

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 2/2012 OF 24TH JANUARY 2012

BETWEEN

GOWHARRUD CONSTRUCTION AFRICA LIMITED.....APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....PROCURING ENTITY

AND

INTEX CONSTRUCTION LIMITEDINTERESTED PARTY

Review against the decision of the Tender Committee of Kenya National Highways Authority dated 13th December, 2011 in the matter of Tender No. KeNHA/375/2011 for construction of Chiakariga - Mitunguu - Meru (C92) Road.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	- Chairman
Mr. J.W. Wambua	- Member
Mrs. L. Ruhui	- Member
Ms. J. Guserwa	- Member
Mr. S.M. Kioko	- Member

IN ATTENDANCE

Mr. C.R. Amoth - Secretary
Mr. N. Soita - Secretariat
Mr. L. Otieno - Secretariat
Ms. M. Kinyundo - Secretariat
Ms. J. Maina - Secretariat

PRESENT BY INVITATION

Applicant, M/s Gowharrud Construction Africa Limited

Mr. O.M.T. Adala - Advocate, OMT Adala Advocates
Mr. Abdulwalli Shariff - Director

Procuring Entity, Kenya National Highways Authority

Mr. Charles Dulo - Advocate, Dulo & Co. Advocates
Ms. Carol Mutai - Advocate
Eng. M. Kivoto - Manager (Roads)
Mr. Joseph Onyisi - Personal Assistant
Mr. Vincent Chelimo - Senior Procurement Officer
Levina Wanyonyi - Senior Procurement Officer
Mr. Gitau Muiruri - Assistant Supplies Officer

Interested Party, M/s Intex Construction Ltd

Mr. Muthomi Thiankolu - Advocate, Mohammed Muigai Advocates

Ms. Carol Sigei - Pupil, Mohammed Muigai Advocates

Mr. P.S. Tak - Director

BOARD'S DECISION

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

BACKGROUND

Advertisement

Kenya National Highways Authority (KeNHA) invited Contractors registered with the Ministry of Roads in Category A to submit their bids for the Works through open tender by placing an advertisement in the Daily Nation of Tuesday, 18th October, 2011 and Standard newspaper of 24th October, 2011.

Closing/Opening:

The tender attracted Twenty (20) tenderers out of which Eleven (11) responded as at the time of tender opening on 29th November, 2011. The list of tenderers who responded including their particulars is as shown in **Table 1** hereunder.

Table 1: Tender Response

B/ No	Bidder Name	Address and Telephone	Read Out Amount(Kshs.)	Bid Security (Kshs.)	Issuing Bank
1	Intex Construction Co. Ltd.	P O Box 60293 - 00200, Nairobi. Tel: 0720 383 865	4,677,635,582.82	5,000,000.00	KCB
2	Nyoro Construction Co. Ltd.	P O Box 74416 - 00200, Nairobi. Tel: 0723 434 529	4,871,330,173.00	5,000,000.00	NBK
3	H. Young & Co. (EA) Ltd.	P O Box 30118 - 00100, Nairobi Tel: 0734 652 221	5,125,144,565.78	5,000,000.00	I & M Bank
4	China Wu Yi Co. Ltd.	P O Box 49282 - 00100, Nairobi	4,321,085,333.00	5,000,000.00	CITIBANK
5	Victory Construction Co. Ltd.	P O Box 45329 - 00100, Nairobi Tel: 0722 510 534	4,504,123,530.50	5,000,000.00	Bank of Baroda
6	S.S. Mehta & Sons Ltd	P O Box 41853 - 00100, Nairobi Tel: 0728 713 743	4,857,728,520.00	5,000,000.00	I & M Bank
7	Kabuito Contractors	P O Box 14054 - 00100, Nairobi. Tel: 0722 635 319	4,826,616,160.00	5,000,000.00	I & M Bank
8	CATIC International Engineering (K)Ltd.	P O Box 58049 - 00100, Nairobi	4,937,695,005.00	5,000,000.00	CBA
9	Gowharrud Construction Africa Ltd.	P O Box 4000 - 00506, Nairobi. Tel: 0723 111 292	3,950,231,660.00	5,000,000.00	Chase Bank

B/ No	Bidder Name	Address and Telephone	Read Out Amount(Kshs.)	Bid Security (Kshs.)	Issuing Bank
10	Shengli Engineering Construction Group Co.Ltd.	222# Ber'er Road Dongying City, China Tel: 0731 191 877	5,199,513,785.93	5,000,000.00	Standard Chartered
11	China Overseas Engineering Construction Group Co. Ltd.	P O Box 28 - 00502, Nairobi Tel: 0733 637 203	3,869,891,999.00	5,000,000.00	CfCStanbi c Bank

PRE-TENDER SITE VISIT

A Pre-bid site visit was conducted on 1st November, 2011 by the KeNHA representatives. A total of Fourteen (14) bidders were represented in the pre-bid meeting. Minutes of pre-bid site visit were prepared and circulated and amendments to the Bidding documents were made through One (1) tender addendum issued during the bidding period.

EVALUATION

The received bids were evaluated by an Evaluation Committee of five members under the chairmanship of Eng. Mutii Kivoto, Manager (C-W). The bids were evaluated in three stages namely; Preliminary Evaluation, Technical Evaluation and Financial Evaluation.

PRELIMINARY EVALUATION (MANDATORY)

1.1. COMPLETENESS OF BIDS

Each bid was checked for completeness. A complete Bid was one which complied in all respects with the Conditions of Bid and Instructions to Bidders, all Amendments issued during the period of Bidding in accordance with Clause 10 of the Conditions of Bid and Instructions to Bidders and all other requirements embodied in the bidding documents. These include the following:-

- (a) ***Bid Securities:*** Acceptable Bid securities were required to be in the format of Unconditional Bank Guarantee as given in the bidding documents.
- (b) ***Appendix to Form of Bid:*** Bidders were required to sign their acceptance of the Appendix to Form of Bid without alterations or reservations since it will form part of the Contract.
- (c) ***Schedules of Supplementary Information:*** Bidders were required to complete Schedules of Supplementary Information to be submitted as part of the Bid.
- (d) ***Bills of Quantities:*** Presence of clearly priced Bills of Quantities as part of the Bid summarized on the summary page and transferred to the Form of Bid, was a key requirement for a complete Bid.

1.2. RESPONSIVENESS

For the purpose of evaluation, a responsive Bid was considered as one which meets all responsiveness and completeness criteria, which is the minimum requirements of bidding documents and which does not limit

the rights of the Employer or the obligations of the Bidder or affect unfairly the competitive position of other responsive Bidders.

The information received as a result of examination of the Bid, confirmation and clarification received from the Bidder and other clarifications received on the authenticity of Bid Security from the Bank was evaluated in order to determine responsiveness for the Bidder in accordance with the Responsiveness criteria outlined in this section.

1.3. RESULTS ON COMPLETENESS OF BIDS AND RESPONSIVENESS

The final Preliminary Evaluation results are summarized in *Table 2 below*.

Table 2: Results for Completeness of Bids and Responsiveness

COMPLETENESS OF BIDS AND RESPONSIVENESS												
No.	Items	Bidder No.										
		1	2	3	4	5	6	7	8	9	10	11
1	Certified copy of Certificate of Incorporation	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
2	Certified Registration Certificate with MoRin category A	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
3	Certified Tax Compliance Certificate	✓	x	✓	✓	✓	✓	✓	x	x	x	x
4	Bid Security (<i>Up to 26/4/2012</i>)	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓
5	Litigation History	✓	✓	✓	✓	✓	✓	✓	x	✓	x	x
6	Schedule of Roadworks carried out in the last 7 years	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
7	Equipment Holding	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

COMPLETENESS OF BIDS AND RESPONSIVENESS												
8	Professional and Technical Personnel	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
9	Three Years Audited Accounts	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
10	Schedule of On-going Works	✓	✓	✓	✓	✓	✓	✓	×	✓	✓	✓
11	Form of Bid	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
12	Dully filled Appendix to Form of Bid	✓	×	✓	✓	×	✓	✓	×	✓	✓	✓
13	Confidential Business Questionnaire	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
14	Access to Line of Credit	✓	✓	✓	✓	✓	✓	✓	×	✓	✓	✓
15	Form of Power of Attorney	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
16	Certificate of Tenderers visit to site	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
17	Schedule of Financial Standing	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
18	Schedule of other supplementary information	✓	✓	✓	✓	✓	✓	✓	✓	×	✓	✓
19	Work Methodology	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
20	Basic Rates of Materials	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
21	Schedule of local Labour Rates	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
22	Dully filled Priced BOQ	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
	RESPONSIVENESS	Y	N	Y	N	N	Y	Y	N	N	N	N

Legend:

✓ - Compliant, information provided as required
Responsive

Y - Yes,

× - Not Compliant, information not provided as required
Non-Responsive

N- No,

Notes to Table 2

- 1. Bidder No. 2 (M/s Nyoro Construction Co. Ltd.)**
 - (a) Did not provide copy of valid Tax Compliance Certificate.*
 - (b) Did not provide a Dully Filled Appendix to Bid.*
- 2. Bidder No. 4 (M/s China Wu Yi Co. Ltd.)**
 - (a) Provided Bid Security only valid up to 24th April, 2012 and not 26th April, 2012.*
- 3. Bidder No. 5 (M/s Victory Construction Co. Ltd.)**
 - (a) Did not provide a Dully Filled Appendix to Bid.*
- 4. Bidder No. 8 (M/s CATIC International Engineering (K) Ltd.)**
 - (a) Did not provide copy of valid Tax Compliance Certificate.*
 - (b) Did not provide Litigation History.*
 - (c) Did not provide Schedule of on-going Works.*
 - (d) Did not provide a Dully Filled Appendix to Bid.*
 - (e) Did not provide proof of access to line of credit.*
- 5. Bidder No. 9 (M/s Gowharrud Construction Africa Ltd.)**
 - (a) Did not provide copy of valid Tax Compliance Certificate.*
 - (b) Did not provide Schedule of Supplementary Information.*
- 6. Bidder No. 10 (M/s Shengli Engineering Construction Group Co. Ltd.)**
 - (a) Did not provide copy of valid Tax Compliance Certificate.*
 - (b) Did not provide Litigation History.*
- 7. Bidder No. 11 (M/s China Overseas Engineering Construction Group Co. Ltd.)**
 - (a) Did not provide copy of valid Tax Compliance Certificate.*
 - (b) Did not provide Litigation History.*

Four (4) bidders out of the Eleven (11) bidders who submitted their bids passed the completeness of bid and responsiveness.

The Four (4) bidders were therefore subjected to the next stage of evaluation.

2. TECHNICAL EVALUATION (MANDATORY)

2.1. RESULTS FOR DETAILED EVALUATION

The detailed evaluation results are shown in the *Table 3* hereunder

Table 3: Results for Detailed Evaluation

No	Subject	Requirement	Bidder No.			
			1	3	6	7
1	Eligibility					
1.1	Eligibility	Nationality in accordance with Sub-Clause 4.1.	✓	✓	✓	✓
1.2	Conflict of Interest	No conflicts of interest in Sub-Clause 4.2.	✓	✓	✓	✓
1.3	Employer Ineligibility	Not having been declared ineligible by the Employer, as described in Sub-Clause 4.3.	✓	✓	✓	✓
1.4	Incorporation & Registration	Pursuant to sub clause 4.1 the following shall be provided; - Certified Copy of Certificate of incorporation to show that the applicant is a registered company and legally authorized to do business in Kenya. - Proof of registration with the Ministry of Roads and Public Works in Class A as a Paved Roads Contractor	✓	✓	✓	✓
2	Historical Contract Non-Performance					

No	Subject	Requirement	Bidder No.			
			1	3	6	7
2.1	History of Non-Performing Contracts	Non performance of a contract did not occur within the last five (5) years prior to the deadline for application submission based on all information on fully settled disputes or litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the Dispute Resolution Mechanism under the respective contract, and where all appeal instances available to the applicant have been exhausted.	✓	✓	✓	✓
2.2	Pending Litigation	All pending litigation shall in total not represent more than fifty percent (50%) of the Applicant's net worth and shall be treated as resolved against the Applicant.	✓	✓	✓	✓
3	Financial Situation					
3.1	Financial Performance	Submission of audited balance sheets or if not required by the law of the applicant's country, other financial statements acceptable to the Employer, for the last five [5] years to demonstrate: (a) the current soundness of the applicants financial position and its prospective long term profitability, and (b) capacity to have a cash flow amount of min Kshs 600 Million (Six Hundred Million) equivalent working capital	✓	✓	✓	✓
3.2	Average Annual Construction Turnover	Minimum average annual construction turnover of Kshs. 1Billion [One Billion], calculated as total certified payments received for contracts in progress or completed, within the last three [(3)] years	✓	✓	✓	✓
4	Experience					
4.1	General Construction Experience	Experience under construction contracts in the role of contractor, subcontractor, or management contractor for at least the last seven [7] years prior to the applications submission deadline	✓	✓	✓	✓

No	Subject	Requirement	Bidder No.			
			1	3	6	7
4.2(a)	Specific Construction Experience	Participation as contractor, management contractor or subcontractor, in at least two (2) contracts within the last ten (6) years, each with a value of at least Kshs. 1Billion (One Billion), that have been successfully and substantially completed and that are similar to the proposed works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section 6, Scope of Works	✓	✓	✓	✓
4.2(b)		b) For the above or other contracts executed during the period stipulated in 4.2(a) above, a minimum construction experience in at least one (1) of: - Repair & Rehabilitation to bitumen standards. - New Construction to bitumen standards.	✓	✓	✓	✓
4.3	Work Methodology	Submission of a brief work methodology in accordance with sub clause 5.3	✓	✓	✓	✓
5	Current Commitments					
5.1	On-going contracts	The total value of outstanding works on the on-going contracts must not exceed Kshs. 10 Billion (Ten Billion)	✓	✓	✓	✓
6	Site Staff					
(a)	Site Agent	Qualification = BSc. Civil Eng Reg. Eng General Experience = 10yrs Specific Experience = 8 yrs	✓	✓	✓	✓
(b)	Site Engineer	Qualification = BSc. Civil Eng General Experience = 8 yrs Specific Experience = 5 yrs	✓	✓	✓	✓
(c)	Senior Foreman	Qualification = H.N.D. Civil Eng General Experience = 7 yrs	✓	✓	✓	✓

No	Subject	Requirement	Bidder No.			
			1	3	6	7
		Specific Experience = 5 yrs				
(d)	Site Surveyor	Qualification = H.N.D. Survey General Experience = 7 yrs Specific Experience = 5 yrs	✓	✓	✓	✓
(e)	Foreman	Qualification = Dip. Civil Eng General Experience = 6yrs Specific Experience = 4 yrs	✓	✓	✓	✓
(f)	Materials Technologist	Qualification = Dip. Civil Eng General Experience = 6yrs Specific Experience = 4 yrs	✓	✓	✓	✓
7	Equipment Holding					
7.1	Schedule of Equipment	Core plant and equipment considered by the company to be necessary for undertaking the project together with proof of ownership.	✓	✓	✓	✓

Legend:

✓ - Compliant, information provided as required ✗ - Not Compliant, information not provided as required

Notes to Table 3

All the Four (4) bidders met the minimum requirements.

2.2. POST-QUALIFICATION EVALUATION SUMMARY

The detailed evaluation for the four (4) bidders is summarized in **Table 4** hereunder.

Table 4: Post-Qualification Evaluation Summary

B/ No	Bidder's Name	Eligibility	Registration	Historical performance	Financial Performance	Working capital	Equipment Holding	Current Commitments	turnover	Experience	Site Staff	Ongoing contracts	Remarks
1	Intex Construction Co. Ltd.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Pass
3	H. Young & Co. (EA) Ltd.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Pass
6	S.S. Mehta & Sons Ltd.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Pass
7	Kabuito Contractors	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Pass

Legend:

Y - Yes

N - No

2.3. POST-QUALIFICATION FINDINGS

On the basis of the above analysis, the four bidders were post-qualified as having substantially met the requirements of the Qualification Criteria. Details of Bids for post qualified bidders are as shown in **Table 5** hereunder:

Table 5: Details of Bids for post qualified bidders

B/No.	Name of Bidder	Bid Sum (Kshs)
1	Intex Construction Co. Ltd.	4,677,635,582.82
3	H. Young & Co. (EA) Ltd.	5,125,144,565.78
6	S.S. Mehta & Sons Ltd	4,857,728,520.00
7	Kabuito Contractors	4,826,616,160.00

The Four (4) bidders were then subjected to Financial Evaluation as required by the Qualification Criteria of the bid document.

3. FINANCIAL EVALUATION

3.1. ARITHMETIC CHECKS AND CORRECTION OF BID SUMS

The bids were checked for any Arithmetic errors and corrected in accordance with the following procedure as stipulated in clause 29 of the Conditions of Bid and Instructions to Bidders

In accordance with Clause 29 all bids determined to be substantially responsive were checked by the evaluation committee for any arithmetic errors. The Employer corrected the errors as follows:

- (a) Where there is a discrepancy between the amounts in figures and in words, the amount in words as indicated in the Form of Bid will govern; and
- (b) Where there is a discrepancy between the unit rate and the line item total resulting from multiplying the unit rate by the quantity, the line item total will govern and the unit rate will be adjusted accordingly in such a way that the Bid Sum remains unaltered.
- (c) Any error by the Bidder in pricing or extending the Bills of Quantities or carrying forward to summary or Bid Sum, shall be corrected in such way that the Bid Sum remains unaltered and the Bidder shall within seven (7) days after issuance of the written notice by the Engineer or such further time as the Engineer may allow correct his Bid in such a manner as may be agreed or directed by the Engineer failing which the Bid may be absolutely rejected and the Bid Security forfeited in accordance with Sub-Clause 16.6.

In accordance with the above procedure the errors were to be corrected without affecting the Tender Sums.

3.2. RESULTS ON ERROR CHECKS

No errors were detected in the Four (4) bids.

3.3. ENGINEER'S ESTIMATE

The Engineer's Estimate was **Kshs. 5,227,154,856.87** (*inclusive of the 15 % for VOP, 10 % for Contingencies and 16% VAT*) and it was based on averages of rates for recently tendered works in the region.

3.4. COMPARISONS OF BID SUMS WITH ENGINEER'S ESTIMATE

The Comparison of the Bid Sum for the post qualified bidders to the Engineer's is as indicated in **Table 6** below.

The figure is exclusive of the *15 % for VOP, 10 % for Contingencies and 16% VAT*.

Table 6: Comparisons of Tender Sums with Engineer's Estimate (EE)

BILL No.	Engineer's Estimate (KShs)	Intex Amount (KShs)	% of EE	H. Young Amount (KShs)	% of EE	S.S Mehta Amount (KShs)	% of EE	Kabuto Amount (KShs)	% of EE
1	296,831,919.92	232,585,494.00	78.36	303,543,929.16	102.26	228,212,500.00	76.88	207,009,500.00	69.74
4	56,964,166.67	57,150,000.00	100.33	37,875,000.00	66.49	99,000,000.00	173.79	42,250,000.00	74.17
5	619,010,333.33	564,880,000.00	91.26	535,500,000.00	86.51	652,660,000.00	105.44	379,500,000.00	61.31
7	244,877,187.50	187,420,000.00	76.54	55,902,500.00	22.83	160,082,500.00	65.37	157,312,500.00	64.24
8	420,415,794.70	338,501,000.00	80.52	298,209,600.00	70.93	263,779,000.00	62.74	350,787,500.00	83.44
9	74,940,800.00	70,350,000.00	93.87	191,900,000.00	256.07	56,400,000.00	75.26	53,750,000.00	71.72
12	234,238,400.00	237,253,000.00	101.29	234,944,000.00	100.30	220,000,000.00	93.92	349,270,000.00	149.11
14	602,507,253.33	497,533,000.00	82.58	724,825,400.00	120.30	365,426,000.00	60.65	634,229,500.00	105.27
15	372,901,041.33	333,769,280.00	89.51	379,859,400.00	101.87	482,721,000.00	129.45	352,888,100.00	94.63
16	456,348,750.00	456,358,000.00	100.00	555,030,000.00	121.62	592,020,000.00	129.73	641,368,000.00	140.54
17	137,115,000.00	142,750,000.00	104.11	103,900,000.00	75.78	121,800,000.00	88.83	62,700,000.00	45.73
20	55,583,145.93	75,067,200.00	135.05	89,575,000.00	161.15	78,789,000.00	141.75	66,826,700.00	120.23
21	16,346,573.83	16,029,250.00	98.06	11,235,000.00	68.73	18,450,000.00	112.87	16,263,750.00	99.49
22	12,733,017.50	11,309,350.00	88.82	4,282,630.00	33.63	7,317,400.00	57.47	9,545,250.00	74.96
25	4,121,000.00	5,000,000.00	121.33	8,000,000.00	194.13	3,500,000.00	84.93	5,000,000.00	121.33
TOTAL	3,604,934,384.04	3,225,955,574.00	89.49	3,534,582,459.16	98.05	3,350,157,400.00	92.93	3,328,700,800.00	92.34

All successful bids were compared against the Engineer's Estimate as stipulated in Clause 30.9 of the Conditions; and all bids were found to be neither unbalanced nor front loaded.

3.5. RANKING

Bid Sums were compared and ranked. The results are shown hereunder.

Table 7: Comparisons of Bid Sums and Ranking

B/No.	Name of Bidder	Bid Sum (Kshs)	Ranking
1	Intex Construction Co. Ltd.	4,677,635,582.82	1
7	Kabuito Contractors	4,826,616,160.00	2
6	S.S. Mehta & Sons Ltd	4,857,728,520.00	3
3	H. Young & Co. (EA) Ltd.	5,125,144,565.78	4

3.6. DOMESTIC PREFERENCE

Pursuant to Section 39(8) (b) (ii) of the Public Procurement and Disposal Act, a margin of preference was applied to all the bids depending on the shareholding of the Firms as shown in Table 7 below.

Table 8: Margin of Preference

B/No.	Name of Bidder	Shareholding (%)		Margin of Preference (%)
		Kenya	Foreign	
1	Intex Construction Co. Ltd.	52	48	10
3	H. Young & Co. (EA) Ltd.	61	39	10
6	S.S. Mehta & Sons Ltd	75	25	10
7	Kabuito Contractors	100	0	10

From the table above the margin of preference applied was the same for all the bidders, therefore the ranking order did not change.

4. CONCLUSIONS AND RECOMMENDATIONS

4.1. CONCLUSIONS

Twenty (20) bidders purchased the bid document and Fourteen (14) bidders attended the pre-tender site visit meeting. Only Eleven (11) bidders submitted their bids by the deadline of submitting the bids. The Eleven (11) bidders were subjected to evaluation.

Four (4) bidders who qualified for financial evaluation were found to have fairly competitive rates. All the Four (4) bidders quoted below the Engineers Estimate. All the bids were checked for arithmetic errors in line with provisions of *Clauses 29 and 30 on Instructions to Bidders*.

M/s Intex Construction Co. Ltd. was determined to be the lowest bidder with their submitted tender sum of **Kshs. 4,677,635,582.82**.

4.2. RECOMMENDATION

The Evaluation Committee recommended that the Tender Committee considers and approves the award of the *Contract for Construction of Chiakariga - Mitunguu - Meru Road (C92)* to **M/s Intex Construction Co. Ltd.** of **P O Box 60293 - 00200, Nairobi**, who was the lowest evaluated Tenderer at a total amount of **Kenya Shillings Four Billion, Six Hundred Seventy Seven Million, Six Hundred Thirty Five Thousand, Five Hundred Eighty Two and Eighty Two Cents Only (Kshs. 4,677,635,582.82)**.

The length of this road section is approximately **55km** and the Contract Period shall be **30Months**.

TENDER COMMITTEE DECISION

The Tender Committee at its 67th meeting (Minute No. 1387/2011) held on 13th December, 2011 considered and awarded the tender for *Construction of Chiakariga - Mitunguu - Meru Road (C92)* to **M/s Intex Construction Co. Ltd** who was the lowest evaluated tenderer at a total amount of **Kenya Shillings Four Billion, Six Hundred Seventy Seven Million, Six Hundred Thirty Five Thousand, Five Hundred Eighty Two and Eighty Two Cents Only (Kshs. 4,677,635,582.82)**.

THE REVIEW

The Applicant, Gowharrud Construction Africa Limited, lodged this Request for Review on 24th January, 2012 against the decision of Kenya National Highways Authority in Tender No. KeNHA/375/2011 for construction of Chiakariga - Mitunguu - Meru Road (C92). The Applicant was represented by Mr. O.M.T. Adala, Advocate, while the Procuring Entity was represented by Mr. Charles Dulo, Advocate. The interested party, M/s Intex Construction Ltd was represented by Mr. Muthomi Thiankolu, Advocate.

The Applicant requests the Board for the following orders:-

- a) *The Board do allow the Applicant's request.*
- b) *Annul all steps the Respondent has taken and all acts done by the Respondent consequent upon and immediately following the opening of the Tenders on 29th November 2011 by the Respondent.*

- c) *In the alternative the Respondent be directed to Re-Tender afresh.*
- d) *The Board do direct the Respondent to make available to the Board at the hearing of this Request the Applicant's entire Tender as submitted for inspection by the Board and the Applicant.*
- e) *The Board do make such and further orders as it may deem fit, just and appropriate to meet the ends of justice in the circumstances of this request.*
- f) *The Respondent be compelled to pay the Applicant the costs arising from and incidental to the procurement proceedings.*
- g) *The Respondent be compelled to pay the costs of and incidental to this request, to the Applicant.*

PRELIMINARY OBJECTION

At the commencement of the hearing, the Board noted that the Procuring Entity and the Successful Bidder had filed Preliminary Objections in the following terms;

1. Procuring Entity

- i) *"On 13th December, 2011 the notification letters were sent to all the bidders. Thereafter, the Procuring Entity received the acceptance letter from the Successful Bidder on 14th December 2011.*
- ii) *The fourteen days appeals window period lapsed on 28th December 2011 whereupon both parties signed the contract on 12th January 2012 in accordance with Section 68 (2) and (3) of the Public Procurement and Disposal Act, 2005.*
- iii) *The Procuring Entity was served with the Notice of Appeal on the 24th January 2012 twelve (12) days after signing the contract.*

iv) Consequently the Public Procurement Appeals Review Board (PPARB) has no jurisdiction to hear and determine this Appeal in pursuant to Section 93

2. Successful Bidder;

- i) The Request for Review is fatally and/or incurably defective for offending the express and implied provisions of section 93 (1) and (2) (c) of the Public Procurement and Disposal Act, 2005;*
- ii) The Request for Review is fatally and/or incurably defective for offending the express and implied provisions of Regulations 73 (2) (a) and (c) of the Public procurement and Disposal Regulations, 2006."*

Before the hearing of the Preliminary Objections, Mr. Adala, Advocate for the Applicant, applied for an adjournment on the following grounds;

- i) That on 3rd February 2012 he was served with the Memorandum of Response and a Preliminary Objection filed by the Procuring Entity,*
- ii) On 9th February 2012, he was served with another Preliminary Objection filed by the Successful Bidder, and;*
- iii) He had not yet prepared for the Second Preliminary Objection as he was away from the office when it was served.*

The Procuring Entity and Successful Bidder opposed the application for adjournment on the following grounds;

- i) That the Applicant had adequate notice to prepare for the hearing.*
- ii) Regulation 77 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred "the Regulations), requires that the*

Applicant be given at least one (1) day notice for the hearing of a Preliminary Objection. In the instant matter, the Applicant had been given at least 11 days by the Procuring Entity and 5 days by the Successful Bidder.

- iii) The Preliminary Objection by the Successful Bidder raised the same issues that had been pleaded by the Procuring Entity and therefore the Applicant had more than adequate time to prepare.

Upon hearing the Parties, the Board noted that the preliminary issues raised by the Procuring Entity and the Successful Bidder were similar. The Applicant had been given adequate notice and no good grounds were given to justify the adjournment. Further, the Board noted that the time for hearing and delivering the decision is regulated by statute. It pointed out that under Section 97 of the Public Procurement and Disposal Act, 2005 (herein after referred "the Act"), a Request for Review has to be heard and a decision given within 30 days from the date of filing. In view of this, an adjournment can be given only if an Applicant has good and reasonable grounds. It observed that the Applicant had been given adequate notice and no good grounds were advanced to justify an adjournment.

Accordingly, the Board rejected the application for adjournment and directed that the Preliminary Objection be heard.

Upon proceeding to the hearing of the Preliminary Objections, the Procuring Entity submitted as follows;

- i) The tenders were advertised in the Daily Nation and Standard Newspapers on 18th October 2011 and 24th October 2011 respectively;

- ii) Eleven (11) firms including, the Applicant responded to the tender and the Director General, appointed the Evaluation Committee on 6th December 2011;
- iii) The Evaluation Committee completed its work and its recommendation was tabled before the Tender Committee on 13th December 2011;
- iv) The Notification letters on the outcome of the tender were sent to all the bidders on 13th December 2011 by way of Post Office registered mail;
- v) The fourteen days appeal window lapsed on 28th December 2011 and the Contract was signed with the Successful Bidder on 12th January 2012 in accordance with Section 68 (2) and (3) of the Public Procurement and Disposal Act, 2005 and;
- vi) The Request for Review was served on it on 24th January 2012, twelve days after the signing of the Contract.

In view of the foregoing, the Procuring Entity submitted that the Board had no jurisdiction to hear and determine the Request for Review in view of Section 93 (2) (c) of the Act, which expressly ousted the jurisdiction of the Board where there was a signed contract, executed in accordance with section 68 of the Act.

On its part, the Successful Bidder associated itself with the submissions of the Procuring Entity.

In addition, the Successful Bidder pointed out that the Request for Review as drafted, failed to meet the requirements set out in Regulation 73 (2) as it did not cite the Sections of the Act or Regulations that were breached by the Procuring Entity. On the contrary, it submitted that the Request for Review raised constitutional matters that could only be adjudicated by the High Court.

Consequently, the Procuring Entity and the Successful Bidder urged the Board to dismiss the Request for Review.

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

On factual matters, the Board notes the following;

- i) The Applicant was among the 11 bidders who participated in this tender;
- ii) The recommendations of the Evaluation Committee which commenced work on 6th December 2011, were tabled before the Tender Committee on 13th December 2011. The Tender Committee agreed with the recommendations of the Evaluation committee and awarded the tender to Intex Construction Company Limited;
- iii) The Notification letters are dated 13th December 2011 and were sent to all the bidders by Post Office registered mail on 14th December 2011. The Board has perused the original certificate of postage and confirmed it was stamped at the Post Office on 14th December 2011. The Applicant's letter was one of the letters that was sent by

registered Post to its postal address P.o Box 4000-00506, Nairobi, which it had provided in its Tender Documents;

- iv) The Contract with the Successful Bidder was signed on 12th January 2012 and;
- v) The Request for Review was filed on 24th January 2012.
- vi) On 10th January 2012, the Applicant wrote to the Procuring Entity requesting for the reasons why its tender was unsuccessful. The letter in response, by the Procuring Entity giving the reasons is dated 20th January 2012 but it was posted on 8th February 2012.

The Board notes that the following issues arise for determination;

- i) Whether the Request for Review was filed out of time.
- ii) Whether the jurisdiction of the Board has been ousted in view of the fact that a contract has been executed between the Procuring Entity and the Successful Bidder.

As to whether, the Request for Review was filed outside the stipulated appeal window, the Board notes that Regulations 73 (2) (c) (i) and (ii) provide 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."

73 (2) "The Request referred to in paragraph (1) shall-

- (c) be made within fourteen 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 Act"*

It is clear that appeal window for lodging a Request for Review is fourteen days from the date of occurrence of a breach complained of, where the review is filed before award or from the date of notification.

The Board has held severally that the burden of proof on the issue of notification rests on the Procuring Entity. In this matter, the Procuring Entity has ably demonstrated that it dispatched the letters of notification by Registered post on 14th December 2011. Therefore, time for purposes of the Appeal window started running on 15th December 2011 and lapsed on 29th December 2011.

The Board notes that the Applicant made a feeble statement that it received a letter by ordinary post in January 2012 and that it could not trace the envelop that sent the letter.

The Board further notes that the Applicant wrote to the Procuring Entity on 10th January 2012 requesting to be given reasons why it was not successful. It is clear that the letter dated 10th January 2012 was just an enquiry for the reasons of its failure to win the tender and it cannot by any stretch of argument be a basis for holding that the Applicant was not notified on time. Further, the fact that the Procuring Entity delayed in sending the letter giving the reasons why the Applicant was not successful, cannot be a basis for holding that the notification letter dated 13th December, 2011 was sent late.

On the contrary, there is evidence that the letter was sent to the Applicant by Registered mail on 14th December, 2011.

In the premises, this is a clear case of an Applicant who was indolent and slept on it rights. It failed to lodge the Request for Review on time and it cannot wriggle out of the requirements set out in Regulations 73 (2) (c) (ii).

In view of the foregoing, the Board holds that this Request for Review was filed way out of time and in contravention of Regulation 73 (2) (c) (ii). Consequently, it is for dismissal and this limb of the Preliminary Objection succeeds.

On the issue of jurisdiction, the Board notes that Section 68 and 93 of the Act provides as follows;

Section 68.

- 1) *“The person submitting the successful tender and the procuring entity shall enter into 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.”*

Section 93

- 1) *“Subject to provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a Procuring Entity by this Act or the Regulations, may seek administrative review as in such manner as may be prescribed.*
- 2) *The following matters shall not be subject to the review under subsection (1)-*
 - a) *The choice of a procurement procedure pursuant to Part IV;*
 - b) *A decision by the Procuring Entity under Section 36 to reject all tenders, proposals or quotations;*
 - c) *Where a contract is signed in accordance to section 68; and*
 - d) *Where an appeal is frivolous.”*

Therefore, in view of section 93(2) (c) of the Act, it is clear that where a contract has been signed in accordance with Section 68, the Board has no jurisdiction to entertain the Request for Review.

As already observed, the Bidders were notified of the outcome of the tender by registered post on 14th December 2011. Therefore, the Procuring Entity was at liberty to sign the contract with the Successful Bidder after 30th December 2011. The Board has perused the contract that was signed on 12th January 2012 and is satisfied that it was signed in accordance with Section 68 of the Act. Accordingly, the hands of the Board are tied by the provisions of Section 93 (2) (c) and there is no other option than to down our tools and state that the chips will lie where they fall. The Applicant has no one to

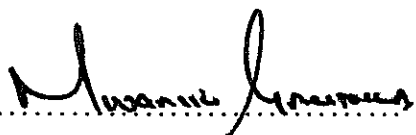
blame for its predicament other than itself. The procurement process, for good reasons, is done within set time frames to avoid disruption in the tender process. A party who participates in the tender process ought to be aware and observe the timelines.

Accordingly, this limb of the Preliminary Objection also succeeds.

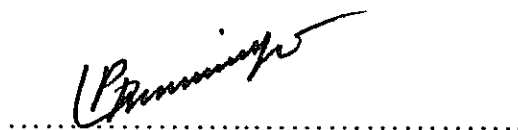
In view of the above holding, it is not necessary to interrogate the Request for Review further and decide whether the Applicant has cited the Sections of the Act and Regulations that were breached.

Taking all the above matters into consideration, the Preliminary Objections succeed. The Request for Review is hereby dismissed and the Board orders pursuant to Section 98 (b) of the Act that the procurement process may proceed.

Dated at Nairobi on this 16th day of January, 2012



Chairman, PPARB



Secretary, PPARB