

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 14 OF 2017 DATED 9TH FEBRUARY, 2017

HALANE CONSTRUCTION COMPANY LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITYPROCURING ENTITY

Review against the decision of the Kenya Airports Authority, in the matter of Tender No. KAA/ES/1075/C (RETENDER) in respect of The Proposed Rehabilitation of Wajir International Airport (Runway, Taxiways, Apron and Access Road).

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Philemon Kiprop	- Secretariat
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PRESENT BY INVITATION

Applicant – Halane Construction Company Limited

1. Alex masika -Advocate, Masika Koross Advocates
2. Muhirwa Jacob - lawyer

Procuring Entity – Kenya Airports Authority

3. Doreen Areri - Legal officer
4. Ethan Muango -Legal officer
5. Lilian Okidi -Ag.Procurement Manager
6. Benard Bosire -PA(procurement Assistant)
7. Joy igandu -Legal Officer 3
8. Francis wambua - Procurement Intern

BACKGROUND OF AWARD

Kenya Airports Authority invited eligible firms to submit sealed bids for the proposed rehabilitation of Wajir airport (Runway, Taxiway, Apron and Access Road).

SCOPE OF WORK

- 1 Supply and install airfield ground lighting system components at Wajir International Airport, comprising of:
 - i. AGL lighting fittings complete with mounting assemblies and installation accessories.

- ii. Primary series circuit cables including connector kits.
 - iii. Series transformers including extension secondary cables and connector kits.
 - iv. Constant current regulator (CCR) for runway lighting circuits as per the Bills of Quantities.
 - v. Remote control and monitoring system at air traffic control and substation, including fibre optic control cables.
 - vi. Taxiing guidance signs complete with mounting assemblies and installation accessories.
 - vii. Apron floodlights complete with cabling
 - viii. Power supply equipment including solar power plant, standby generator, KPLC mains power switchgear and all associated cables
- 2 Trenching for the cabling, laying cable ducts, installation of transformer deep cans and manholes for airfield lighting including laying cable ducts, pulling cables into ducts, backfilling, removal and disposing of rock where necessary and making good.
 - 3 Testing and commissioning of the complete installation.
 - 4 Training of technical personnel.

INVITATION AND SUBMISSION OF TENDERS

Tenders were invited on the Standard and Nation newspaper print media on 31st October, 2016 and 1st November, 2016, received and opened 17th November, 2016 at 11.00 am. The following five (5) tenderers submitted their bids.

Tenders read out during opening

BID	NAME OF COMPANY	ADDRESS
1	Kenasia Holding Ltd	P.O. Box 26383-00100 Nairobi Mob. 0721-542626 Email: kenaisai@icould.com
2	Ogle Construction Co Ltd	P.O. Box 327-70100 Garissa, Mob. 0722516840 / 0734516840 Email: mullaogle@gmail.com
3	Halane Construction Co Ltd	P.O. Box 3 – 70200 Wajir Mob. 0720453361 Email: halaneconstructionyahoo.com/ mohamedahmed434@gmail.com
4	Northern Star Company Ltd - JV - Pinnie Agency Ltd	P.O. Box 156 – 70300 Nandera, Mob. 0726350570 Email: Abdalla0720@gmail.com
5	Anole Construction Co. Ltd	P.O. Box 8161 – 00610 Nairobi ;Mob. 0726800080 Email: elmijnr@gmail.com / ahuss24@gmail.com

3.1 EVALUATION OF TENDERS

The evaluation criteria had two stages, Technical and Financial. Tenders were evaluated based on criteria set out in the bidding documents. The criteria for evaluation were as below;

PRE- QUALIFICATION CHECKLIST FOR COMPLETENESS AND RESPONSIVENESS FOR TECHNICAL PROPOSAL

S/No.	Completeness and Responsiveness Criteria	Requirement
1.	Appendix to Form of Bid	- Duly fill and sign
2.	Bid Security	- Unconditional bank guarantee - In the format provided with all conditions
3.	Schedules of Supplementary Information	- Duly fill and sign - Provide all required information/attachments -Stamp/seal where required
4.	Form of Power of Attorney	- Duly fill and sign - Provide certified copies of National Identification card or Passport for the person(s) being appointed.
5.	Tax Compliance Certificate	- Current Copy of certificate
6.	Registration with National Construction Authority	- Category 2 and superior - Certified Copy of certificate
7.	Certificate of Incorporation	- Certified Copy of certificate
8.	CR 12 form	-Certified copy of the form -within the last 12months
9.	Eligibility	- Certified Copies of National ID or passport for all directors - Certified copy of Form CR12 (current-within last 12 months)
10.	Conflict of interest	- to state explicitly -Duly fill and sign
11.	Debarment	- Duly fill and sign
12.	Litigation History	- Duly Fill in information and sign
13.	History of Non performance	- Duly Fill information on non-completed works

14.	Certificate of Tenderers Visit to Site	- Attend pre-bid meeting/visit - Bidders to sign attendance register - Certificate must be signed by the Employer's representative
15.	Schedule of Major Items of Plant	- Duly fill and sign
16.	Schedule of Key Personnel	- Duly fill and sign
17.	Roadwork Completed Satisfactorily	- Duly fill and sign
18.	Schedule of Ongoing Projects	- Duly fill and sign
19.	Schedule of other Supplementary Information / Financial Standings	- Duly fill and sign
20.	Copy of Bid Document	- Replica of the original for both technical and financial proposals
21.	Bid Document	-Serialise all the pages
22.	Audited accounts	-Must meet the requirements
23.	Line of Credit	-Must meet the requirements
24.	Average Annual Construction Turnover	-Must meet the requirements

PRELIMINARY EVALUATION TABLE

The table below presents an analysis of the bids based on the preliminary evaluation criteria.

PRE- QUALIFICATION/ MANDATORY EVALUATION FINDINGS

The evaluation was done as per the evaluation criteria in the tender document and Out of the above five bidders, four failed to meet all the requirements under Pre- qualification/ Mandatory stage and hence were not evaluated further.

The bidders are:-

Bidder No. 1. Kenasia Holding Ltd.

Bidder No. 2. Ogle Construction Co Ltd

Bidder No. 4. Northern Star Company Ltd - JV – Pinnie Agency Ltd

Bidder No. 5. Anole Construction Co. Ltd

SUMMARY OF - PRE- QUALIFICATION EVALUATION

Bidder No.1. Kenasia Holding Ltd.

- Non Responsive- Bidder did not provide the list Schedule of roadworks/airport pavement works carried out by the bidder in the last three years. (3)
- The supplier omitted the form on details of Sub-Contractors
- (NCA) certificate not certified by commissioner of oaths
- Non Responsive - Certificate of Incorporation Certified but not dated as required.
- Non Responsive - CR 12 form not dated as required.
- - Non Responsive – CR 12 provided is more than 12 months as required.
- Non Responsive - Certification outside period of tendering of National ID.
- Non Responsive - Certified copy of Form CR12 Not date.
- Non Responsive – they did not provided Roadwork Completed Satisfactorily
- Non Responsive - Not certified by the Directors, Auditor and commissioner of oaths and Not stamp by the all above

- Non Responsive. Has Average Annual Construction Turnover of 21,435,775 which is less than the required 300million.

Bidder No.2. Ogle Construction Co Ltd

- Tax Compliance Certificate not dated as per the tender document.
- National Construction Authority Certificate (NCA) not dated as required in tender document.
- Non Responsive certificate of Incorporation not dated as required in tender document.
- CR 12 form Certified but not dated
- Non Responsive because Certified Copies of National ID are not dated as required.
- Non Responsive Certified copy of Form CR12 (current-within last 12 months) not dated as required.
- Non Responsive- Audited accounts not signed and Initialized
- Non Responsive-They did not provide Schedule percentage payment.

Bidder No. 4. Northern Star Company Ltd

- All the pages in the tender document are NOT serialized as required in evaluation criteria.
- Non Responsive –COC for Northern and Pinnie certified but not dated by Pinnie and commissioner of oaths and not serialized.

- Non Responsive –NCA certificate not certified not dated by Pinnie and commissioner of oaths and not serialized.
- Non Responsive – Certificate of Incorporation provided is not certified as required. and not serialized
- Non Responsive – CR 12 form Certified but not dated and not serialized as required.
- Non Responsive – Eligibility – They provided copies of National ID for directors which are not certified and not serialized.
- Non Responsive - copy of CR12 provided is certified but not dated and not serialized as required. not serialized
- Non Responsive – Their copy document was not a replica of the original as they omitted Specification and instruction to bidders and not serialized.
- Non Responsive – The Bidder did not serialize all the pages of the document as per the requirement.
- Audited accounts not certified by the auditor on all the pages as required and not serialized.
- The bidder did not meet average Annual Construction Turnover of Ksh. 300 Million for the last 3 years (2015, 2014, and 2013) or (2014, 2013, 2012). Provided 144million.

Bidder No.5. Anole Construction Co. Ltd

- Non Responsive – The bidder provided a document with some pages not serialized as required in the tender document.

- Director's report in the audited accounts for the year 2013, 2014 and 2015 are not signed by directors.
- Audited accounts are not stamped by the supplier as required in the tender document.

One bidder M/s Halane Construction Co Ltd qualified for Post Pre-qualification Evaluation stage.

POST – QUALIFICATION/ TECHNICAL REQUIREMENTS

4.1(a)	General Construction Experience	Experience under construction contracts in the role as a main contractor or subcontractor for at least the last Three [3] years prior to the applications submission deadline
4.1(b)	Specific Construction Experience	<p>a. Participation as a roads contractor, management contractor or subcontractor, in at least three contracts (3) each with a value of at least Kshs. 200 Million (Two Hundred million), successfully and substantially completed.</p> <p>b. One (1) of the contracts should be worth atleast Kshs. 600million (Six hundred million) in a locality of similar geographical conditions and is similar to the proposed works.</p>
4.2 (a)	Work Methodogy	<p>The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section 12.</p> <p>Submission of a brief work methodology in accordance with sub-clause 5.3</p>

4.2 (b)	Work program	Submission of resourced-based work program as described in schedule 17 Ghantt chart – 0.5 mks Cash flow – 1 mark Sequential activities – 1 mark Within 18 months – 1 mark Resources e.g. manpower & equipment – 1.5 mark
5. Current Commitments		
5.1	On-going contracts	The total value of outstanding works on the on-going contracts should not exceed Ksh. 300million
		The site staff shall possess minimum levels set below <i>NB: Attachment of CVs and certified copies of Annual Practicing Licenses & registration certificates (for Engineers) and Academic Certificates for all staff is mandatory;</i>
	<p>HQ Staff-these are company technical employees who provide management coordination between the site and KAA HQ Project Manager</p> <p>Site Agent</p> <p>Foreman</p> <p>Site Surveyor</p>	<p>The site staff shall possess minimum levels of qualifications set below;</p> <p>At least 2No. Personnel be based at HQ Qualification = Bsc. In Civil Engineering or Equivalent Be Registered Eng. by EBK. Provide copy of registration and current annual practising licence</p> <p>General Experience= 10 Yrs Post Registration Specific Experience = 8Yrs</p> <p>Qualification = Bsc. In Civil Engineering or Equivalent Be Registered Eng. by EBK. Provide copy of registration and current annual practising licence General Experience= 8 Yrs</p>

		Specific Experience = 5Yrs Qualification = Higher National Dip. Civil Engineering or Equivalent General Experience = 10 yrs Specific Experience = 5 Yrs NO QUALIFICATION Qualification = Ordinary Diploma in Survey General Experience = 10 yrs Specific Experience = 5 Yrs Score 0 or 2 marks
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The Bidder was to indicate the core plant and equipment considered by the company to be necessary for undertaking the project together with proof ownership or lease arrangements (*Mandatory minimum number of equipment required by the Employer for the execution of the project that the bidder must make available for the Contract).

(Bidders must provide proof of ownership or lease arrangements for all plants and equipments for award of marks. Leasing arrangements will be awarded on half-point mark of ownership arrangements.

SUMMARY OF POST- QUALIFICATION/ TECHNICAL EVALUATION (SCORE)

The Technical evaluation was done as per the evaluation criteria in the tender document and the finding is as below:-

FINDINGS

- 70 Points = 100% $(70/70*100)=100$

- Therefore $64.815/70*100= 92.59\%$. Pass mark 60%

The minimum point for a bidder to qualify to financial stage is 60%. M/S; Halane Construction Co Ltd scored 92.59% hence qualify to financial Stage.

Observation

It was noted that ICPAK was denoted as ICPAC Independent Auditors opinion did not include the Auditors practicing number as per the ICPAK guidelines and the same is to be confirmed through due diligence.

Litigation

The Evaluation Committee wrote to legal department to confirm if M/S; Halane Construction Co Ltd has any litigation with Kenya Airports Authority. The Legal Department confirmed that M/S; Halane Construction Co Ltd don't have any litigation with the Authority as per attached email.

DUE DILIGENCE

The evaluation committee carried out due diligence on the best evaluated bidder who qualified to financial before opening their financial on the following four areas:-

a). Similar work done by the contractor at:-

- i) Kenya National Highways Authority (KeNHA)
- ii) Wajir County Government.

b). Institute of Certified Public Accountants of Kenya (ICPAK).

- i. To confirm whether the auditor who prepared the accounts for M/S; Halane Construction Co Ltd is registered as a practicing Auditor by ICPAK.
- c). Githinji Kiana & Associates (Certified Public Accountants (K)

To confirm whether they audited the books M/S; Halane Construction Co Ltd.

Response of due diligence

- a) Kenya National Highways Authority (KeNHA) and Wajir County Government confirmed to have awarded the works and carried out by M/S; Halane Construction Co Ltd.
- b) Institute of Certified Public Accountants of Kenya (ICPAK)
 - i) Confirmed that M/S; Githinji Kiana & Associates is registered with ICPAK and of good standing.
 - ii) Practicing certificate number checked and confirmed through ICPAK website.
- c) M/S: Githinji Kiana & Associates (Certified Public Accountants (K) confirmed that they audited the books of M/S; Halane Construction Co Ltd for the said period.

FUNDING

Two fifty Million (Kshs 250,000,000.00 is available under accrued investment income generated from Airstrip funds investments and the balance will be supplementary in the 2016/2017 budget.

RECOMMENDATION

Based on the tender evaluations, the evaluation committee recommends that the Financial proposal for bidder no. 3, M/S; Halane Construction Co Ltd be open.

PROFESSIONAL OPINION AND ACCOUNTING OFFICER APPROVAL

The professional opinion together with evaluation report was submitted by the head of procurement to the Accounting Officer on 9th January, 2017 who stayed the award to the Applicant.

THE REQUEST FOR REVIEW

The Applicant M/s Halane Construction Company Limited filed the Request for review No. 14 /2017 on 9th February, 2017 against the decision of the Kenya Airports Authority challenging the termination of Tender No. KAA/ES/1075/C (RETENDER) for the the Proposed Rehabilitation of Wajir International Airport (Runway, Taxiways, Apron and Access Road).

The Applicant in this Request for Review was represented by Mr. Alex Masika, Advocate while the Procuring Entity was represented by M/s Doreen Areri, the procuring entity's Legal Officer.

The Applicant sought for the following orders:

- a) Annual in whole the decision of the Procuring Entity.

- b) Give directions to the procuring entity with respect to anything to be done or redone including proceedings with procurement process.
- c) The procuring Entity be condemned to pay Costs of this Review to the Applicant.

THE BOARD'S DECISION

The Board has considered the Request for Review dated 9th February, 2017 and which was filed by the Applicant on the same day and has also considered the Response dated 15th February, 2017 which was filed by the procuring entity on the same date together with the bundle of documents filed by the procuring entity on the same day.

Upon examining the Request for Review filed by the Applicant, the Board finds that the Applicant raised a total of five grounds of review but all the grounds were challenging the procuring entity's decision to terminate Tender No. KAA/ES/1075/C which was awarded to the Applicant for the proposed Rehabilitation of Wajir International Airport (Runway, taxiways Apron and Access Road vide the procuring entity's letter dated 27th January, 2017).

The Board has considered the submissions made by the parties and finds that it was the Applicants case that in purporting to terminate the tender herein, the procuring entity acted contrary to the provisions of Section 63 of the Public Procurement and Asset Disposal Act 2015. Counsel for the

Applicant submitted that unlike in the repealed Section 36 of the Public Procurement and Disposal Act, the Provisions of Section 63 of the new Act had set out very specific grounds on the basis of which a termination could be effected and that one of the requirements under the provisions of Section 63(2) of the Act is that any procuring entity terminating a procurement process had to give the Public Procurement Regulatory Authority a written report on the termination within fourteen (14) days and that under Section 63(3) such a report shall include reasons for the termination.

Counsel for the Applicant submitted that he had looked at the entire response filed by the procuring entity and he did not see any evidence of compliance with the provisions of Sections 63(2) and (3).

He further submitted that the reason given by the procuring entity, namely the insufficient funds was not a ground for termination and under Section 3 of the Act.

Counsel for the procuring entity in very brief submissions on the other hand argued that the termination was proper and was carried out in accordance with the provisions of Section 63 (2) of the Act. She however conceded that no report of the termination was given to the Director General under Section 63(2) and (3) of the Act.

The Board has considered the above submissions and the provisions of Section 63 of the Act. The said provision states as follows:-

- 1. An accounting officer of a procuring entity, may at any time prior to notification of tender award terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies:-**
 - a) The subject procurement have been overtaken by:-**
 - i) Operation of law: or**
 - ii) Substantial technological change.**
 - b) Inadequate budgetary provision**
 - c) No tender was received;**
 - d) There is evidence that prices of the bids are above market prices;**
 - e) Material governance issues have been detected;**
 - f) All evaluated tender are non-responsive;**
 - g) Force majeure;**
 - h) Civil commotion, hostilities or an act of war; or**
 - i) Upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.**
- 2. An account officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.**
- 3. A report under subsection (2) shall include the reasons for the termination.**

4. An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

Perhaps the first issue that the Board needs to consider and which appears straight forward in the Board's view is whether the procuring entity gave the Director General of the authority a written report of the termination containing the reasons for the termination under provisions of Section 63(2) and (3) of the Public Procurement and Asset Disposal Act.

On this issue Counsel for the procuring entity did not produce any such a report and in fact conceded during the hearing that she did not have a copy of it. The Board had also looked at all the documents filed by the procuring entity and has not seen such a report.

In the absence of such a report the Board finds that the purported termination was unlawful on this ground alone.

The Board's finding on this issue is further fortified by the case of **China Wu Yi Company Ltd -vs- Kenya School of Monetary Studies (Appl. No. 29 of 2013)** where the Board held that where a procuring entity had failed to give a report to the authority on termination then the purported termination is unlawful.

The Board has also looked at the evaluation report and finds that upon carrying out a preliminary technical and a financial evaluation the procuring entity recommended that the tender be awarded to the Applicant in its financial evaluation report dated December, 2016

On the issue of funding the report stated as follows:-

FUNDING

“A budget of Kshs. 830,000,000.00 was submitted by the Authority to the Ministry for approval. The ministry approved the budget, allocating Kshs. 250 Million accrued from the investment income generated from airstrip funds investment and the balance to be provided in the supplementary budget of 2016/2017. (Vide letter MOTAI/C/AT/024/3 VOL. VII/55, dated 30th September, 2016)”.

It is clear on the face of this report which speaks for itself that the procuring entity had available funds in the sum of Kshs. 250 Million at the time and that the balance would be sourced from the 2016/2017 budget.

The Board was not however given any evidence to show where the said sum of Kshs. 250 Million reserved for this project went to. The Board was also not told that the budget for 2016/2017 has been approved or not. The procuring entity in fact conceded in its submissions that the said budget had not been passed or its request for funding rejected. In the absence of the above evidence the procuring entity could not terminate this

Procurement process on account of lack of funds or lack of sufficient budgetary allocation.

Thirdly the Board has observed that this procurement was being re-advertised after being cancelled previously twice.

The Applicant in fact produced and annexed letter dated 6th January, 2017 from the National assembly where Parliament had raised the question why this tender was being cancelled severally. The Board has read the letter and is of the respectful view as submitted by Counsel for the Applicant that lack of sufficient funds may not be the main or the only consideration for the cancellations and the termination.

As the Board has always stated tendering is a serious business and should not be treated lightly. A bidder who participates in a tender process expends resources in the exercise and it is not fair to cancel a process or terminate it without a fair basis.

On the Board's jurisdiction to hear an application challenging a termination, the Board observed as follows in the case of **AON Kenya Insurance Brokers Ltd -vs- The Teachers Service Commission (PPARB Appl. NO. 8 of 2015)**.

"On the issue of jurisdiction, the Board has previously held that the power to terminate an award of a tender under the Provisions

of Section 36 of the Act is not absolute and further that the Board has jurisdiction to inquire into the circumstances leading up to the termination of the an award of a tender to a successful bidder”.

“The position taken by the Board on the issue of jurisdiction in cases of termination follows several decisions by the High Court such as the case of *Selex Sistemi Intergretti –vs- The Public Procurement Administrative Review and the Kenya Civil Aviation Authority* (NAI HC Misc. Application No. 1260 of 2007) where the High Court (both Justices G. Nyamu and G. Dulu) held that the Board has jurisdiction to hear and determine any grievance arising from the exercise of the power conferred upon a Procuring Entity under the Provisions of Section 36 (6) of the Act. The High Court has further held that the said Section 36 (6) does not oust the jurisdiction of the Court or the Board to hear any grievance under the Provisions of Section 36 of the Act”.

The Board has affirmed this Position in several of its past decisions as illustrated by the case of *Horsebridge Network Systems (E.A) Ltd –vs- Central Bank of Kenya* (PPARB APPL. No. 65 of 2012).

Where the Board held that it has jurisdiction to investigate the circumstances under which a Procuring Entity has exercised the powers of termination under the Act.

This Request for Review therefore succeeds and is allowed.

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 termination of tender No. No. KAA/ES/1075/C for the Rehabilitation of the Wajir International Airport (Runway, Taxiways, Apron and Access Road) awarded to the Applicant vide the procuring entity's letter of notification of termination dated 27th January, 2017 is set aside and annulled.
- b) The procuring entity is directed to issue a letter of award of the tender to the Applicant and complete the procurement process herein including the signing of a contract with the Applicant herein within fourteen (14) days from today's date.
- c) In view of the orders made above, each party shall bear its own costs of this Request for Review.

Dated at Nairobi this 2nd day of March, 2017.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

