

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 22/ 2011, OF 30<sup>TH</sup> MAY 2011**

**BETWEEN**

**KUNDAN SINGH CONSTRUCTION COMPANY LTD..... ..APPLICANT**  
**AND**  
**KENYA RURAL ROADS AUTHORITY ..... ..PROCURING ENTITY**

Review against the decision of the Tender Committee of the Kenya Rural Roads Authority dated 27<sup>th</sup> April, 2011 in the matter of Tender No. D 330 and E334 for Rehabilitation and Repair of Eldoret - Ziwa - Kachibora Road (D328 and Kachibora - Moi's Bridge Road (D.330/E334)

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Ms. Natasha Mutai	-	Member
Amb. Charles Amira	-	Member
Mr. Sospeter Kioko	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Secretary
Ms. Shelmith Miano	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Kundan Singh Construction Ltd**

- Mr. C. N. Kihara - Advocate, C. N Kihara & Co. Advocates  
Mr. Arthur Sagaru - Senior Counsel, C. N. Kihara & Co. Advocates  
Ms. Linda Wanjiru - Pupil, C. N. Kihara & Co. Advocates

### **Procuring Entity, Kenya Rural Road Authority**

- Mr. Justine Rapando Kenya Rural Roads Authority, Advocate  
Mr. Kenneth Mwangi - Kenya Rural Roads Authority, Manager  
Procurement  
Eng. S. M. Osiro - Kenya Rural Roads Authority, General Manager  
Maintenance  
Eng. J. K. Gakubia - Kenya Rural Roads Authority, Manager  
Maintenance

### **Interested Candidates**

- Mr. Paul Gicheru, - Gicheru & Co. Advocate, Kimilili Hauliers

## **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 Rehabilitation and repair of Eldoret-Ziwa- Kachibora Road (D328) and Kachibora- Moi's Bridge Road (D330/E 334) was advertised in the Daily Nation of 3<sup>rd</sup> December 2010.

**Closing/Opening:**

The bids were closed/opened on 25<sup>th</sup> January 2011 in the presence of 13 bidders and the bid prices and the bid bonds provided read out and recorded as listed below:

No	Firm Name	Bid Price	Bid Bond	Bid Issuer
1	Kabuito Contractors	1,799,685,625.00	500,000,000.00	I &M Bank
2	G. Issaias & Co. (K) Ltd	2,136,431,305.00	500,000,000.00	I &M Bank
3	Jiangxi Zhungmei Eng. Construction (K) Ltd	2,320,046,445.99	500,000,000.00	Standard Chartered Bank
4	Dittman Construction Company	1,472,665,856.00	500,000,000.00	ABC bank
5	Coastal Kenya Enterprises	2,120,491,389.75	500,000,000.00	KCB Bank
6	S.S. Mehta & Sons Ltd	2,046,507,525.00	500,000,000.00	Standard Chartered Bank
7	Hayer Bishan Singh & Sons Ltd	2,254,918,432.00	500,000,000.00	I&M Bank
8	Kimilili Hauliers Limited	1,435,212,465.00	500,000,000.00	AB C Bank
9	Kundan Singh Ltd	1,699,910,980.00	500,000,000.00	KCB Bank
10	Associated Construction Co. (K)Ltd	1,994,538,075.00	500,000,000.00	Middle East Bank (K)
11	Victory Construction Co. Ltd	1,890,960,473.00	500,000,000.00	Trident Insurance company
12	Nyoro Construction Co. Ltd	2,070,416,488.00	500,000,000.00	National Bank
13	Tai Enterprises	1,714,417,731.20	500,000,000.00	Co-operative Bank
<b>Engineer Estimate</b>		<b>1,696,663,125.00</b>		

The bids were then evaluated in three stages namely,

- a) Completeness and Responsiveness
- b) Bid price comparison
- c) Detailed Evaluation
- d)

### Preliminary Evaluation for Completeness and Responsiveness

A responsive Bid was considered as one which meets all completeness criteria described above and which is, at the minimum, consistent with the requirements of bidding documents and does not limit the rights of the employer, obligations of the Bidder or affect unfairly the competitive position of the other Responsive Bidders. Bid security from the bank was evaluated in order to determine the responsiveness of the Bidder in accordance with the Responsiveness criteria outlined.

### Summary of Findings for Completeness and Responsiveness of the Bid

COMPLETENESS CRITERIA	Kabuto Construction	ISSAIAS & Co	jiangxi Zhongmei	Dittman Construction	Coastal Kenya	S. S. Mettah & Sons Ltd	Hayer Bishan	Kimili Haliers Ltd	Kundan Singh & Sons Ltd	Associated Construction	victory Construction	NYORO Construction	Tai Enterprises
Tender Opening No.	1	2	3	4	5	6	7	8	9	10	11	12	13
Signing/initiating pages with entries	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Certificate of Incorporation	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N3
Certificate of Registration (MOR Category B)	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N4
VAT Registration	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N5
PIN Registration	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N6
Valid Tax Compliance Certificate	Y	Y	N1	Y	Y	Y	Y	Y	Y	Y	N2	Y	N7
Signed Form of Bid	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Signed Appendix to Form of Bid	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Bid Security	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Cert. of Tenderer's visit to site.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

Schedule of major items of plant	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Key Personnel	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N8
Schedule of ongoing Projects	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Schedule of other supplementary information	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Priced bill quantities	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Remarks	R	R	NC	R	R	R	R	R	R	R	NC	R	NC

**KEY/LEGEND** Y - Yes, Document provided as required

N - No/ Not Compliant R- Responsive NC - Not Compliant

N1, N2 & N7- Jiangxi Construction, Victory Constructions and Tai Enterprises do not have a valid Tax Compliance Certificate.

N3,N4,N5,N6,N7, & N8 Tai Enterprise do not have Certificate of Incorporation, Certificate of Registration (MOR),VAT, Registration, PIN Registration, and Key Personnel respectively.

#### POST- QUALIFICATION ANALYSIS

- a) The evaluation team subjected the lowest evaluated bidder M/S Kimilili Hauliers Ltd to post qualification detailed evaluation in accordance with ITB Clause 30 and Regulations Section 5

#### DETAILED EVALUATION

##### 1 Technical Evaluation

###### a) Specific experience (Similar Work Performed)

The bidder was required to have participated either as Contractor or Sub Contractor in at least two Construction Contracts within the last 5 years each with a value of kshs.250 million

###### b) Plant Equipment Holding

The bidder provided a list of plant holding sufficient for the works and complying with the requirements of the schedule of major items of plant to be used on the proposed contract as contained in the tender document.

### **c) Completion period**

The Bidder had signed the Appendix to form of Tender which provides for a twenty four (24) month completion period.

## **2 Financial Evaluation**

### **a) Annual volume of construction work**

The bidder was required to demonstrate a minimum average annual turnover kshs. 75 million for the last three years.

### **b) Access to credit facilities/Liquid Assets**

The bidder had attached a signed letter of availability of Credit Line of Kshs.240,000,000.00 from African Banking Corporation

### **c) Comparison of Major Rates & Credibility of the Bidders Rates**

The bidder Tender sum is 15.41% below the Engineer's estimate. The highest bid for this project is 36.74% above Engineer's Estimate

The Evaluation Committee therefore recommends that the Contract for Rehabilitation and repair of Eldoret-Ziwa- Kachibora Road (D328) and Kachibora- Moi's Bridge Road (D330/E 334) be awarded to Ms Kimilili Hauliers Limited at their evaluated tender sum of kshs. 1,435,212,465.00 for being the lowest evaluated bidder.

## **THE TENDER COMMITTEE DECISION**

The Company Tender Committee meeting held on 20<sup>th</sup> April 2011

**CTC: 21/2010-2011** deliberated on the recommendations of the Evaluation Committee. The Tender Committee approved the award of the contract for Rehabilitation and Repair or Eldoret-Ziwa-Kachibora Road D 328 and Kachibora Moi's Bridge 330/E 334 to M/S Kimilili Hauliers Limited at their

evaluated tender sum of Kshs. 1,435,212,465.00 (One Billion, Four Hundred and Thirty Five Million, Two Hundred and Twelve Thousand, Four Hundred And Sixty Five Shillings) being the lowest evaluated bidder.

## THE REVIEW

The Applicant lodged this Request for Review on 30<sup>th</sup> May, 2011 against the decision of the Kenya Rural Roads Authority dated 27<sup>th</sup> April 2011. The Interested Party was represented by Mr. C. N. Kihara, Advocate while the Procuring Entity was represented by Mr. Paul Gicheru, Advocate the Interested Party present was Kimilili Hauliers Limited.

The Applicant requests the Board for the following orders.

- a) *The tender award to the successful tenderer be annulled*
- b) *The subject tender for rehabilitation and repair of Eldoret - Ziwa - Kachibora Road (D328 and Kachibora - Moi's Bridge Road (D.330/E334) be awarded to the Applicant.*
- c) *Alternatively, the Procuring Entity be ordered/directed to re-evaluate and award bids submitted in accordance with Criteria set out in the tender documents and Law.*
- d) *The cost of these proceedings be awarded to the applicant.*

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

### Grounds 1, 2 & 3: Breach of Section 66(2), and Regulation 49(1) & (2).

These grounds have been combined as they raise similar issues with regard to evaluation of the tender.

The Applicant submitted that the Procuring Entity failed to evaluate the bids/tenders submitted in accordance with the evaluation criteria set out in

the tender document contrary to Section 66(2) and regulation 49(1) and (2) of the Public Procurement and Disposal Act 2005 and thereto Regulations 2006, herein after the Act and the Regulations respectively. It alleged that the Successful Tenderer had no capacity or sufficient equipment to undertake the works. The Applicant further alleged that the Successful Tenderer had not demonstrated or furnished the information/documentation required for access to sufficient credit facilities contrary to the specifications of the Tender Document.

The Applicant argued that the Procuring Entity failed to scrutinise the successful tenderer's documents such as the proof of Plant and Equipment Ownership, Financial Statements and reports contrary to the tender specification, thereby breaching Section 66(2) of the Act and Regulation 49(1) and (2).

The Applicant further argued that schedule 3.5 of the tender document had required bidders to submit audited financial statements for the last 3 years so as to demonstrate the current soundness of their financial positions and their respective long term profitability and also the capacity to have a cash flow amount of minimum Kshs. 100,000,000.

It submitted that the same section had mandatorily required bidders to submit a bank credit line guaranteed by a bank, and that the Successful Bidder had not met the requirements and therefore should not have been found to have the lowest evaluated price.

In response, the Procuring Entity denied that it had breached Section 66(2) of the Act and Regulations 49(1) & (2) as alleged by the Applicant.



It submitted that a preliminary evaluation had been carried out as required by regulation 47 and that only six (6) firms namely; Kundan Singh Construction Ltd., Nyoro Construction, G. Issaiahs & Co. Ltd., Kimilili Hauliers, S.S Mehta & Sons and Hayer Bishan Singh & Sons had been found to be responsive.

The Procuring Entity further submitted that M/S Kimilili Haulier's tender being the lowest responsive tender was then subjected to detailed post qualification evaluation which comprised of both Technical and Financial Evaluation under section 6 of the evaluation report. It stated that the Successful Bidder had qualified under this detailed evaluation and was awarded the tender having been found to be the lowest evaluated price in accordance with the provisions of section 66(4) of the Act and regulation 51(1). The Procuring Entity contended that the Applicant's assertion on the Successful Bidder's sufficiency of equipment was not true as the Evaluation Committee had considered the same under section 6.2 of the evaluation report, whereby after checking the list of plant and equipment provided by the Successful Bidder and the average annual turnover, as stipulated in the tender documents, the Evaluation Committee had found them to be adequate.

It further contended that the assertions by the Applicant in connection with access to sufficient credit facilities were also not true since the bid document at Section 6, qualification criteria, Clause 3.1 (b) had required the bidders to demonstrate capacity to have a cash flow amount of minimum Kshs. 100 million equivalent working capital, but not a bank guarantee to that effect. It submitted that the lowest responsive bidder had provided a letter from a bank, showing the bank (African Banking Corporation) was ready to give it a credit facility of Kshs. 240,000,000.00 as soon as it had confirmed its acceptance

and indeed the Evaluation Committee confirmed the same under Section 6.3.2 of the evaluation report.

The Procuring Entity stated that the successful tenderer had provided mandatory proof of Plant and Equipment ownership and also the Financial Statements and reports as required by the tender specifications and hence this confirmed that the Applicant's allegations and assertions were not true.

The Interested Party, Kimilili Hauliers Limited being the Successful Tenderer on its part, averred that it had capacity and sufficient equipment to undertake the works and that it had demonstrated and furnished sufficient information/documentation as required to demonstrate its ability to access sufficient credit facilities.

It further argued that it had provided mandatory documents and proof of plant and equipment ownership to support its tender and that it had provided financial statements and reports in compliance with the provisions of Section 66(2) of the Act. It concluded that the Procuring Entity did not act in breach of any section or regulation in awarding the tender to it being the lowest evaluated bidder at a tender sum of kshs.1,435,212,465.00.

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

The Board notes that the bids were evaluated in three stages namely,

- b) Completeness and Responsiveness
- c) Bid price comparison
- d) Detailed Evaluation

The Board further notes that a responsive bid was considered to be one which met all the requirements as set out in the tender document.

The Board also notes that out of the 13 bids that were received and evaluated only 6 were found to be responsive.

The Board notes that the 6 responsive bidders were compared as follows:

No	Firm Name	Bid Price	Bid Bond	Bid Issuer
1.	G. Issaias & Co. (K) Ltd	2,136,431,305.00	500,000,000.00	I &M Bank
2.	S.S. Mehta & Sons Ltd	2,046,507,525.00	500,000,000.00	Standard Chartered Bank
3.	Hayer Bishan Singh & Sons ltd	2,254,918,432.00	500,000,000.00	I&M Bank
4.	Kimilili Hauliers Limited	1,435,212,465.00	500,000,000.00	AB C Bank
5.	Kundan Singh Ltd	1,699,910,980.00	500,000,000.00	KCB Bank
6.	Nyoro Construction Co. Ltd	2,070,416,488.00	500,000,000.00	National Bank
<b>Engineer Estimate</b>		<b>1,696,663,125.00</b>		

The Board notes that the Successful Candidate, Ms Kimilili Hauliers Limited was found to be the lowest responsive bidder and was then subjected to a detailed evaluation as follows;

- Technical Evaluation which checked the specific experience(similar works performed), plant & equipment holding and the completion period.
- Financial Evaluation which checked the annual volume of construction work, access to credit facilities and level of liquid assets held and also comparison of major rates & credibility of the Bidders rates in regard to the Engineer's Estimate.

The Board finds that the Successful Bidder was found to have complied with these requirements in line with the set criteria.

The Board further notes that the Evaluation Committee thereafter recommended that the Contract for Rehabilitation and repair of Eldoret-Ziwa-Kachibora Road (D328) and Kachibora- Moi's Bridge Road (D330/E 334) be awarded to Ms Kimilili Hauliers Limited at their evaluated tender sum of kshs. 1,435,212,465.00 for being the lowest evaluated bidder.

The Board also notes that the Tender Committee at its meeting held on 20<sup>th</sup> April 2011 CTC: 21/2010-2011 deliberated on the recommendations of the Evaluation Committee and approved the award of the contract to M/S Kimilili Hauliers Limited at their evaluated tender sum of Kshs. 1,435,212,465.00 (One Billion, Four Hundred and Thirty Five Million, Two Hundred and Twelve Thousand, Four Hundred and Sixty Five Shillings) being the lowest evaluated bidder.

The Board notes that the instructions to bidders, qualification criteria had required at clause 3.1:-

That Bidders submit audited balance sheets or if not required by the law of their countries, other financial statements acceptable to the employer for the last three(3 years to demonstrate:

- a) Soundness of financial position.
- b) Capacity to have a cash flow amount of minimum kshs. 100 million equivalent capital.

and at Clause 7:-

That "Schedule of the major items of the plant to be used on the proposed contract. The bidder must indicate the main plant and equipment with proof of ownership".

The Board has scrutinized the documents and found that the Successful Bidder provided a list of equipment and provided logbooks to prove its ownership of the equipment. The Board further notes that the Successful

Bidder had provided audited accounts for the years 2007, 2008 (ksh.121,183,853.00), 2009 (ksh.108,929,845.00) and 2010(kshs.128,110,602) and that all these accounts show a turnover which is way above the required threshold of Kshs. 75 million per annum. The Board observes that whereas the Applicant provided accounts for 2009, 2008, 2007, 2006 and 2005. It never provided the accounts for 2010 though its financial accounting year ends 31<sup>st</sup> March. The Board also observes that since the requirement was for provision of financial statements for the previous immediate years, the 2005/2006 statements would not be of any benefit to the Procuring Entity. The Board finds that the successful bidder abided by this instruction to the Bidders unlike the Applicant.

With regard to the credit line offered by the Bank, expected to be kshs. 100 million, the Board notes that the Successful Bidder provided such evidence from African Banking Corporation totalling kshs. 212 million broken down as Overdraft for working capital at kshs. 100 million, Revolving asset at kshs.40 million, and a guaranteed letter of credit to the tune of kshs.72 million, and that this was more than the threshold expected by the procuring entity at kshs. 100 million.

The Board therefore finds that the Successful bidder Had not only presented the lowest tender price but had met all the set criteria and was therefore properly evaluated in line with Section 66(2) of the Act and Regulation 49 (1) & (2).

Accordingly these grounds of review fail.

#### **Ground 4: Breach of Section 67**

The Applicant submitted that the Procuring Entity did not notify it of the outcome of the tender award simultaneously with the Successful Bidder thereby prejudicing the Applicant's chances of seeking the reasons of its unsuccessfulness for preparing for a review in good time, contrary to section 67 of the Act.

The Procuring Entity submitted that it had prepared and signed all the letters to the Unsuccessful Bidders and the Successful Bidder on the 27<sup>th</sup> April, 2011. It added that though all the letters were dispatched at the same time, three tenderers, M/S Kundan Singh Ltd, M/S Jiangxi Zhunguai Eng. Construction Ltd and M/S Landmark Holding Ltd thereafter claimed that they had not received their letters and that the three, were subsequently given copies of the notification letter from the Procuring Entity's file.

The Procuring Entity argued that though this confusion had occurred, the Applicant had not suffered any prejudice since the contract was yet to be signed and further the Applicant had been able to lodge this request for review.

The Interested Party averred that the Applicant had not demonstrated what prejudice it had suffered since it had managed to file a Request for Review within time.

The Board has carefully examined the documents presented before it and listened to the Parties submissions.

The Board notes that no evidence was adduced before it as to whether the notification letter to the Applicant was dispatched simultaneously with the other letters.

The Board however notes that a copy of the said letter was given to the Applicant and that it was able to file this request for review within time.

The Board therefore finds that no prejudice was suffered by the Applicant.

**Ground 5: Breach of Section 66(4)**

The Applicant submitted that the Procuring Entity failed to award the tender to it being the tenderer with the lowest evaluated price contrary to Section 66(4) of the Act.

The Procuring Entity averred that the Applicant's assertions were not true since the Procuring Entity awarded the tender to the tenderer with the lowest evaluated price as per the recommendations of the tender Evaluation Committee and hence had complied with section 66(4) of the Act.

The Interested Party denied that the Applicant's price was the lowest evaluated price and averred that the Interested Party's price was in fact the lowest evaluated price.

The Board notes that the Successful Bidder presented the lowest evaluated price of Kshs. 1,435,212,465 and that the price was well within the Engineers estimate of Kshs. 1,696,663,125.

As the board has already found in the previous grounds 1,2& 3, the Successful Bidder was properly evaluated and found to be the lowest evaluated bidder.

The Board therefore finds that the Successful Candidate was rightly awarded the tender being the lowest evaluated bidder pursuant to Section 66(4) of the Act.

Accordingly this ground of review fails.

## Ground 6

This is merely a general Statement that is not backed by either material evidence or breach of any sections of the Act and the Board therefore need not make any findings on it.

### Further Submissions:

The Applicant submitted that the Procuring Entity had wrongly computed its outstanding contract sums. It claimed that its total outstanding sum was kshs.2,947,017,770 which was below the required sum of kshs.3 billion and that therefore it had met the stipulation and qualification criteria under Section 6 of the tender.

The Procuring Entity contended that the true value of the Applicant's outstanding contract sums at the time of the tender was ksh. 4,131,619,845. It argued that the Interested Party had intentionally failed to disclose one of its ongoing projects and had also understated the outstanding sum of another of its projects, all this in a bid to defeat the evaluation process.

In conclusion, the Procuring Entity submitted that the Interested Party failed to meet the mandatory tender requirement stipulated under Section 6, qualification criteria, Clause 5.1 on ongoing contracts which stipulates that the total value of the outstanding contract sums should not exceed Kshs. 3 Billion.

The Interested Party on its part averred that the Applicant was guilty of material non disclosure and concealment of material facts all of which rendered the entire Request for Review incompetent and a nullity.

The Board has carefully examined the documents presented before it and the party's submissions. From the evaluation report, the Board notes that the

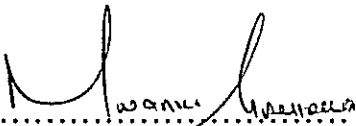


Applicant was disqualified on the basis of its bid price and not on the issue of the value of outstanding contract sum.

Taking into account all the foregoing, this request for review fails and is hereby dismissed. The Board orders, pursuant to Section 98(b) of the Act that the procurement process may proceed.

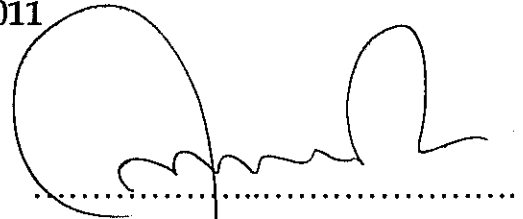
The Board gives no orders as to cost.

Dated at Nairobi on this 23<sup>rd</sup> day of June, 2011



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**CHAIRMAN  
PPARB**



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**SECRETARY  
PPARB**

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