

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 12/2011 OF 28TH MARCH, 2011

BETWEEN

EUROCONSULT MOTT MACDONALD/

SAMEZ CONSULTANT LTD.....APPLICANT

AND

NATIONAL IRRIGATION BOARD.....PROCURING ENTITY

Review against the decision of the Tender Committee of the National Irrigation Board dated 28th October, 2011 in the matter of Tender No. NIB/T/69/2009-2010 for Engineering Services for Mwea Irrigation Development Project.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Euroconsult Mott Macdonald/ Samez Consultant Ltd

Mr. Charles Agwara	- Advocate
Mr. Sean Murphy	- Divisional Director
Eng. Dr. E. Nyangeri	- Managing Director, Samez Ltd
Eng. John Moguche	- Engineer, Samez Ltd
Mr. Ng'ethe Peter	- Assistant
Ms. Lynda Mkalama	- Assistant

Procuring Entity, National Irrigation Board

Mr. Andrew Wandabwa	- Advocate
Ms. Victoria Kariithi	- Advocate
Ms. Lilian Kimani	-Advocate
Mr. Boaz Akello	- Procurement & Supplies officer
Mr. George	- Ag. Dam(T)
Ms. Eddah Mwanyumba	- Advocate

Interested Candidates

Mr. A. M. Muriithi	- Advocate, Nippon Koei Co. Ltd
Eng. Lusigi Mugeru	- Engineer, Gibb Africa

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

Advertisement

The Procuring Entity advertised the Expression of Interest for the Engineering Services for Mwea Irrigation Developments Project on 15th February, 2010 in the Daily Nation and Standard Newspapers.

Closing/Opening:

The tender was opened and closed on the 20th September, 2010. Three (3) firms out of the Five (5) shortlisted firms submitted their Technical and Financial proposals, they were;

1. Nippon Koei Co. Ltd
2. Euroconsult Mott MacDonald
3. Otieno Odongo & Partners

Evaluation

Technical Evaluation

The following parameters were used to determine responsiveness.

- (i) Experience of the Consultants relevant to the assignment:
- | | |
|--|-----------|
| a) Experience of international projects of comparable size, complexity and technical specialty | 4 |
| b) Experience of developing countries under comparable condition | 3 |
| c) Experience in Japanese ODA projects | 3 |
| Total points for criterion (i): | 10 |
- (ii) Adequacy of the proposed methodology and work plan in responding to the Terms of Reference:
- | | |
|---|-----------|
| a) Technical approach and methodology | 20 |
| b) Work plan | 15 |
| c) Organization and staffing | 5 |
| Total points for criterion (ii): | 40 |
- (iii) Personnel qualifications and competence for the assignment:

Design

1. Team Leader.....	6
2. Construction Engineer (Dam Earthworks)	4
3. Structural Design Engineer.....	3
4. Irrigation Engineer.....	3
5. Construction Plan & Cost Estimate Engineer.....	3

Construction

1. Team Leader.....	6
2. Construction Engineer (Dam Earthworks).....	4
3. Construction Engineer (Dam Tunnel).....	4
4. Dam Design Engineer.....	5
5. Construction Engineer (Irrigation).....	3
6. Environmental Assessment & RAP Expert-A.....	3
7. Quantity Survey Engineer.....	3
8. Quality Control Engineer.....	3

Total points for criterion (iii): 50

The minimum technical score required by a bidder to pass was 80 marks as set out in the Request for Proposal document.

The summary results of the evaluation was as follows;-

Sub criteria	EUROCONSULT MOTT MACDONALD		OTIENO ODONGO PARTNERS		NIPPON KOEI CO. LIMITED	
	Average score	Max Score	Average Score	Max Score	Average Score	Max Score
Total for Sub-criteria i	6	10	6	10	10	10
Total for Sub-criteria ii	37	40	28.5	40	39	40
Total for Sub-criteria iii	39	50	42	50	43	50
TOTAL TECHNICAL SCORE	82	100	76.5	100	92	100

From the evaluation only two firms attained the minimum technical score required. The firm of Otieno Odongo & Partners got an average score of 76.5 missing the 80 marks minimum score required.

The two firms that were found responsive were Nippon Koei Co. Ltd and Mott Macdonald. A report was then submitted to JICA to seek their no objection after which the highest scored firm was to be invited for negotiations.

Financial Evaluation

There was no financial evaluation conducted since quality based selection method (in accordance with provisions of the Guidelines for Employment of Consultants under Japanese ODA Loans) was approved as the Procurement method. Nippon Koei scored the highest from the technical evaluation hence its financial proposal accepted and it was invited for negotiations. Mott Macdonald scoring the second was returned to its financial proposal unopened.

THE TENDER COMMITTEE DECISION

The Tender Committee approved the recommendation of Technical Evaluation committee and award of tender No. NIB/T/69/2009-2010 for the Engineering Services for Mwea Irrigation Development Project to Nippon Koei Company Limited.

THE REVIEW

The Request for Review on 28th March, 2011 against the decision of the Procuring Entity in the matter tender No. NIB/T/69/2009-2010 for Consultancy for Engineering Services for Mwea Irrigation Developments Project.

The Applicant raised 5 grounds of review and requests the Board for the following orders:

- 1. "The PPARB to find and declare that the PE acted in breach of Section 68(2) when PE signed contract with alleged successful bidder two days after notification to the Applicants in which case the highest ranked signed contract is null and void.*
- 2. The PPARB to find and declare that the participation and involvement of Nippon Koei co. Ltd in the tender no. NIB/T/69/2009-2010 was in*

- violation of paragraph seven of the letter of invitation dated 23/7/2010 and also in breach of clauses 1.7.1 and 1.7.2 of the RFP issued by the PE*
- 3. The PPARB to find and declare that Nippon Koei Co. Ltd had an unfair advantage, contrary to section 2(b) and Section 52(2), over the Applicant in procurement proceedings involving Nippon koei Co. ltd in respect of Tender No. NIB/T/069/2009-2010 for Engineering Services for MIDP wherein Nippon Koei Co. Ltd have previously been involved in the preparation of draft Terms of reference.*
 - 4. That PPARB to find and declare that the PE cannot receive independent review of MIDP documents as well as get value for money (as required in Section 2(a)) in procurement proceedings in the Tender No. NIB/T/69/2009-2010 since Nippon Koei Co. Ltd has done reviews of the MIDP in previous engagements for Engineering Services and the same services are sought under the said tender.*
 - 5. The PPARB to find and declare that Nippon Koei Co. Ltd stood disqualified from involvement and participation in RFP for Tender NO. NIB/T/69/2009-2010 pursuant to Paragraph 7 of PE's letter of invitation dated 23rd July 2010 and Clauses 1.7.1 and 1.7.2 of the RFP.*
 - 6. The PPARB to find and declare that the PE shall commence negotiations with the first ranked firm after disqualification of Nippon Koei Co. Ltd and comply with the Act and Regulations relating to procurement of Engineering Services in respect of Tender No. NIB/T/69/2009-2010"*

PRELIMINARY OBJECTION

The Procuring Entity raised a Preliminary Objection to the Request for Review pursuant to Regulation 77 on the following grounds;

- a) *The Appeal has been filed outside the required period of fourteen (14) days contrary to the law and regulations applicable thereto.*
- b) *A contract between the parties has already been signed on the 18th of February 2010, by reason of which this Honorable Tribunal is by virtue of Section 93 (c) of the Public Procurement and Disposal Act, barred from entertaining the subject matter.*
- c) *The subject contract was signed in keeping with the JICA Procurement Guidelines and Regulations, being the project financier, in keeping with the provisions of Section 6 and 7 of the Public Procurement and Disposal Act.*
- d) *Further, the subject contract was signed in keeping with the JICA's directives in keeping with the provisions of Section 6 and 7 of the Public procurement and Disposal Act.*
- e) *This appeal is a disingenuous attempt to urge an appeal that has previously been withdrawn on account of its fatal defects.*
- f) *This appeal is frivolous, vexatious and an abuse of process.*

The Procuring Entity argued that the Applicant had filed a Request for Review No. 9 of 2010 on 7th March 2009. That Request for Review was fixed for hearing on **28th March 2011**. It stated that on that date, the Applicant applied to withdraw the Request for Review under Regulation 83 of the Public Procurement and Disposal Regulation 2006 (hereinafter referred to as the Regulations). It further stated that upon hearing the parties, the Board allowed the withdrawal of the Request for Review and allowed the procurement to proceed.

The Procuring Entity submitted that the Request for Review was filed outside the stipulated appeal window. It stated that the letter of notification was received by the Applicant on **17th February 2011** and that fact was not in dispute. It therefore argued that the appeal window closed on **3rd March 2011**

and pointed out that this Request for Review was filed on **28th March 2011** which was out of time.

The Procuring Entity further argued that the filing of the Request for Review against the decision of a Procuring Entity is governed by Regulation 73 2 (c) (i) & (ii) which clearly states that a Request for Review shall be filed within 14 days of the occurrence of the breach complained of where the Request is made before the making of an award or within 14 days of notification under Section 67 or Section 83 of the Act.

The other issue raised by the Procuring Entity was that ground 2 to 5 of the Request for Review relate to involvement of the Successful Bidder in the feasibility study that was done before this tender was advertised. It stated that this issue was raised in **September 2010** by the Applicant and the Procuring Entity replied and stated that the involvement of the Successful Bidder in the feasibility study did not amount to a conflict of interest. The Procuring Entity argued that if the Applicant was dissatisfied with that explanation, it ought to have challenged that decision within fourteen days as contemplated by Regulation 73 (2) (c) (i). It further argued that issue cannot be raised eight months later.

The third ground raised by the Procuring Entity was that a contract was signed with the Successful Bidder on **18th February 2011**. It argued that by virtue of section 93(2) (c) the Board had no jurisdiction to hear the Request for Review. It cited the Board Ruling in **Application No. 69 of 2011 Nihon Kogyo Shoji -VS- Kenya Pipeline Limited**

The Procuring Entity submitted that this tender was done by way of a Request for Proposal and therefore Section 68 of the Act which provides that a contract can only be signed after expiry of fourteen days from the date of notification was not applicable.

It further submitted that notification for tender done by way of a Request for Proposal is governed by section 83 of the Act that does not impose a waiting period before the signing of the contract. It is stated this is not similar to a notification done under Section 68 of the Act which provides for a 14 days waiting period before the signing of a contract.

The Procuring Entity made an alternative argument that assuming, without conceding, that Section 68 of the Act is applicable then this tender was a donor funded project. It argued that this tender was governed by Japanese ODA loans guidelines. It stated that under the said ODA guidelines, a Procuring Entity is required to sign a contract with the Successful Bidder and thereafter inform the Unsuccessful Bidders. It argued that this requirement is in conflict with the Act which provides that notification to the Successful and Unsuccessful Bidder shall be done simultaneously. It further submitted that in case of conflict between a condition imposed by the Donor and the Act, the condition by the Donor prevails.

Finally, the Procuring Entity argued that under Section 7 of the Act, it was bound by the directions issued by the Donor. It stated that it has signed the contract and 20% of the contract sum had been disbursed.

The Successful Bidder, associated itself with the submission of the Procuring Entity and urged the Board to uphold the Preliminary Objection.

In response the Applicant argued that the withdrawal of the Request for Review No. 9 of 2011 did not defeat it's rights under the Act.

It argued that this Request was filed within time. It argued that the notification was given on **17th February 2011** and the contract signed on **18th February 2011**. It further argued that in signing the contract, the Procuring Entity failed to protect the rights of the Applicant.

The Applicant submitted that the fact that an agreement had been signed was disclosed on **15th March 2011** when the Procuring Entity filed its Response to the Request for Review No. 9 of 2011. It therefore argued that the fourteen days Appeal window started running on **15th March 2011** and since this Request for Review was filed on **28th March 2011**, it was well within time. It cited Section 26 of the General Interpretation Act Cap 2 which provides that for purpose of limitation in case of fraud, time starts running from the time the fraud is discovered.

The Applicant argued that section 68 of the Act was applicable to a tender done by way of Request for Proposal. It stated that the contract ought to have been signed fourteen days after the notification.

On the submission that the issue of conflict caused by the participation of the Successful Bidder in the feasibility study, the Applicant argued that it could not challenge the decision as it was not yet a candidate as envisaged by section 93 of the Act.

As regards the applicability of Sections 6 and 7 of the Act, the Applicant argued that this tender was not a donor funded project. It argued that the funds in issue were a loan by the Japanese Government to the Kenyan Government.

In conclusion, the Applicant stated that the Board had jurisdiction to hear and determine this Request for Review and that the Preliminary objection should be dismissed.

In reply the procuring Entity reiterated its submission and urged the Board to dismiss the Request for Review.

The Board has carefully considered the submissions by the parties and considered the documents that were presented.

The preliminary objection raises three issues for consideration as follows;

1. Whether this Request for Review was filed out of time?
2. Whether the signing of the contract by the Procuring Entity with the Successful Bidder is lawful in view of the provision of Sections 68 & 83 of the Act.
3. Whether this tender is governed by the provision of Section 6 and 7 of the Act

On the issue of time the Board notes that the following issues are not in dispute;

- i) That on 7th March 2011 the Applicant filed Request for Review No. 9 of 2011 against the decision of the Procuring Entity.
- ii) That the Procuring Entity filed its response on 15th March 2011 and one of the issues raised was that the Request for Review was filed out of time.
- iii) That Request for Review No. 9 of 2011 was fixed for hearing on 28th March 2011. On that, 28th March 2011 the Applicant filed a Notice of Withdrawal of the Request for Review. The said notice stated as follows;

"We are writing to hereby give notice pursuant to Regulation 83(1) of the Public Procurement and Disposal Act 2005 and Regulations 2006 that we shall, during the hearing of the Appeal, formally withdraw our Appeal for Review No. 9/2011 scheduled for hearing in your Boardroom on Monday 28th March, 2011 starting from 2.30 p.m.

Thank you for having allocated time for the hearing of the Appeal for Review No. 9/2011."

- iv) Pursuant to Regulation 83, the Board accepted the withdrawal of Request for Review No. 9 of 2011 and ordered that the procurement process may proceed.
- v) On the same date, **28th March 2011** the Applicant filed the present Request for Review.
- vi) The Applicant has acknowledged in dated Application No. 9 of 2011 and 12 of 2011 that it was notified that it was unsuccessful by a letter dated **16th February 2011**.

The Board notes that Regulation 73 (2)(c)(i) and (ii) stipulates the time when the appeal window opens to a Bidder who is aggrieved by a tender process.

The said regulation provide as follows;

"73(c) be made within fourteen days of-

- (i) The occurrence of the breach complained of where the request is made before the making of an award; or**
- (ii) The notification under sections 67 or 83 of Act:"**

The Applicant has argued that this Request for Review is filed within time because it became aware that a contract had been signed when the Procuring Entity filed its response to the Request for Review No. 9 of 2011 on **15th March 2011**. According to the Applicant time for purposes of the Appeal window on that issue started running on that day.

The Board has noted that the Applicant has acknowledged that it was notified of the outcome of the tender on **16th February 2011**. Therefore time for purposes of the Appeal window started running on 17th February 2011 and closed on 3rd March 2011. The Board notes that Request for Review No. 9 of 2011 was filed on 7th march 2011 but since it was withdrawn the issue of whether it was filed within time is not an issue for determination in this Request for Review.

The nexus between Request for Review No.9 of 2011 and this Request for Review is the argument by the Applicant that it became aware that a contract had been signed on 15th march 2011 when the Procuring Entity filed its response to the said Request for Review No. 9 of 2011.

The Board notes that the time for filing a challenge to a Request for Review is clearly stipulated by Regulation 73 (2) (c) (i) (ii) cited hereinabove.

It is clear that the Applicant had until the 3rd of March 2011 to file its Request for Review. This Request for review was filed on 28th of March 2011 and it was filed out of time.

The Applicant has raised an ingenious argument that time started running on 15th march 2011 when it became aware that a contract was signed. Since that issue was raised in response to its Request for review No. 9 of 2011, nothing prevented the applicant from raising that issue in that Request for Review. It is clear that to avoid arguments on whether that Request for Review was filed within time, the Applicant opted to withdraw it and file a fresh Request for Review. The Board is a creature of statute and has no power to extend time for the parties. A Bidder wishing to challenge a tender process must bring itself within the provisions of Section 93 of the Act and Regulation 73 (2) (c) (i) (ii).

As already observed, the Applicant had up to 3rd of March 2011 to file a Request for Review but it failed to do so.

The Board wishes to reiterate it's holding in **Application No. 55 Voith Hydro GmbG & Company Advocates Vs Kenya Electricity Generation Company Limited** when answering a similar issue.

The Board stated as follows.....

"To leave the question of when to file an appeal totally at the discretion of a candidate would create uncertainty in the procurement process. It is clear

that the Act and the Regulations to go to great lengths to fix timelines in the tender process. The whole procurement process is a highly regimented regime which requires actions to be performed within certain timelines. Examples of these timelines are found in Section 36 (3), 52(3) (h), 55, 58(i) (b), 59(2), 66(6),67,68(2),71(c) and 97 among others and the review procedures as specified in Regulations 73,74,77 and 78 among others.

Secondly, Section 93(1) provides that the procedures for the review are to be in "such a way as may be prescribed" These procedures have been prescribed by Regulations 73 which makes it mandatory that an appeal must be filed within fourteen days of the occurrence of the breach or after notification of award. It is clear that there is no conflict between Section 93 of the Act and Regulations 73(2) (c) as far as the prescribed time of lodging a Request for Review is concerned."

In view of the foregoing, the Board holds that this Request for Review was filed out of time.

On the second issue that the Procuring Entity erred by signing the contract on **18th February 2011**, the Board notes that this tender was financed by a loan to the Government of Kenya, by Japan International Corporation Agency (JICA).

The Board has perused the Request for Proposal that was issued to the Bidders. It is clear that all the bidders were aware that the tender was to be processed as per the criteria set out in the Request for Proposal. The Board notes that the instructions to the consultants clearly stipulated the steps that were to be followed in the tender process.

The Board has further noted that the clause 7 of the instructions to the consultants provided as follows;

"7.1 After completing negotiations the client shall award the Contract to the selected Consultant and notify the other Consultants who have submitted proposal that they were unsuccessful.

(i) When the QCBS method is used, after Contract signature the client shall return the unopened Financial Proposals to the Consultants whose Technical Proposals have not secured the minimum qualifying mark, or were found to be technically non-responsive."

It is clear under the JICA guidelines the Procuring Entity is required to sign the contract with the Successful Bidder and thereafter notify the Unsuccessful Bidder and return their financial proposals unopened.

As already stated all the Bidders were aware that this procurement was conducted under the JICA guidelines. By submitting a tender, the Bidders in essence confirmed that they were bound by the procedure set out in the Request for Proposal. Therefore, the Applicant was aware of the procedures that were used in evaluation and notification of the outcome of the tender. It is not in dispute that this procedure is different from the one set out in Sections 67 and 68 of the Act. This tender was being conducted under the JICA guidelines and there is a conflict between the guidelines and the Act in regard to time when a contract is signed with the Successful Bidder. That conflict has to be resolved in line with Section 7 of the Act which provides as follows;

"If there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others."

In view of the foregoing the Board holds that the signing of the contract on **18th February 2011** was not fraudulent as argued by the Applicant.

As to the third issue as to whether Sections 6 and 7 of the Act are applicable to this tender, the Board notes that the said provisions state as follows;

Section 6

"Where the provisions of this Act conflicts with any obligations of the Republic of Kenya arising from a tender or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans.

Section 7

"If there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others."

It is not in dispute that;

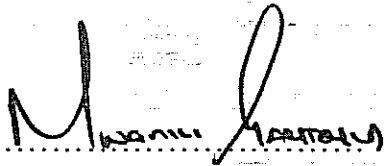
- i) The ODA agreement for the financing of this tender was signed between JICA and the Government of Kenya on **26th August 2010**.
- ii) This tender has been conducted under the JICA Procurement guidelines.
- iii) The Request for Proposal clearly set out the procedures to be followed and all the Bidders were aware of the guidelines. By submitting a tender the Bidders bound themselves to the said guidelines.
- (v) The JICA guidelines have different procedures than those set out in that Act. The Board notes that Section 7 of the Act states that in case of a conflict between the Act and a conditioning imposed by a Donor, the condition shall prevail. The Board further notes that

funds for this tender was a loan provided by the Japanese International Corporation Agency (JICA) and therefore Sections 6 & 7 of the Act are applicable to this tender.

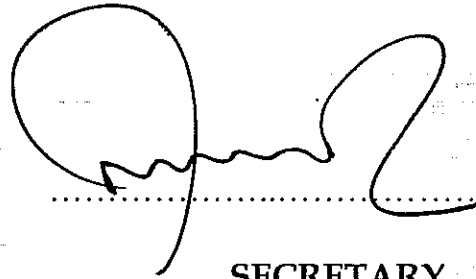
In view of the foregoing the Board holds that this Request for Review was filed out of time. Further, the Procurement Entity signed the contract in accordance with the JICA guidelines which were governing this tender and there is no irregularity as argued by the Applicant.

Accordingly, the Preliminary objection succeeds and the Request for Review is hereby dismissed and the procurement process may proceed.

Dated at Nairobi on this 5th day of April 2011



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**

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