

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 1/2011 OF 14TH JANUARY, 2011

BETWEEN

INTEX CONSTRUCTION LTD.....APPLICANT

AND

KENYA RURAL ROADS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Rural Roads Authority dated 22nd December, 2010 in the matter of Tender/Contract No. RWC 009 for construction of Giakanja-Tetu Mission (D434), Kagogi-Ihwa-Ihururu (E576/E1690) and Wandumbi-Kigogoini (E573) Roads.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Joshua W. Wambua	-	Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Ms. Florence. Okumu - Secretariat
Ms. Maureen N. Kinyundo - Secretariat

PRESENT BY INVITATION

Applicant, Intex Construction Ltd

Mr. Mohammed Nyaoga - Advocate
Mr. Muthomi Thiankolu - Advocate
Mr. Gabriel Mwangi - Legal Assistant
Mr. Samit Genlot - Managing Director
Mr. R. S. Tak - Project Manager
Mr. D.K. Kihara - Quantity Surveyor

Procuring Entity, Kenya Rural Roads Authority

Mr. Justin Rapando - Advocate
Eng. J.O. Ogango - General Manager (D&C)
Mr. Kenneth Mwangi - Procurement Manager

Interested Candidates,

Mr. Onsando Osiemo - Advocate, China Wu Yi Co. Ltd
Mr. Peter Ogonji - Advocate, China Wu Yi Co. Ltd
Mr. Job Odhiambo - Advocate, China Wu Yi Co. Ltd

Mr. Meshack Guto

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Advocate, Roads and Civil

Engineering Contractors Association

BOARD'S DECISION

Upon hearing the representations of the parties and Interested Candidates and upon considering the information in all documents before it, the Board decides as follows: -

BACKGROUND

The Procuring Entity advertised the tender for construction of Giakanja-Tetu Mission Road (D434), Kagogi-Ihwa-Ihururu (E576/E1690) and Wandumbi-Kigogoini (E573) Roads in the newspapers of 20th August 2010.

Closing/Opening:

The bids closed/opened on 3rd November 2010. Out of the twenty one tender documents bought nineteen bids were received from the following firms:

1. Kimemia Engineering Ltd
2. S. S. Mehta & Sons Ltd
3. Icon CPC (K) Ltd
4. Intex Construction Ltd
5. Kirinyaga Construction Ltd
6. China Wu Yi Co. Ltd
7. Associated Construction Ltd
8. Elite Earth Movers Ltd

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9. Mulji Devani & Brothers Ltd
 10. Progressive Construction Ltd
 11. Victory Construction Co. Ltd
 12. G. Issaias & Co. (K) Ltd
 13. Gowharrud Construction Africa Ltd
 14. H-Young & Co. (EA) Ltd
 15. Njuca Consolidated Ltd
 16. Nyoro Construction Co. Ltd
 17. China Overseas Engineering Group Ltd
 18. Lee Construction Ltd
 19. Landmark Holdings Ltd

The Tender Opening Committee noted that M/s China Wu Yi Co. Ltd had a modification to their bid of 9.5% discount exclusive of provisional sums.

Evaluation

The bids were evaluated by a committee chaired by Eng. J. K. Magondu. The evaluation was conducted in four stages namely; Preliminary Evaluation; Detailed Evaluation; Sensitivity Analysis; and Post Qualification Analysis.

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

Evaluation Criteria

Item	Condition	Clause Ref.	Requirement	Priority
1.	Form of Bid	ITB 28.1	Filled and signed by authorized agent	High
2.	Bid security	ITB 17, 28.1	Must provide	High
3.	Power of Attorney	ITB 5.1(a)	Must be attached	High
4.	VAT Registration	Invitation to Tender	Must be attached	High
5.	PIN Registration	Invitation to Tender	Must be attached	High
6.	Valid Tax Compliance Certificate	Invitation to Tender	Must be attached	High
7.	Appendix to Form of bid	ITB 13.1(a), 28	Must be signed	High
8.	Schedules of Supplementary Information	ITB13.1(d)	Must be filled	Medium
10.	Bills of Quantities	ITB 13.1 (c)	Must be filled and pages initialed.	High
11.	Clarity and presentation of Bid Documents	ITB 20.3	All pages signed and any alterations initialled	High
12.	Results on Completeness		Confirmation of bid securities by the surety.	Medium

A). PRELIMINARY EVALUATION

The bids were evaluated on responsiveness and the summary of results was as tabulated below:

COMPLETENESS CRITERIA	Kimemia	S. S. Mehta	Icenn	Intex	Kirinyaga	China Wu Yi	Associated	Elite Earth Movers	Muji Devani	Progressive	Victory	G. Issaias	Gowharrud	H-Young	Njuca	Nyoro	COVEG	Lee	Landmark
Tender Opening No	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
Signing/ installing of pages with entries	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Certificate of Incorporation	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N/C	N/C	Y
Certificate of Registration (MOR)	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N/C	Y
VAT Registration	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N/C	Y	N/C	Y	Y	N/C	N/C	Y
TIN Registration	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N/C	Y	N/C	Y	Y	Y	N/C	Y
Valid Tax Compliance	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N/C	Y	N/C	Y	Y	Y	N/C	Y
Form of Bid	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Appendix to Form of Bid	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Bid Security	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Term of Power of Attorney	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Cert of Tenderer's visit	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Schedule of major items of plant	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Key Personnel	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	N/C	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Roadwork completed	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Schedule of ongoing Projects	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Schedule of other supplementary information	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Priced Bill of Quantities	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Overall Performance	R	R	R	R	R	R	R	R	R	R	NR	NR	R	NR	R	R	NR	NR	R

Key: Y - Yes, document provided as required; Y/S - Yes/Signed, information complete as required; N/C - No/Not compliant; R - Responsive, NR - Non Responsive

Five bidders namely, Victory Construction Ltd, G. Issaias & Co. Ltd, H-Young & Co. (EA) Ltd, China Overseas Engineering Group Ltd and Lee Construction Ltd were disqualified at this stage for failure to attach either the list of key personnel, VAT Registration, PIN Registration, Valid Tax Compliance Certificate, Certificate of Incorporation and or Certificate of Registration with the Ministry of Roads.

B) DETAILED/COMPLETENESS EVALUATION

The remaining fourteen bids were subjected to detailed evaluation and the results are summarized in the table below;

Criteria No.	COMPLETENESS CRITERIA	Kimemia	S. S. Mehta	Icon CPC (K)	Intex	Kirinyaga	China Wu Yi	Associated	Elite Earth	Mulji Devani	Progressive	Gowharrud	Njuca	Nyoro	Landmark
	Tender Opening	1	2	3	4	5	6	7	8	9	10	13	15	16	19
1	Non Performing	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
2	Pending Litigation	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
3	Financial	N	Y	Y	N	Y	Y	Y	N	Y	Y	N	N	Y	Y
4	Average Annual	N	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	N	Y	N
5	General Experience	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
6	Specific Experience	N	Y	N	Y	Y	Y	Y	Y	N	Y	Y	N	N	N
7	Current	Y	Y	N	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
8	Site Staff	Y	Y	N	Y	Y	Y	N	Y	N	N	Y	Y	N	Y
Overall Performance		F	P	F	F	P	P	F	F	F	F	F	F	F	F

Key: P - Pass, F- Fail

Eleven bidders were disqualified at this stage for failure to meet the set requirements. Kimemia Engineering Ltd had a cash flow below the required Kshs.200 million, did not have the required turnover of Kshs.500 million and

didn't have the relevant specific experience of 5 years. Icon CPC (K) Ltd failed to meet the required 7 years general experience, 5 years specific experience, outstanding ongoing works exceeded the limit of Kshs.5 billion and key personnel fell short of the requirement. Intex Construction Ltd had a working capital below the required Kshs.200-million. Associated Construction Ltd had key personnel staff that fell short of the required qualification. Elite Earth Movers Ltd had a cash flow of less than Ksh.200 million and didn't have the required turnover of Kshs.500 million. Mulji Devani & Brothers Ltd failed on specific experience and site agent not being a registered engineer. Progressive Construction Ltd had ongoing works in excess of Kshs.5 billion and also failed on key staff requirement. Gowharrud Construction Africa Ltd failed on cash flow requirement and audited accounts. Njuca Consolidated Ltd failed on cash flow, turnover and the contracts carried out in the last 5 years. Nyoro Construction Co. Ltd failed to meet the specific experience and the site agent being not registered engineer. Landmark Holdings Ltd failed on the required turnover of Kshs.500 million and the specific experience.

At this stage, tenderers were requested to provide clarifications where discrepancies had been noted in the requested breakdown of indices to be used in administration of Variation of Prices. They were also requested to provide clarification on the total value of outstanding works in their ongoing contracts as provided for under Clause 5.1 of the qualification criteria. This was to be provided in a new format sent to the four responsive tenderers after it was noted that the figures indicated combined the works value together with value of non-work items like VAT, VOP and Contingencies which are financed by the client as additions to the value of executed works.

Bidders' financial situation was considered in terms of cash flow/working capital and access to credit facilities.

Only three bidders namely, S.S. Mehta & Sons Ltd, Kirinyaga Construction Ltd and China Wu Yi Co. Ltd fulfilled the requirements of detailed evaluation. However, the Evaluation Committee decided to subject to full evaluation all the bidders whose bids were within the lowest five bracket, whose bids had been found to be responsive and whose bids contained not more than one non-conformance to the set evaluation criteria of detailed evaluation. This resulted in four (4) bidders whose bids were to be subjected to a full evaluation namely; S.S. Mehta & Sons Ltd, China Wu Yi Co. Ltd, Kirinyaga Construction (K) Ltd and Intex Construction Ltd.

C) SENSITIVITY ANALYSIS

The four bids were checked for any Arithmetic errors and corrected. They were further subjected to sensitivity analysis by varying the quantities of the critical bill items by 50% with the intention of investigating the possibility of the bidders' rates causing escalation beyond the allowed 15% variation in the event that quantities of work changed and the results were as summarized in the table below:

Bidder No.	Bidder	Bid Price	Escalated Amount	Escalation (%)
6	China Wu Yi Co. Ltd	2,158,764,126	2,517,242,154	14.24
4	Intex Construction Ltd	2,453,093,782.82	2,768,513,007.82	11.39
2	S. S. Mehta & Sons Ltd	2,751,346,290	3,080,740,615	10.69
5	Kirinyaga Construction (K) Ltd	2,956,305,292.20	3,132,483,917.20	5.62

From the above table the rates of all the bidders were found to be balanced.

D) POST QUALIFICATION ANALYSIS

The lowest evaluated bidder M/s China Wu Yi Co. Ltd was subjected to post qualification analysis where it was found to meet all the requirements. The items considered in this stage included general experience, plant and equipment holding, completion period, annual volume of construction works, access to credit facilities, comparison of major rates and credibility of the bidder's rates and current commitments.

RECOMMENDATION

The Evaluation Committee recommended that the Contract for the Construction of Giakanja-Tetu Mission Road (D434), Kagogi-Ihwa-Ihururu (E576/F1690) and Wandumbi-Kigogoini (E573) Roads project be awarded to **M/s China Wu Yi Co. Ltd** at their evaluated Tender Sum of **Kshs. 2,158,764,126.00**

THE TENDER COMMITTEE DECISION

The Tender Committee, in its meeting held on 22nd December 2010 awarded the tender to M/s China Wu Yi Co. Ltd of P.o Box 49282-00100 NAIROBI at a total tender sum of Kshs. 2, 158, 764, 126.00 (Two billion one hundred and fifty eight million seven hundred sixty four thousand one hundred and twenty six). During the deliberations, the Tender Committee noted that the Applicant's bid was disqualified for not meeting the Cash flow requirement of Kshs.200 million. It was further noted that the tenderer gave false information as to the contract sum for one of their ongoing contracts i.e. Ena - Ishara road and therefore falsely stating the value of outstanding works after allowing for items described as VAT, VOP and Contingencies.

THE REVIEW

The Request for Review was lodged by M/s Intex Construction Limited on 14th January 2011 in the matter of Tender/Contract No. RWC 009 for construction of Giakanja-Tetu Mission (D434), Kagogi-Ihwa-Ihururu (E576/E1690) and Wandumbi-Kigogoini (E573) Roads. The Applicant was represented by Mr. Mohammed Nyaoga and Muthomi Thiankolu both Advocates while the Procuring Entity was represented by Mr. Justin Rapando, Advocate.

The Applicant raised seven grounds and sought for the following orders:

- (a) The Decision of the Procuring Entity is hereby annulled to the extent that it purports to award the Contract envisioned by the Tender to M/s China Wu Yi Co. Ltd;*
- (b) The Procuring Entity is hereby ordered to re-evaluate the tenders afresh, through a different evaluation committee.*
- (c) Alternatively, and without prejudice to prayers (a) and (b) above, the Procuring Entity be directed to award the Tender to the Applicant;*
- (d) The Applicant be awarded the costs of and incidental to this Request for Review; and*
- (e) Such other or further or incidental orders and or directions as the Honourable Board shall deem just and expedient.*

The Applicant raised 7 grounds of review which we deal with as follows:

Ground 1 – Breach of Section 2 of the Act

The Applicant alleged that the Procuring Entity's decision to award the tender to the Successful Bidder gravely offended the express and implied provisions

of Section 2 of the Act. It argued that the Procurement proceedings did not meet the requirements of Section 2 of the Act, which requires that the proceedings be conducted in such a way to achieve economy, efficiency, fair competition, integrity and public confidence. It submitted that the Procuring Entity altered the provisions of the tender document relating to the value of outstanding works, after submission of tenders, which was contrary to the requirements of fair competition and transparency. It submitted that, the successful bidder had outstanding works valued at over Sh. 5 billion, which was not in line with the tender requirements as set in the Tender document and hence was a counter to the set requirements of efficiency by the Procuring Entity.

The Applicant sought to rely on a decided case; *Republic V. Public Procurement Administrative Review Board Ex-Parte Kenya Medical Supply Agency and 3 other (2010) e KCR*, in which the High Court ruled on deviations from the provisions of the Tender Document as follows:-

"The tender documents, which they availed to the intending bidders, set out the manner and format in which the bids would be submitted. It is clear from the above provisions (of Regulation 47), that the requirements that the bids be compliant, is mandatory; to be fulfilled to the letter, one of such requirements being that 'the tender has been submitted in the required format.'"

It argued that in view of the aforesaid Ruling by the High Court, it was not open to the Procuring Entity to change the Format of schedule 7 to the Tender Document after the deadline for the submissions.

On its part, the Interested Candidate, in support of the Procuring Entity stated that it received a letter from the Procuring Entity requiring it to give information on its pending works value. It submitted that this amounted to seeking of a clarification under Section 62 of the Act. It argued that, the clarification did not amount to an addendum as it did not go to the substance of the Tender.

With regard to the Report on progress of work relied on by the Applicant to support its allegation that the successful tenderers outstanding works was more than the maximum set, the Interested Candidate stated that, the said Report should not be relied on as it predated the tendering period and had information going back to year 2009. It argued that the Report was outdated and hence urged the Board to disregard and expunge it from the proceedings.

In its response, the Procuring Entity denied the allegations and submitted that the procurement process was conducted in accordance with the provisions of Section 2 of the Act and the decision reached of awarding the tender to the Successful Bidder was in line with the requirements of the Act. It further submitted that this ground was not supported by any breach of specific provisions of the Act and the Regulations and therefore requested the Board to make the finding that it lacked merit.

The Board has considered the submissions of the Parties and also perused the documents presented before it, and observe that this ground was a general statement concerning the purpose of the Act and not specific to a particular Section of the Act or Regulation which was breached.

Grounds 2, 4 and 5 – Breach of Sections 31(1)(a) and, (5),53, 62 and 66

The three grounds have been combined as they raise similar issues on the evaluation criteria.

The Applicant submitted that the Procuring Entity breached Sections 31(1) (a) and (5), 53, 62 and 66 of the Act as read together with the qualification criteria set out in Clause 5.1 of Section 5 of the Tender Document, by awarding the tender to a bidder who had outstanding works valued more than Kenya Shillings 5 billion. It stated that the Successful Bidder had, as at the date of submission of tenders, outstanding works valued at greater than Kenya Shillings 5 Billion. It submitted that on receiving its notification letter on the tender, the Applicant made enquiries from relevant government offices on the Successful Bidder's value of outstanding works as at the time of bids submission and obtained a Monthly Progress Report from the Ministry of Roads, relating to Lot 1 of the Nairobi-Thika Highway Improvement Project. It submitted that from the said Report only 12.5% of the more than Kshs.8 billion worth of project was complete as at August 2010. It argued that this meant that out of this Project alone, the Successful Bidder's outstanding value of works was Kshs. 7 billion, which was well over the maximum requirements of Kshs. 5 billion set by the Procuring Entity.

The Applicant alleged that the Procuring Entity, vide its letter dated 1st December 2010, required it to (re)-submit information as to the value of its outstanding works, in a format that was inconsistent with that set out in Schedule 7 of the Tender Document. The Applicant stated that contrary to the claim in the Procuring Entity's letter, it had disclosed the value of its outstanding works in strict compliance with Schedule 7 of the Tender Document. It stated that in response to the said letter, it prepared a new table

of its value of outstanding works using the format introduced by the Procuring Entity and was dismayed to note that the results were significantly different from the one in the Schedule initially prepared in compliance with Schedule 7. It contended that the Procuring Entity's introduction of the new format was an unlawful manipulation of the evaluation criteria and the tender process. It argued that this was contrary to Section 62 of the Act as it changed the substance of the Tender. It further argued that the purported clarification sought by the Procuring Entity was discriminatory and was meant to favour the Successful Bidder by removing the VAT, VOP and Contingency elements of the value of outstanding works, since they constituted a significant portion of the value of outstanding works.

The Applicant further argued that, the value of outstanding works was part of the mandatory qualification criteria set out in Clause 5.1 of Section 5 of the Tender Document and thus the Procuring Entity could only have amended the format set out in Schedule 7 of the Tender Document by way of an Addendum issued to all bidders pursuant to Section 53 of the Act, but not to treat the issue as a matter for clarification.

The Applicant argued that under Section 31(1) (a) of the Act, it is a requirement that Procuring Entities must ensure that before awarding a Contract that the intended Contractor has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured. It argued that, the requirement of the bidder that it should not have outstanding value of works of more than Kshs. 5 billion was meant to ensure that the bidder awarded the tender does not have its resources, equipment and facilities committed in other projects. Therefore, it stated that

the issue of the value of outstanding works was very critical, but was not properly handled by the Procuring Entity.

In response, the Procuring Entity denied the allegations by the Applicant and stated that its decision was in accordance with the provisions of the Act and Clause 5.1 of the Tender Document, which required that bidders should not have the total value of outstanding works exceeding Kshs. 5 billion. It argued that value of works was subject to the definition of "works" as per the provisions of the Tender Document and that Clause 67 of the Tender Document was not relevant for purposes of the review. It submitted that it had established that the Successful Bidder had outstanding works valued at below Kshs.5 billion. The Procuring Entity submitted that the Applicant's tender was properly rejected for not meeting the post-qualification criteria and for giving false information as to the contract sum for one of the value of its ongoing works namely, *Ena - Ishara road*.

The Procuring Entity argued that the Monthly Progress Report from the Ministry of Roads relied upon by the Applicant to estimate the value of ongoing works of the Successful Bidder as being over Kshs. 5 billion was not authentic and was therefore irrelevant for purposes of this matter.

The Procuring Entity reiterated that all the Addenda on the Tender were issued in accordance with the provisions of Section 53 of the Act and clause II of Section 4 of the Tender Document. It submitted that the letter written to the Applicant dated 1st December 2010 only sought a clarification of the amounts stated as value of outstanding works as per the provisions of the Tender Document. It stated that the letter was written to all the four responsive

bidders seeking clarification based on schedule 7 of the Tender Document and was not inconsistent with the contents of schedule 7 , as alleged because;

- a) Value Added Tax (VAT), Variation of Price (VOP) and Contingencies are not part of value of works as per section 5 clause 5(1) and section 6 of the tender document;
- b) Contingencies are emergency funds for any unforeseen works or costs and are not necessarily expended during the contract and further are financial commitments on the part of employer and not the contractor;
- c) Value Added Tax and Variation of Price are financial commitments of the employer and not of the contractor; and
- d) Some road projects are Value Added Tax exempt and that further the rates vary from one country to another.

The Procuring Entity stated that it needed to compare "like with like" in the evaluation and therefore it had to seek for the clarification, to which the Applicant willingly complied with by responding to the said letter. The Procuring Entity further submitted that this was neither contrary to Section 62 of the Act as alleged, nor was it discriminatory as it was applied to all the responsive bidders and not the Successful bidder alone. The Procuring Entity reiterated that separation of VAT, VOP and contingencies from the contract sums was done by the participants themselves and the aspect of the value of the outstanding works was part of the evaluation criteria and was duly applied during the evaluation process. The Procuring Entity denied that seeking for the clarification after tender opening amounted to amendment of Schedule 7 of the Tender Document. Finally the Procuring Entity submitted that the Applicant was disqualified at the Financial Evaluation Stage, for failing to meet the requirement on credit line of Sh. 200 million.

In this regard, it urged the Board to find no merit on these grounds.

On its part, the Successful Bidder supported the submissions of the Procuring Entity. It further stated that it had received a letter from the Procuring Entity requiring it to give information on the value of its outstanding works. It argued that this amounted to seeking of a clarification as provided under Section 62 of the Act and did not amount to an Addendum, since it did not change the substance of the Tender. In reply the Applicant submitted that the letter dated December 1, 2010 did not amount to a clarification, as it changed the substance of the Tender. Finally, the Applicant argued its bid documents met all the requirements as set out in the Tender Document including the financial requirements on Working Capital and Credit line.

The Board has considered the submissions of the parties and has analysed the documents presented before it, which included the blank Tender Document, the Applicant's and the Successful bidder's original tender documents and the Evaluation Report.

The Board has observed that the tender was evaluated in four stages namely; Preliminary Evaluation for Responsiveness, Detailed Evaluation, Sensitivity Analysis and Post Qualification evaluation. The Board notes that five (5) bidders were disqualified at the Preliminary stage for being non-responsive, Eleven (11) tenderers, including the Applicant, were disqualified at the Detailed Evaluation stage, leaving only three bidders that qualified to proceed to the next stage. The Board further notes that the Evaluation Committee however decided to subject all bidders whose bids were responsive and within the lowest five bracket and whose bids contained not more than one non-conformance to the set evaluation criteria of detailed evaluation to full

evaluation. In doing so, the Evaluation Committee decided to subject the Applicant to full evaluation.

The Board further notes that Clause 5.1 of Section 5 of the Tender Document on qualification criteria provides as follows;

"The total value of outstanding works on the on-going contracts must not exceed Ksh.3 billion".

The Board notes that this value was later amended by an Addendum No.1 dated 4th October 2010 which read *"In the requirements column, the total value of outstanding works has been increased from Ksh.3 billion to Ksh.5 billion".*

The Board further notes that Schedule 7 of the Tender Document required bidders to provide information of ongoing projects in a tabular format provided in the Tender Document as follows;

Schedule 7

DESCRIPTION OF WORKS	NAME AND ADDRESS OF CLIENT	DATE OF COMMENCEMENT	DATE OF COMPLETION	VALUE OF WORKS (KSHS)	VALUE COMPLETED UPTO DATE %	PHYSICALLY COMPLETED UPTO DATE %

In addition the Board notes that based on this Schedule, the Successful Bidder provided information on outstanding works amounting to Kshs.8.5 billion while the Applicant's outstanding works amounted to Kshs.3.8 billion.

The Board further notes that the Procuring Entity sought clarification from the four responsive tenderers namely: S.S. Mehta & Sons Ltd, Kirinyaga

Construction Ltd, China Wu Yi Co. Ltd and Intex Construction Ltd, vide its letter dated 1st December 2010, which read in part as follows:

“Under section 5 of the tender document dealing with qualification criteria subsection 5.1: current commitments, it was required that you state the value of outstanding work, on the on-going contracts. However in the provided details - copy attached - the Build up of the contract sum was not provided. Pursuant to the provisions of clause 27 of the Instruction to Bidders, you are hereby requested to furnish the above build up in the attached format

1	Contract Name	Date of Commencement	Client	Date of Completion	VOP	Contingencies	VAT	Works Value	Total Contract Sum	Value Completed to Date

It is noted that based on this new format, the Successful Bidder’s outstanding works on ongoing contracts came down from Kshs.8.5 billion to Kshs.4,948,411,689.88, while that of the Applicant also reduced from Kshs.3.8 billion to Kshs.2,881,627,049.70. This was after deducting VOP, VAT and Contingencies from the contract sum.

The Board notes that in seeking the above clarification, the Procuring Entity invoked Clause 27 of the Instruction to Bidders which read as follows:

“To assist in the examination, evaluation, and comparison of bids, the Employer may, at its discretion, ask any bidder for clarification of its bid, including breakdowns of unit rates. The request for clarification and the response shall be in writing or by cable, but no change in the price or substance of the bid shall be sought, offered, or permitted except as required to

confirm correction of arithmetic errors discovered by the Employer in the evaluation of the bids"

The Board is alive to the provisions of Section 62(1) and (2) of the Act on clarification which reads as follows: *"The Procuring Entity may request a clarification of a tender to assist in the evaluation and comparison of tenders. A clarification may not change the substance of the tender"*.

The Board notes that although in the Tender Document, the Procuring Entity indicated that the value of outstanding works was subject to the definition of works as per the provisions of the Tender Document, on perusal of the Blank Tender Document, there are no such provisions where the said definition was indicated. The Board has also noted that the Procuring Entity stated that the Applicant provided false information on one of the outstanding contracts without providing prove as to how that information was obtained.

It is also noted that the Monthly Progress Report from the Ministry of Roads for the Month of August 2010 on Lot 1 of the Nairobi-Thika Highway Improvement Project is not authenticated. There was also an attempt by the Procuring Entity to discredit the source of the Monthly Progress Report which appear to have been provided by a Private Consultant, instead of the Ministry of Roads. It is apparent that determination of the amount of works outstanding for the bidders is a key parameter which should have been carefully handled and in an authenticated manner. It is also clear to the Board that although the bidders provided value of their respective outstanding works, the value of such works have become the subject of contention in this review. It appears that by not requiring authentication by an authoritative

source, each bidder filed a report of its outstanding works but the Procuring Entity had no way of authenticating the accuracy of that information.

The Board further finds that the letter dated 1st December 2010 was issued to the four bidders, when the evaluation process of the tender was in progress. The four bidders were required to provide new information in the format that was introduced through the letter by the Procuring Entity. As a result of this, the value of the outstanding works dropped significantly for all the bidders and this also had the effect of bringing the Successful Bidder's value of outstanding works from Kshs. 8 billion to Kshs. 4 billion, now within the threshold of Kshs. 5 billion introduced by Addendum No. 1 issued by the Procuring Entity. The Board therefore finds that by issuing such a new Format, in the course of the evaluation, the Procuring Entity introduced a new criteria that changed the substance of the tender and therefore this does not amount to a mere clarification as envisaged by Section 62 (2) of the Act.

The Board observes that the original Format for provision of information on value of outstanding works as contained in the Tender document and also the Addendum No. 1, stipulated that for a bidder to participate in the tender they were required not to have pending value of works of more than Ksh. 5 billion. This requirement locked out other potential bidders who could have submitted their bids. In this regard, changing the format after the opening of tenders and during the evaluation process goes contrary to the provisions of Section 2 of the Act. It further goes contrary to the provisions of Section 62(2) of the Act.

After further perusal of the evaluation Report the Board notes that the Evaluation Committee disqualified the Applicant for failing to submit evidence that it had adequate Working Capital.

Upon perusal of the Applicant's bid documents, the Board found that the Applicant had attached letters from various banks, including one from the Kenya Commercial Bank, dated 10th June, 2010 confirming availability of Credit line to the tune of Kshs. 2,897,752,125.

Further, the Board notes that the minutes of the Tender Committee meeting, stipulates that the Applicant had submitted a Letter of Credit from Kenya Commercial Bank Limited.

On further perusal, it is found that the Tender Committee requested that the Kenya Commercial Bank be required to certify the authenticity of the said Credit Line Letter, which was certified, as evident from the Minutes. In view of this finding the Board holds that disqualification of the Applicant by the Evaluation Committee was not justified.

Taking into consideration all the above matters, these grounds of the Request for Review succeed.

Ground 3 – Breach of Section 44(1)(c) and 67 of the Act and Clause 26.1 of Section 4 of Tender Document.

The Applicant submitted that the Procuring Entity breached the express and implied provisions of Section 44 (1)(c) of the Act as read with Clause 26.1 of Section 4 of the Tender Document by leaking and or communicating the

results of the evaluation process to the press prior to the notification of bidders participating in the procurement process. It stated that, this raised serious doubts as to the fairness, credibility and integrity of the tender evaluation. The Applicant averred that on or around 29th December 2010, it chanced upon a publication on page 35 of the Standard Newspaper of the same date stating, inter alia, that the Tender had been awarded to China Wu Yi Co. Ltd at the total cost of Kshs.2.1 billion. The Applicant stated that this leakage of the results of the evaluation process to the press before notification of bidders was a breach of the provisions of Section 67 of the Act. It reiterated that the information published in the Standard Newspaper was exactly the same information that was communicated to the Applicant in the notification of the Unsuccessful Bidders' letter that was received by the Applicant on 3rd of January 2011. In this regard, it urged the Board to find that the Procuring Entity breached the provisions of Section 44 of the Act on confidentiality and credibility.

In its response, the Procuring Entity denied offending the express and implied provisions of Section 44(1) (c) and 67 of the Act as read together with Clause 26.1 of Section 4 of the Tender Document. The Procuring Entity reiterated that the procurement process was conducted in line with the said provisions and that the Applicant did not demonstrate any prejudice suffered as a result of the alleged breach.

The Procuring Entity denied leaking and or communicating the results of the evaluation process to the Standard Newspapers prior to notification and that any alleged communication, if at all, may have been done by parties out to derail the procurement process. It further submitted that the alleged similarity

in contents between the Standard Newspaper story and the notification letter, if at all, was coincidental. It urged the Board to find no merit on this ground.

The Interested Candidate submitted that, the Newspaper Report should not be relied upon to test the Confidentiality of the tender process. It argued that the Report was hearsay and the source was not disclosed. It argued that the Report had ulterior motives and that it should be expunged from the proceedings.

The Board has carefully considered the submissions of the parties and perused the documents presented before it and observes that the contents of the newspaper cutting attached on the Applicant's Request for Review document at page 651, and the notification of unsuccessful bidders letter dated 31st December 2010, appear similar, on who the successful bidder and the 2nd lowest evaluated bidder were. The Board is alive of Section 44(1) (c) of the Act which provides, as follows;

"During or after procurement proceedings, no procuring entity and no employee or agent of the procuring entity or member of a board or committee of the procuring entity shall disclose information relating to the evaluation, comparison or clarification of tenders, proposals or quotations".

In this particular case, it is clear that there is similarity on the information carried in the Newspaper and the Notification Letters. However, the source of the information in the newspaper is not from a person who is involved in the Tender Process and hence the Procuring Entity cannot be blamed.

Ground 6 – Statement of Loss

This is not a ground of review but a statement of the Applicant's Loss as a result of the Procuring Entity's decision.

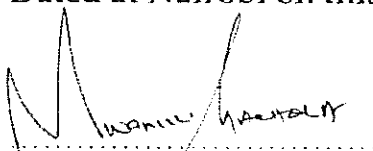
The Board has on several occasions, held that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business and therefore each bidder carries its own costs.

Ground 7 – Such other or further grounds

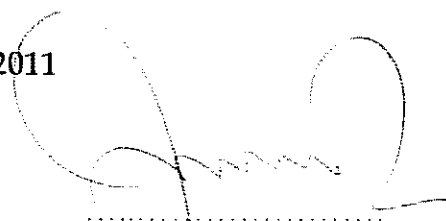
This is not a ground, but the Applicant's general statement on other or further grounds as may emerge or be adduced or canvassed at the hearing to which the Board need to make any findings.

Taking into account all the above, the Request for review succeeds and pursuant to section 98(a) of the Act, the Award to the Successful bidder is hereby annulled. Further, Pursuant to Section 98 (b) of the Act, the Board directs the Procuring Entity to do a re-evaluation of the bids based on the information contained in their original bids. In addition, the Procuring Entity is directed to verify the authenticity of the value of outstanding works submitted by each bidder, with the Ministry of Roads and any other relevant reliable authorities. In view of the importance of this project, this re-evaluation to be done and concluded on priority basis.

Dated at Nairobi on this 9th day of February, 2011



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**