

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 04/2017 OF 18<sup>TH</sup> JANUARY, 2017**

**LEX OILFIELD SOLUTIONS LIMITED.....APPLICANT**

**AND**

**GEOHERMAL DEVELOPMENT COMPANY**

**LIMITED.....PROCURING ENTITY**

Review against the decision of the Geothermal Development Company Limited, in the matter of Tender No. GDC/ICB/DPL/015/2016-2017 for Provision of Drill String Inspection & Remedial Services for Menengai Geothermal Development Project.

**BOARD MEMBERS PRESENT**

- |                    |          |
|--------------------|----------|
| 1. Paul Gicheru    | - Chair  |
| 2. Nelson Orgut    | - Member |
| 3. Rosemary Gituma | - Member |
| 4. Paul Ngotho     | - Member |

**IN ATTENDANCE**

- |                    |               |
|--------------------|---------------|
| 1. Philemon Kiprop | - Secretariat |
| 2. Maureen Kiyundo | - Secretariat |

## **PRESENT BY INVITATION**

### **Applicant – Lex Oil Field Solutions limited**

1. Paul Kiragu - Advocate
2. Joyce Mukururi - Advocate
3. Caroline Chege - Legal Assistant
4. Anne Migale - Legal Assistant
5. Emmanuel Kitusa - Director

### **Procuring Entity – Geothermal Development Company**

1. Elijah Muhoro - Advocate
2. Kikanae Topoti - Legal Officer
3. Philip Chemgn'orem - Legal Officer II
4. Justus Muhambi - SCO
5. Koske A K - SCO

### **Interested Parties**

1. Evans Omuony - PM, SGS (K) Ltd
2. Alice Kanda - CM, Weatherford.
3. Felix Maiyo - Engineer, NOV Kenya
4. Ehab Said - Manager, Nov Kenya
5. Anne Babu - Advocate, NetFast
6. Agnes Silantoi - Lawyer Netfast

## THE BOARD'S DECISION

Upon hearing presentations from the parties and the interested candidate and upon considering the information in the documents before it, the Board decides as follows:

### BACKGROUND OF AWARD

### BACKGROUND OF AWARD

#### 1.1 IDENTIFICATION AND BIDDING PROCESS

1.1	Name of Borrower	Government of Kenya
1.2	Loan/Grant number	ADF Loan No. 2100150026101
1.3	Date of effectiveness	July 10, 2012
1.4	Closing date	-----
(a)	Original	December 31 <sup>st</sup> 2017
(b)	Revised	N/A
1.5	Name of project	Menengai Geothermal Development Project
1.6	Purchaser (or Employer)	
(a)	Name	Geothermal Development Company Limited
(b)	Address	P.O Box 100746 – 00101, Nairobi, Kenya
1.7	Name of Contract	Tender for Provision of Drill String Inspection & Remedial Services.
1.8	Contract number (identification)	GDC/ICB/DPL/015/2016-2017
1.9	Contract description	Tender for Provision of Drill String Inspection & Remedial Services.
1.10	Cost estimate	Ksh. 150,000,000.00
1.11	Method of procurement (check one)	ICB
1.12	Prior review required	Yes

1.13	Domestic preference allowed	No
1.14	Regional preference allowed	No
1.15	Fixed price contract	Yes
1.16	Co-financing, if any:	None
(a)	agency name	N/A
(b)	per cent financed by agency	N/A

<b>Table 1B: Bidding Process</b>		
2.1	General Procurement Notice first issue date	January 27, 2012
2.2	Prequalification, if required	None
(a)	Number of firms prequalified	N/A
(b)	Date of Bank's no-objection	N/A
2.3	Specific Procurement Notice	September 21 <sup>st</sup> , 2016
(a)	Name of National Newspaper	Daily Nation & The Standard Newspaper
(b)	Issue date	September 21 <sup>st</sup> & 23 <sup>rd</sup> , 2016
(c)	Name of international publication	UNDB website
(d)	Issue date	September 14 <sup>th</sup> , 2016
(e)	Address of the Web site(s)	<a href="http://www.devbusiness.com/ProjectViewer.aspx?ProjectID=66942&amp;ProjectType=1">http://www.devbusiness.com/ProjectViewer.aspx?ProjectID=66942&amp;ProjectType=1</a>
(f)	Issue date	September 14 <sup>th</sup> , 2016
2.4	Standard Bidding Document	
(a)	Title, publication date	Tender for Provision of Drill String Inspection & Remedial Services, September 21 <sup>st</sup> & 23 <sup>rd</sup> , 2016
(b)	Date of Bank's no-objection	September 19 <sup>th</sup> , 2016
(c)	Date of issue to bidders	September 21 <sup>st</sup> , 2016
2.5	Number of firms issued documents	Twelve (12)
2.6	Amendments to documents, if any	One (1) addendum
(a)	List all issue dates	November 4, 2016

(b)	Date(s) of Bank's no-objection	N/A
2.7	Date of pre-bid conference, if any	N/A
2.8	Date minutes of conference sent to bidders and Bank	N/A
3.1	Bid submission deadline	November 14 <sup>th</sup> , 2016; 11:00hrs EA
(a)	Original date, time	November 9 <sup>th</sup> , 2016; 11:00hrs EA
(b)	Extensions, if any	Seven (7) Days
3.2	Bid opening date, time	November 14 <sup>th</sup> , 2016; 11:00hrs EA
3.3	Record of bid opening, date sent to Bank	Attached
3.4	Bid validity period (days or weeks)	150 Days
(a)	Originally specified	150 days
(b)	Extensions, if any	None

## **1.2 SCOPE OF CONTRACT AND APPROXIMATE COST**

The scope of the service is summarized below:

No.	Name of Service	Brief Description	Quantity
1.	Inspection Services	As per Schedule A	Assorted
2.	Hardbanding and Pipe Straightening Service	As per Schedule B	Assorted

- i) Estimated cost at the time of appraisal: Ksh. 150,000,000.00 for Schedules A & B
- ii) Actual cost for the proposed contract is: USD695, 781.50 for Schedule A. Schedule B no responsive bid.

**2.0 BID OPENING PROCESS**

**TABLE 2. BID PRICES (AS READ OUT)**

Bidder No.	Bidder Identification				Read-out Bid Price(s)			Modifications or Comments or Discount
	Name	City/State or Province	Country	Schedule	Currency	Amount(s) or %		
1.	Hunting Alpha (EPZ) Limited	Mombasa	Kenya	A	USD	769,890.13	None	
2.	Lex Oil Field Solutions Limited	Nairobi	Kenya	A	USD	644,173.20	None	
3.	Shandong Kerui Petroleum Equipment Company Limited	Shandong	China	A	USD	1,132,777.20	None	
4.	JC International Limited	Port Harcourt	Nigeria	A	USD	530,200.00	None	
5.	National Oilwell Varco Downhole Eurasia Limited	Gloucestershire	UK	A	KSHS	200,140,132.00	None	
6.	Quality Inspectors Limited	Nairobi	Kenya	A	KSHS	93,395,756.00	None	
7.	SGS Kenya Limited	Nairobi	Kenya	A	USD	6,239,050.00	None	
8.	AIVEO Limited	Nairobi	Kenya	B	USD	753,420.00	None	
9.	Netfast Communication Limited	Nairobi	Kenya	A	USD	807,106.54	None	
10.	Unique Wellbore FZC & Tubecare	Doha	Qatar	A	USD	915,334.66	None	

Bidder No.	Bidder Identification					Read-out Bid Price(s)				Modifications or Comments or Discount
	Name	City/State or Province	Country	Schedule	Currency	Amount(s) or %				
	International WLL, Qatar (JVCA)									
11.	Weatherford Services & Rentals Limited	Nairobi	Kenya	A	USD	1,085,875.00				None
12.	Schlumberger Offshore Services Limited	Nairobi	Kenya	A	USD	509,873.00				None

### 3.0 EXAMINATION OF BIDS

**TABLE 3A-EXAMINATION OF COMMERCIAL RESPONSIVENESS**

	BIDDERS											
	1	2	3	4	5	6	7	8	9	10	11	12
Schedule Quoted for;	A	A	A	A	A	A	A	B	A	A	A	A
<b>2.1 Eligibility</b>												
Nationality in accordance with ITB 4.2.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
No- conflicts of interests as described in ITB 4.3.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Not having been declared ineligible by the Bank as described in ITB 4.4.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Compliance with conditions of ITB 4.5	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Not having been excluded as a result of the Borrower's country laws or official regulations, or by an act of compliance with UN Security Council resolution, in accordance with ITB 4.8	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
<b>2.2 Historical Contract Non-Performance</b>												
Non-performance of a contract did not occur within the last Five (5) years prior to the deadline for application submission, based on all information on fully settled disputes or litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the Dispute Resolution Mechanism under the respective contract, and where all appeal instances available to the bidder have been exhausted.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Not being under execution of a Bid-Securing Declaration pursuant to ITB 4.6 for five (5) years	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	X
All pending litigation shall in total not represent more than fifty Percent (50%) of the Bidder's net worth and shall be treated as resolved against the Bidder.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	X
<b>2.3 Financial Situation</b>												
Submission of audited balance sheets or if not required by the law of the bidder's country, other financial statements acceptable to the Purchaser, for the last Three (3) years to	X	X	Y	X	Y	Y	Y	X	Y	Y	X	X



	BIDDERS											
	1	2	3	4	5	6	7	8	9	10	11	12
Schedule Quoted for;	A	A	A	A	A	A	A	B	A	A	A	A
demonstrate the current soundness of the bidders financial position and its prospective long term profitability.  Criterion 1: $Current Ratio = \frac{Liquis Assets}{Liquis Liabilities} \geq 1$ Criterion 2:  $Debt Ratio = \frac{Total Debt}{Total Assets} \leq 1$												
Minimum average annual turnover of Kshs. 150 million (USD 1.5 million) calculated as total certified payments received for contracts in progress or completed, within the last three (3) years	X	X	Y	X	Y	Y	Y	X	Y	Y	X	X
The Bidder must demonstrate access to, or availability of, financial resources such as liquid assets, unencumbered real assets, lines of credit, and other financial means, other than any contractual advance payments to meet:  (i) the following cash-flow requirement: Equivalent to bid price and  (ii) The overall cash flow requirements for this contract and its current commitments.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	X	X
<b>2.4 Experience</b>												
Experience under contracts in the role of contractor, subcontractor, or management contractor for at least Five (5) Contracts in the last Ten (10) years prior to the applications submission deadline, and with activity in at least nine (9) months in each year.	X	X	Y	X	Y	Y	Y	Y	Y	Y	Y	Y
(a) Participation as contractor, management contractor, or subcontractor, in at least Three (3) contracts within the last Ten (10) years, each with a value of at least Kshs. 20 million (USD 200,000), that have been successfully and Substantially completed and that are similar to the proposed Works. The similarity shall be based on the physical size, complexity,	X	Y	Y	X	Y	Y	Y	Y	Y	X	Y	X

	BIDDERS											
	1	2	3	4	5	6	7	8	9	10	11	12
<b>Schedule Quoted for;</b>	A	A	A	A	A	A	A	B	A	A	A	A
methods/technology or other characteristics as described in Section IV, Bidding Forms.												
b) For the above or other contracts executed during the period stipulated in 2.4.2(a) above, a minimum experience in the following key activities:  <input checked="" type="checkbox"/> Inspection of tubulars and tubular handling equipment  <input checked="" type="checkbox"/> Hardbanding and pipe straightening	X	Y	Y	X	Y	Y	Y	Y	Y	X	Y	X
<b>Completeness of Bid</b>	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
a) Bid Validity Period : 150 Days												
b) Original Bid Security of USD 20,000.00	Y	X	Y	Y	Y	X	Y	Y	Y	X	Y	Y
c) Bank guarantee/Not Insurance	Y	Y	Y	Y	Y	X	Y	Y	Y	X	Y	Y
d) Validity period for Bid Security (ITB 19.1) 178days	X	Y	Y	Y	Y	X	Y	Y	Y	X	Y	Y
e) Demonstration of authority to sign the bid on behalf of bidder.	Y	X	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
f) Fully completed letter of bid	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
g) Fully completed Schedule as per ITB 14.8	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
h) JVCA agreement as per ITB 4.1(a)	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A
i) Delivery period Not later 420 days	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
j) Language of Bid : English	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
k) No bidding through agent	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
<b>Qualified (Q) / Not-Qualified (NQ)</b>	NQ	NQ	Q	NQ	Q	NQ	Q	NQ	Q	NQ	NQ	NQ

From the above Table 3A, eleven firms submitted bids for Schedule A (Inspection Services) and One (1) firm submitted bid for Schedule B (Hardbanding and Pipe straightening service). Four firms out of the eleven that were evaluated for schedule A met the requirements of commercial responsiveness and proceeded for technical responsiveness evaluation stage.

The only firm (bidder 8) that submitted bid for schedule B was declared non-responsive as it did not meet the commercial examination requirements and thus could not be evaluated further.

### **3.1 BIDDERS WHO QUALIFIED IN THE COMMERCIAL RESPONSIVENESS**

The following bidders qualified in the examination for commercial responsiveness

1. Shandong Kerui Petroleum Equipment Company Limited (Bidder 3)
2. National Oilwell Varco Downhole Eurasia Limited (Bidder 5)
3. SGS Kenya Limited (Bidder 7)
4. Netfast Communication Limited (Bidder 9)

### **3.2 BIDDERS WHO DID NOT QUALIFY IN THE EXAMINATION OF COMMERCIAL RESPONSIVENESS- SCHEDULE A**

The following Bidders did not qualify in the examination of commercial responsiveness for the following reasons;

1. **Hunting Alpha (EPZ) Limited- (Bidder No 1)**
  - i. The bidder did not submit audited balance sheets and other financial statements for the last Three (3) years to demonstrate the current soundness of the bidder's financial position and its prospective long term profitability as required in in Section III. Evaluation and Qualification Criteria clause 2.3.1 Historical Financial Performance.
  - ii. The bidder did not demonstrate minimum annual turnover of Kshs 150 Million (USD 1.5Million) since it did not Submit audited balance sheets and other financial statements for the last Three (3) years as required in Section III. Evaluation and Qualification Criteria clause 2.3.2 on Average Annual Turnover.
  - iii. The bidder did not demonstrate general experience under contracts in the format prescribed in Form EXP-2.4.1. The bidder excluded start dates and his role in the contracts.
  - iv. The bidder provided only one admissible contract instead of the required three (3) as required in 2.4.2 Specific Experience of Section III. Evaluation and Qualification Criteria.
  - v. The bidder submitted a bid security valid until 10<sup>th</sup> April 2017 (147days) against the required 178 days as per ITB 19.3.
  
2. **Lex Oil field solutions limited & Lafem Oil & Gas Limited- JVCA(Bidder No 2)**
  - i. Lex Oil field solutions limited &Lafem Oil & Gas Limited JVCA submitted audited financial statements for two years(2015 & 2014) contrary to the requirement to submit for the last three years as stipulated in 2.3.1 (Historical financial performance).
  - ii. Lex Oil field solutions limited &Lafem Oil & Gas Limited JVCA submitted ratios for the last three years. However, the ratios for the year 2013 could not be substantiated since the bidder did not submit audited financial statements for the year 2013.

- iii. Lex Oil field solutions limited & Lafem Oil & Gas Limited JVCA minimum average annual turnover for the third year (2013) could not be substantiated since the bidders did not submit audited financial statements for the year 2013.
- iv. Lex Oil field solutions limited & Lafem Oil & Gas Limited JVCA did not demonstrate general experience under contracts as stipulated in Section III. Evaluation and Qualification Criteria. The JVCA partners listed seven (7) combined general experience contracts against the requirement of five (5) contracts for each partner.
- v. The bid security submitted has the name of one partner in the JVCA (Lex Oil field solutions limited) contrary to the requirement of Instruction to bidders 19.8 of the bid document.
- vi. No power of attorney submitted by the JVCA partners as per the requirement of Instruction to bidders 20.3 (b) of the bid document.

**3. JC International limited (Bidder No 4)**

- i. The bidder did not demonstrate experience under contracts in the role of contractor, subcontractor, or management contractor for at least Five (5) Contracts in the last Ten [10] years as required in 2.4.1 General Experience Section III. Evaluation and Qualification Criteria
- ii. The bidder did not demonstrate Participation as contractor, management contractor, or subcontractor, in at least Three (3) contracts within the last Ten (10) years, each with a value of at least Kshs. 20 million (USD 200,000), that have been successfully and Substantially completed and that are similar to the proposed Works as required in 2.4.2 Specific Experience of Section III. Evaluation and Qualification Criteria and described in Section IV, Bidding Forms
- iii. The bidders financial statements for the three (3) years were inconsistent hence financial ratios could not be determined. The balance sheet for the year 2015 did not balance and had no Notes to the Financial Statement.

**4. Quality Inspectors Limited (Bidder No 6)**

- i. The bidder submitted a bid security from Cannon Assurance Limited against the requirement of a Bank Guarantee issued by a local bank or a bank with local correspondence as stipulated in the Specific Procurement Notice for the Invitation for bids for the tender of provision of drill String Inspection & Remedial Services.

**5. Unique Wellube FZC & Tubecare International WLL, Qatar- JVCA (Bidder No 10)**

- i. The bidder submitted a bid security from Geminia Insurance Company Limited issued in the name of M/s Infraenergy Services Limited against the requirement of a Bank Guarantee issued by a local bank or a bank with local correspondence in the name of the bidding firm as stipulated in the Specific Procurement Notice for the Invitation for bids for the tender of provision of Drill String Inspection & Remedial Services.
- ii. The bidder did not adequately fill the specific experience from EXP-2.4.2 as per Section III. Evaluation and qualification criteria. It did not indicate the similarity of contract in terms of physical size,

complexity, methods/technology and other features as per the requirement of Section IV. Bidding Forms.

**6. Weatherford Services & Rentals Limited(Bidder No 11)**

- i. The bidder did not submit audited balance sheets and other financial statements for the last Three (3) years to demonstrate the current soundness of the bidder's financial position and its prospective long term profitability as required in Section III. Evaluation and Qualification Criteria clause 2.3.1 Historical Financial Performance
- ii. The bidder did not demonstrate minimum annual turnover of Kshs 150 Million (USD 1.5Million) since it did not Submit Form FIN –3.2 and audited balance sheets and other financial statements for the last Three (3) years asrequired in Section III. Evaluation and Qualification Criteria clause 2.3.2 on Average Annual Turnover.
- iii. The bidder did not demonstrate access to financial resources as required in Section III. Evaluation and Qualification Criteria clause 2.3.3.Financial Resources.

**7. Schlumberger offshore services limited(Bidder No 12)**

- i. The bidder did not fill FORM CON -2 hence his historical contract non-performance and all pending litigation details could not be established
- ii. The bidder did not submit audited balance sheets and other financial statements for the last Three (3) years to demonstrate the current soundness of the bidder's financial position and its prospective long term profitability as required in Section III. Evaluation and Qualification Criteria clause 2.3.1 Historical Financial Performancehence the financial ratios could not be ascertained.
- iii. The bidder did not demonstrate minimum annual turnover of Kshs 150 Million (USD 1.5Million) since it did not submit Form FIN –3.2 and audited balance sheets and other financial statements for the last Three (3) years asrequired in Section III. Evaluation and Qualification Criteria clause 2.3.2 on Average Annual Turnover.
- iv. The bidder did not demonstrate access to financial resources as required in Section III. Evaluation and Qualification Criteria clause 2.3.3.Financial Resources.The bidder did not adequately fill form FIN-3.3. The firm indicated source of funding and excluded the amounts.
- v. The bidder provided two specific experience contracts against the required three contracts as stipulated in 2.4.2 of Section III Evaluation and qualification criteria.

**3.2 BIDDER WHO DID NOT QUALIFY IN THE EXAMINATION OF COMMERCIAL RESPONSIVNESS-SCHEDULE B**

**1. Aiveo Limited(Bidder No 8)**

- i. The bidder submitted audited financial statements for the year 2013, 2014 & 2015. However, only financial statements for the year 2014 & 2015 are admissible. The statements for the year 2013 could

not be authentic as the company was incorporated in Kenya on 27<sup>th</sup> April 2014 as depicted in the submitted certificate of Incorporation hence the financial ratios in Section III, clause 2.3.1 on Historical Financial Performance and clause 2.3.2 on Annual Turnover couldn't be objectively determined.

**TABLE 3B. EXAMINATION OF TECHNICAL RESPONSIVENESS**

No.	TECHNICAL REQUIREMENTS	BIDDERS			
		3	5	7	9
1.	<b>Personnel</b> -The Bidder must demonstrate that it has the personnel for the key positions that meet the requirements as per section III. Evaluation and Qualification Criteria qualification table 2.5. The Bidder shall provide details of the proposed personnel and their experience records using Forms PER-1 and PER-2	Y	Y	Y	Y
2.	<b>Contractor's Equipment</b> - The Bidder must demonstrate that it has the key equipment as per Section III. Evaluation and Qualification Criteria qualification table 2.6. The Bidder shall provide further details of proposed items of equipment using the Form EQU in Section IV.	Y	Y	Y	Y
3.	<b>Procedures/ Work Instructions</b> - The Bidder must submit a comprehensive technical description of the inspection procedure it shall utilize in the form of Work Instruction Manual (WIM) as per section IV, Technical Specification of the Duties and responsibilities of contractor	Y	Y	Y	Y
	<b>Responsive (R) / Non-Responsive (NR)</b>	R	R	R	R

**Key:**

1. Bidder 3 - Shandong Kerui Petroleum Equipment Company Limited
2. Bidder 5- National Oilwell Varco Downhole Eurasia Limited
3. Bidder 7- SGS Kenya Limited
4. Bidder 9- Netfast Communication Limited

4.0 CORRECTION

TABLE 4. CORRECTIONS AND UNCONDITIONAL DISCOUNTS

SCHEDULE A: INSPECTION SERVICES

Bidder	Read-out Bid Price(s)		Corrections		Corrected Bid Price(s)	Unconditional Discounts		Corrected/Discounted Bid Price(s)
	Currency(ies)	Amount(s)	Computational Errors	Provisional Sums		Percent	Amount(s)	
(a)	(b)	(c)	(d)	(e)	(f) = (c) + (d) - (e)	(g)	(h)	(i) = (f) - (h)
Shandong Kerui Petroleum Equipment Company Limited(Bidder 3)	USD	1,132,777.20	-	188,796.20	943,981.00	-	-	943,981.00
National Oilwell Varco Downhole Eurasia Limited (Bidder 5)	KSH	200,140,132.00	(3,679.00)	65,645,964.00	134,490,489.00	-	-	134,490,489.00
SGS Kenya Limited (Bidder 7)	USD	6,239,050.00	136,800.00	-	6,375,850.00	-	-	6,375,850.00

Bidder	Read-out Bid Price(s)		Corrections			Corrected Bid Price(s)	Unconditional Discounts		Corrected/Discounted Bid Price(s)
	Currency(ies)	Amount(s)	Computational Errors	Provisional Sums	Percent		Amount(s)		
Netfast Communication Limited (Bidder 9)	USD	807,106.54	-	111,325.04	695,781.50	-	-	695,781.50	



## Comments on the Corrections

1. **Shandong Kerui Petroleum Equipment Co. Ltd (Bidder 3)**
  - The bidder's Price as read-out included a local tax component of USD188,796.20 which was adjusted on the total read-out price of USD. 1,132,777.20 to USD 943,981.00
2. **National Oilwell Varco Downhole Eurasia Limited (Bidder 5)**
  - The bidder's Price as read-out had a computational error of Kshs. 3,679.00 which was adjusted on the total read-out price of Kshs. 200,140,132.00 to Kshs. 134,490,489.00
  - The bidder's Price as read-out included a local tax component of Kshs. 65,645,964.00 which was adjusted on the total read-out price of Kshs. 200,140,132.00 to Kshs. 134,490,489.00
3. **SGS Kenya Limited (Bidder 7)**
  - The bidder's Price as read-out had a computational error of USD 136,800.00 which was adjusted on the total read-out price of USD 6,239,050.00 to USD6,375,850.00
4. **Netfast Communications Limited (Bidder 9)**
  - The bidder's Price as read-out included a local tax component of USD 111,325.04 which was adjusted on the total read-out price of USD. 807,106.54 to USD 695,781.50

## 5.0 CURRENCY OF EVALUATION

### TABLE 5. EXCHANGE RATES

Currency Used for Bid Evaluation: USD 1 = KES101.8417

Effective Date of Exchange Rate: November 14, 2016

Authority or Publication Specified for Exchange Rate: Central Bank of Kenya Selling Rate

**6.0 CURRENCY CONVERSION**

**TABLE 6A. CURRENCY CONVERSION (SINGLE CURRENCY)**

**Specify Evaluation Currency: USD**

**SCHEDULE A: INSPECTION SERVICES**

Bidder	Corrected / Discounted	Payment Composition			Exchange	Amounts in	Exchange	Evaluation Currency	
		Currency of Payment	Percent of Total Bid	Amount in Evaluation Currency				Rate Used by Bidder	Exchange Rate for Evaluation
(a)	(b)	(c)	(d)	(e) = (b) x (d)	(f)	(g) = (e) x (f)	(h)	(i) = (g) x (h)	(i)
Shandong Kerui Petroleum Equipment Company Limited(Bidder 3)	943,981.00	USD	100%	943,981.00	N/A	943,981.00	N/A	943,981.00	943,981.00
National Oilwell Varco Downhole Eurasia Limited (Bidder 5)	134,490,489.00	KSH	100%	134,490,489.00	1	134,490,489.00	0.009812	1,320,583.69	1,320,583.69

Bidder	Corrected / Discounted	Payment Composition			Exchange	Amounts in	Exchange Rate for Evaluation	Evaluation Currency	
		Currency of Payment	Percent of Total Bid	Amount in Evaluation Currency				Bid Prices	Total
(a)	(b)	(c)	(d)	(e) = (b) x (d)	(f)	(g) = (e) x (f)	(h)	(i) = (g) x (h)	(j)
SGS Kenya Limited (Bidder 7)	6,375,850.00	USD	100%	6,375,850.00	N/A	6,375,850.00	N/A	6,375,850.00	6,375,850.00
Netfast Communication Limited (Bidder 9)	695,781.50	USD	100%	695,781.50	/N/A	695,781.50	N/A	695,781.50	695,781.50

**7.0 ADDITIONS AND ADJUSTMENTS**

**TABLE 7. ADDITIONS, ADJUSTMENTS, AND PRICED DEVIATIONS**

Specify Evaluation Currency: USD

Bidder	Corrected/Discounted Bid Price <sup>1</sup>	Additions	Adjustments	Priced Deviations	Total Price
(a)	(b)	(c)	(d)	(e)	(f) = (b) + (c) + (d) + (e)

There were NO Adjustments and Priced Deviations and therefore Table above is NOT applicable

**8.0 DOMESTIC PREFERENCES**

**TABLE 8B. DOMESTIC/REGIONAL PREFERENCE FOR WORKS**

Specify Evaluation Currency: USD

Bidder	Domestic/Regional Preference Group	Total Price	Exclusions for Preference	Revised Total	Preference	Total Comparison Price
(a)	(b)	(c)	(d)	(e) = (c) - (d)	(f)	(g) = (c) + (f)

There were No requirements for Domestic/Regional Preferences for works therefore the Table above is NOT applicable

**9.0 RECOMMENDATION FOR CONTRACT AWARD**

**TABLE 9. PROPOSED CONTRACT AWARD**

**SCHEDULE A: INSPECTION SERVICES**

1.	Lowest evaluated responsive bidder (proposed for contract award).  (a) name  (b) address	Netfast Communications Limited  4834-00200 NAIROBI,	
2.	If bid submitted by agent, list actual supplier.  (a) name  (b) address	N/A	
3.	If bid from joint venture, list all partners, nationalities, and estimated shares of contract.	N/A	
4.	Principle country(ies) of origin of goods/materials.	N/A	
5.	Estimated date (month, year) of contract signing.	January 15, 2017	
6.	Estimated delivery to project site/completion period.	420 days	
		Currency(ies)	Amount(s) or %
7.	Bid Price(s) (Read-out)	USD	807,106.54
8.	Corrections for Errors	USD	111,325.04
9.	Discounts	USD	None
10.	Other Adjustments	USD	None
11.	Proposed Award	USD	695,781.50
12.	Disbursement Category	Component B: Well Drilling – Acquisition of Offshore Drilling Materials	

**TABLE 12. ESSENTIAL PROCUREMENT DATA (PDE)**

<b>APPROVAL &amp; PUBLICATION OF AWARD OF CONTRACT, INFORMATION NOTICE</b>	
<b>PART I – TO BE FILLED IN LINE WITH THE OUTCOME OF THE BID EVALUATION</b>	
Country: Kenya	
Executing Agency: Geothermal Development Company Limited	
Project Title: Menengai Geothermal Development Project	
Loan Number(s): 2100150026101	
Package Title: Tender for Provision of Drill String Inspection & Remedial Services	
Lot Number & Title (If different from Package): N/A	
Procurement mode: International Competitive Bidding	
Domestic preference: No Regional preference: No	
Borrower Tender number:	Date reception draft tender doc: September 9 <sup>th</sup> , 2016
GDC/ICB/DPL/015/2016-2017	
Tender Doc approved date: September 19 <sup>th</sup> , 2016	Tender issuing date: September 21 <sup>st</sup> , 2016
Tender/proposals closing date: November 14, 2016	Bid opening date: November 14, 2016
Receipt bid evaluation date:-----	Approval evaluation date: -----
Names of Bidders	Nationalities
	Address
	Bid Price as Read
	Evaluated Price
	Bid
	Reason for

	Refer Table 2	Refer Table 2	Refer Table 2	Refer Table 2	Refer Table 2	Refer to Table 4	Accepted or Rejected	Rejection
Refer Table 2	Refer Table 2	Refer Table 2	Refer Table 2	Refer Table 2	Refer Table 2	Refer to Table 4	Refer to Section 3	Refer to Section 3
Total Number of Bidders	Twelve (12)							
Name of Winner	Nationality	Address	Address of Supplier or Contractor	Contract Award Price (USD)	Contract Duration			
<b>SCHEDULE A: INSPECTION SERVICES</b>								
Netfast Communications Limited	Kenya	4834-00200 NAIROBI	N/A	695,781.50	420 days			
<b>SCHEDULE B: HARDBANDING AND PIPE STRAIGHTENING SERVICE</b>								
No responsive bid hence to be terminated and retendered	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A



<b>PART II – TO BE FILLED AFTER CONTRACT SIGNATURE</b>			
<b>Summary of Scope of Contract Awarded</b>			
<b>Contract currency code:</b>	<b>Rate of exchange:</b>		
<b>Ref. of contract</b>	<b>ADB contract Nr:</b>		
<b>Contract signature date:</b>	<b>Contract reception date:</b>		
<b>Complaint (s) received Yes No; if Yes, how many:</b>	<b>Complaint (s) received Yes No; if Yes, how many:</b>		
<b>Comments:</b>	<b>Comments:</b>		
<b>Goods or related services</b>	<b>Country of origin</b>	<b>Procurement country</b>	
1.			
<b>Subcontractor:</b>			
<b>Part to be financed by ADB/ADF/NTF:</b>			
<b>Allocation by categories of expenditure (indicate title &amp; amount):</b>			
i.	ii.		
iii.	iv		
<b>Allocation according to various currencies of payments</b>			
i.	ii.		

iii.	iv
Price escalation amount	
Provisional amount	
Signature & date Director, Operations Dept.	Signature & date: Division Manager
Name/Signature & date Task Manager	

## **THE REQUEST FOR REVIEW**

The Applicant M/s **Lex Oil field Solutions** filed the Request for review No. 4 /2017 on 18<sup>th</sup> January, 2017 against the decision of the challenging the award of Tender No. *GDC/ICB/DPL/015/2016-2017*, in respect of the Provision of Drill String Inspection & Remedial Services for Menengai Geothermal Development Project.

The Applicant in this Request for Review was represented by Mr . Paul Kiragu, Advocate while the Procuring Entity was represented by Mr. Elijah Muhoro, Advocate. The successful bidder on the other hand was represented by Anne Mbabu.

**The Applicant sought for the following orders:-**

- a) A declaration that the decision by the procuring entity awarding the subject tender to M/s Netfast Communication Limited as set out in the letter dated 28<sup>th</sup> December, 2016 be annulled.
- b) A declaration that the lowest and substantially responsive bidder be awarded the tender;
- c) The procuring entity is hereby ordered to pay the Applicant the costs of and incidental to this Request for Review; and
- d) Such other, additional, further, incidental and/or alternative orders as the Honourable Board may deem just and expedient.

When this Request for Review came up for hearing, Counsel for the procuring entity raised a preliminary objection on the following grounds:-

- a) That the Board lacks jurisdiction to hear the Request for Review as the said procurement is not subject to the Act pursuant to Section 4(2) (f) and Section 6(i) of the Act.
- b) That as per rules and the procedures for procurement of goods and works (revised 2012) Part II Section 2.43 states that any dispute /review and or appeals in contracts for the provision of Goods and Works ,a disputing /aggrieved party should proceed by way of International Commercial Arbitration as Kenya is a signatory of Protocol of agreement with the African Development bank as per Article VII Section7.01
- c) That the said Application is premised on grounds that otherwise fail to demonstrate a legitimate cause of action as against the procurement proceeding contrary to Section 172 of the Act and is for striking out as it amounts to an abuse of the Procurement Process.

It was the procuring entity's case that the Board inter-alia lacked the jurisdiction to hear and determine the Request for Review under the provisions of Section 4(2) (f) of the Public Procurement and Asset Disposal Act because the proceeds to be used in the subject procurement were to be sourced from funds from the African Development Bank and the procurement therefore fell outside the provisions of the Act. Counsel for the procuring annexed the agreement by the African Development Bank to the notice of preliminary objection and argued based on the first ground that a reading of both Sections 4(2) (f) and 6(1) of the Act the Board did not have jurisdiction to hear and determine the dispute.

The second point of preliminary objection raised by Counsel for the procuring entity was that under the Rules and procedures for procurement for goods and works (revised edition 2012) part II Section 2.43, any dispute arising between the parties had to be determined on arbitration.

In terms of Article VII Section 7.01, Counsel for the procuring entity therefore submitted that the provisions of the Public Procurement and Asset Disposal Act 2015 were not therefore applicable to this dispute and that the Applicant ought to have sought its dispute determined on arbitration.

The 4<sup>th</sup> and the 5<sup>th</sup> grounds of preliminary objection were general in nature and it was the procuring entity's case that the Applicant did not demonstrate a legitimate cause of action under Section 172 of the Act while ground 5 was to the general effect that the Request for Review was an abuse of the court process.

Mr. Kiragu on behalf of the procuring entity opposed all the 5 limbs of preliminary objection and relied on the case of **Webb Fountaine Group F2 - LLC -vs- The Kenya Revenue Authority (PPARB NO. 27 of 2015)**.

He argued that the funds to be used in this project were from proceeds of a loan which would be repayable by the public and therefore amounted to public funds within the definition of the Public Procurement and Asset Disposal Act.

He further argued that Section 6(1) of the Act could only come into play where there was a conflict between the provisions of the Act or any donor

conditions and that Counsel for the procuring entity had failed to demonstrate any such conflict.

On the issue of arbitration, Counsel for the Applicant argued that in order for a dispute to be arbitrable, there ought to have been a contract containing an arbitration clause binding upon the parties to have any dispute between them referred to arbitration. He therefore urged the Board to dismiss the proceeding entity's preliminary objection.

In a short response to the Applicant's submissions, Counsel for the procuring entity conceded that there was no agreement in existence between the African Development Bank and the Applicant and no arbitration clause could therefore be invoked by the said parties.

### **THE BOARD'S DECISION ON THE PRELIMINARY OBJECTION**

The Board has considered the submissions made by the parties and finds that the funds to be used in this procurement are from proceeds of a loan that will eventually be paid by the public.

Section 2 of the Public Procurement and Asset Disposal Act defines public money as follows:-

*"public money includes monetary resources appropriated to procuring entities through the budgetary process, as well as extra budgetary funds, including aid grants and loans, put at the disposal of procuring entities by donors".*

Being public money therefore, the procurement is therefore subject to the Act and Section 4(2) (f) cannot aid the procuring entity since it does not relate to procurement and Disposal of Assets under a bilateral or multilateral agreement between the Government of Kenya and any other agency since such agreements are not subject to any tender process.

On the issue of Section 6(1) of the Act, Counsel for the Applicant failed to demonstrate what conflict there was between the Act and the donor conditions.

While considering a similar situation the High Court observed as follows in the case of *Okinya Omtata OKoiti & 2 Others -vs- The Attorney General & 3 Others* (Nai HC Petition No. 55 of 2014 Eklr)

*"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 4<sup>th</sup> Respondent had to be awarded the contract”.*

On the issue of Arbitration, it is clear that Arbitration is consensual and parties must consent to it either through an express agreement or through an exchange of correspondences or through pleadings where the existence of an arbitration agreement is alleged by one party and is not disputed by the other. In this particular case, none of those ingredients was shown to exist. In any event a party who has not been awarded a tender leading up to the execution of a contract cannot be subject to arbitration proceedings. The upshot of all the above is that the procuring entity's preliminary objection fails and is dismissed.

Turning to the merits of the Request for Review, the Applicant's tender was inter-alia declared non-responsive at the preliminary evaluation stage because the Applicant did not among other things inter-alia submit audited financial statements for the year 2013. The Board has looked at the Applicant's tender document and finds that indeed the Applicant did not do so. Mr. Kiragu advocate for the Applicant conceded this much. This ground alone is therefore sufficient to dispose of this issue and the Board can do no more than to uphold the procuring entity's decision.

This is however not the end of the matter. When this Request for Review came up for hearing and upon allowing all the parties to address the Board



on the issue of the form of tender and the price, it transpired that whereas the successful bidder submitted a tender price of USD 807,106.54 in its form of tender, it was awarded the tender at the sum of USD 695,781.50 this correction of error was repeated for other bidders namely SGS(K) from USD 6,239,050.00 to USD6,375,850.00 and the National Oilwell Varco Downhole Eurasia Limited (Bidder 5) which was adjusted from the total read-out price of Kshs. 200,140,132.00 to Kshs. 134,490,489.00. Another element that transpired during the hearing is the qualification of the Successful Bidder.

The variation in the figures from what was read out and eventually awarded in the letter of award were in contravention of Section 82 of the Public Procurement and Asset Disposal Act which stipulates as follows:-

**Section 82: "The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity".**

Clause 14.8 of the tender document further stipulates as follows:-

**"14. 8: All duties taxes and other levies payable by the contractor under the contract, or for any other cause, as of the date 28<sup>th</sup> days prior to the deadline for submission of bids shall be included in the rates and prices and the total bid price submitted by the bidder".**

All duties, taxes and other levies payable by the contractor under the contract should have therefore formed part of the tender price.

Inview of the above discrepancies, the Board cannot close it's eyes to what appears to be a breach of the Act and the tender document and will therefore intervene by correcting the anomalies and will thus issue the following orders:-

### **FINAL ORDERS**

Inview of all the foregoing facts and circumstances 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 award of the tender No. GCD/ICB/DPL/2015-2016-2017 in respect of drill string, inspection and Remedial services for Menengai Geothermal Development project to M/s Netfact Communication Ltd as set out in the procuring entity's letter be and is hereby annulled.
- b) The procuring entity shall re-advertise the said tender within 14 days from the date hereof.
- c) Since each party has been partly successful in this Request for Review the Board orders that each party shall bear its own costs.

Dated at Nairobi on this 8<sup>th</sup> day of February, 2017.

  
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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**