

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 11/2017 OF 3rd FEBRUARY, 2017

BETWEEN

**ROBEN ABERDARE (K)
LIMITED.....APPLICANT**

AND

**KENYA RURAL ROADS AUTHORITY.....PROCURING
ENTITY**

Review against the decision of the Kenya Rural Roads Authority in the matter of Tender No. RWC 373 for the Improvement to Bitumen Standard and Maintenance of Jambo (JN A2) - Kagochi - Hombe - Kwa Wambui - State Lodge - Chaka, State Lodge - Giagatika (JN A2) and Muranga - Kiriaini Roads.

BOARD MEMBERS PRESENT

- | | |
|------------------------------|------------|
| 1. Mr. Paul Gicheru | - Chairman |
| 2. Mr. Gilda Odera | - Member |
| 3. Mr. Peter B. Ondieki, MBS | - Member |
| 4. Mr. Nelson Orgut | - Member |
| 5. Mrs. Rosemary Gituma | - Member |

IN ATTENDANCE

- | | |
|-------------------|-------------------------------|
| 1. Stanley Miheso | - Holding Brief for Secretary |
| 2. Maureen Namadi | - Secretariat |

PRESENT BY INVITATION

Applicant – Roben Aberdare (K) Limited

1. G. M. Nyaanga - Advocate, Dennis Anyoka Moturi & Co
2. Daniel Wamahiu - Director
3. Stephen Muriuki - Student, Dennis Anyoka Moturi & Co

Procuring Entity – Kenya Rural Roads Authority

1. Justin Rapando - Advocate
2. Edward Miruni - Procurement officer

Interested Parties

1. Stephen Ngigi - Secretary, China Far East Construction

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

Kenya Rural Roads Authority (KeRRA) has a budgetary allocation in the 2016/2017 Financial Year under the Development Vote for Improvement to Bitumen Standard and Maintenance of Jambo (JN A2) - Kagochi - Hombe - Kwa Wambui - State Lodge - Chaka, State Lodge - Giagatika (JN A2) And Muranga - Kiriaini Roads.

KeRRA invited eligible firms to bid for the works through an advertisement notice in the local dailies on Thursday 28th April, 2016 and completed Bids were received and opened on 26th October, 2016. Five (5) firms submitted their Bids.

There were Six (6) Tender Notices issued pursuant to Clause 10 and 11 of the Instructions to Bidders.

The Employer vide Memo Ref. No. KeRRA/011/1A/Vol. 11/55 dated 15th November, 2016 appointed members of the Evaluation Committee to evaluate the Bids received and make recommendations regarding the award of the tender.

The members of the tender committee were:-

1. Eng. Weche N. Gichangi - Chairman
2. Eng. D. R. Kibet - Member
3. Mr. Macharia Tumu - Member
4. Mr. Stephen Jobba - Member.
5. Mr. Edward Miruni - Secretary

Out of the (5) Bidders, from whom Bids were received, Four (4) bidders were found to be non-responsive. The Tender Evaluation Committee therefore did not therefore subject the said bids to detailed evaluation.

The remaining One (1) Bidder was found to have fulfilled the requirements of detailed evaluation in accordance with the criteria set out in the Bid Document and was subjected to full evaluation.

The Tender Processing Committee therefore recommended that the Contract for Upgrading to Bitumen Standard and Maintenance of Jambo (Jn A2) - Kagochi - Hombe - Kwa Wambui - State Lodge - Chaka, State Lodge - Giगतिका (Jn A2) and Muranga - Kiriaini Roads, RWC 373, be awarded to M/s. Roben Aberdare (K) Ltd at their Tender price of Kshs. 6,081,865,936.29 (Six Billion, Eighty One Million, Eight Hundred Sixty Five Thousand, Nine

Hundred Thirty Six, Cents Twenty Nine) for being the Lowest Evaluated Bidder.

INTRODUCTION

Project Background and Description of Works

The project roads are located in Nyeri and Murang'a Counties. The proposed works comprise the rehabilitation and repair of A2 Jambo - Kagochi; Mountain Lodge Jnc - Kwa Wambui; Kwa Wambui -State Lodge Jnc; Chaka - State Lodge - (A2jnc) Giगतिका; Murang'a - Kiriaini and New construction of Kagochi - Hombe - Mountain Lodge Junction.

The Works to be executed under the Contract comprise the upgrading, rehabilitation and repair of approximately 98 km of single carriageway, two-lane roads to bitumen standard.

The links comprising the project roads are as follows:

S/No.	Road Name	Length (km)
1	Jambo - Kagochi	13
2	Kagochi- Hombe- Mountain Lodge Junction	10
3	Mountain Lodge Junction - Kwa Wambui Centre	3
4	Kwa Wambui Centre - State Lodge	8
5	State Lodge - Chaka	13
6	State Lodge - Giगतिका	18
7	Muranga - Kiriani	33
Total Length		98

Jambo- Kagochi Road

The road starts at Junction A2 Jambo about 1 km from Karatina Town and runs in a northerly direction through Ihwagi shopping centre to Kagochi.

Length: The road section is 13Km long and is two way two lanes 6m wide carriageway and no shoulders.

Terrain: Rolling

Economic activity: Subsistence farming (crop and dairy farming) and tourist attraction area.

Kagochi - Mountain Lodge (Junction) Road

The road starts at Kagochi and moves in a westerly direction through the forest to the Mountain Lodge road junction.

Length: The road section is 10.0 km long with 3m wide carriageway

Terrain: Hilly and rolling

Economic activity: Subsistence farming (crop and dairy farming), logging and tourism

Mountain Lodge Junction - Kwa Wambui Shopping Centre

The road starts at Mountain lodge Junction and runs in easterly direction to end at Kwa Wambui shopping centre.

Length: The road section is 3km long and 3m wide carriageway with no shoulders

Terrain: Hilly and rolling

Economic activity: Subsistence farming (crop and dairy farming) and tourism

Kwa Wambui Shopping Centre - State Lodge Junction

The road starts at Kwa Wambui shopping centre and runs in a southerly direction to State Lodge junction

Length: the road section is 8 Km long and is two-way two lane with 6.0 m wide carriageway with no shoulders.

The tender processing committee made the following further observations.

Existing surface: Bituminous surface, the surface condition is fair with minor potholes and edge failure in some sections

Terrain: Hilly and rolling

Economic activity: Subsistence farming (crop and dairy farming) and tourism

State Lodge Junction- Chaka

The road starts at State Lodge junction and runs in a westerly direction to A2 Chaka trading centre

Length: the road section is 13.0 km long and is two way two lane with 7m wide carriageway and 1.0m shoulder each side

Terrain: Hilly and rolling

Economic activity: Subsistence farming (crop and dairy farming), Quarry mining and tourism.

State Lodge Junction- Giगतिका

The road starts at State Lodge junction and runs in an easterly direction to A2 Giगतिका

Length: the road section is 18.0 km long

Terrain: Hilly and rolling

Economic activity: Subsistence farming (crop and dairy farming).

Rain falls mainly in the months of March to May and October to December.

The annual average is about 1500 mm.

The population density along the alignment is very dense in most areas and new settlements are going on.

Murang'a - Kiriaini

The other part of road project is located in Muranga County and is approximately 33 Kms.

It starts at Kiriaini and traverses through Kiharu terminating in Muranga. The road is about 33 Km and is on rolling and hilly terrain.

The road is to bitumen standards with 5m carriageway and has no shoulders.

Rain falls mainly in the months of March to May and October to December. The annual average is about 1500 mm.

The project road corridor traverses an area where commercial and subsistence farming, daily livestock keeping and small businesses at market centres are the main economic activities. Subsistence crops grown include maize, beans and bananas. Various Primary and secondary schools also dot the project area.

The population density along the alignment is very dense in most areas.

Extent of Contract.

The major works to be executed under the Contract comprise mainly but are not limited to the following:

Jambo- Kagochi Road (13km)

1. Provision of facilities to the supervising Engineers.
2. Site clearance and top soil removal.
3. Earthworks.
4. Benching 1 m shoulders on both sides to achieve 150mm depth for shoulder construction.

5. Construction of 150mm of Cement/lime Improved Gravel Base of minimum CBR of 160% (CIG160) on shoulders and reconstruction areas as instructed by the Engineer.
6. Laying of 60mm dense bituminous macadam on carriageway or as shall be directed by the Engineer.
7. Application of surface dressing of single seal surface dressing using 10/14mm pre coated chippings on the carriage-way and shoulders as shall be directed by the Engineer.
8. The carriageway shall be 6.0m wide with shoulders (1m wide both sides) constructed with the material and thickness for base as above.
9. Construction of standard pipe culverts, Box culverts, bridges and the improvement of other drainage and soil erosion protection works
10. Relocation of services as necessary
11. Installation of road furniture.
12. Maintenance of passage of traffic through and around the works.
13. Maintenance of works during construction. The defects liability period shall be 12 months.

Kagochi- Mountain Lodge (Junction) Road (10km) Kwa Wambui Shopping Centre - State Lodge And Chaka - State Lodge-Giगतिका (39km)

1. Provision of facilities to the supervising Engineers.
2. Site clearance and top soil removal.
3. Earthworks.
4. Benching 1 m shoulders both side to achieve 150mm depth for shoulder construction.

5. Construction of 150mm of Cement/lime Improved Gravel Base of minimum CBR of 160% (CIG160) on shoulders and reconstruction areas as instructed by the Engineer.
6. Laying of 50mm asphalt concrete on carriageway as shall be directed by the Engineer.
7. Application of surface dressing of single seal using 10/14mm, pre coated chippings on shoulders or as directed by the Engineer.
8. The carriageway shall be 6.0m wide with shoulders (1 m wide both sides) constructed with the material and thickness for base as above.
9. Construction of standard pipe culverts, Box culverts, bridges and the improvement of other drainage and soil erosion protection work.
10. Relocation of services as necessary.
11. Installation of road furniture.
12. Maintenance of passage of traffic through and around the works.
13. Maintenance of works during construction. The defects liability period shall be 12 months.

Mountain Lodge Junction - Kwa Wambui (3km)

1. Provision of facilities to the supervising Engineers.
2. Site clearance and top soil removal.
3. Earthworks.
4. Benching of the road to achieve 7m carriageway and shoulder or as shall be directed by the Engineer.
5. Construction of 150mm of Cement/lime Improved Gravel sub base and base of minimum CBR of 60% and 160% respectively on benched sections or as instructed by the Engineer.

6. Laying of 50mm asphalt concrete on carriageway or as shall be directed by the Engineer.
7. Application of surface dressing of single seal using 10/14mm, pre-coated chippings on shoulders or as directed by the Engineer, along the following sections.
8. Construction of standard pipe culverts, Box culverts, bridges and the improvement of other drainage and soil erosion protection works
9. Relocation of services as necessary
10. Installation of road furniture.
11. Maintenance of passage of traffic through and around the works.
12. Maintenance of works during construction. The defects liability period shall be 12 months.

Muranga - Kiriaini Section

The major works to be executed under the Contract comprise mainly of but are not limited to the following:

1. Site clearance and top soil removal.
2. Earthworks.
3. Construction 150mm of cement improved graded crushed stones (GCS) or gravel of minimum CBR of 60% on reconstruction areas and on shoulders or as instructed by the Engineer.
4. Construction 150mm of cement improved graded crushed stones (GCS) or gravel of minimum CBR of 160% on reconstruction areas and on shoulders or as instructed by the Engineer.
5. Laying of 80mm dense bituminous macadam on carriageway as shall be directed by the Engineer.

6. Laying of 35mm asphalt concrete type II on shoulders or as shall be directed by the Engineer.
7. Application of surface dressing of single seal using 10/14mm pre coated chippings on the carriage-way.
8. The carriageway shall be 6.0m wide with shoulders (1 m wide both sides) constructed with the material and thickness for base as above.
9. Construction of standard pipe culverts, Box culverts, bridges and the improvement of other drainage and soil erosion protection works
10. Relocation of services as necessary
11. Installation of road furniture.
12. Maintenance of passage of traffic through and around the works.

Any other activity not listed above in either category but deemed to be necessary by the Engineer, shall be subject to the Engineer's formal instructions and within the mode of payment stipulated either by day-works or on a measured basis.

INVITATION TO TENDER

Interested Bidders were invited to bid for the works through an advertisement notice in the Local dailies on 28th April, 2016.

Contractors registered with the National Construction Authority in category "NCA 1" for roadworks were invited to apply for the Works.

BID NOTICES

There were Six (6) Tender Notices issued pursuant to Clause 10 and 11 of the Instructions to Bidders.

OPENING OF TENDERS

The Director General vide memo Ref. No. KeRRA/011/1A/Vol. 1 (43) dated 20th October, 2016, appointed a Tender Opening Committee.

Bids were received and opened on 26th November, 2016 at 12.00 noon in the presence of officials of the Kenya Rural Roads Authority (KeRRA) and Bidders.

The opening session involved an official of KeRRA opening the Bids, announcing the name of the Bidder, the Bid Sum and the presence of the Bid Security including the name of the Bank or Insurance Company offering the Bid Security.

The Bidders who returned their bid documents were as shown below: -

1.	Kiu Construction Ltd
2.	China Far East Construction Co. Ltd
3.	Sakam Enterprises Ltd
4.	Roben Aberdare (K) Ltd
5.	Petwa Construction Co. Ltd

The records compiled at the bid opening are included in the following:-

- Minutes taken at the Bid Opening Meeting
- Records of Bids as Announced at Bid Opening
- Records of Attendance at Bid Opening.

The level of participation and the bid prices as announced at bid opening is summarized below:-

Bidders ranking by Bid Sum

Bid No.	Bidder's Name	Tender Sum 1 (Kshs.)	Tender Sum 2 (Kshs.)	Tender Sum 1+2 (Kshs.)	Bid Security Amount	Bid Security Issuer	Price Ranking
1.	China Far East Construction Co. Ltd	4,847,299,912.89	337,004,870.40	5,184,304,783.29	1,000,000.00	Equity Bank Kenya Ltd	1

2	Roben Aberdare (K) Ltd	5,594,457,414.69	487,408,521.60	6,081,865,936.29	1,000,000.00	Co-operative Bank of Kenya Ltd	2
3.	Petwa Construction Co. Ltd	6,489,556,527.51	497,989,392.00	6,987,545,919.51	1,000,000.00	Eco Bank Ltd	3
4.	Kiu Construction Ltd	6,560,510,339.46	550,535,582.40	7,111,045,921.86	1,000,000.00	Equity Bank Kenya Ltd	4
5.	Sakam Enterprises Ltd	6,681,239,007.01	465,386,246.40	7,146,625,253.41	1,000,000.00	Equity Bank Kenya Ltd	5
Engineers Estimate		4,526,075,291.79	435,852,839.98	4,961,928,131.77			

EVALUATION APPROACH

Introduction

Evaluation of the bids was conducted in accordance with the provisions of the Conditions of Tender and the Instructions to Bidders Clauses 5 and 26 to 30 and involved the following stages;

- A) Completeness & Responsiveness
- B) Post-Qualification
- C) Detailed Evaluation

Tender Processing Committee

The Employer vide Memo Ref. No. KeRRA/11 /1 A/Vol. 11 (55) dated 15th November, 2016 appointed Officers to the Tender Evaluation Committee.

Members of the Tender Evaluation Committee signed a declaration form confirming that they did not have any affiliation to any of the Bidders that could influence their input into the evaluation process.

Evaluation Criteria

The Evaluation was conducted in accordance with the criteria set out in the Invitation for Bids and in the Conditions of Tender and the instructions to Bidders as summarized below;

Evaluation Criteria

Item	Condition	Clause Ref.	Requirement	Priority
1	Certificate of Incorporation	Invitation to	Must Provide	High
2	Registration with NCA in category NCA 1	Invitation to Tender	Must provide	High
3	Form of Bid	ITB 28.1	Filled and signed by authorized agent	High
4	Appendix to form of Bid	ITB 13.1 (a), 28	Must be filled & signed	High
5	Bid Security	ITB 17, 28.1	Must provide, Must adhere to provided format (any alteration of the format is reason for disqualification)	High
6	Power of Attorney	ITB 5.1(a)	Must be attached	High
7	VAT Registration	Invitation to	Must be attached	High
8	PIN Registration	Invitation to	Must be attached	High
9	Valid Tax Compliance Certificate	Invitation to	Must be attached	High
10	Bills of Quantities	ITB 13.1 (c)	Must be filled and pages	High
11	Equipment Holding	Invitation to	Must be attached	High
12	Professional & Technical personnel	Invitation to	Must be attached	Medium
13	Schedules of Supplementary	ITB13.1(d)	Must be filled	Medium
14	Clarity and presentation of Bid Documents	ITS 20.3	All pages signed and any alterations initialed	High
15	Financial Documents	Invitation to	Must be attached	High

EXAMINATION OF TENDERS FOR RESPONSIVENESS

Preliminary Examination for Responsiveness

For the purpose of evaluation, a responsive Bid was considered as one which meets all completeness criteria described above and which is, at the minimum, consistent with the requirements of the bidding documents and which does not limit the rights of the Employer or the obligations of the Bidder or affect unfairly the competitive position of other responsive Bidders.

The information received as a result of examination of the Bids, confirmation and clarifications received from the Bidders and other clarifications received on the authenticity of Bid Securities from the issuing Banks or Insurance Firms was evaluated in order to determine the responsiveness of the Bidders in accordance with the Responsiveness criteria outlined in this Chapter. The final evaluation results on responsiveness are summarized below.

Summary of findings for Completeness and Responsiveness of the Bid

COMPLETENESS CRITERIA	Kiu Construction Ltd	China Far East Construction Co. Ltd	Sakam Enterprises Ltd	Roben Aberdare (K) Ltd	Petwa Construction Co. Ltd
Tender Opening No.	1	2	3	4	5
Results on Completeness	NR	NR	NR	R	NR

Key/Legend: Y-Yes (requirement met) N*-No (requirement not met)

R - Responsive

NR - Non responsive

Bidder 1 - The bidder is registered with NCA 2 as opposed to NCA 1

- The bidder's Tax Compliance Certificate has expired.

Bidder 2 - The bidder altered the Bills of Quantities by omitting Bill item 13 (Graded Crushed Stone) in the summary of Bills of Quantities

Bidder 3 - The bidder's Bills of Quantities were incomplete. The Bidder omitted the Bills of Quantities for Murang'a - Kiriaini

Bidder 5 - The bidder did not provide audited accounts.

- The bidder did not fill the schedule of supplementary information.

Substantial Deviations

Two bidders had substantial deviations in their tender documents as listed below:

Substantial Deviations

Tenderer No.	Tenderer's Name	Nature of Deviation
1.	Kiu Construction Ltd	<ul style="list-style-type: none"> The bidder is registered with NCA 2 as opposed to NCA 1 The bidder's Tax Compliance Certificate has expired.
2.	China Far East Construction Co. Ltd	<ul style="list-style-type: none"> The bidder altered the Bills of Quantities by omitting Bill item 13 (Graded Crushed Stone) in the summary of Bills of Quantities

3.	Sakam Enterprises Ltd	<ul style="list-style-type: none"> The bidder's Bills of Quantities were incomplete. The Bidder did omitted the BoQ for MurangaKiriaini
5.	Petwa Construction Co. Ltd	<ul style="list-style-type: none"> The bidder altered the Bills of Quantities by omitting Bill item 13 (Graded Crushed Stone) in the summary of Bills of Quantities

The remaining One (1) bidder was subjected to detailed evaluation.

Examination for Responsiveness on Account of the Value of Bid Security

The remaining Bidder provided a Bid Security of Kshs. 1,000,000.00 as required in the Invitation to Tender.

Examination for Completeness

For the purposes of evaluation, a responsive Bid was considered to be one which meets all completeness criteria described above and which was at the minimum, consistent with the requirements of the bidding documents and which did not limit the rights of the Employer or the obligations of the Bidder or affect unfairly the competitive position of other responsive Bidders.

The information received as a result of examination of the Bid, confirmation and clarification received from the Bidders and other clarifications received on the authenticity of Bid Securities from the issuing Banks or Insurance Firms were evaluated in order to determine responsiveness of the Bidders in accordance with the Responsiveness criteria. The final evaluation results on responsiveness are summarized below.

Summary of findings for Completeness & Detailed Evaluation Roben Aberdare (K) Ltd

Criteria No.	COMPLETENESS CRITERIA	
1	History of Non performing Contracts	y
2	Pending Litigation	y

Criteria No.	COMPLETENESS CRITERIA	
3	Capacity to have a minimum cash flow amount of Kshs. 100 Million equivalent Working Capital	y
4	Average Annual Turnover of at least Kshs. 200 Million calculated as total certified payments received for contracts in progress or completed within the last 3yrs	Y
5	Similar Experience as a Contractor/Subcontractor in at least one (1) Contract, that has been successfully and substantially completed and that is similar to the proposed works.	y
6	Qualifications of Site Staff	
	Site Agent - BSc Civil, Rgstd, 7yrs, 5yrs	y
	Deputy Site Agent/Site Engineer - BSc Civil, 5yrs, 3yrs	Y
	Senior Foreman - OD Civil, 7yrs, 5yrs	y
	Site Surveyor - OD Survey, 7yrs, 5 yrs	y
	Foreman - Cert Civil, 7yrs, 5yrs	y
	CONCLUSION	R

Key/Legend: Y-Yes (requirement met) N*-No (requirement not met)

R - Responsive NR - Non responsive

Verification of Bid Securities

Letters were written to the Firms issuing Bid Bonds/Securities seeking verification of the authenticity of the submitted Bid Bonds/Securities.

Results of Detailed Evaluation

From the results of preliminary and detailed examination one (1) Bidder was found to have fulfilled the requirements of detailed evaluation.

EXAMINATION OF SUBMITTED BILL PRICES

Correction of Errors

The bids were checked for any Arithmetic errors and corrected in accordance with the following procedure as stipulated in Clause 29 of the Instructions to Bidders.

In accordance with Clause 29.1, all bids determined to be substantially responsive were checked for any arithmetic errors. The errors were corrected as follows;

- a) Where there was a discrepancy between the amounts in figures and in words, the amount in words as indicated in the Form of Bid governed; and
- b) Where there was a discrepancy between the unit rate and the line item total resulting from multiplying the unit rate by the quantity, the line item total governed and the unit rate was adjusted accordingly in a way that ensured the Bid Sum remains unaltered.

There were no errors detected in the Bidder's Bills of Quantities.

Evaluated Bid Prices & Ranking of Bidders

The evaluated Bid Prices and Ranking of Bidders is as shown below;

Bidder No.	Bidder	Evaluated Tender Sum (Kshs)	Ranking
4	Roben Aberdare (K) Ltd	6,081,865,936.29	1

Preference

Preference was to be applied in accordance with clause 39 of the Public Procurement and Disposal Act 2005 and clause 28 of the accompanying regulations of 2006 as revised by legal notice No. 58 of 8th June 2011.

Preference was not applied in this case.

Sensitivity Analysis

Sensitivity analysis was carried out by varying the quantities of critical bill items that are likely to increase or decrease by 20%. The bill items for which quantities were escalated are as below:

i) The entire Bill No.1, 5, 8, 11, 12, 13, 14, 15 & 16

This intended to investigate the possibility of the Bidder's rates causing an escalation beyond the allowable 20% Variation in the event that quantities of work changed.

Any escalation below 20% of the Tender Sum was considered acceptable and the Bidder's rates were found to be balanced.

The Results of the Sensitivity analysis are presented below:-

Bidder No.	Bidder	Evaluated Tender Sum 1 (Kshs)	Escalated Tender Sum 1 (Kshs)	Escalation (%)
4	Roben Aberdare (K) Ltd	5,594,457,414.69	6,470,569,034.19	16

From above, the rates of the bidder were found to be balanced.

POST QUALIFICATION ANALYSIS

Introduction

The Committee subjected the lowest evaluated Bidder M/s Roben Aberdare (K) Ltd to post-qualification analysis in accordance with ITB Clause 30 and Regulations of Section 5.

Technical Evaluation

Specific Experience (Similar Works Performed)

The Bidder was required to have participated either as a Contractor or a Sub-Contractor in at least one construction Contract that has been successfully and substantially completed and that is similar to the proposed works.

The following details were provided by the bidder with regard to this criteria.

S/No	Project Name	Employer	Value of completed works (Kshs)
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1	Periodic Maintenance of Kenol (Makutano) - Kambiti Road (A2)	Kenya National Highways Authority	550,266,312.00
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As indicated in the above table, the Bidder qualified under this criterion.

Plant and Equipment Holding

The Bidder provided a list of Plant holding sufficient for the works and complied with the requirements of the Schedule of major items of plant to be used on the proposed Contract as contained in the Tender Documents.

Completion period

The Bidder signed the Appendix to the Form of Tender which provides for a Forty Two (42) months completion period.

Financial Evaluation

Annual Volume of Construction Works

The Bidder was required to demonstrate a minimum Average Annual Construction Turnover of Kshs. 100 Million for the last three years.

This was provided as shown in the table below:

Item	Year 2015 (Kshs)	Year 2014 (Kshs)	Year 2013 (Kshs)	Average Annual Turnover
Annual Turnover	1,994,182,216	2,095,462,869	1,283,369,496	1,791,004,860

From the findings presented in the table above, the Bidder qualified under this criterion.

Cash flow

The Bidder was required to demonstrate a capacity to have a minimum cash flow of Kshs. 100 Million equivalent working capital.

The bidder showed proof of minimum cash flow stipulated through audited accounts and had a credit line of Kshs. 200 Million from the Co-operative Bank of Kenya Ltd.

Comparison of Major Rates & Credibility of the Bidder's Rates

The Committee did not find any inconsistencies in the bidder's rates.

Cost per Kilometre

The Lowest Evaluated Bidder's Cost per Kilometre for construction/improvement works per Kilometre was Kshs. 57,086,300.15. This exceeded the Kshs. 40,000,000 per km cap required to be achieved for Low Volume Seal Roads by the Government. This was attributed to the following factors:

a) The Pavement Structure

The proposed pavement structure had the following provisions:

Jambo- Kagochi Road (13km)

1. Provision of facilities to the supervising Engineers.
2. Site clearance and top soil removal.
3. Earthworks.
4. Benching 1 m shoulders both side to achieve 150mm depth for shoulder construction.
5. Construction of 150mm of Cement/lime Improved Gravel Base of minimum CBR of 160% (CIG 160) on shoulders and reconstruction areas as instructed by the Engineer.
6. Laying of 60mm dense bituminous macadam on carriageway or as shall be directed by the Engineer.

7. Application of surface dressing of single seal surface dressing using 10/14mm pre coated chippings on the carriage-way and shoulders as shall be directed by the Engineer.
8. The carriageway shall be 6.0m wide with shoulders (1m wide both sides) constructed with the material and thickness for base as above.
9. Construction of standard pipe culverts, Box culverts, bridges and the improvement of other drainage and soil erosion protection works
10. Relocation of services as necessary
11. Installation of road furniture.
12. Maintenance of passage of traffic through and around the works.
13. Maintenance of works during construction. The defects liability period shall be 12 months.

**Kagochi- Mountain Lodge (Junction) Road (10km) Kwa Wambui
Shopping Centre - State Lodge and Chaka - State Lodge-
Giगतिका (39km)**

1. Provision of facilities to the supervising Engineers.
2. Site clearance and top soil removal.
3. Earthworks.
4. Benching 1 m shoulders both side to achieve 150mm depth for shoulder construction.
5. Construction of 150mm of Cement/lime Improved Gravel Base of minimum CBR of 160% (CIG160) on shoulders and reconstruction areas as instructed by the Engineer.
6. Laying of 50mm asphalt concrete on carriageway as shall be directed by the Engineer.

7. Application of surface dressing of single seal using 10/14mm, pre coated chippings on shoulders or as directed by the Engineer.
8. The carriageway shall be 6.0m wide with shoulders (1 m wide both sides) constructed with the material and thickness for base as above.
9. Construction of standard pipe culverts, Box culverts, bridges and the improvement of other drainage and soil erosion protection work.
10. Relocation of services as necessary.
11. Installation of road furniture.
12. Maintenance of passage of traffic through and around the works.
13. Maintenance of works during construction. The defects liability period shall be 12 months.

Mountain Lodge Junction – Kwa Wambui (3km)

1. Provision of facilities to the supervising Engineers.
2. Site clearance and top soil removal.
3. Earthworks.
4. Benching of the road to achieve 7m carriageway and shoulder or as shall be directed by the Engineer.
5. Construction of 150mm of Cement/lime Improved Gravel sub base and base of minimum CBR of 60% and 160% respectively on benched sections or as instructed by the Engineer.
6. Laying of 50mm asphalt concrete on carriageway or as shall be directed by the Engineer.
7. Application of surface dressing of single seal using 10/14mm, pre-coated chippings on shoulders or as directed by the Engineer, along the following sections.

8. Construction of standard pipe culverts, Box culverts, bridges and the improvement of other drainage and soil erosion protection works
9. Relocation of services as necessary
10. Installation of road furniture.
11. Maintenance of passage of traffic through and around the works.
12. Maintenance of works during construction. The defects liability period shall be 12 months.

Muranga - Kiriaini Section

The major works to be executed under the Contract comprise mainly of but are not limited to the following:

1. Site clearance and top soil removal.
2. Earthworks.
3. Construction 150mm of cement improved graded crushed stones (GCS) or gravel of minimum CBR of 60% on reconstruction areas and on shoulders or as instructed by the Engineer.
4. Construction 150mm of cement improved graded crushed stones (GCS) or gravel of minimum CBR of 160% on reconstruction areas and on shoulders or as instructed by the Engineer.
5. Laying of 80mm dense bituminous macadam on carriageway as shall be directed by the Engineer.
6. Laying of 35mm asphalt concrete type on shoulders or as shall be directed by the Engineer.
7. Application of surface dressing of single seal using 10/14mm pre coated chippings on the carriage-way.
8. The carriageway shall be 6.0m wide with shoulders (1m wide both sides) constructed with the material and thickness for base as above.

9. Construction of standard pipe culverts, Box culverts, bridges and the improvement of other drainage and soil erosion protection works
10. Relocation of services as necessary
11. Installation of road furniture.
12. Maintenance of passage of traffic through and around the works.

Bill No 11 - Shoulders

The provision of 43,000 m³ of gravel in Bill No. 11 at a cost of Kshs. 57,500,000.00 is a major cost driver. The Bill item is necessary since there is a section that requires rehabilitation.

Provision of Graded Crushed Stone For Sub base and Base

The project's scope of works involves the provision of 150mm Graded Crushed Stone in Sub base and Base with a total volume of 20,000 m³ amounting to Kshs. 109,000,000.00 is a major cost driver. This helps in strengthening the pavement further.

Bill No. 16 - Bituminous Mixes

The provision 50 mm Asphalt Concrete, 80 mm Dense Bituminous Macadam are major cost drivers that have resulted in. a total cost of Kshs. 1,186,820,000.00 this is opposed to the normal low volume seal roads surfacing of Double surface dressing.

Recommendations

The Tender Processing Committee therefore recommended that the Contract for Upgrading to Bitumen Standard and Maintenance of Jambo (Jn A2) - Kagochi - Hombe - Kwa Wambui - State Lodge - Chaka, State Lodge - Giगतिका (Jn A2) And Muranga - Kiriaini Roads, RWC 373, be awarded to M/s. Roben Aberdare (K) Ltd at their Tender Sum of Kshs. 6,081,865,936.29

(Six Billion, Eighty One Million, Eight Hundred Sixty Five Thousand, Nine Hundred Thirty Six, Cents Twenty Nine) for being the Lowest Evaluated Bidder.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Roben Aberdare (K) Limited on 3rd February, 2017 in the matter of the tender No. RWC 373 for the proposed Improvement to Bitumen Standards and Maintenance of Jambo (Junct A2) Kagochi - Hombe - Kwa Wambui State Lodge - Chaka, State Lodge - Giगतिका (Junct A2) and Muranga - Kiriaini Road.

The Applicant sought for the following orders:

1. *The Respondent's decision not to evaluate and/or award the TENDER NO. RWC 373 be set aside and nullified.*
2. *The Board be pleased to review all records of the procurement processes relating to TENDER NO. RWC 373 and be pleased to order the Respondent to complete the tendering process, evaluate all bids and award the tender to the lowest evaluated bidder as provided for in the tender document.*
3. *In the alternative to (b) above, the Respondent be ordered to award TENDER NO. RWC 373 to the Applicant in case the Applicant was/is determined and/or found to be the lowest evaluated bidder.*
4. *The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and*
5. *Such other or further relief or reliefs as this board shall deem just and expedient.*

PARTIES ARGUMENTS

During the hearing of the Request for Review the Applicant was represented by Mr. Nyaanga Advocate, while the procuring entity was represented by Mr. Rapando, Advocate.

Both the submissions made by Counsel for the Applicant and Counsel for the procuring entity were brief and to the point.

It was the Applicant's case that the subject tender was advertised on 4th July, 2016 and opened on 26th October, 2016 but that the tender had not been evaluated by the procuring entity contrary to the provisions of Section 80(6) of the Public Procurement and Asset Disposal Act 2015 which made it mandatory for the evaluation to be carried out within a maximum period of thirty (30) days from the tender opening.

Counsel for the Applicant stated that the Applicant had not received any communication regarding the evaluation or the outcome of the tender and that it was not privy to any evaluation report. He argued that the procurement process ought to be concluded and urged the Board to allow the application.

On the other hand, Counsel for the procuring entity relied on the response filed by the procuring entity in support of its case. Counsel for the procuring entity argued that although the Applicant had approached the Board under the provisions of Section 167 of the Public Procurement and Asset Disposal Act 2015, the Applicant had failed to put forth any material before the Board to demonstrate any loss it had suffered or risked suffering as required by the said provision.

He further argued that the Request for Review was premature and was made in bad faith and was further calculated at ensuring that an award be made in favour of the Applicant as the procurement process was yet to be completed by the procuring entity. He stated that the procuring entity had in it's response issued an explanation for the delay in conclusion of the process but that the process was fairly at an advanced stage. He urged the Board not to interfere with the process and allow the procuring entity to conclude the evaluation on merit.

Despite confirmation by Counsel for the procuring entity and the procuring entity's Procurement Officer that an evaluation committee had been appointed on 15th November, 2016 vide the Memo reference No. KERRA/011/1A/VOL. 2/65 and that the committee had made a recommendation to award the tender to the Applicant at a tender sum of Kshs. 6,081,865,936.29, Counsel for the procuring entity submitted that the tender process was yet to be concluded as the accounting officer was yet to issue a professional opinion on the evaluation report.

While conceding to the fact that the professional opinion would not change the Evaluation Committee's recommendation, he reiterated that the Board ought to allow the procuring entity to conclude the process within such timelines as would be set by the Board and that the Applicant would have recourse to approach the Board after the issuance of an award if prejudiced by it.

He therefore urged the Board to dismiss the Request for Review.

In response to the submissions made by Counsel for the procuring entity that the Applicant had not demonstrated any loss or risk of suffering loss, Counsel for the Applicant stated that Section 167 of the Public Procurement

and Asset Disposal Act 2015 did not require a party making an application under that Section to prove any loss or risk of loss and that a claim of loss or risk of loss was sufficient to warrant a hearing before the Board.

As regards the evaluation of the tender, Counsel for the Applicant submitted that in light of the revelations made by the procuring entity during the hearing that evaluation had already been done, then the issue was spent and that since the tender validity period of 210 days had not run out the tender was still valid. He urged the Board to issue appropriate orders directing conclusion of the tender process within a limited time frame as the only outstanding issues were the professional opinion and award.

THE BOARD'S DECISION

The Applicant filed this Request for Review on 3rd February, 2017 seeking to challenge the procuring entity's failure to award tender No. RWC 373 for the proposed improvement to Bitumen Standards and Maintenance of Jambo (Junction A2) Kigochi - Hombe - Kwa Wambui State Lodge - Chaka, State Lodge Giगतिका (Junction A2) and Muranga - Kiriaini Road to the Applicant or any of the other tenderer who had bid for the said road.

On its part the procuring entity applied for the dismissal of the Request for Review and filed a response running into 16 paragraphs which was undated but signed by one Eng. J. O. Ogango and filed with the Board on 9th February, 2017.

The effect of the procuring entity's response was that the procuring entity had not concluded the evaluation process and that it was in the course of carrying out the exercise because in its view, the procuring entity had received numerous applications for implementing 10,000 low volume seal

programme roads pursuant to the Governments intention to improve 10,000 km of roads to Bitumen Standards.

When this Request for Review however came up for hearing and on the basis of the clear evidence contained in the evaluation report placed before the Board by the procuring entity it transpired that contrary to what was stated in the procuring entity's undated response, the procuring entity in a unanimous evaluation report produced in November, 2016 signed by all the members of the tender evaluation committee, the procuring entity conceded that it had carried out a preliminary, technical and a financial evaluation for the tender and recommended the award of the same to the Applicant at the Applicant's proposed price of Kshs. 6,081,865,936.29. Mr. Rapando advocate who is a senior and a respected member of the bar infact confirmed that this position was true and stated that he was not made aware of this fact before the matter came up for hearing. He confirmed that during the evaluation process, there was no divergence of opinion by any member of the tender evaluation committee and that the decision was infact unanimous.

Under the provisions of Section 84(2) of the Public Procurement and Asset Disposal Act, where there is no dissenting opinion by any committee member, it cannot fall within the competence of the professional expert to substitute his/her own opinion with that of the tender of the evaluation committee and any attempt to do so would be illegal on his or her part.

Section 84 (2) of the Act provides as follows:-

Section 84(2): "The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations".

There is therefore no room under Section 84(2) of the Act for a procurement official to substitute her/his opinion with that of the tender evaluation committee unless there is lack of concurrence.

During the hearing of this Request for Review no professional opinion was placed before the Board to show that the professional expert disregarded or did not follow the recommendation of the tender evaluation committee. Things would have however been different if he/she had done so and the Board would not have hesitated in reversing such a purported opinion.

The Board is however unable to understand how a reputable institution such as the procuring entity which is charged with the extremely important public responsibility to assist in developing the Country's infrastructure to fail to award a contract even after making a recommendation of award. This is a responsibility which the Board will not allow to be abused now or in future. It is this kind of conduct that erodes public confidence in procuring entities and unnecessarily delays projects for no justifiable reason. Such lack of diligence results in the public suffering for reasons that are beyond their control.

The Board therefore takes a dim view of such conduct particularly when accompanied by a false statement that an evaluation has not been concluded. Misleading the Board or a court in pleadings filed before it does not aid a party's case and such attempt must be avoided.

For all the above reasons, this Request for Review therefore succeeds and is allowed in the following terms.

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, the Board makes the following orders on this Request for Review.

- a) The procuring entity shall forthwith and within a period of not less than Seven (7) days complete the procurement process herein and shall in doing so award the subject tender to the Applicant M/s Roben Aberdare (K) Ltd in compliance with the tender evaluation committee's recommendation and upon compliance with Section 84(2) of the Act.
- b) For avoidance of doubt the professional expert shall give a professional opinion in concurrence with the recommendations of the tender evaluation committee in the absence of any dissenting opinion and provided for under Section 84(2) of the Public Procurement and Asset Disposal Act 2015.
- c) The procuring officer/procuring entity shall file the letter of award with the Board within Seven (7) days from today's date.
- d) The procuring entity shall pay costs of Kshs. 250,000 together with all the filling fees paid by the Applicant in filling this Request for Review.

Dated at Nairobi on this 20th day of February, 2017.


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CHAIRMAN
PPARB


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SECRETARY
PPARB