

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 68/2018 OF 21ST MAY, 2018

BETWEEN

CHINA INTERNATIONAL WATER &
ELECTRIC CORP APPLICANT

AND

NATIONAL IRRIGATION BOARD PROCURING ENTITY

Review against the decision of the National Irrigation Board in the matter of Tender No NIB/T/001/2016-2017 for the Funding, Design, Build and Transfer of the Lowaat Dam Project, Turkana County, Republic of Kenya.

BOARD MEMBERS PRESENT

- | | |
|----------------------------|------------|
| 1. Mr. Paul Gicheru | - Chairman |
| 2. Mrs. Rosemary K. Gituma | - Member |
| 3. Mr. Hussein Were | - Member |
| 4. Mr. Nelson Orgut | - Member |
| 5. Paul Ngotho | - Member |

IN ATTENDANCE

- | | |
|-------------------------|---------------|
| 1. Mr. Philip Okumu | - Secretariat |
| 2. Ms. Maryanne Karanja | - Secretariat |

PRESENT BY INVITATION

APPLICANT-China International Water & Electric Corp

- | | |
|-------------------|--------------------------------------|
| 1. Austin Ayisi | Advocate, Matheka & Oketch Advocates |
| 2. Wang Ruyi | Representative |
| 3. Wachira George | Representative |

PROCURING ENTITY- NATIONAL IRRIGATION BOARD

- | | |
|------------------------|---------------------------------------|
| 1. Lilian Kimani | Advocate, L.G. Kimani & Co. Advocates |
| 2. Samuel Karanja | Pupil, L.G. Kimani & Co. Advocates |
| 3. Eng. Charles Muasya | Engineer |
| 4. Dennis Arora | Company Secretary |

INTERESTED PARTIES

1. Consortium of Sinotech Company Ltd

- | | |
|-----------------------|---|
| 1. Prof. Albert Mumma | Advocate, Prof. A. Mumma & Co. Advocates |
| 2. Justus Omollo | Advocate, Prof. A. Mumma & Co. Advocates |
| 3. Jocylene Omondi | Pupil, Prof. A. Mumma & Company Advocates |
| 4. Chen Yitao | Representative |

INTRODUCTION

The request for the prequalification of firms for the works and services was approved by National Irrigation Board (NIB)'s Accounting Officer, on 19th December 2016 following a request from User Department and earlier authority granted by the Permanent Secretary, State Department of Irrigation, Ministry of Water and Irrigation to procure the works and services and the publication of the Expression of Interest (EOI) on 15th July 2016.

The prequalification of firms for the works was undertaken competitively through open international tender. The EOI advertisement was published in GoK's e-procurement portal, <http://www.supplier.treasury.go.ke>, NIB's website <http://www.nib.or.ke/tenders> and two daily newspapers of nationwide circulation, "Daily Nation" and "The Standard" on 20th July 2016.

The deadline for submission of the applications for expression of interest for the works was on 19th September 2016 at 12.00 noon local time.

Ten (10) applicants submitted their applications in time. The appointed Opening and Evaluation Committee received and opened the applications.

Table 1: List of applicants

Applicant No.	Applicants	Opened application
1.	Sinotec Consortium Sinotec Co. Ltd Zhejiang Provincial No.1 Water Conservancy and Electric Power Construction Group Holdings Co Ltd Toddy Civil Engineering Co.Ltd	1 Original document and 3 Copies
2.	Cooperative Muratori & Cementisti -CMC Di Ravenna	1 Original document and 3 Copies
3.	China International Water Electric Corp	1 Original document and 3 Copies
4.	SBI International Holdings AG, Tahaal Group BV and Meridiam Group BV SBI International Holdings AG (Kenya)	1 Original document and 3 Copies
5.	Hebei Conservancy Engineering Bureau	1 Original document

Applicant No.	Applicants	Opened application
		and 3 Copies
6.	Kunming Engineering Corporation Limited	1 Original document and 3 Copies
7.	Consortium of Africa Rising Capital, Steffanutu Stocks Limited, Mecanidi Donwoods and Natconsult and CAS Holdings	1 Original document and 3 Copies
8.	SinoHydro Corporation Limited	1 Original document and 3 Copies
9.	Rushydro International AG	1 Original document and 3 Copies
10.	Andrade Gutierrez Engenharia SA(AGE) Andrade Gutierrez-Europa Africa, Asia SA(AG) SMEC INTERNATIONAL PTY LIMITED (Consultant).	1 Original document and 3 Copies

The appointed evaluation committee undertook the evaluation of the applications based on the advertised shortlisting criteria, prepared their EoI evaluation report and submitted a report to the Head of Procurement function dated 16th October 2016.

Based on the documentation submitted by the applicants and the short listing criteria, the evaluation committee recommended the shortlisting of six

(6) tenderers who met the stated shortlisting criteria. Four other applicants were not shortlisted since they did not meet the stated shortlisting criteria.

The recommendation for prequalification of the six applicants were reviewed by the Head of Procurement Function and submitted to the General Manager on 25th November 2017 for his consideration, review and approval.

The NIB's General Manager approved the prequalification/EoI Evaluation report and prequalification/shortlisting of the six applicants on 19th December 2016.

The notification of prequalification outcome was sent to all the ten (10) applicants on 19th December 2016 through registered mail and e-mail addresses.

The User Department, Engineering Services, initiated the procurement for the works and services through a procurement request in an internal memorandum addressed to the National Irrigation Board (NIB)'s General Manager dated 19th December 2016 pursuant to Sec 45 and 73 of the Act and Regulation 9 and 22 of 2006.

The request for the procurement of the works and services through Public Procurement and Asset Disposal Act, 2015 was approved by National Irrigation Board (NIB)'s General Manager on 19th December 2016 following the receipt of the request from the User Department.

The method of procurement approved by National Irrigation Board (NIB)'s General Manager was Request for Proposals through restricted tendering.

Following the National Irrigation Board (NIB)'s General Manager's approval of the short list and issuance of the RFP Document on 19th December 2016,

the letter of invitation for submission of proposals was sent to the six (6) shortlisted and approved tenderers on 21st December 2016 by the Procurement Function pursuant to Sec 74 of the Act and Regulation 8 (3) (b, f) of 2006

A pre-proposal briefing and mandatory site visit was conducted on 6th January 2017.

Following requests from the participating tenderers, addendum No. 01 was issued to reduce tender security from 2% to 0.5% and extend submission deadline from 30th January 2017 to 17th February 2017. Clarifications were also made to the tenderers. Addendum No. 02 that extended the submission deadline from 17th February 2017 to 3rd March 2017 and set the second site visit of 10th February 2017 was also issued on 2nd February, 2017.

The deadline for submission of the technical and financial proposals for the works and services was on 3rd March 2017 at 12.00 noon local time. Three tenderers submitted their proposals in time. These were:

Table 2: Summary of the opened proposals

Tender No.	Tenderer	Opened proposals
1.	Consortium of Sinotec Co. Ltd, Zhejiang Provincial No.1 Water Conservancy and Electric Power Construction Group Holdings Co Ltd and Toddy Civil Engineering Co.Ltd	1 original and 3 copies of technical proposals and 1 sealed financial proposal
2.	Cooperative Muratori & Cementisti -CMC Di Ravenna	1 original and 3 copies of technical proposals and 1 sealed financial proposal
3.	China International Water & Electric Corp (CWE)	1 original and 3 copies of technical proposals and 1

Tender No.	Tenderer	Opened proposals
		sealed financial proposal

The appointed opening and evaluation committee received and opened the technical proposals. The sealed financial proposals were taken back for safe custody in the NIB's tender box.

The appointed evaluation committee undertook the evaluation of the technical proposals based on the stated evaluation criteria, prepared their technical evaluation report and submitted a signed and initialled original report dated 12th April 2017 to the Head of Procurement Function on 13th April 2017 for review and recommendation (s) pursuant to requirements of Sec 80 (4) and 84 of the Act.

Based on the documentation submitted by the tenderers and the technical evaluation criteria, the appointed evaluation committee reported that all the three tenderers met the minimum technical score of 70% and subsequently recommended approval of the technical evaluation report and public opening of financial proposals from all the three tenderers.

The recommendation for approval of the technical evaluation report and subsequent public opening of financial proposals from the three tenderers was reviewed by the Head of Procurement Function and submitted to the General Manager on 20th April 2017 for his review and approval. The NIB's General Manager as the Accounting Officer approved the procurement proceedings, evaluation committee's technical evaluation report and the recommendation for subsequent public opening of financial proposal from

the three technically qualified tenderers that met the set technical score on 21st April 2017.

The Procurement Function invited all the three participating tenderers on 21st April 2017 in writing to the public opening of the financial proposals meeting. The letter was sent to all the tenderers through their e-mail addresses on 21st April 2017.

The appointed evaluation committee conducted the public opening of financial proposals on 26th April 2017 at 1200 hours local time in the Nile Basin Board, NIB Head Office, Nairobi, Kenya as was communicated in the letter of invitation. The public opening of financial proposals was attended by representatives from all the three participating tenderers.

During the public opening of the financial proposals, the technical scores attained by the three tenderers were read out loudly, followed by opening of the sealed financial proposals. The total prices from the signed financial proposal submission form were loudly read out and recorded in the summary of the financial proposals. The total prices read out were inclusive of all taxes. All the three tenderers' representatives present countersigned the record of quoted and read out tender prices in the summary of the tenders. The summary of the technical scores and financial proposals/tender prices as publicly read out was as presented in Table 3.

Table 3: Summary of public opening of financial proposals/tender prices

S.No	Tenderer	Technical score awarded (Max Tech score= 100)*	Technically qualified (Pass or Fail)	Financial Proposal (Kes.)
1.	Cooperative Muratori & Cementisti -CMC Di Ravenna	92.0	Pass	USD.349,822,292.52 (Inclusive of taxes) Bid bond: USD 1,750,000.00 From : Monte Dei Paschi Di Siena valid up to 29 th September 2017
2.	Consortium of Sinotec Co. Ltd, Zhejiang Provincial No.1 Water Conservancy and Electric Power Construction Group Holdings Co Ltd and Toddy Civil Engineering Co.Ltd	89.5	Pass	Amount KES. 29,855,869,838.12 (Inclusive of taxes) Bid Bond Kes.150,000,000.00 UBA Kenya Bank Valid up to 30 th September 2017
3.	China International Water Electric Corp (CWE)	72	Pass	Amount USD: 179,943,027.00 (inclusive of taxes) Bid Bond: USD 1,750,000.00 from Stanbic Bank Kenya Ltd valid up to 31 st October 2017

*Minimum technical score to pass= 70

The appointed tender evaluation committee prepared their combined technical and financial evaluation report and submitted a signed and initialled original report dated 27th June 2017 to the Head of Procurement Function on 3rd October 2017.

Based on the documentation submitted by the tenderers and the financial evaluation criteria, the appointed evaluation committee evaluated the financial proposals and subsequently recommended the invitation of Consortium of Sinotec Co. Ltd, Zhejiang Provincial No.1 Water Conservancy and Electric Power Construction Group Holdings Co Ltd and Toddy Civil Engineering Co. Ltd for pre-contract negotiations since the tenderer attained the highest combined technical and financial score.

The recommendation for approval of the combined technical and financial evaluation report and invitation of Consortium of Sinotec Co. Ltd, Zhejiang Provincial No.1 Water Conservancy and Electric Power Construction Group Holdings Co Ltd and Toddy Civil Engineering Co. Ltd for pre-contract negotiations was reviewed by the Head of Procurement Function and submitted to the General Manager on 11th October 2017 for his review and approval.

The General Manager as the Accounting Officer issued the notification of tender outcome on 11th October 2017 to all the three participating tenderers through letters dated 11th October 2017.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s China International Water & Electric Corp, on 21st May, 2018 in the matter of the Tender No.

NIB/T/001/2016-2017 for the funding, designing, building and transfer of the Lowaat Dam Project, Turkana County, Republic of Kenya.

The Applicant sought for the following orders:-

- a) A declaration that the Procuring Entity breached the provisions of the Public Procurement and Assets Disposal Act, 2015 and Article 47 and 227 of the Constitution.
- b) The procuring Entity be directed to notify the Applicant of the current status of the procurement process.
- c) The applicant be declared the most responsive bidder and the lowest bidder and the tender no. NIB/T/001/2016-2017 for the funding, designing, building and transfer of the Lowaat Dam Project, Turkana County, Republic of Kenya be awarded to the Applicant.
- d) In alternative to (c) above, the Procuring Entity be directed to carry out a fresh evaluation of the Tenders submitted in accordance with the Public Procurement and Assets Disposal Act.
- e) Costs of the request for review be awarded to the Applicant.
- f) Any other orders or directions the Review Board deems fit to grant under the circumstances.

During the hearing of the Request for Review, the Applicant was represented by Mr. Austin Ayisi advocate while M/s Lilian Kimani Advocate appeared for the Procuring Entity. Prof. Albert Mumma on the other hand appeared on behalf of the successful bidder.

THE BOARD'S DECISION

The Board has considered the submissions made by the advocates for all the parties who appeared before it and has also perused all the documents filed before it.

It is evident from the submissions and the documents filed that this Request for Review raises only two issues namely:-

- a) Whether the Applicant's Request for Review was filed out of time thereby depriving the Board of the jurisdiction to hear and determine this Request for Review.
- b) Whether the Procuring Entity breached the provisions of Section 80 and other provisions of the law while evaluating the tender in issue.

ISSUE NO. 1

Whether the Applicant's Request for Review was filed out of time thereby depriving the Board of the jurisdiction to hear and determine this Request for Review.

On the first issue framed for determination, it was both the Procuring Entity and the successful bidder's cases that the Request for Review had been filed out of time therefore depriving the Board of the jurisdiction to hear and determine the same.

The basis for the objection by the two parties was however anchored on different premises.

The objection by the Procuring Entity and which appears at pages 3 and 4 of its written submissions was that the Applicant had been served with the letter of notification dated 11th October, 2017 on a date which the Procuring Entity did not specify and that the Request for Review filed by the Applicant had therefore been filed outside the statutory period of fourteen (14) days allowed by the provisions of Section 167(1) of the Act and that the same was therefore incompetent.

On the issue of how the service of the letter of notification on the Applicant was effected, Counsel for the Procuring Entity submitted that the Applicant had been served with the letter of notification by ordinary post while the letters of notification served on the other bidders including the successful bidder were collected physically by them. She however conceded in her submissions that the Procuring Entity did not produce any evidence of service before the Board.

Counsel for the successful bidder on the other hand associated himself with the submissions made by Counsel for the Procuring Entity and added that it was evident from the prayers sought by the Applicant that one of the reliefs it was seeking was that the Board directs that it be served with a letter of notification of the outcome of its tender.

He further stated that although there was no evidence of service of the letter of notification on record, the Applicant being a bidder in a tender process ought to have known that a tender process is time bound and ought to have either made inquiries from the Procuring Entity why the process had not been concluded immediately it became apparent that the process had delayed or alternatively immediately file a Request for Review with the Board so soon thereafter.

Counsel for the successful bidder therefore submitted that the Request for Review filed by the Applicant had been filed in breach of the provisions of Section 167(1) of the Act.

Counsel for the Applicant however opposed the above submissions and stated that the Applicant had not been served with a letter of notification

notifying it of the outcome of its tender contrary to the provisions of Section 87(3) of the Act.

Counsel for the Applicant further submitted that the Procuring Entity had not submitted to the Board any evidence of service of the letter of notification on the Applicant and further argued that under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act, an Applicant can file a Request for Review either within a period of fourteen (14) days from the date of the breach complained against or from the date of notification of the outcome of a tender process.

He therefore argued that the Applicant was within its right to file the Request for Review at the time that it did.

The Board has considered the rival submissions on this issue and finds that under the provisions of Section 167(1) of the Act, a bidder can either file a Request for Review either within a period of 14 days from the date of becoming aware of a breach in the procurement process or within a period of 14 days from the date of notification of the outcome of its tender.

The said Section 167(1) of the Act provides as follows:-

Section 167 (1) “Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or

disposal process as in such manner as may be prescribed.”

The Board further finds that under the provisions of Section 87(3) of the Act, a Procuring Entity is under a legal obligation to serve all bidders with letters of notification simultaneously informing them of the outcome of their tenders and the said letters of notification must contain all the particulars required by the said Section of the Act.

The said Section 87(3) of the Act provides as follows:-

Section 87(3): “When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.”

The issue of if, whether and when a bidder was served with a letter of notification of the outcome of its tender for the purposes of filing a Request for Review cannot therefore be left to speculation as was submitted by Professor Mumma learned counsel for the successful bidder.

It is further clear from the evidence placed before the Board that the Procuring Entity did not provide the Board with any evidence of service of the letter of notification dated 11th October, 2017 on the Applicant. Counsel for the Procuring Entity in fact conceded this fact during the hearing of the Request for Review.

As the Board has always stated, where the issue of service of a letter of notification is disputed, a Procuring Entity must produce evidence to show

that the said letter was served on the Applicant something which the Procuring Entity did not do in this case.

For all the above reasons therefore, the objection by the Procuring Entity and the successful bidder on the Board's jurisdiction fails and the same is accordingly disallowed.

The Board consequently holds that it has the jurisdiction to hear and determine the Request for Review now before it on merits.

ISSUE NO. II

Whether the Procuring Entity breached the provisions of Section 80 and other provisions of the law while evaluating the tender in issue.

The second issue relates to the evaluation of the tenders submitted by the Applicant and the successful bidders to the Procuring Entity.

The Applicant's case on this issue was that it submitted the lowest tender in terms of price to the Procuring Entity and that it ought to have therefore been awarded the tender.

Counsel for the Applicant further argued that the Applicant scored a score of 72% during technical evaluation and was consequently invited for the opening of the financial bids.

The Applicant further submitted that it attended the financial opening of the financial proposals where according to the Applicant, the following prices were read out for the three bidders who passed the technical evaluation stage.

- a) Consortium of Sinotech Company Limited & others - Kshs. 29,885,869,839.12

b) Co-operativa Muratori & Cementisti USD 349,822,292.52

c) China International Water & Electric Corp- USD 290,699,827.00

It was the Applicant's further case that based on the above financial proposals, it was the bidder with the lowest price and ought to have therefore been awarded the tender.

It was the Applicant's further case that by failing to award it the tender, the Procuring Entity breached the provisions of Section 80 of the Public Procurement and Asset Disposal Act by evaluating the tenders in question using a criteria other than the criteria set out in the tender document.

He therefore urged the Board to allow the Request for Review as prayed.

In response to the submissions made by Counsel for the Applicant, Counsel for the Procuring Entity opposed the Applicant's Request for Review and stated that the Procuring Entity fully complied with the law while evaluating the tenders in question.

She further submitted that the method of procurement used in this tender was that of a Request for Proposals and the successful bidder was therefore properly awarded the tender in issue under the provisions of Section 86(b) and 127 of the Public Procurement and Asset Disposal Act.

On the issue of the prices quoted as set out by the Applicant in its Request for Review, Counsel for the Procuring Entity argued that the price quoted by the Applicant was infact much higher than that quoted by the successful bidder and attributed the increase in the Applicant's price from that in the form of tender to the correction of arithmetical errors.

She however conceded at page 6 of her written submissions and in her oral submissions that the price quoted by the Applicant in its form of tender was the sum of USD 179,943,027.00 and stated that upon the re-calculation the Applicant's price went up to the sum of USD 290,699,827 which in her view was higher than that submitted by the successful bidder.

She further argued based on the High Court decision in the case of **Republic -vs- Public Procurement and Administrative Board and Another, Ex parte University of Eldoret (2017) eKLR** that a bidder cannot in any event be awarded a tender merely because it submitted the lowest priced tender.

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

Professor Mumma on behalf of the successful bidder fully associated himself with the submissions made by Counsel for the Procuring Entity and stated that issues to do with evaluation of tenders are largely within the domain of a Procuring Entity but not a bidder such as his client. His submissions on this issue were not therefore lengthy.

In response to the submissions made by Counsel for the Procuring Entity and Counsel for the successful bidder, Counsel for the Applicant reiterated his earlier submissions and added that the Procuring Entity had admitted in its written submissions that it had evaluated the Applicant's and the successful bidders tenders using sums which were different from those contained in the respective parties forms of tender.

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

The Board has considered the submissions made by all the parties regarding this issue and finds that both the Applicant and the Procuring Entity were determined to have been technically qualified and were invited for the financial opening of their respective financial bids.

The Board wishes to observe that although substantial submissions were made by all sides regarding the manner in which the financial evaluation of this tender was carried out the Board finds that the figures used in arriving at the final recommendation of award were figures other than those set out in the forms of tender contained in the tender documents submitted by the two parties.

The Board has perused the forms of tender submitted by the Applicant and the successful bidder to the Procuring Entity and finds that the price quoted by the Applicant in its form of tender was USD 179,943,027 and that by the successful bidder was Kshs. 29,855,869,838.12.

However, instead of evaluating the two tenders on the basis of the above prices, the Procuring Entity in what it termed as a correction of errors increased the Applicant's price to the sum of USD 290,699,827.00.

The Board is however of the respectful view that by purporting to change the price or prices set out in the form of tender and instead use different prices at the financial evaluation stage, the Procuring Entity breached the provisions of Section 82 of the Act which prohibits a Procuring Entity from changing the prices set out in the form of tender.

The said Section 82 of the Public Procurement and Asset Disposal Act provides 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".

In addition to the above provisions of the Act, the Board has severally held that the form of tender reigns supreme in matters relating to price.

The Board held so in the cases of Surestep Systems and solutions Limited -vs- Industrial & Commercial Development Corporation (PPRB Appl. NO. 42 of 2017) and Bevaj Furniture -vs- Kenya School of Monetary studies (PPRB Review NO. 24 of 2013) and in the more recent case of the Joint Venture of Baran International & Integrated Solutions Africa International Entrepreneurship -vs- National Irrigation Board (PPARB 101 of 2017) in which the Procuring Entity herein was also the Respondent. The Board stated as follows at page 36 of its said decision:-

"The Board takes the view that this Request for Review will therefore stand or fall on the determination of the question of the effect of the form of tender in any tender process and the interpretation of the provisions of Section 82 of the Act.

As the Board has severally held, in a matter relating to price, the form of tender takes precedence and supremacy over all other documents and a bidder is bound by the price set out in its form of tender".

In addition to the above findings, the Board has also perused the technical evaluation report and notes that during the technical evaluation process, each evaluator did not assign his or her individual score in respect of each

item set out under the technical evaluation criteria as set out in the tender document.

Where a tender evaluation committee sits to evaluate a tender, each individual member of the committee must give a score and state the reasons and the basis for arriving at the particular technical score in order to avoid arbitrariness and achieve the objectives of fairness, proportionality and all the other objectives set out in Articles 201 and 227 of the Constitution and in Section 3 of the Public Procurement and Asset Disposal Act.

Where a Procuring Entity's tender evaluation committee fails to do so, then it renders the entire process vague and deprives it of the necessary transparency as envisaged by the above provisions of the law and may lead to manipulation of the technical scores.

Finally, the Board notes that in one of its prayers, the Applicant sought for a direct award of the subject tender to be made to it. While the Board appreciates that it can order for the substitution of an award made by a Procuring Entity or make a direct award in appropriate cases to a bidder other than the successful bidder, the Board is however cognizant of the law that before making a direct award where the circumstances of the case so permit, the bidder in whose favour the substitution of an award is made must have been evaluated at the preliminary, technical and the financial evaluation stages. The Board however notes that it has already faulted both the technical and the financial evaluation processes in respect of this tender and it would therefore be premature to make a direct award of the tender to the Applicant at this stage.

The above position is supported by the High Court decision in the case of **Republic -vs- Public Procurement Board & 2 Others, Ex-parte Akamai Creative Limited [2015] eKLR.**

The Board wishes to state that the substitution of an award is a drastic step which it may be forced to take if any Procuring Entity does not put its act together or acts in a manner that is outrightly in contravention of the law.

The fact that the Board can substitute an award or make a direct award in favour of a bidder was recently re-affirmed by the court of Appeal in the case of the **Energy Regulatory Commission -vs- SGS Kenya Ltd & 2 others [Nai CA NO. 341 of 2017]** which was delivered on 11th May, 2018.

In the above decision, the Court of Appeal re-affirmed its earlier decision in the case of **Kenya Pipeline Ltd -vs- Hyosung Ebara Company Ltd (2012) eKLR.**

Based on all the above reasons, this ground of review therefore succeeds and the Request for Review dated 18th May, 2018 is allowed in the following terms:-

FINAL ORDERS

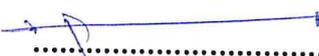
In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review.

- a) **The Applicant's Request for Review dated 18th May, 2018 in respect of tender No. NIB/T/001/2016-2017 for the Funding, Design, Build**

and Transfer of the Lowaat Dam Project, Turkana County, Republic of Kenya is allowed.

- b) The award of the said tender to the successful bidder as contained in the Procuring Entity's letter of notification dated 11th October, 2017 is hereby annulled.
- c) The Procuring Entity is directed to carry out a fresh evaluation of the Applicant and the successful bidder's bids using the evaluation and the award criteria set out in the tender document and on the basis of the sums set out in the respective bidders forms of tender.
- d) Owing to the urgency and the public importance involved in this project, the Procuring Entity is directed to complete the evaluation and the award processes within a period of 7 days from today's date.
- e) The Board further extends the tender and the tender security validity periods for this tender by a period of thirty (30) days from today's date to enable the Procuring Entity complete the process.
- f) Upon the end of the Seven (7) days period set out in order number (d) above, the Procuring Entity shall file an evaluation report and letters of notification under the provisions of Section 87(3) of the Act with the Board to confirm compliance with these orders.
- g) In view of the nature of the orders made above, the Board directs that each party shall bear its own costs of the Request for Review.

Dated at Nairobi on this 11th day of June, 2018.


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CHAIRMAN
PPARB


.....
SECRETARY
PPARB

