

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 7/2012 OF 27TH FEBRUARY, 2012

BETWEEN

NJAMA LIMITED.....APPLICANT

AND

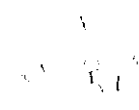
NORTHERN WATER SERVICES

BOARD.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Northern Water Services Board dated 13th February, 2012 in the matter of Tender No. NWSB/ICB/CW/006/2001/2011 for Water Supply Component Lot 1 Nyahururu.

BOARD MEMBERS PRESENT.

Mr. P.M Gachoka	-Chairman
Ambs. Charles Amira	- Member
Eng. Christine Ogut	- Member
Ms. Natasha Mutai	- Member
Mr. Joshua Wambua	- Member



IN ATTENDANCE

- Mr. C.R Amoth - Secretary
Mrs. Maurine Kinyundo - Secretariat
Mr. L. Otieno - Secretariat

PRESENT BY INVITATION

Applicant, Njama Limited.

- Mr.Owuor Isaac - Advocate, Masika Koros
& Co. Advocates
Mr. J. Maina - Engineer, Njama Ltd
Mr. Maina Njagwe - Director

Procuring Entity, Northern Water Services Board

- Mr. Benedict Kimweri - Procurement Officer
Mr. S. Ndungu - A S O
Mr. A.N. Osman - FAM
Mr. D.N.S Nderu - T S M

Interested Candidates, Sinohydro Corporation Ltd

- Mr. Jin Yang Ping - Contractor
Mr. Yang Ying Ye - Contractor

BACKGROUND OF AWARD

The tender for Water Supplies Project in Nyahururu was advertised in both the Daily Nation and Standard news papers of Friday, 21st October, 2011 and the East African Newspaper of 24th - 30th of October, 2011.

Closing/Opening

As at the time of tender opening on 6th December, 2011 thirteen firms had bought the bid documents but only five returned theirs.

The five firms that returned their bid documents are as listed hereunder;

1. Victory Construction Ltd
2. Oriental Construction Company Ltd
3. Penelly Construction & Engineering Ltd
4. Zhongmei Engineering Group Ltd
5. Sinohydro Construction Ltd
6. Njama Ltd

However, Bidder No.2 (i.e Penelly Construction & Engineering Ltd) bill of quantity entries are those of water component in Lot 1 and not for sewerage Lot 2. In view of this and considering all lots had the same closing date and time, this bidder was hence forth moved to water component.

EVALUATION

The tenders were evaluated from 14th December, 2011 to 23rd December, 2011. The evaluation was undertaken into three stages of preliminary, Technical and financial stages.

Preliminary Evaluation

Preliminary evaluation was done with the purpose of identifying bids that are incomplete, invalid and substantially non responsive to the bidding documents and therefore are not to be considered further. The following parameters were considered in preliminary evaluation stage;

1. Verification

Verification consisted of the following five criteria;

- Validity period
- Registration Documentation
- Submitted JV Agreement
- Number of Copies of Bid Submitted
- Comparison with the Original Bid Document and correction done.

The results of the verification were as tabulated below;

TABLE 1A- Verification of bids

Table 2.1 Verification of Bids

NYAHURURU LOT 1 WATER COMPONENT						
VERIFICATION OF THE BIDS						
Criteria	1	2	2*	3	4	5
Validity Period	YES	YES	NO. ¹	YES	YES	YES
Registration Documentation	YES ¹	YES	YES	YES	YES	YES
Submitted JV Agreement	YES	YES	YES	YES	YES	YES
Number of Copies of Bid Submitted	YES	YES	YES	YES	YES	YES
Comparison with the Original Bid Document and correction done	YES	YES	YES	YES	YES	YES
Conclusion with the Note	YES	YES	NO. ¹	YES	YES	YES
Note:						
<p>2*. This bidder's bill of quantity entries are those of water component in Lot 1 and not for sewerage Lot 2 as indicated in this bid. In view of this and considering all lots had the same closing date and time, this bidder is hence forth moved to water component Lot 1.</p>						
<p>1. Although the Bid is not a joint venture, the three directors have been authorized to transact business by the company which has been certified by Advocate. It is also assumed that the three directors also own the company in the absence of the incorporation papers which would ideally state the ownership.</p>						

1. The bid bond is only for 120 days and not (120+28) 148days as required which ends on 3rd May, 2011. His ends on 3rd Day of April, 2012

2. Eligibility

This parameter was comprised of the following eight criteria;

- Eligible Country
- Minimum Average Turnover of at least Kshs 600million in the any of the last five years
- Bid Signed by Authorized representative
- Experience as prime contractor in the construction of at least two works of Kshs 550million of nature and complexity equivalent to the works over the last 5years
- A Contract Manager/Site Agent with 15 years experience and 10 years experience in works of an equivalent nature and volume and should be registered with ERB or equivalent
- A Minimum amount of liquid assets and/or credit facilities net of other contractual commitments of Kshs 160 million
- Type of Enterprise and Autonomy
- Equipments.

The results of bidders' eligibility on the criteria provided above were as tabulated below;

TABLE 1B-Eligibility in line with clause 4 of the bidding document

NYAHURURU LOT II SEWERAGE COMPONENT						
EILIGIBILITY IN LINE WITH CLAUSE 4						
Criteria	1	2	2*	3	4	5

Eligible Country	YES	YES	YES	YES	YES	YES
Minimum Average Turnover of at least Kshs 600million in the any of the last five years	YES	YES	NO ⁷	YES	YES	YES
Bid Signed by Authorized representative	YES	YES	YES	YES	YES	YES
Experience as prime contractor in the construction of at least two works of Kshs 550million of nature and complexity equivalent to the works over the last 5years	YES	YES	NO ⁸	YES	YES	Yes ³
A Contract Manager/Site Agent with 15 years experience and 10 years experience in works of an equivalent nature and volume and should be registered with ERB or equivalent	YES ¹	YES ²	YES	Yes ⁶	Yes ⁴	YES
A Minimum amount of liquid assets and/or credit facilities net of other contractual commitments of Kshs 160 million	YES	YES	NO ⁹	YES	YES	YES
Type of Enterprise and Autonomy	YES	YES	YES	YES	YES	YES
Equipments						
2Nos. D8 Type Bulldozer with ripper	YES	YES	No	YES ⁷	Yes ⁵	YES
2Nos. Front End Loader 2 m ³ bucket capacity	YES		No	YES ⁷	Yes ⁵	YES
8Nos. Tipper Trucks 20 tonne capacity	YES	YES	No	YES	Yes ⁵	YES
2Nos. Motor Graders/Motor Grader, 150 hp	YES		No	YES ⁷	Yes ⁵	YES
2Nos. Steel Wheeled Roller, 8 tonnes	YES	YES	No	YES ⁷	Yes ⁵	YES
2Nos. Vibrating Roller, 12 tonnes	YES	YES	No	YES	Yes ⁵	YES
2Nos. Pneumatic Tyred Roller - 12 tonnes-	YES		No	YES ⁷	Yes ⁵	YES
2Nos. Water Tankers, 15 m ³	YES	YES	No	YES ⁷	Yes ⁵	YES
1Nos. Prime Mover	YES	YES	No	YES	Yes ⁵	YES
2Nos. Crane 50 tonnes	YES	YES	No	YES ⁷	Yes ⁵	YES
1Nos. Rebar Bending Machine	YES		No	YES ⁷	Yes ⁵	YES
2Nos. Hydraulic Excavator of 1 cum bucket capacity	YES	YES	No	YES	Yes ⁵	YES

1No. Drilling Rig		YES	No	YES ⁷	Yes ⁵	YES
2Nos. Excavator with Jack Hammer	YES	YES	No	YES ⁷	Yes ⁵	YES
2Nos.Mobile Concrete Mixers (premix)	YES	YES	No	YES	Yes ⁵	YES
1No. Mobile Welding Set	YES	YES	No	YES ⁷	Yes ⁵	YES
2Nos.Single Tool Compressor	YES	YES	No	YES ⁷	Yes ⁵	YES
2Nos.Generator Set, 31-40 KW	YES	YES	No	YES ⁷	Yes ⁵	YES
1No. Concrete Pump	YES	YES	No	YES ⁷	Yes ⁵	YES
Note:						
1: The provided CVs of Project Manager/Site Agent reveals they are experienced but non is registered with ERB or similar body						
2: The proposed Site Agent has the required necessary experience but is not registered with ERB or (similar body hence not qualified						
3: The firm has several water supply projects which when cumulated meet the minimum requirements						
4: The provided CVs of Project Manager/Site Agent reveals they are experienced but non is registered with ERB or similar body						
5: The Firm has indicated that they have the equipment but has not provided evidence of ownership or hire						
6: The provided CVs of Project Manager/Site Agent reveals they are experienced but non is registered with ERB or similar body						
7: The Firm has indicated that they have the equipment but has not provided evidence of ownership or hire						
8 The average Turnover 2009 - 2005 is Kshs between 191,120,180 to Kshs 280,134,750. It is not even 50% of the minimum requirements						
9: The firm does not have a single project of and even if combined cannot reach the minimum requirements of Kshs 550million.						
10: The firm current assets are less than 50% of the required credit/current assets. And thus does not qualify						

Other aspects considered at the preliminary stage were;

- Bid security
- Completeness of bid; and
- Commercial responsiveness

The results of these aspects are as tabulated in table 2 which also show the results of the technical evaluation.

Technical Evaluation

Bidders were also subjected to technical evaluation immediately after the preliminary evaluation was complete.

The following criteria which formed the basis for Technical Responsiveness were checked;

- a bid offering alternative goods that are equal or superior in specifications and performance, unless the bid documents explicitly prohibit consideration of any alternatives, a bid which meets all performance criteria of a works plant, but not dimensional provisions that do not affect performance or the utility for the purpose intended;
- a bid which offers goods with minor deviations from the technical specifications which do not affect the suitability of the goods for the intended use; and
- A bid which offers the equipment specified but has omitted minor attachments and components, e.g. a tool kit in motor vehicle.

TABLE 2

<u>Bidder</u>	<u>Verification</u> Indicate ¹ Provision in Bid.Doc	<u>Eligibility</u> Provision in Bid Doc.	<u>Bid Security</u> Provision in Bid Doc.	<u>Completeness of Bid</u> Provision in Bid Doc.	<u>Substantial</u> ² <u>Commercial</u> <u>Responsiveness</u>	<u>Acceptance for Detailed Examination</u>
(a)	(b)	(c)	(d)	(e)	(f)	(g)
1	YES	YES	YES	YES	YES	YES
2	YES	YES	YES	YES	YES	YES
2*	YES	NO¹	NO³	NO²	YES	NO¹
3	YES	YES	YES	YES	YES	YES
4	YES	YES	YES	YES	YES	YES
5	YES	YES	YES	YES	YES	YES

1. The Bidder does not have the required Turnover of Kshs 600million lacks necessary experience, liquid assets/credit facility of Kshs 600million and has no equipments to execute the works.

2. The Bidder did not include the equipments he has.

3. The bid bond is only for 120days and not (120+28) 148days as required which ends on 3rd May, 2011. His ends on 3rd Day of April, 2012.

After both the preliminary and technical evaluations were complete, five out of the six bidders that were evaluated qualified to move to the detailed evaluation. These were Bidders No. 1,2,3,4 and 5.

Bidder No. 2* did not qualify for detailed evaluation stage due to:-

- ✓ *The Bidder does not have the required Turnover of Kshs 600million, lacks necessary experience, liquid assets/credit facility of Kshs 600million and has no equipments to execute the works.*
- ✓ *The Bidder did not include the equipments he has.*
- ✓ *The bid bond is only for 120days and not (120+28) 148days as required which ends on 3rd May, 2011. His ends on 3rd Day of April, 2012*

Detailed/Financial Evaluation

The following check/actions were undertaken during the detailed phase of the evaluation;

- Correction of Errors

Bids were checked carefully by the evaluation committee for arithmetic errors in the bid form to ensure that stated quantities and prices were consistent. The quantities were the same as stated in the bidding document. The total bid price for each item was the product of the quantity and the quoted unit price. If there was any discrepancy, the quoted unit price governed in the recalculation.

The methodology for correction of computational errors was as per clause 29 of the instruction to bidders.

Arising from the arithmetic check, the following was noted:-

- Bidder No. 5 had the largest deviation at Kshs +23,656,721 while bidder No. 2 had the least deviation at Kshs +138, 600

TABLE 3

Bidder	Discrepancy (Kshs)	Reasons
No. 1	-1,321,012	<ul style="list-style-type: none"> • Multiplication errors
No. 2	+138,600	<ul style="list-style-type: none"> • Wrong addition of PC sum in BOQ No. 1
No.3	+2,965,826.6	<ul style="list-style-type: none"> • Wrong addition of PC sum in BOQ No. 1 and 2 • Multiplication and Addition Errors
No.4	-8,198,284	<ul style="list-style-type: none"> • Error resulting from addition of P.C. sums in BOQ No. occasioned by administrative and profit margin on the same
No. 5	+23,656,721	<ul style="list-style-type: none"> • Mainly a P.C. Sum of Kshs 23million was excluded from the addition of BOQ 8 page 4 of 4

Correction of Provisional Sums.

Some bids contained provisional sums quoted by the NWSB in the bidding documents. These sums were not standard items of the Bill of Quantities.

The table below represents the deduced Provisional Sums;

TABLE 4A.

BOQ No.	Description	Amount (Kshs)
1	BILL No. 1: Preliminary and General Items	29,500,000
2	BILL No. 2: Leshau Well Drilling and Development	200,000
3	BILL No. 3: Raw Water Pumping Main from LeshauSwamp	1,500,000
4	BILL No.4: Nyahururu Water Treatment Works	16,500,000
5	BILL No. 5: Electro-mechanical Works	0
6	BILL No. 6: Treatment Plant - 3500m3 Clear Water Tank	0
7	BILL No. 7 :Clear Water Rising Main	0
8	BILL No. 8: Nyahururu Distribution System	23,000,000

9	BILL No. 9: High Level Clear Water Tank (Capacity 2000m3)	0
10	BILL No. 10 Schedule of Day Works	0
	Total PC	70,700,000

The above Provisional Sums were subtracted from the read-out prices in Table 4 B, column (e) below to allow for a proper comparison of bids in subsequent steps.

TABLE 4B

Table 4 Correction and Unconditional Discounts

Order	Read Out Bid Price (S)		Corrections		Corrected Bid Prices	Unconditional Discounts		Corrected Bid Price (S)
	Currency(ies)	Amount(s)	Computational Errors	Provisional Sums		Percent	AMOUNT(S)	
a	b	c	d	e	(f)=c+(d)-(e)	(g)	(h)	(i)= (h)
1	Kshs	1,113,969,708.50	-1,321,012	70,700,000	1,041,948,697	0	0	1,041,948,697
2	Kshs	1,170,000,000.00	138,600	70,700,000	1,099,438,600	0	0	1,099,438,600
3	Kshs	949,952,046.59	2,965,826.60	70,700,000	882,217,873	0	0	882,217,873
4	Kshs	799,537,292.00	-8,198,284	70,700,000	720,639,008	0	0	720,639,008

								8
								799
5	Kshs	990,281,160.00	23,656,721	70,700,000	943,237,881		144,040,896	96,5

Modification and Discounts

Out of the responsive bids, only one bidder offered discounts. This discount is as follows;

- ✓ **Bidder No. 5 offered a discount of Kshs 144,040,896.**

Accordingly, the original bid prices were modified at this point in the evaluation. The effect of unconditional discounts (or alternatively, increases) is shown as in Table 4B above (columns g and h).

Competitiveness

In order to determine whether the bidders were competitive and will be able to offer the required services, individual BOQs were compared against each other and the Engineers estimate.

i) Whole works

Bidder No. 2 offered the highest bid at 38% above the Engineer's Estimate while Bidder No. 4 offered the lowest bid at 7% below the Engineer's Estimate.

However, all the bids will be able to perform the works since their prices are $\pm 20\%$ or above.

Table 4B(i): percent deviation of the corrected bid prices against the Engineers estimate

Whole Works						
Bid No.	Engineer's Estimate	1	2	3	4	
Total Corrected /Discounted Bid Price in Kshs	846,576,124.90	1,112,648,697	1,170,138,600	952,917,873	791,159,008	86
%Deviation	0	31	38	13	-7	

ii) Individual BOQ's

The highest quoted bidder No. 2 has quoted highest in three bills out of ten while the lowest quoted bid bidder no. 4 has quoted lowest in 5 out of the ten bills (50%)

This result indicates that:-

1. The received bids are competitive and
2. Consistency of the bidders especially bidder No. 2 who is the highest quoted bidder and bidder No. 4 who is the lowest quoted.

Table 5 below shows how different bills were compared

TABLE 5- Comparison of Bills.

BOQ No.1 Preliminary and General Items					
Bid No.	Engineer's Estimate	1	2	3	
Corrected Bill in Kshs	87,730,000	66,598,000	96,825,600	86,010,200	87,329,43

%Deviation		0	-24	10	-2	0
BOQ No.2 Leshau Well Drilling and Development						
Bid No.	Engineer's Estimate	1	2	3		
Corrected Bill in Kshs	33,075,280.00	26,400,680.00	47,578,415.00	30,186,142.00	28,394,259.00	
%Deviation	0	-20	44	-9	-14	
BOQ No.3 Raw Water Pumping Main from LeshauSwamp						
Bid No.	Engineer's Estimate	1	2	3		
Corrected Bill in Kshs	167,773,700.00	188,002,101.00	188,002,101.00	184,573,304.15	148,402,692.0	
%Deviation	0	12	12	10	-12	
BOQ No.4 Nyahururu Water Treatment Works						
Bid No.	Engineer's Estimate	1	2	3		
Corrected Bill in Kshs	141,527,865	237,404,810	217,989,811	148,219,932	162,544,689	
%Deviation	0	68	54	5	15	
BOQ No.5 Electro-Mechanical Works						
Bid No.	Engineer's Estimate	1	2	3		
Corrected Bill in Kshs	55,308,550	110,789,850	123,719,814	51,644,800	67,949,87	
%Deviation	0	100	124	-7	23	

BOQ No.6 Treatment Plant -3500m³ clear water tank					
Bid No.	Engineer's Estimate	1	2	3	
Corrected Bill in Kshs	45,673,999.00	110,789,850.00	53,462,360.00	52,157,340.00	28,864,312.00
%Deviation	0	143	17	14	-37
BOQ No.7 Clear Water Rising Main					
Bid No.	Engineer's Estimate	1	2	3	
Corrected Bill in Kshs	11,667,100.00	13,304,700.00	11,189,338.00	10,151,063.31	5,372,418.00
%Deviation	0	14	-4	-13	-54
BOQ No.8 Nyahururu Distribution System					
Bid No.	Engineer's Estimate	1	2	3	
Corrected Bill in Kshs	205,301,965	306,267,530	294,713,427	276,838,324	173,297,149
%Deviation	0	49	44	35	-16
BOQ No.9 High Level Clear Water Tank (Capacity 2,000m³)					
Bid No.	Engineer's Estimate	1	2	3	
Corrected Bill in Kshs	16,643,800.00	30,001,680.00	23,279,298.00	19,708,396.70	12,139,095.30
%Deviation	0	80	40	18	-27

BOQ No.10 Day works					
Bid No.	Engineer's Estimate	1	2	3	
Corrected Bill in Kshs	4,912,400	5,923,745	7,002,200	6,799,474	4,941,540
%Deviation	0	21	43	38	1

i) Major unit rates

Generally, Bidder No. 4 offered the lowest major rates at a minimum of 38% below the Engineer's and it is doubtful if he can deliver on them unless they are catered somewhere else. Bidder No. 2 offered the highest rates with a minimum above the Engineer's Estimate of 7%.

TABLE 5A.

COMPARISON OF MAJOR UNIT RATES						
BOQ No.1 Preliminary and General Items						
Overhead and Profit Margins (%)						
Item 1.A42-8						
Page 2						
Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	20	25	18	20	10	10
%Deviation	0	25	-10	0	-50	-50

TABLE 5A-Continued

BOQ No.1 Preliminary and General Items						
Allow for Establishment of Contractor's Camp						
Item 1.A701						
Page 2						
Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	10,000,000	1,500,000	27,000,000	6,500,000	6,204,434	10,000
%Deviation	0	-85	170	-35	-38	0
BOQ No.2 Leshau Well Drilling and Development						
Procure and install electric submersible pumps ASI model - E10S55/7A + MAC 10150 - 8V Rated kw, 3ph, 415V, 50Hz and capable of delivering 200m3/hr against a head of 185m or approved equivalent						
2.B910						
Page 1						
Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	2,750,000	3,500,000	5,610,000	2,250,000	961,886	1,400,
%Deviation	0	27	104	-18	-65	-49
BOQ No.3 Raw Water Pumping Main from LeshauSwamp						
Supply and Transport to site. Transport from site store, lay and joint pipes in trench, include for excavation, preparation of surfaces, disposal of excavated material, shoring sides of excavation backfilling for PN 16 Epoxy Coated/Cement Lined ND 450mm diameter Steel Pipe.						
3.I432						
Page 1						

Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	14,550	11,900	14,542	14,177	13,082	18,000
%Deviation	0	-18	0	-3	-10	24

BOQ No.4 Nyahururu Water Treatment Works

BILL No. 4-1: Chemical Storage, Mixing Tank and Dosing Unit

Excavate for Foundations and bases for depth 0.25 - 0.5m

4-1.E322

Page 1

Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	250	350	309	300	113	500
%Deviation	0	40	24	20	-55	100

TABLE 5A- Continued

BOQ No.4 Nyahururu Water Treatment Works						
BILL No. 4-1: Chemical Storage, Mixing Tank and Dosing Unit						
Excavating in rock Class "C"						
4-1.E333						
Page 1						
Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	2,200	1,000	8,100	1,500	1,097	1,000
%Deviation	0	-55	268	-32	-50	-55

BOQ No.4 Nyahururu Water Treatment Works						
BILL No. 4-1: Chemical Storage, Mixing Tank and Dosing Unit						
Mass Concrete Class 15/20mm :-						
4-1.F511						
Page 1						
Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	12,000	15,000	12,960	14,500	6,788	11,000
%Deviation	0	25	8	21	-43	-8
BOQ No.4 Nyahururu Water Treatment Works						
BILL No. 4-1: Chemical Storage, Mixing Tank and Dosing Unit						
Vibrated Reinforced Concrete Reinforced Concrete Class 25/20mm:-						
4-1.F622						
Page 1						
Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	15,000	16,000	18,200	16,000	8,408	12,000
%Deviation	0	7	21	7	-44	-20
BOQ No.4 Nyahururu Water Treatment Works						
BILL No. 4-1: Chemical Storage, Mixing Tank and Dosing Unit						
Formwork - Rough Finish:-						
4-1.G143.4						
Page 1						
Bid No.	Engineer's Estimate	1	2	3	4	5

Item Rate in Kshs	600	1,500	810	750	416	600
%Deviation	0	150	35	25	-31	0

TABLE 5A-Continued

BOQ No.4 Nyahururu Water Treatment Works						
BILL No. 4-1: Chemical Storage, Mixing Tank and Dosing Unit						
Provide and Fix High Tensile Steel Reinforcement to SRN 127 Including Cutting, Bending, Propp with Spacers and Tying as Specified :-						
4-1.G524						
Page 2						
Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	150	200	154	145	110	120
%Deviation	0	33	3	-3	-27	-20
BOQ No.4 Nyahururu Water Treatment Works						
BILL No. 4-6 : Treatment Plant - Raw Water Balancing Tank (Capacity 600m3)						
DN 400 steel inlet pipe flanged jointed						
4-6.I432.1						
Page 2						
Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	18,500	189,560	23,060	22,155	11,405	54,000
%Deviation	0	925	25	20	-38	192

BOQ No.4 Nyahururu Water Treatment Works						
BILL No. 8: Nyahururu Distribution System						
UPVC Class C ND 315 in trench, depth 1.5 m - 2.0 m						
8.I533.1						
Page 1						
Bid No.	Engineer's Estimate	1	2	3	4	5
Item Rate in Kshs	4,150	4,000	4,450	4,055	2,087	4,40
%Deviation	0	-4	7	-2	-50	6

Evaluation Currency

The bids as corrected for computational errors and as adjusted for discounts were converted to Kenya shillings as described in clause 30 of the Instructions To Bidders read together with Clause 1.3 on page II-30 Section III on Evaluation and Qualification Criteria which define the source of Exchange Rate as Central Bank of Kenya at the date of bid opening (6th December, 2011).

Table six (6A) below has the adopted exchange.

TABLE 6A

Table 5 Exchange rate					
Currency used in bid Evaluation	Kenya Shillings	Euro	US Dollar	STG Pound (British) Pound (£)	
Effective Date of	6 th December,	119.7698	89.5467	139.9169	

exchange rates	2011				
Authority of Publication Specified for exchange rate	Mean rates, Central Bank of Kenya				

Table 6B below has the currency corrections which indicates that Bidder No. 4 as the lowest followed by Bidder No. 5.

TABLE 6B

Table 6B Currency Conversion (Single Curr								
Bidder	Corrected/ Discounted Bid Price (s) (In Kshs)	Payment Composition			Exchange Rate used by Bidder	Amounts in Currency of Payment	Exchange Rate for Evaluation	Bid Prices
		Currency of Payment	Percent of Total Bid	Amount in Evaluation Currency				
(a)	(b)	©	(d)	(e)=(b)x(d)	(f)	(g)=(e)/(f)	(h)	(i)=(g)x(h)
1	1,041,948,697	Kshs	20	208,389,739.30	1.00	208,389,739.30	1.00	208,389,73
		USD	40	416,779,478.60	89.95	4,633,457.24	89.5467	414,910,80
		GBP(STG Pound)	40	416,779,478.60	140.62	2,963,870.56	139.9169	414,695,58
		Total (Kshs)		1,041,948,696.50				1,037,996,12
2	1,099,438,600	Kshs	15	164,915,790.00	1.0000	164,915,790.00	1.00	164,915,79
		USD	85	934,522,810.00	89.8528	10,400,597.53	89.5467	931,339,18
		Total (Kshs)		1,099,438,600.00				1,096,254,97
3	882,217,873	Kshs	30	264,665,361.96	1.00	264,665,361.96	1.00	264,665,36
		USD	70	617,552,511.23	89.8281	6,874,825.49	89.5467	615,617,93
		Total (Kshs)		882,217,873.19				880,283,29

4	720,639,008	Kshs	20	144,127,801.60	1.0000	144,127,801.60	1.00	144,127,80
		USD	40	288,255,603.20	96.4528	2,988,566.46	89.5467	267,616,26
		Euro	40	288,255,603.20	133.4328	2,160,305.44	119.7698	258,739,35
		Total (Kshs)		720,639,008.00				670,483,41
5	799,196,985	Kshs	100	799,196,985.00	1.0000	799,196,985.00	1.00	799,196,98

As at the end of bid evaluation, Bidders were ranked as shown in the table below;

TABLE7

Bidder	Total Comparison Price (Kshs)	Rank
1	1,141,795,738.38	5
2	1,096,254,977.10	4
3	968,311,627.03	3
4	737,531,757.58	1
5	799,196,985.00	2

After the Evaluation process was completed, the Evaluation Committee recommended to the Tender Committee that the tender be awarded to Bidder No. 4 M/s Sinohydro Corporation Ltd at a total cost Kshs 791,

339,008, which include a Total PC sum of Seventy Million, seven hundred thousand shillings (Ksh 70.7 Million) of which to be paid as follows:-

- 20% Kshs (KES)
- 40% USD and
- 40% EURO

TENDER COMMITTEE'S DECISION

The Tender Committee in its meeting of 13th February, 2012 deliberated upon the recommendations of the Evaluation Committee and decided to uphold those recommendations and awarded the tender for Water Supply Component Lot 1 to Sino Hydro Corporation Ltd for a sum of Kshs 791, 339, 008.00.

THE REVIEW

The Applicant, Njama Limited, lodged the Request for Review against the decision of the Tender Committee of Northern Water Services Board. The Applicant was represented by Mr. Owuor Isaac of Masika Koros & Co. Advocates while the Procuring Entity was represented by Mr. Samuel Ndung'u, the Assets Development Officer, Northern Water Services Board. The interested parties, Sinohydro Corporation Limited were represented by its contractors Mr. Jin Yang Ping and Mr. Wang Ying Ye.

The Applicant requests the Board for the following orders;

- a) The decision of the Procuring Entity is illegal and the same be annulled in whole.**

b) The Board be pleased to award the contract to the Applicant

c) ~~The Procuring Entity be condemned to pay costs of this Review to the Applicant.~~

The Applicant raised six (6) grounds of review and the Board deals with them as follows.

GROUND 2, 3 AND 4- Breach of Sections 64, 66 (3) and 66 (4) of the Public Procurement and Disposal Act, hereinafter referred to as the Act and Regulations 48, 50 (2)(d) and 50(3) of the Public Procurement and Disposal Regulations, hereinafter referred to as the Regulations.

These grounds have been combined because they raise similar issues on evaluation and responsiveness and, or non-responsiveness of tenders with respect to the exchange rates to have been quoted by bidders and applied at the time of bidding and evaluation.

The Applicant alleged that the Procuring Entity had breached Section 64 of the Act, as read together with Regulation 48 of the Regulations for failing to find the bid by the Successful Bidder as non-responsive because it did not comply with the mandatory requirements of the tender document found under ITB 30.1 read together with Section III, Evaluation and Qualification Criteria Clause 1.3 of the Instructions to Bidders.

The Applicant averred that the Tender Document at Clause 30.1 of the Instructions to Bidders read together with Section III, Evaluation and Qualification Criteria Clause 1.3 of the Instructions to Bidders had required

bidders to quote the exchange rate applicable on the date of the tender opening/close. It further averred that it would have been impossible for the Successful Bidder and indeed any other Bidder to be able to comply with the Tender Document requirement because the day's foreign currency exchange rates against the Kenya Shilling are not published at the start of the day whereas the tender close was at the start of the day at 10am.

The Applicant further alleged that the Procuring Entity had breached Sections 66(2) and 66(3) of the Act as read together with Regulation 50(2)(d) of the Regulations for failing to strictly apply the criteria expressed in ITB 30.1 read together with Section III, Evaluation and Qualification Criteria 1.3 of the Tender Document, by proceeding to allow the Successful Bidder to use a currency exchange rate not provided for in the Tender Document; and as a consequence the Applicant was greatly prejudiced and unfairly lost the tender.

In conclusion, the Applicant submitted that the Procuring Entity had breached Section 66(4) of the Act as read together with Regulation 50(3) of the Regulations for failing to find that it had submitted a cost competitive bid in terms of price which met all the requirements of the tender; and that its price was the lowest evaluated as compared to other bidders including the Successful Bidder who ought to have been disqualified for not complying with the requirements of the tender.

In its response, the Procuring Entity submitted that the Successful Bidder had complied with the requirements of Clause 30.1 of the Instructions to Bidders and that the procurement of the works was done in accordance with the terms and conditions of the loan agreement between The Republic of Kenya and the African Development Fund (the 'Fund').

The Procuring Entity further submitted that the process of procurement and subsequent payment would only be successful if the loan agreement was followed, and that Clause 2.2 of the Instruction to Bidders stated as follows;

"Payments by the Bank will be made only at the request of the Borrower and upon approval by the Bank in accordance with the terms and conditions of the financing agreement between the Borrower and the Bank (hereinafter called the Loan Agreement), and will be subject in all respects to the terms and conditions of that Loan Agreement. No party other than the Borrower shall derive any rights from the Loan Agreement or have any claim to the funds".

The Procuring Entity claimed that the Applicant having quoted its bid in Kenya shillings and that it had not required any payments in any other currencies, it had not acquainted itself with the summary of payment currencies on page IV – 49 of the Tender Document.

It submitted that in this summary, the bidder was expected to change its foreign currency payments to Kenya shillings, because all bids were to be submitted in Kenya shillings, and state the exchange rate for converting the foreign currency payments required into Kenya shillings.

It further submitted that the Applicant ignored Section II of the bid data sheet Clause 15.1(b) of the Instructions to Bidders which specifically advised on how foreign currency payments were to be handled. It stated that the clause read as follows;

ITB 15.1 (b);

“The rates of exchange to be used by the Bidder in arriving at the local currency equivalent and the percentage(s) mentioned in (a) above shall be specified by the Bidder in the Summary of Payment Currencies, furnished in Section IV. Bidding Forms, shall apply for all payments under the Contract so that no exchange risk will be borne by the successful Bidder”.

The Procuring Entity averred that it had used Table 6A: Currency Conversion (single currency) as per the Fund’s Standard Bid Evaluation Guide to arrive at the evaluated prices for all bidders. It further submitted that for bidders requiring payments in currencies other than Kenya shillings, it computed the Kenya shilling evaluated prices by using Table 6A and applied both the bidders’ quoted exchange rate for converting its foreign currency payment requirements into Kenya shillings, and then applied the Central Bank of Kenya exchange rate of the day of tender opening/close to convert the resultant foreign currency payments into Kenya shillings to arrive at the evaluated price.

In conclusion, the Procuring Entity averred that the Applicant was not the lowest evaluated bidder, and that the Applicant seemed to have confused the lowest read out price at the tender opening with the lowest evaluated price.

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

The Board notes that this procurement was carried out under the African Development Fund's Rules of Procedure for the Procurement of Goods and Works which is also stated in the Loan Agreement under Section 8.02; and the Public Procurement and Disposal Act, 2005 of Kenya.

From the Applicant's submissions on these grounds, the main issue for the Board to determine is whether the Procuring Entity evaluated the bids from tenderers who required foreign currency payments in accordance with the Tender Document and the Fund's Standard Bid Evaluation Guide for Procurement of Goods and Works.

From the Tender Document, the Board notes that bidders who required foreign currency payments were to quote their exchange rates as provided for in clause 14.3 of the ITB; and that the Procuring Entity was to apply the CBK exchange rates of the day of the tender opening/close for evaluation of the tenders as at clause 1.3 of Section III Evaluation and Qualification Criteria of the Tender Document. Therefore, in this regard, the Board finds that the Tender document envisaged that two possibly different exchange rates were to be quoted/applied; one quoted by the tenderers when submitting their bids and the other based on the Central Bank of Kenya's ruling rates on the date of the tender opening and applied by the Procuring Entity during evaluation of the bids.

The question then is whether the Tender Document or the Evaluation Guide provided for how these two different exchange rates were to have been applied in the tender evaluation.

The Board notes that the said Evaluation Guide envisages two different currency options for bidding/payment, with each requiring a different conversion method, namely:-

- i) The Bidder uses a single currency option, in which the bid is expressed entirely in the Borrower's (Procuring Entity's) currency, with other foreign currency requirements stated as percentages of the bid price, together with the exchange rates used by the bidder to determine the percentages. For single currency bids, sections of the works may require payment in different currencies and proportions. In such instances, the impact of any corrections found will require lengthier analysis for each bid, based on the submitted Appendix to Bid. Table 6A is to be used for these calculations; and
- ii) The Bidder uses multiple currency option, in which the bid price is allowed in local and foreign currencies.

From the Tender Document at clause 15.1 of ITB, the Board notes that the bid was to have been expressed entirely in Kenya shillings, with other foreign currency requirements stated as percentages of the bid price, together with the exchange rates used by the bidders to determine the percentages.

The Board therefore finds that the bid prices after evaluation for corrections were to be evaluated in accordance with Table 6A Currency Conversion (single currency).

TABLE 6A. CURRENCY CONVERSION (SINGLE CURRENCY)

Bidder (a)	Corrected/discounted Bid price(in specified currency) (b)	Payment composition Currency of payment (c)	Percent of total bid (d)	Amount in evaluation currency (e)=(b) *(d)	Exchange Rate used by bidder (f)	Amounts in currency of payment (g)=(e)*(f)	Exchange Rate for Evaluation 79 (h)	Evaluation	curre
								Bid prices (i)	Total (j)

Specify Evaluation Currency

On reviewing the Procuring Entity's Tender Evaluation Report, the Board finds that the Procuring Entity had used Table 6A above to evaluate the bid prices and that therefore, it had followed the evaluation criteria set out in the Tender Document and the Fund's evaluation guidelines by:-

- i) Using the foreign currency requirements stated as percentages of the bid price to calculate the Kenya shilling equivalent of the foreign currency payments required by the bidders (see columns (c) (d) and (e) of Table 6A);

- ii) Using the exchange rates quoted by the bidders to convert the Kenya shilling equivalent of the foreign currency requirement into the actual foreign currency payment required (see columns (f) and (g) of Table 6A); and
- iii) Using the CBK's exchange rate of the day of the tender opening/close to convert the said foreign currency payment required back into Kenya shillings so as to compute the evaluated bid price in Kenya shillings (see columns (h) (i) and (j) of Table 6A).

Based on the above currency conversion approach, the Board notes that the summary of the evaluation is as per the following table:-

Table 6A Currency Conversion (Single Currency)

Bidder	Corrected/ Discounted Bid Price (s) (in Kshs)	Payment Composition				Exchange Rate used by Bidder	Amounts in Currency of Payment	Exchange Rate for Evaluation	Evaluation Currency	
		Currency of Payment	Percent of Total Bid	Amount in Evaluation Currency	(f)				(g)=(e)/(f)	(h)
(a)	(b)	©	(d)	(e)=(b)x(d)	(f)	(g)=(e)/(f)	(h)	(i)=(g)x(h)	(j)	
1	1,041,948,697	Kshs	20	208,389,739.30	1.00	208,389,739.30	1.00	208,389,739.30		
		USD	40	416,779,478.60	89.95	4,633,457.24	89.5467	414,910,805.30		
		GBP(STG Pound)	40	416,779,478.60	140.62	2,963,870.56	139.9169	414,695,581.21		
		Total (Kshs)		1,041,948,696.50				1,037,996,125.80	1,037,996,125.80	
2	1,099,438,600	Kshs	15	164,915,790.00	1.0000	164,915,790.00	1.00	164,915,790.00		
		USD	85	934,522,810.00	89.8528	10,400,597.53	89.5467	931,339,187.10		
		Total (Kshs)		1,099,438,600.00				1,096,254,977.10	1,096,254,977.10	
3	882,217,873	Kshs	30	264,665,361.96	1.00	264,665,361.96	1.00	264,665,361.96		
		USD	70	617,552,511.23	89.8281	6,874,825.49	89.5467	615,617,935.34		
		Total (Kshs)		882,217,873.19				880,283,297.30	880,283,297.30	
4	720,639,008	Kshs	20	144,127,801.60	1.0000	144,127,801.60	1.00	144,127,801.60		
		USD	40	288,255,603.20	96.4528	2,988,566.46	89.5467	267,616,264.36		
		Euro	40	288,255,603.20	133.4328	2,160,305.44	119.7698	258,739,350.03		
		Total (Kshs)		720,639,008.00				670,483,415.99	670,483,415.99	
5	799,196,985	Kshs	100	799,196,985.00	1.0000	799,196,985.00	1.00	799,196,985.00		
									799,196,985.00	
									670,483,415.99	
									799,196,985.00	

From the evaluation done above, the Board finds that the Successful Bidder emerged with the lowest bid price.

In addition, the Board also finds that the Procuring Entity after completing the above evaluation subjected the bids to evaluation for domestic preference where foreign bidders' prices were subjected to a 10% increase.

The Board finds that after this evaluation, the Successful Bidder's price was still lower than that of the Applicant's.

Accordingly, the Board finds that the Procuring Entity had evaluated the bids in accordance with the set criteria in the Tender Document and the Fund's Standard Evaluation Guide pursuant to Section 66 of the Act and Regulation 50; and further that the Applicant's tender was found to be the second lowest evaluated bid.

Subsequently, these grounds of appeal fail.

GROUND 1, 5 AND 6

These grounds have been consolidated because they deal with similar issues on loss and damage suffered by the Applicant.

The Applicant stated that it had duly submitted its bid to the Procuring Entity in strict compliance with the criteria and requirements set out in the tender document and confirmed the change of the bid price from Kshs. 990,281,160.00 and discounted to Kshs. 846,240,264.00 to the new price bid

price of Kshs. 1,013,937,881.00 and discounted to Kshs. 869,896,985.00 and accepted it unconditionally.

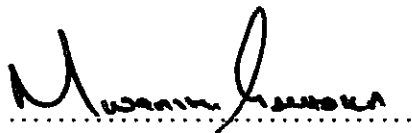
It alleged that as a result of the Procuring Entity's actions resulting in denying it the award of the tender, it was bound to suffer severe loss and damage.

In its response, the Procuring Entity submitted that the Applicant's services were not the cheapest.

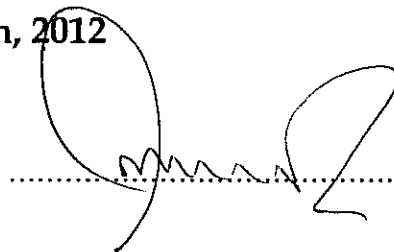
As the Board has already found under grounds 2, 3 and 4, the Applicant was not the lowest evaluated bidder and further the Board has consistently held in previous decisions, that the costs of tendering and any loss/damage arising out of participating in the tender process are commercial risks that each tenderer bears.

From the foregoing, the Board finds that this Request for Review fails and orders, pursuant to Section 98 of the Act, that the procurement process may continue. On costs, the Board notes that each party shall bear their own costs.

Dated at Nairobi on this 19th day of March, 2012



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**