

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 42/2011 OF 9th NOVEMBER, 2011

BETWEEN

SCHNEIDER ELECTRICAL FRANCE / MEHTA ELECTRICAL LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Airports Authority dated 10th October, 2011 in the matter of Tender No. KAA/ES/JKIA/476/B/E for Renovation and Expansion of Passenger Terminal Facilities at the JKIA Nairobi (Electrical Installations Sub-Contract Works).

BOARD MEMBERS PRESENT

Mr. Mwaniki Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Akich Okola	-	Member
Mrs Loise Ruhiu	-	Member
Amb. C.M. Amira	-	Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Pamela Ouma - Secretariat
Shelmith Miano - Secretariat

PRESENT BY INVITATION:

Procuring Entity - Kenya Airports Authority

Mr. Victor Arika - Legal Counsel
Allan Muturi - GM Procurement
Mr. Fredrick Mulaku - Quantity Surveyor
Ms. Margaret Muraya - Manager, Projects
Ms. Salome Miskai - Intern
Mr. Sammy Kemboi - Programme Assistant
Mr. Jonah Riwall - Programme Assistant

Applicant - Schnider Electrical France / Mehta Electrical Limited

Mr. Mohamed Nyaoga	-	Lawyer
Ms. Muthoni Thiankolu	-	Lawyer
Ms. Wanjiru Ngige	-	Lawyer
Pravin Soni	-	Project Director

Interested Candidates

Wilson Mwhuri	-	Lawyer, China National Aero-Technology Engineering Corporation
George Nganga	-	Lawyer, China National Aero-Technology Engineering Corporation
Zheng Yi	-	Vice Director, China National Aero-Technology Engineering Corporation
Mu Yunqing	-	Project Manager, China National Aero-Technology Engineering Corporation
Cyrus Khalusi	-	Manager, Power Technics Ltd
Mohamed Tajdin	-	GM Business Development, Sterling and Wilson Group.

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates and upon considering the information in all the documents before it, the board decides as follows:

BACKGROUND OF AWARD

Advertisement:

An invitation for bids was made vide a Specific Procurement Notice (SPN) for the works on 11th February 2011. The notice was placed at the Procuring Entity's website, AFD dgmarket and at the DG Websites. A total of Thirty Five (35) firms purchased the tender. Two letters of clarification and two addendums of the bids documents were issued during the tendering period.

Closing/Opening:

Following a pre-bid meeting held on 2nd March 2011, and requests made by bidders for extension of time, the bid submission deadline was extended to 8th April 2011 at 10.00 am local time from 25th March 2011.

The following Five (5) bids were received by the submission deadline and are inclusive of VAT at 16%:

Bidder Identification			Read-out Bid		Modificatio
			Price(s)*Note 1		ns or
Name	City/State or Province	Country	Currenc y(ies)	Amount(s) or %	Comments

China National Aero-Technology International Engineering Corporation	<i>Beijing</i>	<i>Peoples Republic of China</i>	<i>Kenya Shillings</i>	<i>1,276,189,430.04</i>	<i>None</i>
Red International Commercial Investment	<i>Abu Dhabi</i>	<i>United Arab Emirates</i>	<i>Kenya Shillings</i>	<i>1,484,120,528.00</i>	<i>None</i>
Limelight Creations Ltd. In joint Venture with East China Power Transmission & Transmission Engineering Co.	<i>Nairobi</i>	<i>Kenya</i>	<i>US Dollars</i>	<i>19,022,882.83</i>	<i>None</i>
Sterling and Wilson Ltd.	<i>Mumbai</i>	<i>India</i>	<i>US Dollars</i>	<i>16,916,645.00</i>	<i>Yes* Note 1</i>
<i>Schnider Electric in joint venture with Mehta Electrical Ltd.</i>	<i>Rueil Malmaison</i>	<i>France</i>	<i>Kenya Shillings</i>	<i>1,195,126,090.00</i>	<i>None</i>

Note 1-

The bidder attached qualifications to the technical specifications and other conditions in the bid

EVALUATION

The bids were evaluated by a committee chaired by Eng. Francis Ngigi, the Projects Manager.

a) Preliminary evaluation requirements

The bids were checked for responsiveness to the Bid requirements to verify:-

- i) Legal Registration of the Bidder
- ii) The bid was accompanied with the proper bid security.
- iii) The bid was properly signed.
- iv) The bid was valid for at least 120 days in accordance with the bid requirements.
- v) There were no deviations or reservations that would affect in any substantive way the
 - The scope, quality or performance of the works,
 - Employer's rights or the bidder's obligations under the contract.

The results of the Preliminary Evaluation was as tabulated below:-

Bidder	Verification	Signing of Form of Bid	Eligibility	Bid Security	Completeness of Bid	Deviations/Reservations	Substantial Responsiveness	Acceptance
China National Aero-Technology International Engineering Corporation	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>
Red International Commercial Investment	<i>No</i>	<i>No</i>	<i>No</i>	<i>No</i>	<i>No</i>	<i>No</i>	<i>No</i>	<i>No</i>
Limelight Creations Ltd/East China Power Transmission & Transmission Engineering Co.	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>
Sterling and Wilson Ltd.	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>No</i>	<i>No</i>
Schnider Electric	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>

in joint venture with Mehta Electrical Ltd.								
---	--	--	--	--	--	--	--	--

The Evaluation Committee made the following observations following the Preliminary Evaluation of the bids

• Red International Commercial Investment

The bidder did not submit any other documentation apart from the priced BQ.

• Limelight Creations Ltd/East China Power Transmission & Transmission Engineering Company

Most of the documentation submitted is for the lead partner of the JV only. Documentation from the other partner has not been submitted including documentation on the legal status of the firm, Power of Attorney for the Authorized Representative etc.

• Sterling and Wilson

- o The Bid Security submitted by the bidder was not addressed to the employer correctly but rather to “Managing Director, Attn: Procurement and Logistics Manager, Jomo Kenyatta International Airport” which was a place and not an entity. The Bidding Document instructed the bids to be addressed to the ‘Managing Director Kenya Airports Authority’

- The bidder submitted Technical Clarifications attached to its Letter of Bid thereby offering reservations on the Bidding Document against the provisions of ITB 28.

- The bidder further submitted a bid quoted in US dollars whereas, in accordance with ITB Clause 15.1 Bidders were to quote entirely in local currency. In addition, its bid was exclusive of all duties, taxes and other levies which is against the provisions of ITB 14.7.

From the preliminary evaluation the three bidders were found to be non-responsive and their bids were not subjected to further evaluation. Only two firms namely China National Aero Technology International Engineering Corporation and M/s Schneider Electric in JV with Mehta Electricals were determined to have satisfied the preliminary and qualification requirements and were accepted for detailed evaluation.:

Detailed Examination

The two responsive Bids were then subjected to detailed evaluation as follows:

a) Correction of Errors for China National Aero-Technology International Eng. Corporation

The bidder had Submitted tender sum of Kshs. 1,276,189,430.04 including 16% VAT.

There were several extension errors contained in Bill No.2 totaling Kshs. +59.95. There was also a minor arithmetic error in the totals of Bill No.2 totaling Kshs. + 0.12. The overall errors therefore total Kshs. + 60.07 on the bid sum. Adjusting this amount for 16 % VAT, which is +ve 9.61, the total error including VAT is Kshs. +ve 69.68 as tabulated in Table A3.

From the foregoing, the corrected tender sum was **Kshs. 1,276,189,499.72 including VAT**. The bidder accepted the correction of the error.

b) Correction of Errors for Schneider Electrica in JV with Mehta Electricals Ltd.

The bidder had submitted a tender sum of Kshs. 1,195,126,000.00 excluding VAT. The Evaluation Committee made the following corrections on its bid:-

- There were a number of wrong entries with respect to quantities in Bill No.2. Under item 2.2.1, 4 core 4 mm cable the bidder entered a 725 metres as the quantity instead of 1725 metres. At a rate of Kshs. 874 per metre, the corrected amount is Kshs. 1,507,650.00 instead of 633,650.00 submitted by the bidder. This error has had an effect of Kshs. +874,000.00 to the bid sum.
- Similarly under item 2.2.4, 150 mm single core XPLE insulated 11k v cable the bidder entered a 20 metres as the quantity instead of 200 metres. At a

rate of Kshs. 33,571 per metre, the corrected amount is Kshs. 6,714,200.00 instead of 671,420.00 submitted by the bidder. This error has had an effect of Kshs. +6,042,780.00 to the bid sum.

- Further, under item 2.2.5, 150 mm single core PILCA outdoor termination a 4 No. as the quantity instead of 8 No. At a rate of Kshs. 89,680.00 each, the corrected amount is Kshs. 717,440.00 instead of 358,720 submitted by the bidder. This error has had an effect of Kshs. +358,720.00 the bid sum.
- Under the Civil Works Bill 1, Engine Room Page 1/ A2-7 item A & B there were extension errors resulting in Kshs. +1.58 to the bid sum
- Under the Civil works Bill 5, Gate Houses there were extension errors on page 5/8A-48 resulting in Kshs. +0.39 to the bid sum.
- The total error excluding VAT is Kshs. +7,725,501.97. The corrected bid sum excluding VAT is therefore Kshs. 1,202,401,591.70.

From the foregoing, the corrected tender sum including 16% VAT is **Kshs. 1,394,785,846.69**. The bidder accepted this correction.

c) Net Correction of Errors.

The following was the summary of all the bids after the corrections of errors including VAT:-

Bidder	Submitted Tendered Sum including 16% VAT (Kshs)	Correction (Kshs) including 16% VAT	Corrected Tender Sum (Kshs) including 16% VAT
China National Aero- Technology International Engineering Corporation	1,276,189,430.04	+ve 69.68	1,276,189,499.72
Schneider Electric in JV with Mehta Electricals Ltd.	1,386,346,264.40	+ve 8,439,582.29	1,394,785,846.69

i. Distribution of Bid Price.

The Pre- Bid estimate for the works was Kshs. 1,291,647,227.00 including VAT. A summary comparison of the Pre-Bid estimate and the bids received including all taxes based on the Sectional Bill Totals is as tabulated below:

Bill No.	Description	Pre-Bid Estimate	Submitted (CATIC)	Corrected (CATIC)	Submitted (Schneider & Mehta)	Corrected (Schneider & Mehta)
1	Preliminaries & General	62,677,500 .00	13,200,000.0 0	13,200,000. 00	80,481,782. 00	80,481,782. 00
2	66/11kv Substation And Yard	330,834,47 0.00	288,927,186. 03	288,927,246 .10	310,734,781 .00	318,010,310 .00
3	Sst4, Plus T4 Building And Pg	373,576,20 8.11	432,497,944. 23	432,497,944 .23	327,093,781 .00	327,093,781 .60
4	Fire Detection Alarm System	26,771,000 .00	18,355,153.0 0	18,355,153. 00	23,525,636. 40	23,525,636. 40
5	Public Address System	32,337,000 .00	14,836,080.0 0	14,836,080. 00	28,752,281. 20	28,752,281. 20
6	Fibre Optic Cabling (Scada)	32,803,800 .00	22,826,440.0 0	22,826,440. 00	31,213,253. 80	31,213,253. 80
7	Supply & Installation Of Lan	22,783,425 .00	17,330,460.0 0	17,330,460. 00	14,623,150. 00	14,623,150. 00

	Cabling T4 & Parking Garage					
8	Supply & Installation Of Lan Switching Equipment T4 & Pg	159,525,000.00	72,198,000.00	72,198,000.00	135,933,050.00	135,933,050.00
9	Building Automation System (Scada/Bms)	117,357,000.00	46,255,538.00	46,255,538.00	58,099,188.00	58,099,188.00
10	Civil Works In Connection With Electrical Installations	92,981,824.00	113,711,072.50	113,711,072.50	112,267,005.00	112,267,006.97
11	Mechanical Works In Connection With Electrical Installations	Included Above	20,025,428.00	20,025,428.00	32,402,152.00	32,402,152.00

Sub-Total	1,251,647, 227.11	1,060,163,30 1.76	1,060,163,3 61.83	1,155,126,0 90.00	1,162,401,5 91.97
Plus: Contingency	40,000,000 .00	40,000,000.0 0	40,000,000. 00	40,000,000. 00	40,000,000. 00
Total Tender Amount For Electrical Installation (Excluding Vat)	1,291,647, 227.11	1,100,163,30 1.76	1,100,163,3 61.83	1,195,126,0 90.00	1,202,401,5 91.97
Add: 16% Vat	Rates Inclusive Of Vat	176,026,128. 28	176,026,137 .89	191,220,174 .40	192,384,254 .72
Total Tender Amount Including Vat	1,291,647, 227.11	1,276,189,43 0.04	1,276,189,4 99.72	1,386,346,2 64.40	1,394,785,8 46.69

From the Above table it was noted that the bids vary between -1.20% and 7.99% as compared to the pre-bid estimate. The bidders were within the margin of 25% off the pre-bid estimate. The Committee further observed that there was no front loading in terms of elemental comparison of bid prices with the pre-bid estimate.

e) Risk analysis.

A risk analysis was conducted on the items perceived to constitute the major cost of the project i.e 80% of the pre-bid cost estimate on the following:-

- The effect of an increase of 20% in quantities for the items on the bid sums
- The effect of items with excessively low and high rates (compared the rates of the other bidders/market) on the ability of the bidder to perform if awarded the contract and the effect on project cost should quantities vary during construction.

The result was as tabulated for an increase of 20%

Where the Contract is Awarded to:	Increase in Contract Value as a result of 20% increase of Quantities for major items (Kshs) (A)	Corrected Bid Price (Kshs) excluding VAT (B)	Effect on Corrected Bid Price of increasing quantities of major items by 20% (Kshs) (A) + (B)
China National	138,346,421.20	1,060,163,361.83	1,198,509,783.03
Schneider & Mehta	190,280,667.30	1,162,401,591.97	1,352,682,259.28

The Evaluation Committee noted that in the event of a 20% increase in the quantities of all items substantially contributing to the cost of the project, there was no risk in awarding the contract to the lowest evaluated bidder as the ranking of all the bidders remained the same as before the increase in quantities.

Although the bidders rates for the items are considered high the risk of the quantities for the items involved changing significantly is minimal. The Consultant confirmed that the quantities in the bid were accurate with minimal chances of significant changes.

In the absence of a detailed breakdown from M/s China National Aero-Technology International Corporation (CATIC) to enable detailed evaluation of the prices of brands to be submitted, the evaluation team notes that for evaluation purposes the total risk assessed is Kshs. 179,196,010.64 for items considered to be lowly priced and which are contained in the various bill items generally. It has further been established that the bidder may have savings of Kshs. 160,720,931.95 on various bill items considered to be priced highly. The evaluation committee concluded that the overall risk associated with the low rates items be reduced by the savings on highly price items which reduces to Kshs. 18,475,078.69. The Evaluation Committee further noted that to protect the interests of the Procuring Entity before signing the contract there should be negotiations with the winning bidder to agree on the brands to be submitted by the bidder. This is due to the fact that in its

submission the bidder had indicated that all submissions will be in accordance with the specifications issued by the Client or equal and approved.

g) Payment Currency Conversion

The proposals from the bidders were as follows:

Bidder	Payment currency	Currency Proportion as % of bid
China National Aero Technology International Engineering Corporation(CATIC)	Kenya Shilling	65%
	US DOLLAR	35%
Schneider Electric in JV with Mehta Electricals Ltd.	Kenya Shilling	19.80%
	EURO	80.20%

The request by CATIC seem to be proportionate in terms of foreign currency payment. However, the request by Schneider & Mehta for 80.20% payment in foreign currency is on the higher side.

CLARIFICATIONS:-

i. China National Aero Technology International Engineering Corporation (CACTIC)

The bidder was requested to confirm compliance with technical specifications. It was noted that the bidder filled the technical specification compliance form but did not submit any information on any alternatives or sufficient data on the items to be supplied. The bidder indicated that this information was contained in a CD submitted with the bidding documents. The CD was found to contain insufficient information.

The Bidder in response, confirmed that the itemized construction materials contained in the bid will conform to Specifications contained in the Bid Documents or equivalent approved by the Engineer. It was noted that in his response, CATIC submitted a replica of the bid document requirements, including the typo errors. This was noted to be a serious omission on the part of the bidder and that in the event this bidder is awarded the contract, then mitigating measures should be incorporated into the Contract to safeguard the interest of the Client (Kenya Airports Authority) with respect to specifications of plant & equipment proposed in the bidder's submission and the sources of materials included in the bid.

ii. Schneider Electric JV with Mehta Electricals

It was noted that the bidder did not reduce quantities of work undertaken in accordance to Form EXP 2(b) requirements. The bidder submitted overall quantities for the entire project. The bidder to provide the exact data required.

Recommendation

The Evaluation Committee recommended the contract for Electrical Installation Sub- Contract Works for Expansion of Passenger Terminal Facilities - Construction of Terminal Building, Parking Garage and other associated services be awarded to M/s China National Aero Technology International Engineering Corporation at the corrected bid sum of Kshs. 1, 100, 163, 361.83 inclusive of Contingency sum of Kshs. 40, 000,000.00, but VAT exclusive of Kshs. 176, 026, 137.89.

THE TENDER COMMITTEE DECISION

The Tender Committee in its meeting No. 164 held on 23rd September, 2011 deliberated on the recommendation of the Evaluation Committee and noted that the World Bank had granted a no-objection to the award on 16th September, 2011 as it was a donor funded project. The Tender Committee adjudicated and awarded the tender as recommended and recommended that the Procuring Entity negotiate with the contractor prior to signing the contract.

PRELIMINARY OBJECTION

At the commencement of the hearing the Procuring Entity raised a Preliminary Objection on the following grounds;

“That the Applicant’s Request for Review is time barred as it is contrary to Regulation 73(2) (c) of the Public Procurement and Disposal Regulations, 2006 which stipulates that the Request for Review shall be made within fourteen days of notification under the Act”

The Procuring Entity submitted that the notification of award to the Successful and Unsuccessful Bidders was done on 10th October 2011 by registered post.

It further submitted that the Applicant had expressly admitted in the statement in support of the Review that it received the Notification letter on 12th October 2011.

The Procuring Entity argued that the Regulation 73 (2) (c) clearly stipulates that a Request for Review shall be filed within 14 days from the date of notification. It stated that upon expiry of the stipulated appeal window, any Request for Review that is filed is incompetent and ought to be dismissed.

The Procuring Entity stated that since the Applicant had admitted that it received the Notification Letter on 12th October 2011, the appeal window lapsed on 26th October 2011. It pointed out that the Request for Review was filed on 9th November 2011 contrary to the clear provisions of Regulation 73 (2) (c).

The Procuring Entity urged the Board to dismiss the Request for Review.

The Successful Bidder supported the submissions of the Procuring Entity and urged the Board to dismiss the Request for Review.

In response, the Applicant stated that the Procuring Entity was correct in its submissions on the law, that a Request for Review has to be filed within 14 days from the date of notification as stipulated under Regulation 73 (2) (c). However, it stated that the provision of Regulations 73 (2) (c) did not apply to this tender due to the following reasons;

- (i) The period between notification of award and the signing of a contract serves only one purpose, that is, to enable any aggrieved bidder to challenge a Procuring Entity's decision to the Board. It stated that under the Act, the appeal window is fourteen days from the date of notification;
- (ii) In the instant tender, the tender document approved by the donors provided at Clause 2.12 of the World Bank Guidelines for a 28 days period between notification and the signing of contract;
- (iii) To the extent that there is a conflict between the 14 days provided by Regulation 73 and the 28 days provided by the tender Document issued by the Donors, the operative window period is 28 days in view of the provisions of Section 6 and 7 of the Act;
- (iv) In the instant case, the notification letter dated 10th October 2011 was sent by Registered Post and was received by the Applicant on 12th October 2011. Therefore, time began to run with effect from 13th October 2011. Accordingly, the appeal window provided for in the tender Documents expired on 12th November 2011 which was three days after the filing of the Request for Review;

- (v) That the Procuring Entity engaged the Applicant in an exchange of correspondence beyond the 14 days following the notification without raising the issues of time. It stated that this correspondence includes letters dated 31st October 2011 and 9th November 2011; and
- (vi) The Procuring Entity is estopped from raising the issues of time limitation to the extent that it;
- a) Issued a tender document providing a 28 days period between notification of award and signing of the contract, thereby representing to the Applicant that it would not be prejudiced by raising any claim within 28 days and;
 - b) The Procuring Entity engaged the Applicant in correspondence beyond 28 days without raising the issue of time limitation, thereby representing to the Applicant that it would not be prejudiced by filing its claim within 28 days. To support its argument the Applicant relied on the case of **Gatune -vs- Headmaster of Nairobi Technical High School and Another [1988] KLR 561.**

In view of the above arguments the Applicant invited the Board to hold that the Request for Review was filed within time and to dismiss the preliminary Objection.

The Board has carefully considered the submissions of the parties and the documents that were presented before it.

At the outset, the Board notes that the Applicant has raised a novel and interesting argument on the applicable appeal window. The issue the Board is

called to determine is whether the appeal window in this tender was 14 days as argued by the Procuring Entity or 28 days as argued by the Applicant. To determine the issues it is necessary to set the following provisions of the Act and the Tender document.

Section 67 of the Act which provides that;

“(1) Before the expiry of the period during which tenders must remain valid, the Procuring entity shall notify the person submitting the successful tender that his tender has been accepted”

“(2) At the same time as the person submitting the successful tender is notified, the Procuring Entity shall notify all other persons submitting tenders that their tenders were not successful.”

“(3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security”

Section 68 of the Act which provides that;

(1)The person submitting the successful tender and the Procuring Entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under Section 62 and any corrections under Section 63.

(2) The written contract shall be entered into within the period specified in the notification under section 67 (1) but not until at least fourteen days have elapsed following the giving of that notification.

(3) *No contract is formed between the person submitting the successful tender and the Procuring Entity until the written contract is entered into.*

Regulations 73 (2) (c) (i) and (ii) which provides that;

"The request referred to in paragraph 1 shall-

(c) be made within 14 days of -

- i. the occurrence of the breach complained of where the request is made before the making of an award; or*
- ii. the notification under section 67 or 83 of the Act"*

Clause 2.12 of the World Bank Guidelines which provides that;

"Bidders shall be required to use the appropriate Standard Bidding Documents (SBDs) issued by the Bank WITH MINIMUM CHANGES, acceptable to the Bank, as necessary to address project-specific conditions. Any such changes shall be introduced only through the bid or contract data sheets, or through special conditions of contract, and not by introducing changes in the standard wording in the Bank's SBDs. Where no relevant SBDs....."

Clause 38.1 of Instructions to Bidders (hereinafter referred to Clause 38. which provides that;

"Subject to ITB 37.1, the employer shall award the Contract to the bidder whose offer has been determined to be the lowest evaluated bid and is substantially responsive to the Bidding Document, provided further that

the Bidder is determined to be qualified to perform the Contract satisfactorily."

Clause 40.1 of ITB which provides that;

"promptly upon notification, the employer shall send the successful Bidder the Contract Agreement."

Clause 40.2 of ITB which provides that;

"Within twenty-eight days of receipt of the Contract Agreement, the Successful Bidder shall sign, date, and return it to the employer."

The Board has considered the above provision of the Act, Regulations and the tender Document together with Sections 6 (1) and 7(1) of the Act which provide as follows;

Section 6 (1);

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

Section 7 (1);

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

The Board notes that its common ground that;

- (i) The bidding process was conducted through international competitive bidding procedures specified in the World Bank's Guidelines under IBRD loans and IDA credits; and
- (ii) The Applicant has admitted that it received the notification letter on 12th October 2011. At Paragraph 22 of the supporting statement to the Request for Review it states as follows;

“ on or around 12th October 2011, the Applicant received a Notification letter from the Procuring Entity indicating that the subcontract had been awarded to an undisclosed entity at the sum of Kshs. 1,100,163,361,83 exclusive of VAT”

As already stated, the point to determine is whether clauses 40.1 and 40.2 of the instructions to Bidders give the aggrieved Bidders a 28 days appeal window.

The Board notes that Clauses 40.1 and 40.2 of the instructions to Bidders provide the period within which the main Contractor and the Subcontractor may sign the contract. The said clauses provide that the contract may be signed within 28 days. This means that the contract can be signed on the first day or by the latest, the 28th day.

This is in contrast to the Public Procurement and Disposal Act which at Section 68 clearly provide for a waiting period of 14 days before the contract can be signed. If any contract is signed within the 14 days appeal window, the said contract would be unlawful and the mere act of signing the contract would not oust the jurisdiction of the Board. On the other hand, when a

contract is signed after the expiry of the 14 days – the Board has no jurisdiction pursuant to section 93 (2) (c).

The Board notes that Clauses 40 of the Instruction to Bidders provided that until a formal contract is prepared and executed, the notification of award shall constitute a binding contract.

The Board has noted that clauses 40.1 and 40.2 of the Instructions to Bidders provide the period within which the Contractor and Sub-contractor should sign the contract. This is a very significant point. This tender was for a sub-contract for electrical installations. The main tender for civil works for renovation and expansion of passenger terminal facilities at the Jomo Kenyatta International Airport is already on-going. The 28 days period specified in Clauses 40.1 and 40.2 is the time within which the main Contractor and the Sub-contractor should sign the contract.

The Board notes that Clauses 2.43 on the Applicable law and settlement of Disposal state as follows;

“In case of works contracts, supply and installation contracts, and turnkey contracts, the dispute settlement provision shall also include mechanisms such as dispute review boards or adjudicators, which are designed to permit a speedier dispute settlement.”

The said clause clearly recognizes that disputes shall be settled through the set mechanisms such as dispute Review Boards. Therefore the tender document expressly recognizes that this Board is the forum in which any dispute arising from the tender should be resolved. That being the case, disputes arising from the instant tender can only be resolved using the

procedures set out in the Act. The Act clearly states that any bidder who is aggrieved must do so within a period of 14 days. As clearly stated, Clauses 40.1 and 40.2 of the instructions to tenderers provide that the Main Contractor and the Sub-contractor may sign the Contract within 28 days. This means that the contract can be signed on the first day or at the latest on the 28th day. If the intention was to create an appeal window as argued by the Applicant, the clauses would have stated that no contract can be signed before the expiry of twenty eight days. The Board notes that clause 2.43 of the World Bank guidelines recognized that dispute resolution would be done through the local mechanism and therefore there is no conflict under sections 6 and 7 of the Act.

The appeal window is the stand still period in the tender process within which the Procuring Entity is required to withhold any action to allow an aggrieved bidder to lodge a complaint with the adjudication body. Under our law the period is 14 days as provided in Section 68 and Regulation 73.

As already observed, clauses 40.1 and 40.2 did not provide for a stand still period. The clauses merely provided the period within which the main contractor and the subcontractor could sign the contract. The Board notes that if the said clauses provided that the contract should be signed after a period of 28 days then the argument by the Applicant that there was a standstill or an appeal window would be correct.

It is clear to the Board that as at 12th October 2011 the Applicant was aware that it was unsuccessful. It did not file its Request for Review until the 9th of November 2011. Clearly, the Applicant is using an ingenious argument to

extend the appeal window. However, as already stated regulation 73 (2) (c) is very clear that an aggrieved bidder has 14 days to lodge an appeal after the date of notification.

As regards the argument by the Applicant that the Procuring Entity is estopped from raising the Preliminary Objection in view of the fact that it was in correspondence with it, the Board notes as follows;

By a letter dated 20th October 2011 the Applicant wrote to the Procuring Entity in the following terms;

“In response of your letter here above referenced, we noticed that the name of the awarded company was not indicated. This is not compliant with ITB 39.1 clause of the RFP. As per RFP requirements, could you clarify:

- name of each bidder who submitted a Bid;***
- bid prices as read out at Bid Opening;***
- name and evaluated prices of each bid that was evaluated;***
- names of bidders whose bids were rejected and the reasons for their rejection;***
- name of the Successful Bidder, and the Price it offered, as well as the duration and summary scope of the contract awarded.”***

It is note worthy, that the Applicant stated that; *“Moreover, allowed claim period will start after receiving completely fulfilled award letter”*. This clearly shows that the Applicant was well aware that there was a set appeal window. However, the Applicant by that letter attempted to set the conditions on when the appeal window will start running. The Board notes that a bidder has no power or mandate to stipulate when time will start running. Such a period is

clearly set out in the Act, Regulations or the tender documents. The Board further notes that the Applicant wrote a letter on 31st October 2011 stating reasons why it was not happy with the award.

In view of the above, it is clear that the applicant was aggrieved with the tender award as early as 20th October 2011 when it wrote the first letter to the Procuring Entity.

There is no letter exhibited in the Request for Review to show that the Applicant and the Procuring Entity were holding negotiations to settle the matter out of court. There is nothing on record to show that the Procuring Entity misled the Applicant not to file the Request for Review within time. Therefore, the case of *Gatune -vs- Headmaster of Nairobi Technical High School and Another (1988) KLR 561* is clearly distinguishable and it cannot assist the Applicant.

Finally, the Board observes that the Procurement process is a regimented process that is done within set time lines. It is a process in which time is of essence. The aggrieved bidders are given a chance to raise their objections within the set timelines. This is to ensure that Bidders also follow the set procedure and should not disrupt the procurement process. If a Bidder fails to raise an objection within the set time frame it has no one to blame but itself.

In view of the above the Board holds that the applicant had 14 days to lodge its appeal from 12th October 2011. The day started running on 13th October 2011 and time expired on 26th October 2011. The Applicant did not file this Request for Review until the 9th of November 2011. The Applicant's attempt to stretch the appeal window by relying on clause 40.1 and 40.2 of the

instructions to Bidders cannot stand as already demonstrated. The law as it currently stands recognizes a 14 day appeals window that applies to both local and international Bidders.


Accordingly, the Preliminary Objection succeeds and the request for review is dismissed with no orders as to cost.

The procurement process may proceed.

Dated at Nairobi on this 5th day of December, 2011.

A handwritten signature in black ink, consisting of a large 'M' followed by a cursive flourish, positioned above a horizontal dotted line.

**CHAIRMAN
PPARB**

A handwritten signature in black ink, featuring a large circular loop followed by a cursive flourish, positioned above a horizontal dotted line.

**SECRETARY
PPARB**