Applicant's tender as non-responsive.

The Board wishes to state that upon a careful examination of the accounts and the other documents contained in the Applicant's tender document, the procuring entity was overly generous to the Applicant and that had the procuring entity carefully considered the accounts, it would have found that the average annual turnover in the actual accounts submitted by the Applicant in it's tender document reflected a much lower average annual turnover than the sum of Kshs. 253,627,679.80 and would have as a matter of good accounting practices refused to consider the Applicant's accounts for the year 2015 which were marked as "draft" accounts.

For all the foregoing reasons the Board therefore finds and holds that the Applicant was rightly declared as non-responsive at the preliminary evaluation stage and having been disqualified at this stage, the Applicant did not go through the technical and the financial evaluation and the contention that the Applicant was the lowest evaluated bidder cannot therefore also stand.

In view of the Board's findings on issues numbers II and III above, the Applicant's Request for Review therefore fails and is dismissed 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 31st March, 2017 and which was filed with the Board on 5th April, 2017 in respect of tender Number NMK/FJ/115/2016 for the construction of Section Sea Wall protection for fort Jesus World heritage, Mombasa is hereby dismissed.**
- b) **The procuring entity is therefore at liberty to proceed with the procurement process herein.**
- c) **In view of the fact that the Applicant was successful in resisting issue number I and in view of the Board's finding on the issue of**

notification, the Board orders that each party shall bear it's own costs of this Request for Review.

Dated at Nairobi on this 25th day of April, 2017.


.....
CHAIRMAN
PPARB


.....
SECRETARY
PPARB

