

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 7/2011 OF 28TH FEBRUARY, 2011

BETWEEN

GIBB AFRICA LTD & CANARAIL CONSULTANTS

INC.....APPLICANT

AND

KENYA RAILWAYS CORPORATION.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Railways Corporation dated 25th February, 2011 in the matter of Tender No. KR/PLM/71/2010 for Consultancy services for Preliminary Design, Environmental and Social Impact Assessment for developing a Modern High Capacity Standard Gauge Railway line between Mombasa and Malaba with a branch line to Kisumu.

BOARD MEMBERS PRESENT

Mr. Joshua W. Wambua - Member (In the Chair)
Mrs. Judith Guserwa - Member
Mrs. Loise Ruhiu - Member
Mr. Sospeter Kioko - Member
Amb. Charles Amira - Member
Mr. Akich Okola - Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Mr. N. M. Soita - Secretariat
Ms. Maureen N. Kinyundo - Secretariat
Ms. Lucy Barno - Corporate Affairs Manager (PPOA)

PRESENT BY INVITATION

Applicant, Gibb Africa Ltd & Canarail Consultants Inc.

Mr. Desterio Oyatsi - Advocate
Mr. David Ohenga - Advocate
Mr. Edwin Kubebea - Student Lawyer
Mr. Kasyoka Malinda - Director
Mr. Thomas Ndeda - Engineer

Procuring Entity, Kenya Railways Corporation.

Prof. Albert Mumma - Advocate
Mr. Charles Agwara - Advocate
Mr. David Njogu - Legal Officer
Ms. Wangeci Wanyahoro - Lawyer

Interested Candidate, Italferr SPA.

Mr. Anthony Njogu - Advocate

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

The Procuring Entity advertised for Expression of Interest for Consultancy services for Preliminary Design, Environmental and Social Impact Assessment for Standard Gauge Railway line between Mombasa and Malaba with a branch line to Kisumu in the Daily Nation newspaper of 8th October 2010 and closed on 2nd December 2010.

Closing/Opening:

Expressions of Interest were received from nine (9) firms as follows;

1. Feedback Ventures Pvt. Ltd (FVPL)
2. Engenieria - Idom International S.A
3. Typsa Consulting Engineers and Architects
4. Minter Ellison Lawyers
5. Naqsh Tarsim Milad Consulting Engineers (NTM)
6. SNC-Lavalin Inc.
7. Canarail Consultants inc.
8. Mott MacDonald
9. Italferr S.P.A

EVALUATION

Two separate bid processes were undertaken in compliance with Section 76 of the Act as follows;

1. Expression of Interest
2. Successful bidders were issued with RFP

Expression of Interest

Submitted Expressions of Interest were subjected to the evaluation criteria provided in the advertisement as follows:

1. Company profiles of the firm(s)
2. Constitution/Registration documents of the firm(s)
3. Audited accounts for the lead firm for the last five consecutive years
4. Minimum annual turnover of USD 5 million for the last five consecutive years for the lead firm.
5. Experience in at least three (3) transport infrastructure projects of comparable magnitude and/or complexity.
6. Availability of key professional staff with requisite qualifications and experience.

The following three firms met the prerequisite requirements and thus qualified to the next stage of the Request for Proposal (RFP):

1. Mott MacDonald
2. Canarail Consultants Inc./Gibb Africa Ltd
3. Italferr SPA

Request for Proposal

The three qualified firms were issued with the Request for Proposal document vide the letter dated 23rd December 2010 which closed and opened on 25th January 2011. All the three firms responded by submitting their Technical and Financial Proposals. These proposals were evaluated in two stages namely; Technical Evaluation and Financial evaluation.

Technical Evaluation

The Technical Evaluation was carried out based on the parameters provided under Clause 2.7.1 of the Appendix to Information to Consultants (Appendix "ITC") of the RFP document as shown in table 1 below:

Table 1: Technical Evaluation criteria

2.7.1	Technical Evaluation Criteria	Maximum Points
	(i) Specific experience of the consultant related to the assignment	10
	(ii) Adequacy of the proposed work plan and methodology in responding to the terms of reference	36
	(iii) Qualifications and competence of the key staff for the assignment	50
	(iv) Suitability to the transfer of Technology Programme (Training)	4
	Total Max. Points	100

Details of Evaluation criteria are shown in table 2 below:

Table 2: Details of the technical evaluation criteria

1.SPECIFIC EXPERIENCE OF THE CONSULTING FIRM RELATED TO THE ASSIGNMENT		10
Responsibility	Qualification & Experience	Max. Points
1.1 Railway Engineering Design	i) The firm shall provide details of 3 (three) Similar projects in the last 10 years which demonstrate taking a lead role in Railway Planning and Design. At least one of the assignments must have been done in the last five years. ii) The firm should describe the nature, scope and	5.0

	value of the assignments, the role of the firm in the Planning and Design of a mixed passenger and freight traffic railway and the nature and duration of the assignment.	
1.2 Traffic & Market Studies Expert	<p>i) The firm should provide details of 3 (three) railway or road projects in the last 10 years which demonstrate ability to undertake traffic and market demand studies.</p> <p>ii) The firm should describe the nature, scope and value of the assignments and the role of the firm in the assignments.</p>	1.0
1.3 Legal Expertise	<p>i) The firm should provide details of 3 (three) assignments in the last 10 years which demonstrate ability to undertake review of legislation/regulatory provisions and PPP formulation.</p> <p>ii) The firm(s) should describe the nature, scope and value of the assignment, the role of the expert in supporting the assignment the nature of the Legislation/Regulatory Review and the duration of the assignment.</p>	1.0
1.4 Engineering Land Surveying/Geomatics	<p>i) The firm(s) should provide details of 3 (three) projects in the last 10 years which demonstrate experience in undertaking engineering survey for roads or railway infrastructure.</p> <p>ii) The firm(s) should describe the nature of the assignment, role of the firm in the assignments.</p>	1.0
1.5 Economic & Financial Viability Assessment/Investment Appraisal	i) The firm should provide details of 3 (three) assignments in the last 10 years, which demonstrate ability to conduct financial modeling for projects of expected turnover of valued at more than USD 4.0 million.	1.0

	ii) The firm(s) should describe the nature of the assignment, the role of the firm in the assignments.	
1.6 Environmental Impact Assessment	<p>i) The firm(s) should provide details of 3 (three) Related Projects in the last 10 years which demonstrate experience in Environmental Impact Assessment studies for large scale infrastructure projects such as roads, railways, dams, ports etc.</p> <p>ii) The firm(s) should describe the nature of the assignment, the role of the firm in the assignments.</p>	0.5
1.7 Social Impact Assessment	<p>i) The firm(s) should provide details of 2 (two) Related projects in the last 5 years which demonstrate undertaking Social Impact assessment studies, implementing and or Monitoring relocation and or resettlement for linear infrastructure projects.</p> <p>ii) The firm(s) should describe the nature of the assignments, the role of the firm in the assignments.</p>	0.5
2. COMMENTS ON TOR & ADEQUACY OF THE PROPOSED WORK PLAN AND METHODOLOGY FOR RESPONDING TO THE TOR		36
1. Comments on TOR	i) Detailed suggestions to enhance Terms of reference (Refer to Form T4).	2.0
2. Technical approach & Methodology	i) Level of completeness of the Technical approach and methodology in addressing the Terms of Reference. Respond to all areas of sections 5.3 and 5.5 of the TOR.	10.0
	ii) Level of detail and responsiveness of the Technical Approach and Methodology in addressing key specifications of the proposed study.	10.0
	iii) Proposed Computer Aided design & Drafting, ICT software to be used upon the assignment in the following key areas. The Consultant shall list the	8.0

	key software to be used and briefly describe them. Expert should demonstrate experience in use of relevant software in the following area: alignment, earthworks/mass haul diagrams; structural engineering; train system operations & optimization; system operations design. The Bidder to provide descriptive evidence of application of software.	
	Area of Specialization	Max. Points
	Survey & Route alignment	1.0
	Civil engineering/Earthworks/optimization/pway	2.0
	Structural/Geotechnical/tunnel engineering	2.0
	Traffic systems operation/operation models/traffic simulation	1.0
	Signaling/Train control software	1.0
	Financial modeling	1.0
	iv) Organizational structure & Staffing	2.0
3. Work Plan	i) Provide logical, sequential and well structured work plan consistent with the time frames and terms of reference of this RFP Document	2.0
	ii) Details of proposed main activities of the assignment – refer Form 3 of Appendix 2	2.0
Responsibility/Title	Qualifications, Experience & Competences	Max. points
3. QUALIFICATIONS AND COMPETENCE OF THE KEY STAFF FOR THE ASSIGNMENT		50
1. Project Management		6.0
1. Project Director/Overall Project Team Leader (1No)	i) The Expert should provide details of 3 assignments in the 10 years which demonstrate ability to undertake complete control of project management for the development of major	6.0

	<p>multidiscipline engineering infrastructure project such as road, railway, ports and dams.</p> <p>ii) The Expert should describe the nature of the assignment, the role of the expert in the management of the project.</p>	
2. Railway Expertise		30
<p>2.1 Railway, civil & structural engineering design Experts.</p> <p>11 No (as listed in table herein. Inclusive of Technical Advisor, who will be Team Leader)</p>	<p>i) The Experts should provide details of at least 2 assignments in the last 5 years which demonstrate competence and experience on design of Similar or Related Projects.</p> <p>ii) The Experts should describe the nature of the assignment, the role of the expert in the design of railways or major highways, bridges, tunnels, electrification, etc as the case may be and the nature and duration of the assignment.</p> <p>The experts should be registered/Chartered in their respective countries and have current practicing licences to be submitted with CV.</p>	
	<p>Area of specialization</p> <p>No. of personnel to be evaluated</p>	
	Technical Team Leader/Deputy Project Director 1No.	4.0
	Civil Engineers (Permanent way design) 2 No.	4.0
	Civil Engineers 2 No.	4.0
	Structural Engineer 1 No.	2.5
	Geotechnical/tunnel engineer/Geologist 2 No.	4.0
	Signaling/Communication/train control engineer 1No.	2.0
	Rolling Stock Engineer 1 No.	2.0
	Electrification Engineer 1 No.	2.0
	Engineering Surveyor 1No.	2.5

2.2 Railway operations Expert (1No.)	<p>i) The Expert(s) should provide details of 2 assignments in the last 10 years which demonstrate experience and competence in the design of railway operation systems and/or actual operational logistics of Railway projects of at least 300 kilometers.</p> <p>ii) The Expert(s) should describe the nature of the assignment, the role of the expert in the operation of a passenger and /or freight high capacity railway and the nature and duration of the assignment.</p>	3.0
3. Traffic forecast & Market Demand Analysis		3.0
3.1 Traffic forecasting and market demand studies Expert (1 No.)	<p>i) The Expert should provide details of 2 assignments in the last 10 years which demonstrate ability to undertake traffic and market studies for surface transport infrastructure Projects.</p> <p>ii) The Experts should describe the nature of the transaction, the role of the expert in undertaking traffic Forecasting and Market Studies and the nature and duration of the assignment.</p>	3.0
4. Environmental & Social Impact Assessment		4.0
4.1 Environment Impact Assessment Expert (1No.)	<p>i) The Expert should provide details of 2 assignments in the last 10 years which demonstrate ability to undertake Environmental Impact Assessment for a major infrastructure projects such as roads, railways, dams, ports etc.</p>	2.0
	<p>ii) The Experts should describe the nature of the assignment, and the role of the expert in the assignment and the duration of the assignment.</p> <p>iii) Team should include a local expert who registered as a Lead expert and licensed by National Environment management Authority (NEMA) of Kenya.</p>	

4.2 Social Impact Assessment Expert (1No.)	<p>i) The Experts should provide details of 2 assignments in the last 10 years which demonstrate ability to undertake Social Impact Assessment for a road, railway or dam project including any relocation exercises.</p> <p>ii) The experts should describe the nature of the assignment, and the role of the expert in Social Impact Assessment and the duration of the assignment.</p>	2.0
5. Financial/Investment Expertise		2.0
5.1 Financial/Investment Expert (1No.)	<p>i) The Experts should provide details of 2 assignments in the last 10 years, which demonstrate ability to conduct financial modeling for projects of expected turnover of valued at more than USD 4.0 million. One of the two projects should be a Similar Project.</p> <p>ii) The Experts should describe the nature of the transaction, the role of the expert in supporting that transaction, the nature of the financial modeling, its relationship to the transaction, and the duration of the assignment as provided for in Form 8.</p>	2.0
6. Legal Expertise		3.0
6.1 Legal Expert (1No.)	<p>i) The Experts should provide details of 2 assignments in the last 10 years, which demonstrate ability to undertake review of legislation/regulatory provisions and guidance on PPP transaction structure.</p> <p>ii) The Experts should describe the nature of the transaction, the role of the expert in supporting that transaction, the nature of the Legislation/Regulatory Review and the duration of</p>	3.0

	the assignment. iii) At least one lawyer should have local experience and be registered to practice in Kenya.	
4. TRANSFER OF TECHNOLOGY & CAPACITY BUILDING		4.0
4.1 Training programme local and overseas	KR shall attach to the project for training three trainees in each of the disciplines; Civil, Rolling Stock, Electromechanical, Permanent Way and Survey. The bidder shall draw up a suitable training programme.	2.0
4.2 Capacity Building programme for serving staff	KR and MOT shall identify (ten) 10 serving staff for seminars and workshops and field visits to be conducted locally and overseas visits to identified institutions and installations. The bidder shall draw up a suitable capacity building programme.	1.0
4.3 Capacity building programme for trainers from RTI	KR shall identify five (5) three trainers for seminars and workshops and field visits to be conducted locally and overseas visits to identified institutions and installations. These shall be in railway operations & maintenance. The bidder shall draw up a suitable capacity building programme.	1.0

The summary results of the Technical Evaluation were as shown in table 3 below:

Table 3: Summary results of the Technical evaluation

Criteria	Mott MacDonald	Canarail Consultants Inc/Gibb Africa Ltd	Italferr SPA	Maximum
Specific experience of the consulting firm related to the assignment	3.85	5.80	8.45	10

Comments on TOR and adequacy of proposed work plan and methodology for responding to TOR	25.42	21.13	31.08	36
Qualifications and competence of key staff	28.51	33.12	42.45	50
Technology transfer, capacity building and training	0.68	0.65	3.88	4
Total	58.46	60.70	85.86	100

The pass mark for a bidder to qualify and proceed to Financial Evaluation stage was 70% as provided by Clause 2.6.3 of Appendix "ITC" to the RFP document.

From the above results, only one bidder M/s Italferr SPA qualified to proceed to Financial Evaluation stage.

Financial Evaluation

M/s Italferr SPA submitted its Financial proposal in line with the requirements of the RFP document as shown in table 4 below.

Table 4: Financial proposal

Firm	Amount in Figures (US\$)	Taxation
Italferr SPA	9,430,800	With Tax
	8,130,000	Excluding Tax

Final Combined Score

The final combined score was calculated according to the formula provided in clause 2.8.2 of the FRP document and the results were as shown in table 5 below.

Table 5: Summary results of the combined technical and financial scores

	ITALFERR SPA			
Evaluation criteria	Max Score (%)	Actual score (%)	Weight given (%)	Final score
Technical Score	100%	85.86%	80	68.69
Financial Score	100%	20.00%	20	20
Final combined score				88.69
Ranking				1

RECOMMENDATION

The Evaluation Committee recommended that the Tender Committee considers the Evaluation Report and award the Consultancy services to M/s Italferr SPA at their proposal sum of US\$ 9,430,800 inclusive of Taxes.

THE TENDER COMMITTEE DECISION

The Tender Committee at its meeting No.150 held on 25th February 2011 deliberated on the Evaluation Report, concurred with its recommendations and approved the selection of proposal of M/s Italferr SPA at their total sum of US\$9,430,800 (Ksh.773,325,600.00 using exchange rate of US\$1=Ksh.82 as at 24th February 2011) being the lowest

evaluated. The Committee recommended that management should negotiate with M/s Italferr prior to award of contract.

THE REVIEW

The Request for Review was lodged by M/s Gibb Africa Ltd & Canarail Consultants Inc. on 28th February 2011 in the matter of Tender No. KR/PLM/71/2010 for Consultancy services for Preliminary Design, Environmental and Social Impact Assessment for developing a Modern High Capacity Standard Gauge Railway line between Mombasa and Malaba with a branch line to Kisumu. The Applicant was represented by Mr. Desterio Oyatsi, Advocate while the Procuring Entity was represented by Prof. Albert Mumma, Advocate.

The Applicant raised six grounds of review and sought for the following orders:

- (a) The decision to award the tender No.KR/PLM/71/10 if made be annulled.*
- (b) The decision to disqualify the Applicants' proposal from proceeding to the financial evaluation stage be annulled.*
- (c) The evaluation of the Applicants' proposals, both technical and financial be conducted in accordance with the evaluation criteria and terms of reference set out in the Request for Proposal.*
- (d) The tender be awarded to the successful bidder determined and chosen in accordance with the evaluation criteria and terms of reference set out in the Request for Particulars.*
- (e) Alternatively, the Procuring Entity be ordered to re-tender for the supply of services referred to in the said tender No.KR/PLM/71/10.*
- (f) That the Procuring Entity pays all the costs incurred by the Applicants in preparing and submitting the said tender plus the cost of this review.*

(g) Such other relief or reliefs that this Honourable Review Board may deem fit to grant.

**A). RULING ON PRELIMINARY ISSUES FILED BY THE
PROCURING ENTITY ON TERMINATION OF THE
PROCUREMENT PROCESS FILED ON 17TH MARCH, 2011**

At the commencement of the hearing, the Procuring Entity tabled a letter dated 16th March 2011 indicating that the Tender which is the subject matter of the instant Review had been terminated by the Ministry of Transport. The Letter which was addressed to the Director General Public Procurement Oversight Authority, and also to the Chairman, Public Procurement Administrative Review Board read in part;

"Pursuant to the provisions of Section 36 of the Public Procurement & Disposal Act, 2005, a decision has been taken to terminate the above procurement proceedings with immediate effect. The decision has been informed by a directive received from the Ministry of Transport on 16th March 2011 that the procurement process be terminated forthwith as the Government is already in the process of exploring alternative methods of implementing the project and consequently, the proposed study will not be necessary."

The Procuring Entity stated that it relied on Section 36(1) of the Public Procurement and Disposal Act which it argued, empowered a Procuring Entity to terminate Procurement proceedings at any time or stage of the tender process before entering into a contract.

In the circumstances, it requested the Board to give directions regarding the review proceedings in view of the aforesaid termination.

In response, the Applicant submitted that the purported termination of the tender by the Procuring Entity was null and void, since the Procurement proceedings were stayed from the time a Request for Review was filed on 28th February 2011. It submitted that according to Regulation 74, immediately after a Request for Review is filed with the Secretary, the Secretary of the Board is required in mandatory terms to notify the Procuring Entity of the suspension of the procurement proceedings. It stated that from the time the Procuring Entity was notified of the pending Application for Review with the Board, the procurement proceedings were suspended and would remain so suspended until the Board hears and determines the application. It therefore urged the Board to proceed to hear and determine the Request for Review as filed since the Procuring Entity lacked the capacity to terminate the tender proceedings as it was no longer within its powers to do so.

On its part, the Successful bidder reserved its comments on the matter for the time being at this stage of the proceedings.

The Board considered the submissions of the parties and the Letter served upon the Board by the Procuring Entity on the termination of the tender. The Board notes that the issue before it for determination is whether the Application for Review that was filed on 28th February 2011 should proceed for hearing in view of the termination letter issued by the Procuring Entity.

The Board notes the following:-

- i) That the Request for Review before the Board was filed on 28th February 2011 and the Procuring Entity was served on the same

date. Upon notification, the Procuring Entity responded to the grounds raised by the Applicant and filed its response with the secretary on 7th March 2011.

- ii) That the parties came before the Board ready to proceed with the hearing of the Request for Review as filed by the Applicant.
- iii) That at the hearing, the Procuring Entity sought to have the Board give directions on the ground that the Procuring Entity had terminated the Procurement, following a directive issued by the Ministry of Transport that the Government was not going to proceed with the consultancy work. The said termination Letter is dated 16th March 2011 and addressed to the Director General, Public Procurement Oversight Authority and the Chairman, Public Procurement Administrative Review Board.

The Board is alive to the provisions of Section 36(1) which allows a Procuring Entity to terminate a tender any time before entering into a contract. However, the Board notes that the termination notice is not what is before the Board for challenge. What is before the Board for hearing is the Request for Review as lodged by the Applicant.

The Board also notes that Section 36(2) requires that the ***“Procuring Entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation... ..”***

The Board notes that the Procuring Entity can only execute this power if it is still incharge of the Procurement proceedings. In the instant case, the Request for Review was filed on 28th February 2011 and the Procurement Entity was notified by the Secretary to the Board on that

day that all procurement proceedings should be stayed. This was done pursuant to Regulation 74(2). Therefore, the Board finds that, as argued by the Applicant, the Procuring Entity purported termination of the tender proceedings is not before the Board for determination. Indeed, all the Tender documents on the said tender were submitted by the Procuring Entity to the Secretary to the Board for perusal, verification and determination of the Request of Review.

To the above end, the Board directs that the Request for Review before it proceeds to the hearing and determination.

B) THE RULING ON THE PRELIMINARY ISSUES FILED BY THE PPROCURING ENTITY ON THE 24TH OF MARCH 2011

At the commencement of the hearing, the Procuring Entity sought leave to prosecute the Notice of Preliminary issues dated 23rd March, 2011 and filed on 24th March 2011. The Procuring Entity argued that it was important to deal with the said preliminary issues which were seeking striking out orders to issue against the Applicant's further Affidavit dated 11th March, 2011 and filed at the Board on the 11th March, 2011.

The Procuring Entity stated that it objected to the filing of the further Affidavit by the Applicant on the grounds that the same was filed without leave of the Board. It added that there were no provisions in the Act nor Regulations allowing for filing of further Affidavits by any party.

In the circumstances, it applied to the Board to strike out the further Affidavit which in any event had raised fresh grounds of review.

In response, the Applicant submitted that there was no provision in the Act nor Regulations stopping it from filing a further Affidavit. It stated that if the Affidavit was rejected, it would defeat the whole purpose of the Act and the provisions of Section 44 of the Act. It further stated that it had been given the evaluation report in compliance with the Provisions of Section 44 which it used to respond to the issues raised by the Procuring Entity regarding the evaluation criteria and scores which were the issues in dispute. It argued that it had not introduced any new ground in the further Affidavit. It added that the Procuring Entity had ample time to respond to the further Affidavit save that it had not requested for such time. It submitted that it would be highly prejudiced if it was not allowed to rely on the further Affidavit. It argued the Board to overrule the Preliminary issues.

On its part, the successful bidder stated that although it was not served with the Notice of Preliminary issues, Section 44 of the Act contained a prohibition against disclosure except by the Procuring Entity as provided thereat. It stated that all information touching on the subject tender was placed before the Board.

The Board has considered the submissions of the parties and the documents served upon the Board by the Procuring Entity on the Preliminary issues. The Board notes that the issues raised in the alleged issue is the admissibility of the further Affidavit filed by the Applicant on the 11th March, 2011.

The Board notes the following:-

- i) That the further Affidavit alluded to was filed before the Board and served on the Procuring Entity on 14th March, 2011.
- ii) That the Procuring Entity indicated to the Board that it had Preliminary issues on the 25th of March, 2011 which it was directed to file and serve on the Applicant.
- iii) That at the hearing scheduled for 25th March, 2011, the Procuring Entity sought to have the Board rule on the admissibility of the further Affidavit on the ground that the same was filed without leave of the Board.

The Board is alive to the fact that there are no express provisions in the Act nor the Regulations for a party to file further Affidavit other than those referred to in Regulation 73 which states as follows:-

"73(1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these Regulations.

(2) The request referred to in Paragraph (1) shall-

(a) State the reasons for the complaint, including any alleged breach of the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;"

The Board also notes that there are no express provisions in the Act nor the Regulations that bars it from admitting any such Affidavit if it is filed with the leave of the Board depending on the facts of each application.

The Board therefore finds that the admission of the Applicants further Affidavit dated 11th March, 2011 is not prejudicial to the hearing of the instant request for review application in the interests of justice. Therefore, the Board finds that the Preliminary issue raised by the Procuring Entity lacks merit.

Accordingly, the Board dismisses the Preliminary issues raised by the Procuring Entity and orders that the Application for review do proceed to the hearing for determination on merits.

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

Grounds 1,2,3,4,5 &6: Breach of Sections 2 and 82 of the Act.

All these grounds have been consolidated since they raise similar issues on the evaluation of the proposals.

The Applicant submitted that the Procuring Entity made an erroneous and unlawful decision by unfairly disqualifying its Technical proposal at the Technical Evaluation stage. It stated that the Procuring Entity breached Section 2 of the Public Procurement and Disposal Act 2005 (hereinafter "the Act") by treating the Applicant unfairly in the Evaluation of its Technical Proposal and disqualifying its bid at that stage. It stated that the Procuring Entity breached the mandatory provisions of the law as enacted in Section 82(1) of the Act in the process of evaluation of its proposal. The Applicant further stated that the Procuring Entity breached Section 82(2) of the Act during the evaluation of the proposals by failing to assign scores to the Applicant's Technical

Proposal in accordance with the Evaluation Criteria and Terms of Reference as set out in the Request for Proposals. The Applicant averred that, the Procuring Entity breached Section 82 of the Act by manipulating the technical scores in order to disqualify its bid. It submitted that the evaluation process as conducted by the Procuring Entity, defeated the whole purpose and objects of the Act on the rights conferred upon the Applicant as a tenderer.

The Applicant further submitted that the tender was a repeat process following the annulment of the previous tender No.KR/PLM/28/10 by the Review Board, for the same services. It stated that the requirements in the Request for Proposal in both tenders were in most cases identical and the proposals were to be evaluated using similar Evaluation Criteria and Terms of Reference. The Applicant further stated that it had scored 76% in the Technical Evaluation of the previous tender and qualified for Financial Evaluation and therefore it expected to score higher in the current tender since it submitted a superior Technical Proposal. It argued that having perused the Evaluation Report by the Procuring Entity on the annulled tender and the scores awarded thereof, it had improved on its Proposal and submitted a superior proposal. It stated that the said Evaluation Report was forwarded to it by the Procuring Entity pursuant to Section 44 of the Act.

The Applicant submitted that in the Ruling by the Review Board on 8th September 2010, the Board annulled the previous award of the tender for the same services to Italferr SPA, on the grounds that the Procuring Entity had breached the law by failing to use the correct procedures. It added that in disobedience of the said ruling and orders, the Procuring

Entity had committed the same breaches by changing the Evaluation Criteria and the Terms of Reference set out in its Request for proposals when evaluating the Technical Proposal submitted by the Applicant. The Applicant argued that the only reasonable explanation for assigning a score of less than 76% to its Technical Proposal on the subject tender, which was superior to the previous tender, for the same services and which was to be evaluated using the same or similar Evaluation Criteria and Terms of Reference, was the manipulation of the process. It argued that this was done by changing the evaluation criteria and the Terms of Reference as set out in the Request for Proposal in order to disqualify it. It alleged that the Procuring Entity breached Clause 2.7.1 of the Standard RFP document which gave ranges of scores to be applied in the evaluation criteria for the Technical Proposals by amending the scores allocated to each parameter. The Applicant further argued that the Procuring Entity breached Clause 2.8.5 of the Standard RFP document by not stating the weightings to be assigned to both the Technical and Financial proposals in the Appendix "ITC" of its RFP.

In response, the Procuring Entity submitted that it did not commit any error as alleged by the Applicant while carrying out the evaluation of the bids. It stated that it not only evaluated the proposals in compliance with the mandatory provisions of Section 82(1) and (2) of the Act, but also ensured that the evaluation was carried out in accordance with the provisions of Section 82(1) to (5) of the Act. It added that, all the responsive proposals were treated equally and examined in accordance with the Request for Proposals and assigned scores in accordance with the evaluation criteria and terms of reference as set out in the Request for Proposals. The Procuring Entity stated that it had no interest

whatsoever in manipulating the technical scores and did not in any way manipulate the technical scores with a view of disqualifying the Applicant and/or any other bidder as alleged by the Applicant. It further stated that the Applicant's bid was less competitive and failed to achieve the minimum technical score as required under Clause 2.6.3 of Appendix "ITC" of the Request for Proposals and was therefore lawfully disqualified. The Procuring Entity further stated that, the Applicant was fairly treated and its Proposal like all other Proposals, was strictly evaluated in accordance with the RFP document, but failed to attain the qualifying scores to proceed to the Financial Evaluation Stage. It submitted that all the tenderers were subjected to the same criteria under the RFP in compliance with the purpose and objects of the Act.

The Procuring Entity also submitted that it complied with Sections 76 to 82 of the Act in carrying out the procurement process and used the Standard RFP document as prescribed under Section 29 of the Act. It stated that the Applicant failed to attain the 70% minimum Technical score required in order to proceed to the Financial Evaluation stage, and its Proposal was therefore rejected pursuant to Section 82(1) and (2) of the Act. It added that the Applicant's allegation that the requirements in the current RFP document were identical to those of the previous tender documents, which were declared unlawful was misleading since the requirements in the two said documents were different.

The Procuring Entity reiterated that no changes had been carried out to the Evaluation Criteria and all the proposals were subjected to the same Evaluation Criteria as provided in the RFP document. It further stated that paragraph 19 of the Applicant's Affidavit was not true as the

Procuring Entity did not issue the previous Evaluation Report to the Applicant under Section 44 of the Act. It argued that the Applicant unlawfully obtained the said Evaluation Report and hence should be estopped from relying on it for the purposes of the instant Request for Review. It stated that it still stood by its Preliminary Objection that the Board should expunge the Evaluation Report annexed as CKM-8(6) in the Applicants bundle of documents.

On its part, the Successful Bidder, Italferr SPA, associated itself with the submissions of the Procuring Entity. It stated that all the bidders had submitted their tenders on the basis of the same criteria as set out in the RFP document. It further stated that all the bidders were treated in the same manner during the evaluation process and argued that the Applicant's Request for Review was therefore an afterthought. It also stated that the Procuring Entity did not change the Evaluation criteria and therefore, it was properly evaluated and declared the Successful Bidder, using the criteria set out in the RFP document. It therefore urged the Board to find no merit in the Applicant's submissions and hence requested the Board to dismiss the Request for Review with costs.

The Board has carefully considered the representations of the parties and analysed the Tender documents presented before it. The Board notes that the Procuring Entity carried out the procurement process using the Request for Proposal method as provided for under Sections 76 to 84 of the Act. It is noted that the Procuring Entity advertised an Expression of Interest in the Daily Nation Newspaper of 8th October 2010 in accordance with Section 78 of the Act following which nine (9) firms responded. Out of the nine firms, only three met the pre-requisite

requirements of the Expression of Interest and were issued with the Request for Proposal document. It is also noted that the Requests for Proposals were evaluated in two stages, namely Technical Evaluation and Financial Evaluation, using the criteria provided in the Request for Proposal document under Clause 2.7.1 and 2.8.2 of the Appendix "ITC" of the Request For Proposal document.

The Board is alive to the fact that the Procuring Entity previously processed Tender No.KR/PLM/28/2010 for procurement of the same services which was successfully appealed against by the Applicant in Application No.48/2010, on the grounds that the Procuring Entity breached the Statutory duties imposed on it under the provisions of the Act. In the said Request for Review, it came to light that the Procuring Entity had used tender documents that did not comply with the mandatory provisions of the Act and had applied the wrong tender evaluation criteria. In its Ruling of 8th September 2010, the Board directed the Procuring Entity that it could retender by use of the Restricted tender method by inviting all the bidders who had participated in the tender, using the Standard Tender Document as prescribed by the Act.

The Board further notes that in the instant tender, the Procuring Entity used the Standard Request for Proposal (Selection of Consultants) document, issued by the Public Procurement Oversight Authority, in accordance with Section 29(2) & (4) of the Act. The Board also notes that in carrying out the Technical Evaluation of the Request for Proposals, the Procuring Entity used the Evaluation criteria provided in Clause 2.7.1 as shown in table 1 above.

The Board further notes that, all the three responsive firms were subjected to the same evaluation criteria and assigned scores as shown in table 3.

The Board notes that for a proposal to proceed to Financial Evaluation it was required to score a minimum of 70% as provided in Clause 2.6.3 of the Appendix "ITC" of the Request for Proposal document.

The Board also notes that the Applicant's Technical Proposal was rejected at the Technical Evaluation stage for having scored 60.70%, which was below the set pass mark of 70%.

The issues for the Board to determine are:.

- i) Whether or not the current tender is a repeat tender of that which was annulled by the Board in Application. No. 48/2010.
- ii) Whether the same evaluation criteria was applied in the two tenders.

The Board's findings on the first issue is that, this was not a repeat tender since the Procuring Entity was required to issue fresh Request For Proposal documents using the Standard Tender Documents as prescribed by the Act.

Concerning the Applicant's arguments that it expected to score higher than the 76% marks scored in Tender No.KR/PLM/28/2010, having submitted a superior technical proposal to the earlier one and that most of the requirements and Terms of Reference were identical; the Board

finds that since the requirements in the two tenders were not identical its arguments that it ought to have scored higher than 76% does not hold. With regard to the Evaluation Criteria in the two tenders, the Board has established that there are differences between the RFP document of 21st June 2010 and the current one of 22nd December 2010, as detailed in table 6 below:

Table 6: Differences in the evaluation criteria for the two RFP documents

RFP DOCUMENT OF 21 ST JUNE 2010		RFP DOCUMENT OF 22 ND DECEMBER 2010
1 Tender process	<p>Evaluation of bids were undertaken in 3 stages i.e,</p> <p>(a) Compliance with mandatory requirements as set out in clauses 6.4 and 7.1 of the Tender Document.</p> <p>(b) Tenders meeting the mandatory requirements proceeded to technical evaluation.</p> <p>(c) Tenders achieving minimum technical score proceeded to financial evaluation.</p>	<p>I. Two separate bid processes were undertaken in compliance with section 76 of the Act involving:</p> <ol style="list-style-type: none"> 1. Expressions of interest 2. Successful bidders were issued with RFP <p>II. Bids received were evaluated on 2 stages:</p> <ol style="list-style-type: none"> 1. Technical evaluation followed by: 2. Financial evaluation <p>➤ See clauses 2.7 and 2.8</p>
2 Maximum points awardable	<p>The technical proposal was evaluated out of a maximum of 80 points</p> <p>➤ See tables 2 and 3 at</p>	<p>The technical proposal was evaluated out of 100 points</p> <p>➤ See the Appendix "ITC" at pages 18-23.</p>

	pp16-19	
3 Technical evaluation categories	<p>The Technical evaluation criteria was based on 2 categories:</p> <ol style="list-style-type: none"> 1. The Firm/Consortiums = 40 points 2. The Personnel = 40 points <p>Total = <u>80 points</u></p> <p>➤ See pages 18 to 19 of the RFP</p>	<p>The Technical Evaluation criteria was based on 4 categories:</p> <ol style="list-style-type: none"> 1. Specific Experience of the consultant related to the assignment = 10 points 2. Adequacy of proposed work plan and methodology responding to the TOR = 36 points 3. Qualifications and conference of key staff for the assignment = 50 points 4. Suitability to the transfer of the technology programme (training) = 4 points <p>Total = 100 points</p> <p>➤ See pages 18 to 23 of RFP</p>
4 Weighting	<p>The points awarded for specific requirements to be met by the firm were different as illustrated by:</p> <ol style="list-style-type: none"> 1. Railway engineering design = 11 points 2. Traffic and market studies expert = 4 points 	<p>The points awarded for specific requirements to be met by the firm were different as illustrated by:</p> <ol style="list-style-type: none"> 1. Railway engineering design = 5 points 2. Traffic and market studies expert = 1 point 3. Environmental impact

	<p>3. Environmental impact assessment = 2 points</p> <p>4. Legal expertise = 2 points</p> <p>5. Engineering and Land surveying = 3 points</p> <p>6. Level of completeness of technical approach and methodology in addressing TOR = 3 points</p>	<p>assessment = 0.5 points</p> <p>4. Legal expertise = 1 point</p> <p>5. Engineering and Land surveying = 1 point</p> <p>6. Level of completeness of technical approach and methodology in addressing TOR = 10 points</p>
5 Categories	<p>The categories under which assessment was carried out were simpler:</p> <p>1. Financial Advice = 3 points</p> <p>➤ See paragraph 2.1</p> <p>2. Economic and financial viability was missing as an assessment criteria</p> <p>3. Technology transfer was not included as an assessment criteria</p> <p>4. Only a project director was specified.</p> <p>5. Computer Aided design drafting not included.</p>	<p>New categories were introduced for technical assessment as follows:</p> <p>1. Financial/ Investment Expertise = 2 points</p> <p>➤ See paragraph 5</p> <p>2. Economic and financial viability Assessment/ Investment Appraisal - a new category.</p> <p>➤ See paragraph 1.5</p> <p>3. Transfer of technology and capacity building = 4 points - a new category</p> <p>➤ See paragraph 4</p> <p>4. The requirements Railway expertise (paragraph2) were detailed out by specifying 8 different areas of specialization</p>

		<p>5. Computer Aided design drafting = 8 points</p> <p>➤ See paragraph 2.2</p>
6 Expertise	<p>The requirements regarding qualifications and experience of experts was lower</p> <p>1. Paragraph 2.1 requires the financial modeling expert to give 2 assignments of projects valued at US \$ 0.5 billion</p>	<p>Requirements regarding qualifications and experience of experts was higher</p> <p>1. Paragraph 5.1 requires the expert to provide 2 assignments of projects of expected turnover of US \$ 4 million.</p>

From the foregoing, the Board finds that the Evaluation criteria of the two Requests for Proposals were different and therefore the assertion by the Applicant that it's enhanced bid document was expected to score higher than it scored in the previous Tender does not hold.

The next issue that the Board has to determine is on the Applicant's allegation that the Procuring Entity breached Clause 2.7 of the Standard RFP document which details the ranges of scores to be applied in the Evaluation Criteria for Technical Proposals, by amending the scores allocated to each parameter. The Board notes that the Applicant is challenging the bid document by alleging that the Evaluation Criteria for the Technical Proposals deviated from the criteria provided in the Standard Request for Proposal document, as issued by Public Procurement Oversight Authority. In the First instance, the Board notes that the Applicant did not raise any issue with the Procuring Entity on

the bid document prior to submitting its bid pursuant to Clause 2.2 of the bid document which states in part;

“Consultants may request a clarification of any of the RFP documents only upto seven (7) days before the proposal submission date. Any request for clarification must be sent in writing by paper mail, cable, telex, facsimile or electronic mail to the Client’s address indicated in the Appendix “ITC”. At any time before the submission of proposals, the Client may for any reason, whether at his own initiative or in response to a clarification requested by an invited firm, amend the RFP.”

That notwithstanding, the Board notes that the Evaluation Criteria for the Technical Proposals, as provided under Clause 2.7, in the Standard RFP document issued by the Authority was as follows:

	Points
(i) Specific experience of the consultant related to the Assignment	(5-10)
(ii) Adequacy of the proposed work plan and methodology in responding to the terms of reference	(20-40)
(iii) Qualifications and competence of the key staff for the assignment	(30-40)
(iv) Suitability to the transfer of Technology Programme (Training)	(0-10)
Total Points	<u>100</u>

The Board notes that the Evaluation criteria used by the Procuring Entity as set out in the Appendix “ITC” of the RFP document was as shown in table 1 above.

It is apparent that the distribution of the scores is different and not conforming to the distribution under clause 2.7 of the RFP document.

In this regard the Board notes that the Procuring Entity amended the manner in which the scores were allocated in the Appendix "ITC" of the RFP. This was in line with the instructions on what could be amended under the Appendix "ITC" as contained in the Prescribed RFP document, which reads as follows:

1. ***"The Appendix to information to consultant is intended to assist the procuring entity in providing specific information in relation to corresponding claims in the information to consultants included in Section II and the appendix has to be prepared for each specific consultancy.***
2. ***The Procuring entity should specify in the appendix information and requirements specific to the circumstances of the procuring entity, the assignment of the consultancy and the proposals evaluation criteria that will apply to the RFP Consultancy.***
3. ***In preparing the appendix the following aspects should be taken into consideration.***
 - (a) ***The information that specifies or complements provisions of Section II to be incorporated.***
 - (b) ***Amendments of Section II as necessitated by the circumstances of the specific consultancy to be also incorporated***
 - (c) ***Section II should remain unchanged and any changes or amendments should be introduced through the appendix."***

In this particular case, the Board finds that the Procuring Entity had issued an Appendix as "Information to Consultants" Appendix "ITC". The "Clause Reference" in the "ITC" stated as follows:-

"The Following information for procurement of consultancy services and selection of consultants shall complement or amend the provisions of the information to consultants, wherever there is a conflict between the provisions of the information to consultants and the provisions of the appendix, the provisions of the appendix herein shall prevail over those of the information to consultants."

The Board notes that clause 2.7.1 on the Technical Evaluation criteria, as set out in the Appendix "ITC" was as provided in table 1.

From the Table, it is clear that parameter number (iii) "Qualifications and competence of the Key staff for the Assignment" was granted 50 marks, whereas according to the RFP document, the same had been allocated 30-40 marks. This is the point of contention raised by the Applicant. On this variation of the Marks allocated to the parameter number (iii), the Board finds that, the Procuring Entity made the said variation procedurally in line with the Appendix "ITC" which allowed the change. Accordingly, the Board finds that this limb of the Applicant's ground has no merit and hence fails.

With regard to the failure by the Procuring Entity to state the weighting for the Technical and Financial Evaluations in the Appendix "ITC", the Board notes that Clause 2.8.5 of the Standard Request for Proposal the "clause (Appendix "ITC") Reference in the "ITC" states as follows:"

*"The formulae for determining the Financial Score (Sf) shall, unless an alternative formulae is indicated in the Appendix "ITC", be as follows:-
 $S_f = 100 \times F_m / F$ where Sf is the financial score; Fm is the lowest priced financial proposal and F is the price of the proposal under consideration. Proposals will be ranked according to their combined technical (St) and financial (Sf) scores using the weights (T=the weight given to the Technical Proposal; P = the weight given to the Financial Proposal; T + p = 1) indicated in the Appendix. The combined technical and financial score, S, is calculated as follows:- $S = S_t \times T \% + S_f \times P \%$. The firm achieving the highest combined technical and financial score will be invited for negotiations."*

Further, the Board notes that the method of selection used is "Quality & Cost Based Selection (QCBS)" as provided under Clause 2.1.1 of Appendix "ITC" of the RFP document and the final combined score was calculated using the formula $S = S_t \times T \% + S_f \times P \%$ where:

S= Combined technical and financial score

St= Technical score (85.86%)

Sf=Financial score (20%)

T=Weight given to technical score(80%)

P=Weight given to Financial score (20%)

In addition the Board notes that under clause 2.8.5 of the Appendix "ITC", it was provided that *"The evaluation of the financial proposal shall be based on the NET PRICE (Excluding all Government Taxes)"*

All the above notwithstanding, the Board notes that the Applicant did not qualify at the Technical Evaluation Stage to proceed to the Financial Evaluation stage, where the above Financial evaluation models were to apply.

The Board notes that the ground on cost is a statement of perceived losses arising from anticipated profits, which the Applicant would have made if it were awarded the tender. The tendering process is a business risk. Further, in open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the costs associated with the tendering process, which resulted in the award of the tender to another bidder.

Taking into account all the above, all the six grounds failed. The Request for review is dismissed.

The Board orders, pursuant to Section 98(b) of the Act, that the Procurement process may proceed.

Dated at Nairobi on this 25th day of March 2011



.....
**CHAIRMAN
PPARB**



.....
**SECRETARY
PPARB**

100

100

100