

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

CONSOLIDATED REVIEW NOS. 14/2011 OF 20<sup>TH</sup> APRIL, 2010 &  
15/2011 OF 21<sup>ST</sup> APRIL, 2011

BETWEEN

CHINA WU YI (KENYA) CO. LTD &  
CHINA JIANGXI INTERNATIONAL KENYA LTD.....APPLICANTS

AND

NATIONAL SOCIAL SECURITY FUND.....PROCURING ENTITY

Review against the decision of the Tender Committee of the National Social Security Fund dated 7<sup>th</sup> April, 2011 in the matter of Tender No. 14/2010-2011 for Completion of Hazina Trade Centre Office Tower- Nairobi.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member

### **IN ATTENDANCE**

Mr. C. R. Amoth - Secretary  
Ms. Pamela K. Ouma - Secretariat  
Ms. Maurine Namadi - Secretariat

### **PRESENT BY INVITATION**

#### **Applicant for Review No. 14/2011, China Wu Yi (Kenya) Co. Ltd**

Mr. Andrew Wandabwa - Advocate  
Mr. Munyasa Khasiani - Advocate  
Ms. Edda Mwanyumba - Advocate  
Mr. Dongsheng Wan - Chairman  
Mr. Jieyang Xiang - Translator  
Mr. Tom Nyaoka - Staff  
Mr. Paul Musau - Staff

#### **Applicant for Review No.15/2011 , China Jiangxi International Kenya Ltd**

Mr. Mohammed Nyaoga - Advocate  
Mr. Muthomi Thiankolu - Advocate  
Mr. Paul Nyausi - Legal Assistant  
Mr. Kiruki Mutwiri - Legal Assistant  
Ms. Joy Igandu - Legal Assistant  
Mr. Zhang Jian - Manager  
Mr. Raphael Gichuki - Staff

#### **Procuring Entity, National Social Security Fund**

Mr. Paul Chege - Advocate  
Mr. Chris Wasike - Procurement Manager  
Ms. Caroline Rakama-Odera - Legal Officer

Mr. Mutemi Nzatu - EOI (QS)

Mr. Alfred K. Bauach - SO1

**Interested Candidate, Cementers Ltd**

Mr. Donald B Kipkorir - Advocate

Mr. Dipik Holai - Director

Mr. Rameshbhai Kurji - Director

**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 tender for the completion of the Hazina Trade Centre Office Tower-Nairobi was advertised by the National Social Security Fund on 1<sup>st</sup>February, 2011 in the Daily Nation and Standard Newspapers. The tenders were to close on 24<sup>th</sup>February, 2011 but were extended vide a notice published in the Standard and Daily Nation Newspapers of 16<sup>th</sup> February, 2011 to close on 4<sup>th</sup> March 2011 at 11.00 a.m.

**Closing/Opening:**

The tenders opened/closed on 4<sup>th</sup> March, 2011 and ten bids out of a total of twenty (20) who bought the Tender documents were opened. At the opening the following items were read out loud, the name of the Firm submitting the

Tender; presence or absence of tender security; the Tender Sum; Completion Period; and the number of copies submitted.

The Tender Opening Committee noted that m/s N.K Brothers Ltd submitted only one (1) set of documents contrary to the tender instructions of three (3) copies. The bids opened were as tabulated:

<b>Bid no.</b>	<b>Bidder</b>	<b>Tender sum (Kshs.)</b>	<b>Completion Period</b>
1	China Jiangxi International (K) Ltd	6,263,557,784.00	156
2	EPCO Builders Ltd	6,497,116,084.00	160
3	FUBECO (China Fushun)	6,354,016,059.00	140
4	Cementers Ltd	5,997,711,380.00	170
5	Sichuan HuashiEnt. Corp. E. A.	6,439,171,049.00	139
6	Tulsi Construction Ltd	6,720,527,089.00	190
7	Seyani Brothers Co. (K) Ltd	6,731,607,984.00	212
8	N. K. Brothers Ltd	6,313,909,101.00	199
9	China Wu Yi (Kenya) Co. Ltd	5,715,752,876.73	130
10	Parbat Siyani Construction Co. Ltd	5,951,291,730.00	159

## **EVALUATION**

The evaluation was carried out in three stages namely Preliminary Evaluation, Technical Evaluation and Financial Evaluation.

### **i) Preliminary Evaluation**

At this stage all the mandatory requirements were evaluated to determine the tenderers responsiveness. The criteria for evaluation included:

- a) tender submitted in the required format;
- b) tender security in the required format, amount and the validity;
- c) tender signed by lawfully authorized to do so;
- d) required number of copies;
- e) tender validity period; and
- f) the Provision of mandatory documents which included the certificate of Incorporation; valid NSSF Compliance certificate; valid tax compliance; directors; audited account for the last three
- g) Years; current certificate from the Ministry of Public Work Category "A"; ERC Class A1; CCK License; and the Joint agreements.

All the tenderers except Cementers Ltd were not responsive at this stage of the evaluation. The following were the reasons as to why the nine bidders were declared non-responsive:

- i) China Jiangxi - did not submit a current registration certificate for Raerex E.A. Ltd the proposed Mechanical Ventilation and Air Conditioning subcontractor.
- ii) EPCO Builders Ltd – no current certificate from MOPW for Siyani Ltd the proposed Plumbing & Drainage and Fire Fighting subcontractor and Raerex E. A. Ltd the proposed Mechanical Ventilation and Air Conditioning subcontractor.

- iii) FUBECO (China Fushum)- did not submit their current MOPW registration Certificate for Raerex E. A. Ltd the proposed Mechanical Ventilation and Air Conditioning subcontractor; current registration certificate and ERC license for Contemporary Electricals Ltd the proposed Electrical subcontractor; and the CCK license for Coronation Ltd the proposed Cabling sub-contractor.
- iv) Sichuan Huashi Enterprises Corporation E. A. Ltd- did not submit its current registration certificate from MOPW; valid NSSF compliance certificate; and it did not submit any names and agreements for all the sub-contractors.
- v) Tulsi Construction Ltd- did not submit its current registration certificate from MOPW; a valid NSSF compliance certificate; and did not submit any names and/agreements with all the sub-contractors
- vi) Seyani Brothers Co (K) Ltd - did not submit a valid tax compliance certificate; names of Mechanical Ventilation and Air Conditioning and Structured Cabling subcontracts; and the joint agreements with all the sub-contractors.
- vii) N. K. Brothers Ltd- submitted only one set of documents; did not submitte its certificate of incorporation as required; did not submit

the current registration certificate, ERC license and CCK license where applicable for all the proposed subcontractors

- viii) China Wu Yi (Kenya) Co Ltd - did not submit current category A registration for Axis Engineers Ltd their proposed Mechanical Ventilation and Air Conditioning sub-contractor
  
- ix) Parbat Siyani Construction Co. Ltd - did not submit its current registration certificate; current registration certificates, ERC License and CCK license where applicable for all the proposed subcontractors; and joint agreements with all the proposed subcontractors

Only Cementers Ltd was responsive and its bid evaluated on the technical parameters.

## **ii) Technical Evaluation**

M/s Cementers bid was evaluated and assessed on its level of compliance to the technical requirements and awarded marks. The bidder was evaluated on the following parameters:-

- Completion and compliance of the particular specifications i.e. Compliance with the standards and quality of materials/goods to be supplied ; and errors and consistency
- Personnel i.e. Contract Manager, Site Engineer and Manager, and Construction supervisors
- Relevant experience

- Machinery and Equipment
- Business support
- Referees
- Completion programme for the works

The cut off marks was 75% and M/s Cementers Ltd attained a score of 91.2 and therefore proceeded to the financial evaluation stage.

### iii) Financial Evaluation

The tender sum was checked for full compliance to specifications, arithmetic errors and consistency in price and was as summarized below:-

Tenderers Name	Tender Sum	Arithmetically corrected amount	Tender Error Amount	Error Percentage	Remarks
Cementers Ltd	5,997,711,380.00	5,997,840,822.00	(129,442.00)	-0.002%	Error too insignificant

The Evaluation Committee then noted that the tenderer complied fully with the technical specifications, had an arithmetic error that was too insignificant and its price distributions were consistent. The Committee then recommended that the tender for the completion of Hazina Trade Center Office Tower - Nairobi be awarded to M/s Cementers Ltd at its quoted price of Kshs. 5,997,711,380.00 inclusive of taxes with a completion period of 170 weeks.

### THE TENDER COMMITTEE DECISION

The Fund Tender Committee in its meeting held on 24<sup>th</sup> March, 2011 deliberated on the Evaluation Committee's report and awarded the tender to



M/s Cementers Ltd at its quoted price of Kshs. 5,997,711,380.00 inclusive of taxes with a completion period of 170 weeks.

The bidders were notified the decision of the Procuring Entity vide notifications letters dated 7<sup>th</sup> April, 2011.

### **THE REVIEW**

The two Requests for Review were lodged on 20<sup>th</sup> April, 2011 and 21<sup>st</sup> April 2011 against the decision of the National Social Security Fund dated 7<sup>th</sup> April, 2011 in the matter of Tender No. 14/2010 -2011.

### **REVIEW NO. 14/2011**

The Applicant, China Wu Yi (Kenya) Co. Ltd was represented by Mr. Andrew Wandabwa, Advocate. The Procuring Entity was represented by Mr. Paul Chege, Advocate while the Interested Candidate, Cementers Ltd, was represented by Mr. Donald B. Kipkorir, Advocate.

The Applicant requests the Board for the following orders;

1. *"The Procuring Entities decision awarding the tender to Cementers Kenya Limited be annulled.*
2. *The Procuring Entities decision awarding the tender to Cementers Ltd be substituted with one awarding the subject tender to the Applicant herein.*
3. *The costs of this appeal in any event."*

The Board deals with the six grounds of review as follows:

**Grounds 1 and 2 - Breach of Section 64 and Regulations 47 and 48**

These grounds have been combined because they relate to the same issues.

The Applicant alleged that the Procuring Entity breached Regulations 47 and 48 of the Public Procurement and Disposal Regulations, 2006 (hereinafter "the Regulations") by rejecting its tender at the preliminary evaluation stage even though it had submitted all the required documents and information requested in the tender documents. It admitted that it had submitted a class C registration certificate for its mechanical and ventilation sub-contractor but that this was a minor deviation from the tender requirements which required class "A" registration. It claimed that this was a minor deviation because the works to be carried out by the said sub-contractor under the contract was Kshs. 65 million which was a value of works well within class C registration, whereas class A registration's threshold was Kshs. 250million. It argued that this deviation should have been overlooked in keeping with the provisions of Section 64 of the Public Procurement and Disposal Act, 2005 (herein after "the Act") and in furtherance of the objectives of the Act as set out in Section 2.

In response, the Procuring Entity stated that the Applicant's bid was not the most competitive as it did not comply with the mandatory conditions of the tender. It averred that the alleged deviation by the Applicant was substantive and the tender was not responsive as provided for in Section 64 (1) of the Act. It argued that because the whole of the works was to be under a class A main contractor, then the Procuring Entity required all other sub-contractors to be

class A as well so as to ensure that all sub-contract works are undertaken by the highest quality of sub-contractors.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board notes that Section 64 (2) (a) of the Act stipulates that minor deviations that do not materially depart from the requirements set out in the tender documents will not affect whether a tender was responsive.

The Board has examined the Procuring Entity's tender report and notes that the Applicant together with eight other bidders was eliminated at the Preliminary Evaluation stage. The Applicant was declared non responsive for not submitting a current category "A" registration certificate for M/s Axis Engineers Ltd its proposed Mechanical Ventilation and Air Conditioning subcontractor.

The Board notes that the Tender Notice stated that sub-contractors were to have class A registration. The Board further notes that on the mandatory requirements for preliminary evaluation stated in the Appendix to ITT Clause 1.1 (g) bidders were to submit '*... current registration certificate Category "A" Builders' works with the Ministry of Public Works, current ERC license class "A1" and Class "A" telecommunication license for relevant subcontractors as per Tender Notice.*'

On examination of the Applicant's tender document, the Board finds that it had included a letter from the Ministry of Public Works to its proposed

mechanical and ventilation sub-contractor, M/s Axis Engineering Services Ltd dated 22<sup>nd</sup> December, 2010 which informed the sub-contractor that the Contractors' Registration Committee had agreed to approve its application for upgrading in various works to Class "C" in the Refrigeration, Air Conditioning and Ventilation. The Board further notes that the said letter stated that it shall serve as a certificate until such time that the sub-contractor was issued with a formal certificate.

The Board therefore finds that by submitting a class C certificate of registration for its mechanical and ventilation sub-contractor, the Applicant did not comply with the Procuring Entity's tender requirements which were for class "A" registration certificate. The Board further finds that the class of registration was clearly stated in the Tender Document and that the Applicant's submission of a class C registration certificate in lieu of the class A registration certificate as required under the Tender Documents was not a minor deviation.

Accordingly, these grounds of appeal fail.

### **Grounds 3, 4, 5 and 6 - Breach of Sections 2, 31, 66 of the Act**

These grounds have been consolidated because they raise similar issues about the application of the evaluation criteria.

The Applicant alleged that the Procuring Entity applied the evaluation criteria in a discriminatory manner contrary to the provisions of Section 31 of the Act. The Applicant further alleged that the Procuring Entity erred in failing to award the tender to the lowest evaluated bidder contrary to Section 66 of the

Act. It claimed that the works to be carried out by its mechanical and ventilation sub-contractor under the contract was Kshs. 65million which was a value of works well within class "C" registration. It further claimed that the tender requirement by the Procuring Entity that the mechanical and ventilation sub-contracts hold class A registration certificates, which threshold was Kshs. 250million, was discriminatory and contrary to the provisions of Section 2 of the Act.

In its response, the Procuring Entity stated that it had fully complied with the provisions of Section 31 of the Act and in particular subsections (3) and (4). It further stated that it had also complied with the provisions of Sections 2 and 66 of the Act and that it had convened a pre-tender meeting. It averred that at the pre-tender meeting none of the bidders has raised the issue of the class A registration required for the sub-contractors as being not reasonable for the tender under review.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board has examined the Tender Evaluation Report submitted and finds that the Procuring Entity evaluated all the bidders based on the criteria stated in the tender documents as per the requirements of Section 66 of the Act. The Board notes that the Applicant was eliminated at the Preliminary Evaluation stage. The Board further notes that only one bidder, the Successful Candidate, was found to be responsive and its bid was evaluated at the technical and financial evaluation stages; and was awarded the tender.

The Board finds that the Applicant proposed a sub-contractor registered under class C instead of Class "A" required under the Tender Documents and as such was not qualified to be awarded the contract.

Accordingly, the Board finds that these grounds of appeal fail.

The Board has noted that the only point raised by the Applicant was that the failure to provide a subcontractor's registration certificate in class A was a minor deviation; and no other issues relating to the tender process were raised.

Taking into account all the foregoing, this Request for Review fails and is hereby dismissed.

#### **REVIEW NO. 15/2011**

The Applicant, China Jiangxi was represented by Mr. Mohammed Nyaoga, Advocate. The Procuring Entity was represented by Mr. Paul Chege, Advocate while the Interested Candidate, Cementers Ltd, was represented by Mr. Donald B. Kipkorir, Advocate.

The Applicant requests the Board for the following orders:

- 1. The Board issues an injunction of the award of the tender until our case is heard on the issues raised in this application.*
- 2. The board should review the tender documents of the M/s Cementers to confirm that he qualifies to be awarded this contract.*

3. *Evaluate the whole tender process and ensure justice is served to all the tenderers.*
4. *If there is no contractor who qualifies following the above evaluation, the board should instruct NSSF to retender the project."*

The Board deals with the six grounds of review as follows:

#### **Ground 1**

The Applicant stated that it had been informed that its tender was not successful for not submitting a current registration certificate for its Mechanical Ventilation & Air Conditioning subcontractor. The Applicant alleged that it had submitted M/s Raerex's current registration certificate which was approved by the Ministry of Public Works (MOPW) in a meeting held on 24<sup>th</sup> February, 2010. It averred that the said letter stated that it shall serve as a certificate until such time that the sub-contractor is issued with a formal certificate. It further averred that the said letter/certificate did not have an expiry date. The Applicant added that its subcontractor had applied for the renewal of its registration on 28<sup>th</sup> December, 2010 and that its application had been approved on 18<sup>th</sup> February, 2011. The Applicant stated that MOPW had released this certificate on 3<sup>rd</sup> March, 2011 and the sub-contractor had received it on 4<sup>th</sup> March, 2011. The Applicant argued that because the value of the Mechanical Ventilation and Air Conditioning works accounted for only 0.004% of the total tender figure which was a minimal amount in relation to other subcontracting works, its bid should not have been disqualification on this issue.

In its response, the Procuring Entity stated that the Applicant's bid was not the most responsive because it had failed to comply with the mandatory conditions of the tender. It added that the deviation was substantive and the Applicant was therefore non responsive under Section 64 (1) of the Act. It stated that even though the Applicant had submitted a class A registration certificate for its mechanical and ventilation sub-contractor, that certificate was not current – it was for the year 2009 to 2010. It further stated at the hearing that it had confirmed the sub-contractor's registration verbally with the MOPW who had confirmed that the sub-contractor's registration was not current.

The Board has carefully examined the documents presented before it and the parties' submissions.

On examination of the Tender Evaluation Report, the Board notes that the Applicant had been disqualified at the Preliminary Evaluation stage for not having submitted a current registration certificate for Raerex (E.A.) Ltd its proposed Mechanical Ventilation and Air Conditioning sub-contractor.

On examination of the Applicant's submitted tender document, the Board notes that the Applicant included the Ministry of Public Works' letter dated 24<sup>th</sup> February, 2010 addressed to M/s Raerex (E.A.) Limited indicating that its application for upgrading was approved and that the letter will serve as a certificate until such a time that the firm is issued with a formal certificate. The Board notes that the said letter stated as follows:-



*"Dear Sirs,*

**RE: REGISTRATION OF BUILDING CONTRACTORS**

*Reference is made to your letter dated 24<sup>th</sup> September, 2009.*

*We are pleased to inform you that the Contractors' Registration Committee at its meeting held on 24<sup>th</sup> February, 2010 discussed and agreed to approve your application for upgrading as follows:*

**TYPE OF WORKS**

**CATEGORY**

**REFRIGERATION, AIR CONDITIONING AND**

**MECHANICAL VENTILATION**

**'A'**

*This letter shall serve as a certificate until such time that you are issued with a formal certificate.*

*Yours faithfully,*

*M. A. Nyakiongora,*

**SECRETARY,**

**BUILDING CONTRACTORS' REGISTRATION COMMITTEE**

*For: PERMANENT SECRETARY"*

The Board finds from the wording of the letter above, that the said letter did not state an expiry date and it clearly stated that it was to remain valid until a certificate was issued.

The Board notes from the Tender Evaluation Report, that the reason given by the Evaluation Committee for the disqualification of the Applicant was that the certificate submitted in the tender document was for the year 2009-2010.

The Board further notes that in the Tender Evaluation Report, there is no reason or basis given for reaching this conclusion, yet this was the only reason for disqualifying the Applicant at the preliminary evaluation stage.

This point becomes more critical taking into account the fact that all bidders except the Successful Bidder were disqualified at the preliminary evaluation stage. This therefore led to a scenario where only one bidder proceeded to technical and financial evaluation.

The Board notes the Procuring Entity's submission at the hearing that it had confirmed the sub-contractor's registration verbally with the Ministry of Public Works and that the Ministry had confirmed that the sub-contractor's registration was not current.

The Board finds such confirmation un-procedural and that the Procuring Entity ought to have written officially to the Ministry of Public Works requesting such confirmation, especially when the letter submitted in the Applicant's tender which was to serve as a certificate for its sub-contractor did not have an expiry date.

In the circumstances the Board finds the manner the evaluation was done was flawed and the Applicant was wrongfully disqualified from tender process. As a result only one bidder proceeded to the technical and financial evaluation in a tender whose total contract value is about six (6) billion shillings. The action by the Procuring Entity is contrary to the objection of the Act as set out in section 2 which provides as follows:

*“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) To maximise economy and efficiency;*
- (b) To promote competition and ensure that competitors are treated fairly;*
- (c) To promote the integrity and fairness of those procedures;*
- (d) To increase transparency and accountability in those procedures; and*
- (e) To increase public confidence in those procedures.*
- (f) To facilitate the promotion of local industry and economic development.”*

Accordingly, this ground of appeal succeeds.

**Grounds 2, 3, 4 and 6 - Breach of Instruction to Tenderers (ITT) Section/6  
Section 1.5 Part C**

These grounds have been combined because they raise similar issues on the qualifications of the Successful Bidder.

The Applicant stated that it was a tender requirement in the Instruction to Tenderers (ITT) Clause 1.5 part c, that tenderers were to have experience in works of similar nature and size for each of the last five years and details of work under way or contractually committed. The Applicant further stated that the qualification information part 1.3 of the Tender Document required tenderers to submit works performed as main contractors on works of similar nature and volume in the past five years. In addition, the Applicant stated that it was a requirement under the evaluation section C on relevant experience

that the main contractor should give details of experience within the past ten years; and further that the tenderer should have completed at least five projects valued at Kshs. 500,000,000 each for the last ten years proved by the provision of completion certificates. The Applicant averred that if a tenderer did not attach a completion certificate, then it would attain a nil score for the entire project. The Applicant alleged that the Successful Bidder did not qualify to be awarded the tender under the above stated conditions and requested the Board to review the tender documents submitted by the Successful Bidder to ascertain this. The Applicant averred that it had proposed a completion period of 156 weeks as compared to the Successful Bidder's 170 weeks and that it would have scored higher points as per the Tender Evaluation Criteria, and as such its overall marks would have been higher than the Successful Bidder's.

In its response, the Procuring Entity stated that it had evaluated the Successful Bidder as per the evaluation criteria stated in the Tender Document and that the Successful Bidder had carried out works above the Kshs. 500 million thresholds stipulated in the Tender Documents. It concluded by stating that the Successful Bidder was qualified to be awarded the tender.

The Successful Bidder, M/s Cementers Limited fully aligned itself with the Procuring Entity's submissions. It stated that it was qualified to be awarded the contract.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board notes from the description of the project in the Tender Documents, that the works comprised a reinforced concrete structure of 36 floors above an existing podium roof in the CBD of Nairobi. The Board further notes that the pre-tender estimate for the works as advised by the Procuring Entity at the hearing was above Kshs. 6 billion.

The Board therefore finds that if the evaluation criteria stated in the Tender Documents was on works of a similar nature and value, then the bidders ought to have demonstrated the same in terms of projects they had carried out which were comparable in nature and values.

The Board has examined the tender document of M/s Cementers Ltd the Successful Bidder and notes that the bidder had included in its tender document a list of projects performed as the main contractor as follows:-

Project Name	Type of Construction	Value
Catering Levy	New construction	Kshs. 811 million
Sameer Business Park	New construction	Kshs. 1.8 billion
Red Court Hotel	On-going	Kshs. 1.1 billion
Mt Kenya Safari Club	Refurbishment	Kshs. 549 million
Sunflag Textile and Knitwear Mill	New construction	Kshs. 535 million
Landmark Plaza	New and old	Kshs.600 million
Kampala Serena Hotel	New construction	Kshs. 1.9 billion

Entebbe Airport	International	Rehabilitation of runway	Kshs. 888 million
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The Successful Bidder also included the completion certificates of the listed projects as required by the tender document.

From the list of projects as submitted by the Successful Bidder, the Board finds that in terms of the value of works, the Successful Bidder met the evaluation criteria threshold of Kshs. 500 million, but that in terms of similar works and similar value to the tender under review, the Board did not find any such projects listed in the Successful Bidder's tender documents. It is therefore clear that the technical evaluation which involved the Successful Bidder only, was not properly done contrary to Section 66 (2) which provide as follows:-

*"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."*

Accordingly, these grounds of appeal succeed.

#### **Ground 5 - Breach of Section 31 (1) (b) of the Act**

The Applicant stated that Section 31 (1) (b) of the Act stipulated that for a tenderer to be awarded a contract, it should have the legal capacity to enter into a contract. It averred that the Procuring Entity did not request for the legal documents for the subcontractors and it felt aggrieved that the contract would be awarded to a tenderer whose sub-contractors may not possess the requisite legal documents i.e. valid tax compliance certificate; list of directors

with respective shareholding and citizenship details; valid NSSF compliance certificate.

In its response, the Procuring Entity stated that it had fully complied with the requirements of Section 31 of the Act.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board notes the requirements of Section 31 of the Act and finds that the party being referred to with respect to having capacity to be awarded a contract, is the bidder and not its sub-contractors who are third parties to the contract between a Successful Bidder and the Procuring Entity.

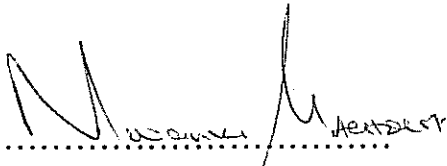
The Board further notes that the Procuring Entity indicated in its tender documents that the bidders' proposed domestic subcontractors must be registered with the Ministry of Public Works, have the current Electricity Regulatory Commission's License, and the telecommunications License from the Communication Commission of Kenya (CCK); and in addition the bidders were to submit valid joint agreements with the proposed domestic subcontractors. The Board also notes that it was a requirement for the main contractor to submit the mandatory documents and that the Procuring Entity evaluated the bids as per the evaluation criteria stated in the Tender Document; and further, that the bidders who had not signed joint agreements and not provided current registrations certificates were declared non-responsive at the Preliminary Evaluation stage.


Accordingly, this ground of appeal fails.

The Board has noted that in this application for review, the Applicant has raised issues that go to the substance of the tender and the manner in which the evaluation process was carried out, which were not raised in Application No. 14/2011 of 20<sup>th</sup> April, 2011.

Taking into account the foregoing, the Board finds that the tender process was flawed and accordingly, the appeal succeeds; and the Board orders, pursuant to Section 98 of the Act, that the award to the Successful Bidder, M/s Cementers Limited, is hereby annulled. The Procuring Entity may retender.

**Dated at Nairobi on this 17<sup>th</sup> day of May 2011**

  
.....  
**CHAIRMAN**  
**PPARB**

  
.....  
for: **SECRETARY**  
**PPARB**