

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 32/2012 OF 28th JUNE, 2012

BETWEEN

LANDMARK HOLDINGS LTD.....APPLICANT

AND

THE UNIVERSITY OF NAIROBI.....PROCURING ENTITY

BOARD MEMBERS PRESENT

Mr. Joshua W. Wambua - Member (In the Chair)

Ms. Judith Guserwa - Member

Mr. Sospeter Kioko - Member

Eng. Christine Ogut - Member

Mrs. Loise Ruhiu - Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary

Mr. N. Soita - Secretariat

Ms. Judy Maina - Secretariat

PRESENT BY INVITATION

Applicant, Landmark Holdings Limited

Mr. Daniel Achachi	- Advocate, Achach & Co. Advocates
Mr. Patrick Anam	- Advocate, Achach & Co. Advocates
Mr. Job Mavasi	- Student, Achach & Co. Advocates
Mr. M.S. Sethi	- Director
Mr. Erastus Gikandi	- Quantity Surveyor

Procuring Entity, University of Nairobi

Mr. Patrick Lutta	- Advocate, Lutta & Company Advocates
Ms. Sussane Lutta	- Pupil, Lutta & Company Advocates
Mr. Lawrence Maruti	- Pupil, Lutta & Company Advocates
Mr. Joseph M.K. Mokaya	- Procurement Manager
Dr. S.M. Masu	- Manager, Constr. & Maintenance
Prof. S.K. Mwea	- University Employee
Mr. T.M. Thuita	- University Employee
Mr. Michael Karue	- University Employee
Dr. I.N. Wachira	- University Employee

Mr. Joel Rarimi - University Employee
Mrs. J. Kanjejo - University Employee
Mr. Peter Igiria - Accountant
Arch. Waweru Gathecha - Waweru & Associates (Achitect)
Mr. E. O. Odhiambo - Songa Ogada (QS)
Mr. Lusweti Wose - Songa Ogada (QS)
Eng. S. Maugo - Multiscope (C/S Engineer)

Interested Parties

China Wu Yi (Kenya) Company Limited

Mr. Mohammed Nyaoga - Advocate, Mohammed Muigai Advocates
Mr. Gabriel Mwangi - Advocate, Mohammed Muigai Advocates
Mr. Duncan Okubasu - Advocate, Mohammed Muigai Advocates

N.K. Brothers

Mr. D. Rajesh - Finance Manager

BOARD'S DECISION

Upon hearing the representation of the parties and upon considering the information in all documents before it, the Board decides as follows;

BACKGROUND OF AWARD

The University of Nairobi advertised Tender No. UON/P/T/01/2011-2012 for prequalification of contractors for main works for the proposed construction of University of Nairobi Towers in the daily newspapers of 17th October, 2011 and closed on 17th November, 2011.

Closing/Opening

The tender closed on 17th September, 2011 with the following twenty one (21) firms responding:

1. Landmark Holdings Limited
2. China Zhongxing
3. Ongata Works Limited
4. Itabuild Imports Limited
5. Milicon's Limited
6. China Jiangxi International Ltd
7. N.K. Brothers Limited
8. China Wu Yi Company Limited
9. Twiga Construction Company Limited
10. Epco Builders Limited
11. Danwood Company Limited
12. Fubeco (China) Fusion
13. Seyan Brothers
14. Cementers Limited
15. M.R. Shah Construction
16. Lalji Meghji Patel Limited

- 17.Dinesh Construction Limited
- 18.China Overseas Engineering Limited
- 19.Varkeep Building
- 20.Vaghiyani Enterprises Limited
- 21.SBI International Holdings

TECHNICAL EVALUATION OF THE PREQUALIFICATION DOCUMENTS

The Technical evaluation was conducted based on the following criteria:

- i. Checking for compliance with mandatory requirements
- ii. Technical responsiveness to specifications
- iii. Capability assessment by site visits
- iv. Financial capability

Mandatory requirements were evaluated based on a Yes/No basis while compliance with Technical specifications, Financial Capability assessment and Site visits were allocated scores as follows:

Conformity to Technical Specifications	- 60%
Financial Capability assessment	- 30%
Capability Assessment by site visit	- 10%
Total in percentage	- 100

The pass mark for a bidder to proceed to the next level was 70%.

Compliance with Mandatory Requirements

At this stage, bidders were evaluated against the following requirements:

1. Copy of MOPW registration certificate – category A
2. Copy of certificate of registration
3. Copy of KRA PIN certificate
4. Copy of KRA VAT registration certificate
5. Copy of KRA Tax Compliance certificate
6. Copy of Local authority single business permit
7. At least 3 names of recommendation from referees who shall be previous clients, Architects, Quantity Surveyors or Engineers.

Five bidders namely; Ongata Works Limited, Fubeco (China) Fusion, Seyani Brothers, Vaghjiyani Enterprises and SBI International Holdings were disqualified at this stage for failure to meet the set mandatory requirements.

Compliance with Technical Specifications

Bidders were evaluated on the following parameters:

1. Experience of at least 2 projects of a nature and complexity comparable to the proposed contract within the last 5 years.
2. Equipment
3. Personnel capabilities and experience

Two bidders namely; Itabuild Imports (26 scores) and Donwoods Company Limited (38 scores) were disqualified at this stage for failure to meet the required pass mark of 42 out of a maximum of 60 scores.

Financial Capability Assessment

The following parameters were used in evaluating bidders at this stage:

1. Audited Accounts
2. Turnover
3. Working Capital
4. Average Networth
5. Current Ratio
6. Gearing ratio
7. Financial trend

Five bidders namely; China Zhongxing(12 scores), Cementers Limited(20 scores), M.R. Shah Construction (K) Ltd(18 scores), Lalji Maghji Hirji Patel Limited(14 scores) and Vakkep Building Contractors Ltd (20 scores) were disqualified at this stage for failure to meet the required pass mark of 21 out of a maximum of 30 scores.

Operational Assessment by Site Visit

Bidders were assessed on the following parameters:

1. Confirmation of Business Name and Physical Address
2. Confirmation of original certificates of the attached copies of MOPW registration, certificate of registration, KRA PIN, VAT, Tax compliance and local authority single business permit.
3. Key staff
4. Equipment
5. General Assessment

Three bidders namely; Milicons Limited (6 scores), China Jiangxi International Limited (5 scores) and Dinesh Construction Limited (2 scores) were disqualified at this stage for failure to meet the required pass mark of 7 out of a maximum of 10 scores.

RECOMMENDATION

The Evaluation Committee recommended that the following six (6) firms be considered for further evaluation:

01 - Landmark Holdings

07 - N.K. Brothers Ltd

08 - China Wu Yi Co. Limited

09 - Twiga Construction Co. Ltd

10 - EpcO Builders Limited

18 - China Overseas Group Engineering

TENDER COMMITTEE DECISION

The Tender Committee at its Special Meeting held on 22nd March, 2012 approved the above six firms for prequalification.

Invitation of prequalified Firms

The six prequalified firms were issued with the Blank Bills of Quantities vide letters dated 23rd April, 2012 where they were required to submit their financial bids by 14th May, 2012.

Financial Bids Opening

Financial bids were opened on 14th May, 2012 and the following firms responded:

01 – Epco Builders Limited

02 – N.K. Brothers

03 – China Overseas engineering Group Company Limited

04 – Landmark Holdings Limited

05 – China Wu Yi Co. Ltd

06 – Twiga Construction Limited

Evaluation of Financial Bids

The received bids were checked for errors and corrections made. The table 3 hereafter provides a summary of the corrections made and the Evaluation Committee's remarks:

Table 3: Results of Financial evaluation

Bidder No.	Name	Quoted Sum (Ksh)	Corrected sum (Ksh)	Error (Ksh)	Ranking	Remarks
01	Epc Builders Limited	3,591,723,080	3,590,943,650	-779,430	3	Recommended
02	N.K. Brothers	3,949,909,101	3,944,571,033	-5,338,068	4	Recommended
03	China Overseas Engineering Group Company Limited	4,251,290,640.98	4,251,246,621	-44,019.98	5	Recommended
04	Landmark Holdings Limited	3,121,717,509	3,195,133,363	+73,415,854	1	Not Recommended
05	China Wu Yi Co. Ltd	3,150,000,000	3,152,000,000	+2,000,000	2	Recommended
06	Twiga Construction Ltd	5,190,000,000	5,190,000,000	None	6	Recommended

One bidder namely; Landmark Holdings Limited was not recommended for the following reasons:

i) Has not done a project of at least 8 storeys. The bidder has carried out works of maximum of 6 storeys whereas the requirement was at least a minimum of 8 storeys.

ii) Has made an arithmetical error of Ksh.73,415,854

REVIEW OF THE STRUCTURAL DESIGN

With the indication from the Evaluation Committee that the lowest bidder M/s China Wu Yi's tender sum is Ksh. 3,150,000,000, the Consultants were asked to review the Structural Design without changing the Design of the Building to be in line with the approved budget for the project. A value engineering process of the project was done and the revised cost of the project in accordance with the reviewed Structural Design and as per the rates contained in bid documents submitted by bidders were as summarized in table 4 hereafter:

Table 4: Revised Costs of the Project

Position	Name of Tenderer	Tender Amount	Reduced Tender Amount	Percentage Reduction
1	China Wu Yi Co. Ltd	3,150,000,000	2,046,268,470.09	35.04
2	Epc Builders Ltd	3,591,723,080	2,400,988,32733.15	33.15
3	N.K. Brothers	3,949,909,101	2,531,456,036.51	35.91
4	China Overseas Engineering Group Co. Ltd	4,251,290,640.98	2,816,045,013.65	33.76
5	Twiga Construction Ltd	5,190,000,000	3,140,170,578.35	39.50
6	Landmark Holdings Ltd	Disqualified by the Technical Evaluation Committee		
Note	The difference in percentage of reduced Tender sums is due to the different levels of pricing in the affected elements/areas.			

TENDER COMMITTEE DECISION

The Tender Committee at its 71st meeting held on 11th June, 2012 approved award of the Tender for construction of the Proposed University of Nairobi Towers to the lowest evaluated bidder M/s China Wu Yi Company Ltd at their value engineered sum of Ksh.2,046,268,470.09.

THE REVIEW

The Applicant lodged this Request for Review on 28th June, 2012 against the decision of the Tender Committee of the University of Nairobi in the matter of Tender No. UON/T/P/01/2011-2012 for Construction of the Proposed University of Nairobi Towers.

The Applicant was represented by Mr. Daniel Achach and Patrick Anam, Advocates, while the Procuring Entity was represented by Mr. Patrick Lutta, Advocate. The interested party China Wu Yi (Kenya) Company Limited was represented by Mr. Mohammed Nyaoga, Advocate.

The Applicant requested the Board for the following orders:

- 1. That the decision of the Procuring Entity awarding the Tender No. UON/T/P/01/2011-2012 to China Wu Yi Co. Ltd or any other person apart from the Applicant be annulled.**
- 2. That the Board do substitute the decision of the Respondent awarding the Tender No. UON/T/P/01/2011-2012 to China Wu Yi Co. Ltd or any other person and award the said tender to the Applicant.**
- 3. That in the alternative and without prejudice to the above, the Board do cancel and nullify the award of the tender to China Wu Yi Co. Ltd or any other person and direct the Respondent to re-evaluate the financial bids of the pre-qualified tenderers in accordance with the law the tender documents.**
- 4. That the costs of these proceedings be assessed by the Board and be awarded to the applicant to be paid by the Respondent.**

The Applicant raised fourteen grounds of review and the Board deals with them as follows;

Grounds 1, 2, 3, 4, 5, 6, 7 & 8: - General Statements

The above eight grounds are general statements by the Applicant regarding the background of the tender and are not supported by any alleged breach of the Public Procurement and Disposal Act, 2005, hereafter referred to as "the Act," the Public Procurement Regulations, 2006, hereafter referred to as "the Regulations" and or the Tender Documents. The Board therefore need not make any findings on them.

Grounds 9, 10, 11, 12, 13 & 14: Breach of Sections 2, 63 and 66(2) & (4) of the Act.

These grounds have been consolidated as they raise similar issues on the evaluation and qualification method used by the Procuring Entity in awarding the subject tender.

The Applicant submitted that it relied entirely on both its Request for Review and Memorandum of Submissions as filed with the Board on 28th June 2012 and 17th July 2012 respectively. With regard to the chronology of events leading to its Application for Review, the Applicant stated as follows:-

1. That by an advertisement in the daily newspapers of 17th October, 2011, interested contractors were invited by the Procuring Entity to submit their applications for prequalification for the construction of the proposed University of Nairobi Towers.

2. That it submitted its bid for the main contractor for builder's work, which bid closed /opened on 17th November 2011.
3. That by a letter dated 23rd April 2012, the Procuring Entity notified it that its technical bid was successful and invited it to submit its financial bid by latest 10.30 a.m on 14th May 2012.
4. That the financial bids closed/opened on 14th May 2012 and that during the opening, it returned the lowest financial bid amongst all the six bidders invited to submit financial bids.
5. That by a letter dated 14th June 2012 and received by it on 15th June 2012, the Procuring Entity informed it that its bid was unsuccessful.
6. That by a letter dated 18th June 2012, it wrote to the Procuring Entity seeking reasons as to why its bid was unsuccessful.
7. That by a letter dated 25th June 2012 and received by it on 26th June 2012, it was advised that its bid was unsuccessful for reasons that:-
 - a) Its bid had an accumulative arithmetic error of Ksh +73,415,854 which when applied to its bid ranked it second lowest and not the lowest and;
 - b) That it did not meet the requirements of condition 2.4.3(b) of the prequalification tender document which required bidders to have constructed two commercial buildings exceeding eight (8) storeys within the last five (5) years.

Regarding the first reason given by the Procuring Entity for the rejection of the Applicants bid, the Applicant submitted that the Procuring Entity breached the provisions of Section 63(2) of the Act by failing to notify it of a correction of error during evaluation. It submitted that it only got to know of the purported error only after it sought for reasons as to why its bid was unsuccessful. It stated that the reasons for the notification of a bidder on correction of errors on its bid under Section 63(2) of the Act are to accord a bidder the chance to understand the correction and either accept or reject it. It argued that, in this particular case, the Procuring Entity wrongly dealt with the issue of correction of errors during the evaluation of the tender. It submitted that the criterion it had adopted in so far as correction of errors was concerned was different from that stated in the Tender Documents and therefore the Procuring Entity was in breach of Section 63(2) of the Act.

The Applicant submitted that the Procuring Entity added the purported arithmetical error to its bid price therefore ranking it as second lowest and not the lowest as was the case during the opening of the financial bids. It stated that the procedure was wrong and not consistent with Clause 10 of the tender document which clearly guided on how correction of errors was to be dealt with. It stated that if the Procuring Entity followed the procedure on correction of errors as set out in Clause 10 of the Tender Documents, it would have applied the correction factor and ended up with the same figure as per its bid, therefore making it the lowest evaluated bidder. In support of its contention, it referred the Board to Clause 10 and particularly 10 (c) of the Tender Documents which provided that correction of errors was to be effected without changing the tendered sum.

The Applicant stated that the Procuring Entity erred in changing its bid price by applying the wrong criteria on correction of errors and modifying its bid price besides failing to accord it a chance to either accept or reject the purported arithmetical error. Further, it submitted that the calculation of the error was in itself erroneous in that it had wrongly taken into account Value Added Tax (VAT) on some items on which VAT was not applicable.

On the issue that it had failed to comply with the requirements of Clause 2.4.3(b) of the Prequalification Documents which required bidders to have constructed two commercial buildings exceeding eight (8) storey's within the last five (5) years, the Applicant submitted that such a reason was unjustified as the Procuring Entity had already prequalified the Applicant and invited it to submit a financial bid. It argued that if the Applicant had failed to meet the prequalification criteria, it would not have been invited to submit the financial bid. Further, it stated that pursuant to Clause 2.4.1 of the prequalification document, the pre-qualification process resulted in either a pass or a fail and that it had indeed scored a pass.

The Applicant submitted that the issue of non qualification of its technical bid at this stage was an afterthought. It contended that the Procuring Entity had carried out an initial prequalification process including due diligence which the Applicant passed. In support of this argument, it referred the Board to the letter from the Procuring Entity dated 23rd April 2012 which in part stated as follows:-

“Following your prequalification for the above tender, you are invited to submit your financial bids.”

It contended that the above statement implied that the Applicant had met all the prequalification criteria as required.

Further, the Applicant submitted that the prequalification was done over 6 months ago and that no one had ever challenged the results within the stipulated period as required under Regulation 73. It stated that, under Clause 2.4 of the Prequalification Documents, it was provided that the Procuring Entity reserved the right to waive minor deviations if they did not materially affect the capability of a bidder to perform the contract.

It argued that, for the same reasons, it should be assumed that the Procuring Entity waived the following deviations at the prequalification stage:-

EPCO- Did not put in a Bid Bond

NK Brothers- Did not include a Bid Bond

COVEC- Was not in the initial list

and yet they were all included in the list of bidders who were invited to submit financial bids.

The Applicant submitted that it was inequitable for the Procuring Entity to turn around and say that it did not pass prequalification when it indeed marked it so and proceeded to invite it to submit a financial bid. It stated that the Procuring Entity is now estopped from arguing on prequalification and cited High Court Judgment in Civil Appeal No.190/2001 (*Benson Ngugi Vs Kenya National Capital Corporation Ltd*) where the court upheld a similar issue on Estoppel.

Finally, the Applicant alleged that the Procuring Entity's decision to award the contract to a party without the most responsive bid offended the spirit of the Act which requires public entities to establish practices and achieve standards which inter-alia:- maximizes economy and efficiency; promotes competition and ensure that competitors are treated fairly; promotes the integrity and fairness of those procedures; increases transparency and accountability in those procedures; and increases public confidence in those procedures. It urged the Board to uphold the Request for Review and grant the prayers as sought.

In response, the Procuring Entity opposed the Request for Review. It relied on its Memorandum of Response as filed.

It stated that the whole process of the tender for construction of the University of Nairobi Towers under appeal was done in full compliance with the Act, and the statutory requirements of the University of Nairobi Act, Cap.210 of the Laws of Kenya and statutes made thereunder. It stated that the project had the full authority of the University Management Board, University Council and other relevant Council Committees.

The Procuring Entity submitted that the Applicant was not qualified to have been pre-qualified to proceed to submit the financial bid principally on account of not having constructed a commercial building exceeding Eight (8) storeys within the last 5 years as provided under Clause 2.4.3 (b) of the Pre-qualification Documents. It stated that this was a mandatory condition that had to be met by all the tenderers in order to be prequalified. During the hearing, the Procuring Entity admitted that pre-qualification of the

Applicant's bid was made in error by the Technical Committee and stated that it was entitled to correct the error by disqualifying the Applicant at any stage. It stated that the erroneous prequalification did not exclude or waive the mandatory requirements set out in Clause 2.4.3 (b) of the pre-qualification conditions.

The Procuring Entity submitted that in the unlikely event that the Board shuts its eyes on the issue on the requirement of 8 storeys building, it would still be found out that the Applicant's bid was not the lowest in the financial evaluation.

The Procuring Entity submitted that during the tender evaluation of the Bill of Quantities, bids were checked for arithmetic errors and corrected. It stated that the Applicant's financial bid had an additional total error of Ksh.73,415,854 thereby moving the Applicant's bid from Ksh. 3,121,717,509 to Ksh.3,195,133,363. It submitted that it therefore amended the Applicant's bid price to reflect the corrected sum and that is the essence of an evaluation process.

The Procuring Entity stated that the Applicant's corrected sum was arrived at taking into account the discount it had given. It averred that after the correction of the error, it emerged that the Applicant's bid price was the second lowest and not the lowest evaluated bid as alleged by the Applicant. It further stated that the evaluation criteria used was applied across the board for all tenderers without any discrimination whatsoever.

The Procuring Entity submitted that it fully complied with the requirements

of Sections 2 and 66(4) of the Act in awarding the tender to the lowest evaluated bidder. With regard to the alleged breach of Section 63, the Procuring Entity stated that it only corrected additions and not rates and was therefore not obligated to notify the Applicant of the correction of the error.

The Procuring Entity submitted that it did not discriminate the Applicant in any way and that on the contrary, it had accorded it fair preferential treatment. It urged the Board not to interfere with the procurement process since the Applicant had not demonstrated any grounds which imply any public suffering. On his part, the Quantity Surveyor for the University informed the Board that the correction of errors is meant to assist in the post contract management in order to ensure that a Procuring Entity does not pay more than what the contractor quoted.

Finally, the Procuring Entity urged the Board to disallow the application and allow the procurement process to continue, considering the fact that any delay to the project would result in increase in cost for both materials and services. Further, it submitted that it is of great public interest that the procurement process proceeds at the earliest opportunity to provide the university with the much needed office accommodation, parking and lecture halls among other utilities.

On its part, an interested candidate M/s China Wu Yi Co. Ltd opposed the Request for Review. It averred that the Board derives its jurisdiction from Section 93 of the Act and that the an applicant can only come before the Board if it claims to suffer or risk suffering due to a breach of a duty imposed on a Procuring Entity by the Act or the Regulations. It submitted

that, contrary to the allegations advanced by the Applicant in this particular case, the Procuring Entity, in rejecting the Applicants bid was fulfilling the requirements of Sections 31 and 64 of the Act read together with Regulation 48 and Clause 2.4.3 of the Prequalification Documents.

The Interested Party submitted that it would be wrong for the Board to penalize the Procuring Entity for reasons which demonstrate efforts to comply with the law. Further, it stated that the Procuring Entity was entitled to correct an error at any stage. In addition, it stated that once a discovery is made that the Applicant ought not to have been prequalified, everything stops from there such that issues of correction of errors do not arise.

In support of its argument, the Interested Party cited the following authorities from the previous Decisions of the Board:

- i. Application No. 42/2010; on Regulation 48 that a Procuring Entity ought to reject all non responsive tenders and;
- ii. Application No. 20/2009; on Section 31 of the Act on who is qualified to be awarded a tender.

Regarding the issue that the Procuring Entity, having prequalified the Applicant, is estopped from going back to the initial prequalification tender, the Interested Party submitted that there can never be Estoppel over the law.

In conclusion and with regard to the failure to notify the Applicant on the correction of errors, the Interested Party supported the Procuring Entity's submission that what was corrected was merely additions and nothing to do

with rates. It submitted that, in the circumstances, the Procuring Entity was not under obligation to notify the Applicant of such errors. It urged the Board to reject the Request for Review and allow the procurement process to proceed.

After listening carefully to the submissions of the parties and having perused the documents presented before it, the Board proceeds to make the following findings, observations and subsequently its decision.

The issue for the Board to determine is whether the tendering process and the subsequent evaluation of the tender were properly done in accordance with the law. Towards this end, it is important to revisit some background information regarding the subject tender.

The Board notes that the Procuring Entity first procured a Consultant M/s Waweru & Associates Architects through Architectural Design competition to oversee the subsequent construction of The University of Nairobi Towers. It is this Consultant that prepared the Bills of Quantities for the proposed construction.

The Board observes that the Procuring Entity then advertised Tender No. UON/P/T/01/2011-2012 for Prequalification of Contractors for the Proposed Construction of University of Nairobi Towers in the daily newspapers of 17th October, 2011 which closed on 17th November, 2011. The tender attracted 21 bidders who submitted their Bid Documents. The bids received were subjected to technical evaluation where the following six firms were prequalified and invited to submit their financial bids:

01 - Landmark Holdings

07 - N.K. Brothers Ltd

08 - China Wu Yi Co. Limited

09 - Twiga Construction Co. Ltd

10 - EpcO Builders Limited

18 - China Overseas Group Engineering

The Board further notes that the above six firms were issued with Blank Bills of Quantities (BQs) by letters dated 23rd April, 2012 which were submitted back on 14th May, 2012. On opening, the received BQs were subjected to financial evaluation where they were checked for arithmetic errors and corrections made. The Applicant was disqualified at this stage mainly due to the following two reasons:-

1. Having not done a project of at least 8 storey's in the last 5 years as required by Clause 2.4.3 of the prequalification document and
2. Having made an arithmetic error of Ksh.73,415,854 which resulted in its bid being ranked 2nd lowest financially.

The Board further notes that during the opening of the financial bids, the Applicant had quoted the lowest tender sum of Ksh. 3,121,717,509. This position changed after the arithmetic error was corrected resulting in the Applicant's new tender sum of Ksh. 3,195,133,363. This made the Applicant to become the 2nd lowest after the Successful Bidder who had quoted a tender sum of Ksh. 3,150,000,000.

The Board observes that after the financial evaluation was complete, the bid prices returned by the bidders caused the Procuring Entity to request the Consultants to review the structural design without changing the Design of the Building to be in line with the approved budget for the project. A Value Engineering process and the revision of the costs of the project in accordance with the reviewed structural design was done contrary to the provisions of Sections 53 and 59 of the Act

The Board notes that all the financial bids that were being evaluated were scaled down proportionately in line with the Value Engineering outcome as tabulated hereafter:

Table 5: Revised Cost of Project

Position	Name of Tenderer	Tender Amount	Reduced Tender Amount	Percentage Reduction
1	China Wu Yi Co. Ltd	3,150,000,000	2,046,268,470.09	35.04
2	EpcO Builders Ltd	3,591,723,080	2,400,988,32733.15	33.15
3	N.K. Brothers	3,949,909,101	2,531,456,036.51	35.91
4	China Overseas Engineering Group Co. Ltd	4,251,290,640.98	2,816,045,013.65	33.76
5	Twiga Construction Ltd	5,190,000,000	3,140,170,578.35	39.50
6	Landmark Holdings Ltd	Disqualified by the Technical Evaluation Committee		
Note	The difference in percentage of reduced Tender sums is due to the different levels of pricing in the affected elements/ areas.			

The questions which now arise are:-

- i. Was it proper for the Procuring Entity to disqualify the Applicant on prequalification issues long after having confirmed to it that it had passed preliminary and technical stages;
- ii. Was the correction of errors properly done in accordance with the law and particularly Section 63 of the Act?

To address the first issue, the Board notes the provisions of Clause 2.4.3 of the Pre-qualification Documents which provided as follows:-

2.4.3 "General Experience. The applicant shall meet the following minimum criteria:

(a)

(b) Successful experience as prime contractor in execution of at least two projects of a nature and complexity comparable to the proposed contract within the last 5 years. This experience should include:

(i)

(ii) Construction of commercial building exceeding eight (8) stories"

The Board notes that this requirement was evaluated by the Technical Evaluation Committee during the prequalification process in line with the Technical Specifications and the Applicant scored zero (0) out of a maximum of six (6) scores earmarked for this parameter. However, since the Procuring Entity had set a pass mark of 70% and the Applicant scored 90%, while the Successful Bidder scored 94%, both were recommended to proceed to the next stage namely, the financial evaluation.

The Board further notes the provisions of Regulation 49 which provides as follows:-

49(1) *“Upon completion of the preliminary evaluation under Regulation 47, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document.*

(2) *“The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1)”*

From the above provisions, the Board finds that the Applicant could not have been disqualified at the Technical evaluation stage because the parameter on 8 storeys was allocated marks and the Applicant scored Zero (0) on the said parameter. However, since bidders were allocated scores which were compared with the set pass mark, the Applicant met the required pass mark and was recommended to participate in the financial bidding.

Considering all the foregoing, the Board finds that the Applicant was rightfully prequalified to submit a financial bid and proceed to the financial evaluation.

Turning to the issue on the correction of arithmetic errors, the Board notes the provisions of Section 63(1), (2) & (3) of the Act which provides as follows:

63(1) *“The procuring entity may correct an arithmetic error in a tender.*

(2) *“The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.”*

(3) *"If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited."*

The Board further notes that Clause 10 of the Tender Documents had provided on how the Procuring Entity would deal with the correction of errors. The said clause stated as follows:-

"Tenders determined to be substantially responsive will be checked by the employer for any error in computation and summation. Errors will be corrected by the employer as follows:-

- (a)
- (b) *Where there is a discrepancy between the unit rate and the total amount derived from the multiplication of the unit rate and the quantity, the unit rate as quoted will govern, unless in the opinion of the employer there is an obviously gross misplacement of the decimal point in the unit rate, in which event the total amount as quoted will govern and the unit rate will be corrected.*
- (c) *Where there is a glaring and substantial pricing error, the employer with the consent of the tenderer shall adjust such rates and the error dealt with as item 10(iii) so as not to change the amount*

Notwithstanding the adjustments as aforesaid, the amounts stated in the Form of Tender shall be taken to be absolute and therefore shall not be changed.

In the event of a discrepancy between the tender amount as stated in the Form of Tender and the corrected tender figure in the main summary of the Bills of Quantities, the following procedure will be adopted:

- (i) The tender amount as stated in the form of tender shall override the tender amount in the Main Summary after corrections.*
- (ii) The difference between the Tender Amount and the Corrected Tender Sum including adjusted pricing errors shall be expressed as a percentage of the Corrected Tender Sum net of PC Sums , Provisional Sums and Preliminaries as a Correction Factor.*
- (iii) The above Error Correction Factor shall be applied as a reduction or an addition as the case may be to adjust the contractor's rates in the Bills of Quantities for the valuation of variations for Interim Certificates and measurements for Final Accounts."*

In view of the above, the Board finds that the Procuring Entity breached the provisions of Section 63(2) of the Act when it corrected the Applicant's bid but failed to notify it of the same until after the Applicant sought the reasons for its disqualification which was after the award.

In addition, the Procuring Entity failed to comply with the provisions of Clause 10 of the Tender Document on correction of errors. In particular, the Board notes that Clause 10 had provided that notwithstanding the

adjustments as aforesaid, the amount stated in the form of tender shall be taken as absolute and therefore shall not be changed. In this regard, the Board finds that the Procuring Entity breached Clause 10 of the Tender Documents by changing the Applicant's bid price and making it move from the lowest priced to the second lowest priced.

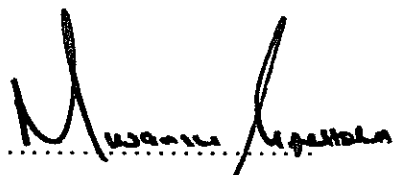
Taking into account all the foregoing, these grounds for review succeed.

Pursuant to Section 98 of the Act the Board orders that:-

- i) The award to the Successful Bidder is hereby nullified; and
- ii) The Procuring Entity may retender

There are no orders as to costs.

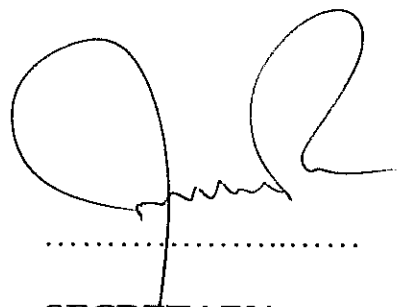
Dated at Nairobi on this 24th Day of July 2012.



A handwritten signature in black ink, appearing to be 'M. M. M. M.', written over a horizontal dotted line.

CHAIRMAN

PPARB



A handwritten signature in black ink, appearing to be 'J. J.', written over a horizontal dotted line.

SECRETARY

PPARB