

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 13/2011 OF 20TH APRIL, 2011

BETWEEN

CHINA WU YI (K) CO. LTD LTD.....APPLICANT

AND

KENYA RURAL ROADS AUTHORITY....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Rural Roads Authority dated 13th April, 2011 in the matter of Tender/Contract No. RWC 009 for construction of Giakanja-Tetu Mission Road (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
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Ms. F. Okumu - Secretariat

PRESENT BY INVITATION

Applicant, China Wu Yi (K) Co. Ltd.

Mr. Andrew Wandabwa - Advocate
Ms. Victoria Kariithi - Advocate
Mr. Munyasa Khasiani - Legal Assistant
Mr. Tom Nyaoka - Staff
Mr. Xu Ji Qtang
Mr. Wukaibin

Procuring Entity, Kenya Rural Roads Authority.

Mrs. Catherine Butaki - Corporate Affairs Manager
Mr. B.A. Otieno - Procurement Officer

Interested Candidate, M/s Intex Construction Ltd

Mr. Mohammed Nyaoga - Advocate
Mr. Muthoni Thiankolu - Advocate
Mr. Paul Momanyi - Pupil
Mr. Thugari Mathenge - Pupil
Mr. Samit Gehlot - Managing Director
Mr. P.S. Tak - Director
Mr. John Kihara - Quantity Surveyor

BACKGROUND OF AWARD

Advertisement

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
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. Following evaluation of the bids by the evaluation committee, the committee recommended that the contract for execution of the works be awarded to China Wu Yi Company Ltd at the tender sum of Ksh. 2,158,764,126.00. The Tender Committee of the Procuring Entity, after deliberating on the recommendation of the tender evaluation committee, awarded the contract to M/S China Wu Yi Company Limited.

M/s Intex Construction Ltd, one of the bidders, lodged a request for review before the Board, (**Application No. 1/2011**), against the decision of the Procuring Entity, citing several breaches of the Act, Regulations and the Tender Document. After hearing the Application, the Board upheld the appeal and directed as follows:

“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, [i.e. the Applicant herein] 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 the 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, re-evaluation to be done and concluded on priority basis."

In order to implement the directive of the Board, the Procuring Entity requested all the bidders to extend validity of their bids and bid bonds for 60 days from 3rd March, 2011 to 2nd May 2011. Six firms extended their bid validity as follows:

1. China Wu Yi Co. Ltd
2. Intex Construction Ltd
3. Kimemia Engineering Ltd
4. G. Issaias & Co. (K) Ltd
5. S. S. Mehta & Sons Ltd
6. Kirinyaga Construction Ltd

EVALUATION

The bids were evaluated by a committee chaired by Eng. S.N. Mwangi. The evaluation was conducted in three stages namely;

Completeness & Responsiveness, Detailed evaluation and Post qualification.

The re-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 initialled.	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). COMPLETENESS & RESPONSIVENESS EVALUATION

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

COMPLETENESS CRITERIA	Kimemia	S. S. Mehta	Intex	Kirinyaga	China Wu Yi	G. Issaias
Tender Opening No.	1	2	4	5	6	12
Signing/ initialling of pages with entries	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Certificate of Incorporation	Y	Y	Y	Y	Y	N
Certificate of Registration (MOR)	Y	Y	Y	Y	Y	Y
VAT Registration	Y	Y	Y	Y	Y	N/C
PIN Registration	Y	Y	Y	Y	Y	N/C
Valid Tax Compliance Cert.	Y	Y	Y	Y	Y	N/C
Form of Bid	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
Bid Security	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Form of Power of Attorney	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Cert. of Tenderer's visit to site	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
Key Personnel	Y/S	Y/S	Y/S	Y/S	Y/S	Y/S
Roadwork completed satisfactorily	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
Schedule of other supplementary information	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
Overall Rating	P	P	P	P	P	F

Key: Y - Yes, document provided as required, Y/S - Yes/Signed, information complete as required, N/C- No/Not compliant, P - Pass, F - Fail

One bidder M/s G. Issaias & Co. Ltd was disqualified at this stage for failure to provide VAT Registration, PIN Registration and Valid Tax Compliance Certificate.

B) DETAILED/COMPLETENESS EVALUATION

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

Criteria No.	COMPLETENESS CRITERIA	Kimemia	S. S. Mehta	Intex Construction	Kirinyaga Construction	China Wu Yi
		1	2	4	5	6
1	Non Performing Contracts	Y	Y	Y	Y	Y
2	Pending Litigation	Y	Y	Y	N	Y
3	Financial Situation/Cash flow	N	Y	Y	Y	Y
4	Average Annual Turnover	N	Y	Y	Y	Y
5	General Experience	Y	Y	Y	Y	Y
6	Specific Experience	N	Y	Y	N	Y
7	Current Commitments	Y	Y	Y	Y	N
8	Site Staff	Y	Y	N	N	Y
Overall		F	P	P	F	F

Key: P – Pass, F- Fail

Three 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; had a turnover of Ksh.127 million against the

requirement of Ksh. 500 million; and did not have the relevant specific experience of 5 years. Intex Construction Ltd proposed a site agent who is not a registered engineer. Kirinyaga Construction had a litigation of Ksh.2.4 billion which is more than 50% of the bidder's net worth of Ksh.831.8 million, no specific experience and the site agent is not a registered engineer as required. China Wu Yi Co. Ltd had current commitments amounting to Ksh.9, 118,491,868 which is above the threshold of Ksh.5 billion.

At this stage, the Procuring Entity verified the value of outstanding works for the bidders from the Ministry of Roads, Kenya National Highways Authority, Ministry of Water and Irrigation, Ministry of Public Works, Ministry of State for Defence and the Local Government. From the information provided, the value of outstanding works for four bidders was given namely; S.S. Mehta & Sons (Ksh.890,834,475), Intex Construction (Ksh.4,000,000,395.58), China Wu Yi Co. Ltd (Ksh.9,118,491,869) and Kirinyaga Construction (Ksh.112,928,723).

Only one bidder, S.S. Mehta & Sons Ltd complied fully with the requirements of the detailed evaluation. However, at this stage, the Committee decided to exercise due diligence and to consider all bidders whose bids were non-compliant in respect to one item. This decision led to Intex Construction Ltd's bid being allowed to proceed to the next evaluation stage on the ground that, although the site agent proposed by them was not a registered engineer as required by the Tender Document,

he had vast experience as an engineer in road construction projects. The Committee thus considered lack of registration as an engineer as a minor non-conformity.

The two bidders, i.e. S.S. Mehta & Sons Ltd, and Intex Construction Ltd, were checked for arithmetic errors and both concurred to the corrections made.

Rate analysis was undertaken and it was established that S.S. Mehta & Sons Ltd generally priced highly while Intex Construction Ltd had an overall balanced pricing.

Evaluated bid prices and ranking of bidders

The evaluated bid prices and ranking of bidders is as shown below:

Bidder No.	Bidder	Tender sum (Ksh)	Ranking
4	Intex Construction Ltd	2,453,093,782.82	1
2	S.S. Mehta & Sons Ltd	2,751,346,290.00	2

C) POST QUALIFICATION ANALYSIS

The lowest evaluated bidder M/s Intex Construction Ltd was subjected to post qualification analysis and it was determined that it met 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 current commitments.

Arising out of this exercise the Evaluation Committee recommended that the contract for the Construction of Giakanja-Tetu Mission Road (D434), Kagogi-Ihwa-Ihururu (E576/E1690) and Wandumbi-Kigogoini (E573) Roads project be awarded to M/s Intex Construction Ltd at their evaluated tender sum of Ksh. 2,453,093,782.82.

The Tender Committee, in its meeting held on 13th April, 2011, to consider the recommendation of the Evaluation Committee, concluded that only one bidder, namely, S.S. Mehta & Sons Ltd, fully complied with the requirements of the tender. Accordingly, it decided to award the tender to M/s S.S. Mehta & Sons Ltd, at their tender sum of Ksh.2, 751,346,290.00.

However, the Accounting Officer, on the advice of the Procurement Manager, and in accordance with section 27 of the Public Procurement & Disposal Act, 2005 decided that the tender be awarded to Intex Construction Ltd at their tender sum of Ksh.2,453,093,782.82 being the lowest evaluated bidder, and as recommended by the Evaluation Committee. It is this decision by the Procuring Entity which is the subject of this Application.

REQUEST FOR REVIEW

The Request for Review was lodged by M/s China Wu Yi (K) Co. Ltd on 20th April 2011 in the matter of Tender/Contract No. RWC 009 for construction of Giakanja-Tetu Mission Road (D434), Kagogi-Ihwa-Ihururu (E576/E1690) and Wandumbi-Kigogoini (E573) Roads.

The Applicant seeks for the following orders:

1. The Procuring Entity's decision awarding the tender to Intex Construction Limited be annulled.
2. The Procuring Entity's decision awarding the tender to Intex Construction Ltd be substituted with one awarding the subject tender to the Applicant herein.
3. Costs be awarded to the Applicant herein, in any event.

The Applicant raises 12 grounds of review which we deal with as follows:

Ground 1 and 2 - Breach of Review Board's directives

The two grounds are consolidated as they raise similar issues on the orders issued by the Board in Application No. 1/2011 Intek Construction Limited -vs- Kenya Rural Roads Authority.

The Applicant submitted that the Procuring Entity erred in not complying with the directives given by the Board in the Application no. 1 of 2011. It stated that the Procuring Entity failed to adhere to the direction and therefore the award in the Successful Candidate should be annulled.

In response, the Procuring Entity stated that, contrary to the allegation by the Applicant, it was merely following the order of the Board to evaluate all the bids, which order it executed by evaluating all bids, including that of the Successful Bidder, in accordance with the criteria set out in the tender document. It further stated that it annulled the tender award which had been given to the Applicant as instructed by the Board and appointed an Evaluation Committee which re-evaluated the tenders and submitted an evaluation report. The Procuring Entity further stated that it also verified the authenticity of the value of outstanding works submitted by each bidder with the Ministry of Roads and other relevant reliable authorities, as directed by the Board. It further submitted that this ground was not supported by breach of specific provisions of the Act and the Regulations. On the basis of these arguments, it urged the Board to dismiss the Application.

On its part, the Successful Bidder submitted that the ground was vague and general, and therefore, frivolous. It further submitted that the Applicant had not disclosed in his pleadings the particulars as to how the Procuring Entity had failed to comply with the directives of the Board. Accordingly, it urged the Board to dismiss the Application.

The Board notes that this tender had been reviewed by the Board under Application No.1/2011 between Intex Construction Ltd (Applicant) and Kenya Rural Roads Authority (Procuring Entity), where the Successful bidder then is the Applicant in this current Review. In the Board's ruling dated 9th February 2011, the Request for Review succeeded and, pursuant to section 98(b) of the Act, the Board annulled the award of the tender to the Successful Bidder and directed the Procuring Entity to do a re-evaluation of the bids based on the information contained in the original bids and also 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. The re-evaluation was to be done and concluded on priority basis considering the importance of the project.

The Board further notes that the Procuring Entity nullified the notification of award by letter to the then Successful Bidder, Ref. No. KeRRA/D&C/2844, dated 24th February 2011. The Board notes that following this ruling, the Procuring Entity wrote to all bidders that had participated in the tender vide the letter ref. KeRRA/D&C/2840 dated 23rd February 2011, asking them to extend their tender validity by 60 days from 3rd March 2011 to 2nd May 2011, since the bid validity period was due to expire on 2nd March, 2011. The Board notes that only six firms validated their bids. The Board further notes that following this process an evaluation committee under the chairmanship of Eng. S.N. Mwangi was appointed on 18th February, 2011 vide letter ref. No. KeRRA/D&C/2837, to

re-evaluate the tenders. The Evaluation Committee submitted its report signed on 30th of March 2011 and an addendum dated 12th April, 2011.

The Board further notes that the Procuring Entity sought to verify the authenticity of the value of outstanding works submitted by bidders vide letters ref. No. MOR/A.35.02 VOL 50/10-13 dated 25th February 2011 from the Ministry of Roads, Kenya National Highways Authority, Ministry of Water and Irrigation, Ministry of Public Works, Ministry of State for Defence and the Local Government. From the information provided, the value of outstanding works for four bidders was determined as follows:

S.S. Mehta & Sons (Ksh.890,834,475);

Intex Construction (Ksh.4, 000,000,395.58);

China Wu Yi Co. Ltd (Ksh.9, 118,491,869);

Kirinyaga Construction (Ksh.112, 928,723).

Finally, the Board notes that the Applicant neither specified any particular directive of the Board that was not complied with nor any section of the Act or Regulations that had been breached.

Taking all the above matters into account, the Board finds that the Procuring Entity carried out re-evaluation of the bids in accordance with the criteria set out in the tender documents. The Board further finds that in carrying out the re-evaluation, the Procuring Entity sought and obtained verification of the outstanding works by bidders in accordance with the

directive of the Board. Accordingly, the Board finds that there's no basis for the claim by the Applicant that the Procuring Entity erred in complying with the directive of the Board.

Taking the above matters into account, these grounds for review fail.

Ground 3 - Breach of section 2(b) and (c) of the Act

The Applicant averred that the Procuring Entity failed to ensure that all the respective bidders were treated fairly in keeping with the objectives of the Act as set out in S.2(b) and (c). It submitted that the evaluation process was skewed by allowing one party, namely, Intex Construction Limited, whose bid did not include a registered site engineer, to be evaluated. It argued that the registration of a site engineer by the Engineers' Registration Board of Kenya was a mandatory requirement. It further argued that the non-conformity by the Successful Bidder in this respect should be applied equally so that the fact that the Applicant had outstanding works of more than five billion Kenya Shillings, which was the threshold set by the tender documents, should not have resulted in its being knocked out of the competition. It submitted that by allowing the Successful Bidder which, had failed to conform to one requirement set out in the tender documents, namely, failure to propose a site engineer who was registered, and disallowing the Applicant on the ground of one non-conformity, namely, having outstanding works valued at over five billion Kenya Shillings, breached section 2 of the Act in that bidders were not treated equally.

In response, the Procuring Entity denied the allegations and submitted that the section being referred to refers to the purposes of the Act in general hence reference to its breach lacks specificity, is purely speculative, lacks merit and cannot therefore be used to prove a breach of the Act and or Regulations.

On its part, the Successful Bidder submitted that section 2 of the Act is a general section which sets out the general objectives of the law, and cannot be breached alone. In support of this argument, the Successful Bidder pointed to previous rulings by the Board in which the Board had stated that an alleged breach of the section must be supported by a specific breach of other sections of the Act or Regulations.

The Board notes that Section 2 of the Act refers to the purpose of the Act and the specified subsections reads as follows:

S.2 The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives:

a)

b) "to promote competition and ensure that competitors are treated fairly"

c) "to promote the integrity and fairness of those procedures."

The Board has held in the past that this section cannot be breached in isolation.

The Applicant having not cited any other section of the Act or Regulations, and having failed to demonstrate how the objectives set out in section 2 were breached, the Board finds that this ground has no merit. Accordingly, this ground of Request for Review also fails.

Grounds 4, 5, 6, 7 and 12- Breach of Sections 66(2), 39(1), 66(1) and 66(4).

These grounds have been consolidated as they raise similar issues related to the evaluation process.

The Applicant submitted that the Procuring Entity in evaluating the tenders erred in relying on a procedure and criteria other than that set out in the tender documents contrary to the provisions of section 66(2) of the Act. It argued that in purporting to apply a criteria and procedure outside those provided in the tender document, the same was applied in a discriminatory manner contrary to provisions of section 39(1) of the Act. It stated that the criteria to be used were set out in Clauses 28.1 and 28.2 of the tender document which provide as follows:-

28.1 "Prior to the detailed evaluation of bids, the Employer will determine whether each bid is (a) has been properly signed; (b) is accompanied by the required securities; (c) is substantially responsive to the requirements of the bidding documents; and"

28.2 " A substantially responsive bid is one that conforms to all the terms, conditions and specifications of the bidding documents

without material deviation or reservation....A material deviation or reservation is one (a) which affects in any substantial way, the scope, quality or performance of the works; (b) which limits in any way, inconsistent with the bidding documents;...or (c) whose rectification would affect unfairly the competitive position of other bidders presenting substantially responsive bids.”

The Applicant argued that only a party, whose bid is substantially responsive in accordance with this clause, and section 66(1) of the Act, can be allowed to proceed to technical evaluation. In this regard, it submitted that the Successful Bidder should not have proceeded to technical evaluation stage because it failed to meet the criterion specified in Clause 6 of the qualification criteria relating to site agent which required that such agent must, **(i) have a BSc. in Civil Engineering; (ii) be a registered engineer** as registered by the Engineer’s Registration Board of Kenya in accordance with the Laws of Kenya Cap 530. It submitted that the site agent proposed by the Successful Bidder was not a registered engineer in accordance with Clause 6. It argued that this was a mandatory requirement, and thus, allowing the Successful Bidder to proceed to the technical evaluation stage without having proposed a site agent who was a registered engineer, was a breach of the tender document and section 66(2) of the Act.

The Applicant averred that the contrived criterion was applied in a skewed manner to its disadvantage and that, the Procuring Entity erred in

considering other bidders, including the alleged Successful Bidder, for further evaluation after they had failed to fulfil the basic requirements, contrary to provisions of section 66(1) of the Act. It added that the Procuring Entity erred in failing to award the tender to the lowest evaluated bidder contrary to the provisions of section 66(4) of the Act. Accordingly, it urged the Board to nullify the decision of the Procuring Entity.

In response, the Procuring Entity denied the allegations that it applied any criterion not set out in the tender document. It submitted that the requirement that the site agent be a registered engineer in accordance with Cap. 530, was a minor deviation. The Procuring Entity further submitted that this provision must be read together with the Conditions of Contract which provides that the site agent could have equivalent status. It stated that this was common practice as it was impractical for international bidders to provide engineers who were registered in Kenya. The Procuring Entity further submitted that it used the qualification criteria under section 5 page 23 to 33 of the blank bid document and the schedules of supplementary information under section 7 pages 56 to 70 of the document, and hence the bid was evaluated in accordance with section 66 of the Act.

The Procuring Entity further stated that the Applicant did not state how it was discriminated against contrary to section 39 of the Act which, deals with preference and reservation schemes. It stated that the Successful

Bidder met all the requirements of the bid document hence was the lowest evaluated bidder. In conclusion, it urged the Board to dismiss the request for review.

On its part, the Successful Bidder stated that the crux of the ruling by the Board in Application No. 1/2011 was that the Procuring Entity was directed to carry out re-evaluation of the bids using the information contained in the original bids, and to verify the value of outstanding works submitted by each bidder. On the issue of whether to treat the registration of the site agent as a minor deviation or as a mandatory requirement, the Successful Bidder stated that it concurred with the view of the Procuring Entity, that this was a minor deviation. It averred that in considering whether a matter was minor or mandatory the practice in international institution, such as the World Bank, distinction is made between matters which relate to contract administration, which are minor, and those that relate to bid submission are considered to be major. It argued that in this case the requirement for the registration of the site engineer was a minor deviation because it is part of contract administration. Accordingly, it urged the Board to dismiss the Application.

In reply the Applicant argued that the provisions of the Conditions of Contract cannot override the provisions of the tender document. It further stated that, in any event, the Conditions of Contract was merely a draft document.

The Board has perused the documents submitted before it and the submissions by the parties and finds as follows:

The Board notes that the tender was evaluated in three stages, namely, Completeness & Responsiveness; Detailed evaluation; and Post qualification analysis. Out of 19 tenderers who participated in the tender, only six validated their bids when asked by the Procuring Entity to validate their tender validity for a further sixty (60) days from 3rd March 2011 to 2nd May 2011. This was done vide the Procuring Entity's letter Ref. No. KeRRA/D&C/2840 dated 23rd February, 2011 and the following bidders responded by validating their tenders:

1. China Wu Yi Co. Ltd
2. Intex Construction Ltd
3. Kimemia Engineering Ltd
4. G. Issaias & Co. (K) Ltd
5. S. S. Mehta & Sons Ltd
6. Kirinyaga Construction Ltd

The Board further notes that one bidder, M/s G. Issaias & Co. Ltd, was disqualified at the Responsiveness stage for failure to provide VAT Registration, PIN Registration, and Valid Tax Compliance Certificate, thereby leaving only five of the six bidders who had validated their tenders to proceed to the detailed evaluation stage. The Board further notes that four bidders failed to meet all requirements of the tender at the detailed evaluation stage but only three were disqualified at that stage. Kimemia

Engineering Ltd had cash flow below the required Kshs.200 million; had a turnover of Ksh.127 million against the requirement of Kshs.500 million; and furthermore, did not have the relevant specific experience of 5 years. Intex Construction Ltd proposed a site agent who is not a registered engineer. Kirinyaga Construction had a litigation of Ksh.2.4 billion which is more than 50% of the bidder's net worth of Ksh.831.8 million; had no specific experience; and the site agent was not a registered engineer, as required. China Wu Yi Co. Ltd had current commitments amounting to Ksh.9, 118,491,868 which was above the threshold of Ksh.5 billion as per the requirement in the tender document.

The Board further notes that only one bidder; S.S. Mehta & Sons Ltd complied fully with the requirements of the detailed evaluation and, therefore, proceeded to the next stage of evaluation. The Board notes that the Evaluation Committee, however, decided to exercise due diligence and as a result, considered all bidders who were not compliant on one criterion. On this basis, Intex Construction Ltd was allowed to proceed to the next stage having noted that although the site agent was not a registered engineer, he had vast experience as an engineer in road construction projects. On this premise, the committee considered this a minor non-conformity.

The Board further notes that the Applicant was disqualified at the detailed evaluation stage for having current commitments amounting to Ksh.9,118,491,868, which was above the threshold of Ksh.5 billion required

under Clause 5.1 of section 5 (qualification criteria) in the bid document.

The clause provides that:

"The total value of outstanding works on the on-going contracts must not exceed Ksh.3 billion". This value was later amended by 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 the requirement that Clause 6 (qualification criteria) in the bid document required that the site agent be of *"BSc- Civil engineering qualification; be a registered engineer; have general experience of 10 years and specific experience of 8 years."*

The Board notes that, notwithstanding Clause 6, Section 6 of the Tender Document, which is entitled "Conditions of Contract," provides at Sub-Clause 15.2 as follows:-

"The Contractor's Agent or Representative on the site shall be a Registered Engineer as registered by the Engineer's Board of Kenya in accordance with the Laws of Kenya Cap 530 or have equivalent status approved by the Engineer and shall be able to read and write English fluently."

The question for determination by the Board is whether or not registration of the site agent as an engineer was a mandatory requirement in terms of Clause 6 of the tender document, as claimed by the Applicant. Upon

perusal of Clause 6 of the tender document, which sets out the qualification criteria, and in which Clause 6 is found, suggests that indeed all the items listed therein must be satisfied by every bidder. A further perusal of the tender document indicates that, apart from reference to the site agent in Clause 6, the matter is also dealt with elsewhere in the document.

In this particular tender the bid document consists of thirteen sections as follows:

1. Form of Bid;
2. Appendix to Form of Bid;
3. Form and Bid Security;
4. Instructions to Bidders;
5. Qualification Criteria;
6. Conditions of contract;
7. Schedules of Supplementary Information;
8. Form of Agreement;
9. Form of Performance Security;
10. Standard Specifications;
11. Special Specifications;
12. Bills of Quantities;
13. Drawings.

Section 6 of the tender document cited above sets out the obligations of the Procuring Entity and a bidder who may be selected for award. Sub-Clause 15.2 of Section 6 makes it clear that the requirement that a site agent must

be a registered engineer as provided in Clause 6 of Section 5, and on which the Applicant relies for its claim that this was a mandatory requirement, is not absolute. It clarifies this requirement by stating that the site engineer can have "**equivalent status approved by the Engineer.**" In light of this clarification in the Conditions of Contract, the Board finds that the qualification criteria set out in Clause 6 of Section 5 must be read conjunctively with the provisions of Clause 15.2 of Section 6 of the tender document. When read together, it is clear that the requirement that the site agent must be a registered engineer was not mandatory requirement.

Section 52(1) of the Act makes it mandatory that Procuring Entities must prepare tender documents in accordance with the provisions of the section. Section 52(3) provides that the tender document must set out a number of requirements. One such requirement is stipulated in section 52(3) (c) which states that a procuring entity must set out in the tender document:

"the general and specific conditions to which the contract will be subject"

It is pursuant to this provision that the tender document under consideration has set out in Section 6 the Conditions of Contract. The conditions of a contract are, therefore, not a matter of discretion for a Procuring Entity, it is a legal requirement which must be included in a tender document. The rationale for this requirement is that bidders are entitled to know from the beginning the legal obligations which they will

face should they win a bid. This disclosure enables them to decide when they purchase the tender documents whether or not, in light of these conditions, they wish to participate in the bidding opportunity in question.

A tender document, especially one designed for the acquisition of high value civil works, is a complex compilation of many parts of a process whose meaning cannot be understood if read in a disjunctive manner. It is therefore not correct, as argued by the Applicant, that the conditions of contract cannot override the provisions of the tender document, the conditions of contract are part of the tender document and must be read together with the other parts.

Concerning the Applicant's allegation of being discriminated against in the Procuring Entity's application of a criteria and procedure not set out in the bid document contrary to Section 39(1) of the Act, the Board notes that the section provides that *"Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the Regulations"*.

The Board notes that the Applicant did not specify the said criteria and procedure and how it was discriminated against.

Taking into account the above findings, these grounds of request for review fail.

Ground 8 and 9

The two grounds have been consolidated as both raise similar issues on mandatory non-compliance.

The Applicant submitted that the Procuring Entity erred in treating a fundamental and mandatory non-compliance on the part of the Successful Bidder as a minor deviation when in fact and in law it was not. It stated that as the Successful Bidder did not have the required operating capital of Ksh. 200 million at the time of the original detailed evaluations as required by the tender document, the Procuring Entity breached the Act and the tender document, by seeking certification from the Successful Bidder's Bank, namely KCB, as to the operating capital of the Successful Bidder. It argued that as a result of this action by the Procuring Entity, the Successful Bidder who was otherwise non-compliant was able to be evaluated. It further argued that the Procuring Entity erred in treating failure by the Successful Bidder to demonstrate that it had the necessary working capital as a minor deviation.

In response, the Procuring Entity denied the allegations and stated it sought clarifications from KCB because the statement attached to the Successful Bidder's tender appeared to be improperly photocopied in that only odd pages were attached. It further stated that it was not unusual for it to carry out due diligence in respect of supporting documents issued by banks, such as bid bonds. The Procuring Entity stated that the content of the evaluation report for this procurement is in accordance with Regulation

51(e) which includes details of any minor deviations accepted under section 64 of the Act. It added that the tender was based on post qualification method hence Regulation 52(1) applied and that the Procuring Entity confirmed that the Successful bidder who submitted the lowest evaluated bid is qualified to be awarded the contract in accordance with section 31(1) of the Act.

The Procuring Entity argued that it made a sound judgment taking into account that the primary objective of the Act according to section 2(a) is to maximize economy and efficiency and this included carrying out due diligence to avoid loss of public funds. It added that if the bid of the Successful bidder had any minor deviation it was addressed in accordance with the instructions to bidders and or the conditions of the contract as stipulated in the tender documents as we do not have perfect tenders.

On its part the Successful Bidder submitted that the matters being raised by the Applicant under this ground were *res judicata*. It argued that the question of whether or not the Successful Bidder should have been allowed to proceed to the next stage in the original evaluation should have been brought up by the Applicant in the hearing of Application No. 1/2011. It submitted that the Applicant having failed to do this the matter cannot now be the subject of litigation by the Applicant. In support of its contention that the matter was *res judicata*, the Successful Bidder cited the case of Pop-In Kenya Ltd [1990] KLR 609.

In reply the Applicant reiterated that the certification sought by the Procuring Entity had the effect of changing the substance of the tender by making a bidder who would have not qualified now commercially qualified. As to the question of whether the issues raised by the Applicant were *res judicata*, Applicant argued that the fact which had given rise to this Application was not in existence at the time of Application No.1/2011. It stated that this was one of the exceptions to the rule of *res judicata*. It further argued that since the principle of *res judicata* is a creation of section 6 of the Civil Procedure Act, it has no application in procurement proceedings, which are governed by the rules that are set out in the Public Procurement and Disposal Act, and the Regulations.

The Board has carefully listened to the submissions by the parties and considered the documents before it and decides as follows.

The Board notes that in Application No. 1/2011 it considered the issue of the evaluation of the tenders which are the subject matter of this Application. After hearing the submissions made before it and perusing the documents presented before it, the Board directed that **“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 authorities. In view of**

the importance of this project, this re-evaluation to be done and concluded on a priority basis.”

The Board further notes that the Applicant in this review was the Successful Bidder in the decision by the Procuring Entity in Application No. 1/2011, and that the Successful Bidder in the current review was the Applicant in that review.

The Board notes that in that Application the issue which has now been raised by the Applicant in this review, namely, the decision by the Procuring Entity to seek information from Kenya Commercial Bank (KCB), as to the Intex Construction Company Ltd’s operating capital, was well within the knowledge of the Applicant in this review. Notwithstanding this knowledge, it did not raise the issue.

It is not in the interest of justice, or public procurement administration, that parties should present their grievances in judicial or administrative proceedings piecemeal, for to do so would result in delay in the delivery of justice, and in the case of procurement, services to the people of Kenya.

In the circumstance, the Board finds that having slept on its rights, the Applicant should not be allowed to revive these rights by raising a subject matter which it had ample opportunity to argue in the previous proceedings.

Therefore, the Board finds that this ground has no merit.

Accordingly, this ground fails.

Ground 10 – Breach of section 41 of the Act

The Applicant alleged that the Procuring Entity erred in awarding the contract to the alleged Successful bidder after having found that the Successful bidder gave false information as to the contract sum for one of their ongoing contracts, contrary to the provisions of S.41 of the Public Procurement and Disposal Act, hereinafter referred to as the “Act.” It argued that the act by the Successful Bidder fits the definition of the term “fraudulent practice” as set out in Section 3 of the Act. It submitted that, insofar as this act by the Successful Bidder constituted fraud in terms of this section, the Procuring Entity erred in awarding the contract to it.

In response, the Procuring Entity argued that it had been directed by the Board to independently verify the authenticity of the value of outstanding works submitted by each bidder with the Ministry of Roads and any other relevant reliable authorities. This was carried out hence the Successful bidder had no opportunity to give false information on their bid which would influence the award of this contract to their advantage. The due diligence confirmed that the ongoing works submitted by the Successful bidder to be correct and factual and that the Applicant is not prejudiced in any way.

The Board has perused the documents submitted to it, and notes that the Procuring Entity sought verification of the authenticity of the value of the outstanding works submitted by each bidder as directed by the Board vide the letters Ref. Nos. MOR/A.35.02 vol. 50/10 -13 dated 25th February, 2011 from the Ministry of Roads, Kenya National Highways Authority, Ministry of Water and Irrigation, Ministry of Public Works, Ministry of State for Defence and the Local Government.

On this premise, the Board finds no justification or merit in the claim by the Applicant that the Successful Bidder gave false information.

Accordingly, this ground fails.

Ground 11 - Breach of section 33 of the Act

The Applicant alleged that the Procuring Entity awarded the tender to the purported Successful bidder who is a party barred by section 33.

In response, the Procuring Entity denied the allegations and submitted that the Successful bidder is not an employee, Minister, public servant, member of a board or committee of the Government or any department of the Government or a person appointed to any position by the President or a corporation who is related to the above persons. The Applicant does not have documentary evidence from Registrar of Companies hence his allegation should be treated as false statements without factual evidence.

We have perused the documents submitted by the Successful bidder and established from their confidential business questionnaire that the firm is a private registered company whose directors are K.S. Gehlot (Indian), P.S.Tak (Kenyan), S. Gehlot (British), Kegee Holdings (Non directorship) and Virendra Dave (Kenyan, Non directorship).

Section 33 of the Act reads "(1) Except as expressly allowed under the regulations, a procuring entity shall not enter into a contract for a procurement with -

- a) An employee of the procuring entity or a member of a board or committee of the procuring entity;*
- b) A Minister, public servant or a member of a board or committee of the Government or any department of the Government or a person appointed to any position by the President or a Minister; or*
- c) A person, including a corporation, who is related to a person described in paragraph (a) or (b)*

(2) Whether a person is related to another person for the purpose of subsection (1) (c) shall be determined in accordance with the Regulations.

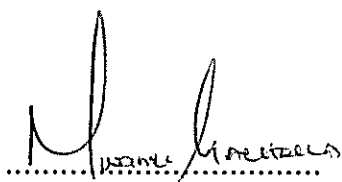
Regulation 26 reads "For the purposes of section 33(2) of the Act, a relative is limited to a spouse or 2 children."

The Board notes that the Applicant did not demonstrate how the Successful bidder is barred by Section 33 of the Act.

Accordingly this ground fails.

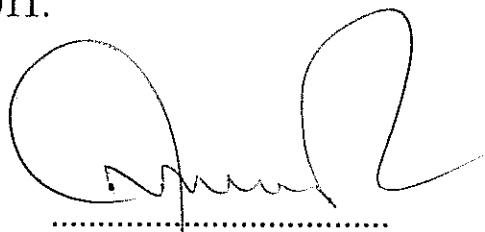
Taking into account all the above matters, the Request for Review fails.
Accordingly, the procurement proceedings may continue.

Dated at Nairobi on this 17th day of May, 2011.



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CHAIRMAN
PPARB



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SECRETARY
PPARB