

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 16/2013 OF 26TH APRIL, 2013

BETWEEN

BENICIA INTERNATIONAL LIMITEDAPPLICANT

AND

LAKE VICTORIA SOUTH

WATER SERVICES BOARDPROCURING ENTITY

Review against the decision of the Tender Committee of Lake Victoria South Water Services Board dated 4th April, 2013 in the matter of Tender No. LVSWB/T/27/2012-13 for Construction of West Karachuonyo Water Supply Project in Homa-Bay County under Italy/GOK Funding.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	- Chairman
Eng. Christine Ogut	- Member
Mr. Sospeter Kioko	- Member
Mrs. Loise Ruhiu	- Member
Amb. Charles Amira	- Member

IN ATTENDANCE

Pauline O. Opiyo	- Ag. Secretary
Judy Maina	- Secretariat

PRESENT BY INVITATION

Applicant- Benicia International Limited

Ms. Leah Njuma - Director

Mr. Alex Gichui - Engineer

Procuring Entity -Lake Victoria South Water Services Board

Ms. Phylis Chepkemboi - Legal Officer

Eng. S. M. Mburu - CMTS

Mr. Samuel Fatayah - Asst. Engineer

Mr. Martin O. Mayi - Procurement Manager

Interested Parties -

Mr. Anthony Mwema - Director, Toddy Merchants Ltd

Mr. Peter Mwangi - Director, Uday Patel & Co. Ltd

Mr. Ronak Thakar - Proc. Manager, Uday Patel & Co. Ltd

BOARD'S DECISION

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

BACKGROUND

Invitation to tender

Tender No. LVSWSB/T/27/2012-2013 for Construction of West Karachuonyo Water Supply Project was advertised in The Standard newspaper of 7th December, 2012.

Closing/Opening:

The initial tender closing / opening date which was given as 17th January, 2013, was changed to 31st January, 2013 through an addendum which was also advertised in The Standard newspaper. The tender closing / opening was duly conducted on 31st January 2013, at noon at the Lake Victoria South Water Services Board Offices in Kisumu. The following eight (8) firms submitted their bids:

Table 1: Particulars of Tenders Opened

S/No	Firm	Postal Address	Documents	Tender Sum - Kshs	Bid Security -Kshs	Source of Bid Security	Tender Security Validity
1	Benicia International Ltd	Box 2537-00521 Nairobi	1 original+ 3 copies	82,469,354.66	1,700,000.00	APA Insurance	30 th June 2013
2	Pasha Enterprises	Box 1136-90100 Machakos	1 original+ 3 copies	91,050,844.50	1,822,000.00	KCB	30 th June 2013
3	Nyamsera Contractors Ltd	Box 8 Kojwang - Kendu-Bay	1 original+ 3 copies	98,121,375.00	1,962,427.50	Kenya Orient	29 th June 2013
4	Toddy Merchants Ltd	Box 30382-00100, Nairobi	1 original+ 3 copies	113,417,216.00	2,300,000.00	Bank of Africa	30 th June 2013
5	Coastal Kenya Enterprises Ltd	Box 46925-00100, Nairobi	1 original+ 3 copies	164,083,634.00	3,300,000.00	AMACO	30 th June 2013

6	Uday Patel & Co. Ltd	Box 18558- 00500, Nairobi	1 original+ 3 copies	84,881,127.10	2,000,000.00	Equity Bank	28 th April 2013
7	Prisconet Systems Ltd	Box 72600, Nairobi	1 original+ 3 copies	99,690,611.90	2,000,000.00	Equity Bank	30 th June 2013
8	Ziyale Investments	Box 75078- 00200, Nairobi	1 original+ 3 copies	104,996,131.0 0	104,996,131.0 0	Equity Bank	30 th June 2013

TENDER EVALUATION

After opening the tenders, an evaluation team was appointed by the Chief Executive Officer comprising the following officers

1. Phelix Okuta - Chairman
2. Fatayah Ouma - Member
3. Kelvin Otieno - Member

Mandatory Requirements

According to Tender Data Sheet (TDS) Clause 13.3 (d) and other information required, the bidders were evaluated on the preliminary requirements which included checking the following;

- Certificate of Incorporation,
- Certificate of Registration with Ministry of Water and Irrigation,
- Value Added Tax Certificate,
- Tax Compliance Certificate,
- Bid Security (2% of tender sum)
- Duly signed tender form
- Power of Attorney

Bidders performed as follows:

Certificate of Incorporation

Bidders No. 6 and 8 did not attach copies of certificate of Incorporation. Other bidders complied with this requirement.

Registration with Ministry of Water & Irrigation (MWI) as a Water Contractor

Bidders No. 3, 6 and 8 did not submit copies of certificate of registration with Ministry of Water while the rest of the bidders complied with this requirement.

VAT and Tax Compliance Certificates

All Bidders complied with this requirement except Bidders No. 6 and 8 who did not attach copies of VAT and Tax Compliant certificates

Bid Security and Validity of Bid Security

All bidders except Bidder No. 6 complied with this requirement. Bidder No. 6 submitted a bid security which was valid until 28th April 2013 while the tender security validity is 29th May 2013

Form of Tender

Bidder No. 3 did not sign form of tender

Power of Attorney

This requirement was met by all the bidders

Conclusion on Mandatory Requirements

The following Firms failed to meet some of the Mandatory requirements hence failed to proceed to technical evaluation stage'

Bidders who failed mandatory requirements

S/No.	Name of Bidder	Documents NOT submitted
3	Nyamsera Contractors Ltd	<ol style="list-style-type: none"> 1. Registration with Ministry of Water & Irrigation (MWI) as a Water contractor. 2. Duly Signed Tender form
6	Uday Patel & Co. Ltd	<ol style="list-style-type: none"> 1. Certificate of incorporation 2. Valid Bid security 3. Registration with Ministry of Water & Irrigation (MWI) as a Water contractor. 4. VAT Registration and Tax Compliance Certificate
8	Ziyale Investments	<ol style="list-style-type: none"> 1. Certificate of incorporation 2. Registration with Ministry of Water & Irrigation (MWI) as a Water contractor. 3. VAT Registration and Tax Compliance Certificate

Bidders who Passed Mandatory requirement

Bidder No.	Bidders Name
1	Benicia International Ltd
2	Pasha Enterprises
4	Toddy Merchants Ltd
5	Coastal Kenya Enterprises Ltd
7	Prisconet Systems Ltd

Detailed Bid Examination

Core criteria for evaluation

The evaluation criteria as set out in the document were as follows:

1. Proposed Key Personnel – Project Manager with at least 10 years
2. Specific Experience of the firm for the last 2 years
3. Financial capability and Value/Volume of works undertaken in the last 2 years
4. Capability of Contractor in terms of critical equipments – 1 no excavator, 2 no concrete mixers (350Lts), compressor, tipper and a pick up.

The bidders performed as follows in the evaluation of the above described criteria:

Proposed Key Personnel

As required in the bid document, all the bidders proposed and submitted CV of experienced Project manager for the project of construction of west Karachuonyo water supply

Specific Experience of the firm for the last 2 years

All the bidders except bidder No. 5 submitted a list and supporting documents for having done similar works in the last 2 years.

Financial capability and Value/Volume of works undertaken in the last 2 years

All the bidders except bidder No. 5 demonstrated to have done work whose value is over 80M in the last 2 years. Bidder No. 7 did not submit evidence of having financial capability to undertake the project as most of his audited

book of accounts 2009-2010 indicate financial losses; the bidder also did not show any line of credit from any financial institution.

Capability of Contractor in terms of critical equipments - 1 no excavator, 2 no concrete mixers (350Lts), compressor, tipper and a pick up

Only bidder No. 1 showed evidence of having an excavator which is a key equipment to be used in the project.

No bidder indicated being in possession of either a concrete mixer or a compressor as required in the bid document.

Except bidder No. 5, all other bidders showed evidence of owning tipper and pick up required in execution of the project.

Conclusion on Detailed examination

The following firms failed to meet some of the requirements hence failed to proceed to financial evaluation stage

S/No.	Name of Bidder	Requirement not satisfied
5	Coastal Kenya Enterprises	<ul style="list-style-type: none"> No evidence of being in possession of any of the critical equipments needed. Only a list of the same submitted. Not showed experience in similar works No demonstration of having done work worth 80M in the last 2 years
7	Prisconet Systems Ltd	<ul style="list-style-type: none"> Showed evidence of owning few of the critical equipments needed in tipper and pick up Showed no evidence of financial capability

The following firms passed the detailed examination although did not show evidence of being in possession of all the critical equipments needed for the project. The evaluation committee however considered that they responded substantially to this particular requirement

Bidders who passed detailed examination

Bidder No.	Bidders Name
1	Benicia International Ltd
2	Pasha Enterprises
4	Toddy Merchants Ltd

Financial Evaluation / Comparison of Bid prices

S/No	Bidders Name	Ranking	Tender Sum (Kshs)
1	Benicia International Ltd	1	82,469,354.66
2	Pasha Enterprises	2	91,050,844.50
4	Toddy Merchants Ltd	3	113,417,219.00

CONCLUSION AND RECOMMENDATION

Conclusion

From the above comparison of the three bidders' technical performance and financial bid, **Benicia International Ltd** has submitted the lowest evaluated responsive bid.

Recommendation of the Evaluation Committee

The evaluation committee therefore recommends that the Tender for Construction of West Karachuonyo Water Supply in Homabay County within LVSWB Region be awarded to **Benicia International Ltd** at the quoted Tender sum of Kenya Shillings **Eighty Two Million, Four Hundred Sixty Nine Thousand, Three Hundred and Fifty-Four, Cents Sixty Six Only (Kshs 82,469,354.66)**.

Notification of Award

By a letter dated 8th February, 2013, the Procuring Entity notified M/s Benicia International Ltd, the Applicant herein, that it had been awarded the Contract for Construction of West Karachuonyo Water Supply Project in Homa-Bay County at a tender sum of Kshs 82, 469, 354.66 (eighty-two million, four hundred sixty-nine thousand, three hundred and fifty-four, and cents sixty-six only).

By a letter dated 1st March 2013, The Ministry of Water and Irrigation informed the Procuring Entity that the awarded contractor, M/s Benicia International Ltd is not a registered contractor with the Ministry of Water and Irrigation and is therefore not eligible for construction of KIDDP supported Water and Sanitation Projects. The Procuring Entity was requested to revisit the evaluation process and award to an eligible contractor.

In letters dated 18th March 2013 and 3rd April 2013 and 10th April, 2013 respectively, the Director of Water Services confirmed to the Procuring Entity that M/s Benicia International Ltd had launched an application for water contractor licence on 10th May, 2012 and that its application had been evaluated and was waiting to be tabled in the Technical Advisory Committee for consideration.

Taking into account the above developments, the Procuring Entity by its letter dated 4th April 2013 informed M/s Benicia International Ltd of the cancellation of the award of Tender No LVSWSB/T/27/2012-2013 for Construction of West Karachuonyo Water Supply Project that had been made to it. Meanwhile the Evaluation Committee was requested to repeat the evaluation process. The outcome of the re-evaluation which was concluded on 8th April, 2013 was as follows:

Mandatory Requirements

According to Tender Data Sheet (TDS) Clause 13.3 (d) and the provisions on the Tender Advertisement, the bidders were evaluated on the preliminary requirements which included checking the following;

- Certificate of Incorporation
- Certificate of Registration with Ministry of Water and Irrigation class C and above whose scope shall include but not limited to construction of intake works, raw water mains, steel/upvc pipeline water treatment works of 4000m³/day, pumps supply, installation, testing and commissioning
- Bid Security (2% of tender sum)
- Duly Signed Tender Form
- Power of Attorney

Note

On the basis of the letter from the Ministry of Water and Irrigation Ref. No. WD/WR/29/ (45) outlining registration status of contractors who submitted bids, the following firms were dropped

- Benicia international Ltd (Applied for registration approval pending)
- Prisconet Investments (registration status unknown)
- Pasha Enterprises (registration status unknown)
- Coastal Kenya Ltd (Registered under category C" dam but not water supply works)

The rest of the Bidders performed as follows:

Certificate of Incorporation

All bidders except bidder No. 8 submitted certificate of incorporation. Bidder No. 8 only attached business registration certificate.

Registration with Ministry of Water & Irrigation (MWI) as a Water Contractor under category C'

Bidders Nos. 4 and 6 submitted copy of license for registration with Ministry of water and irrigation. Bidder No. 3 had license as a contractor for class D while that of bidder No 8 is class F.

Bid Security and Validity of Bid Security

All bidders except Bidder No. 6 complied with this requirement. Bidder No. 6 submitted bid security which was valid until 28th April 2013 while the tender security validity is 29th May 2013

Form of Tender

Copies of Bidder No. 3 had form of tender not signed while original had form signed

Power of Attorney

This requirement was met by all the bidders

Conclusion on Mandatory Requirements

The following Firms failed to meet some of the Mandatory requirements hence failed to proceed to technical evaluation stage.

- Ziyale Investments (bidder No 8)
- Uday Patel and Co. Ltd (bidder No. 6)
- Nyamsera Contractor Ltd (Bidder No. 3)

Bidder(s) who passed all mandatory requirements

Bidder No.	Bidders Name
4	Toddy Merchants Ltd

Technical Evaluation

Core criteria for technical evaluation

The evaluation criteria as set out in the document were as follows:

1. Proposed Key Personnel - Site Manager with at least 10 years
2. Specific Experience of the firm for the last 2 years having done work of similar nature i.e. construction of 4000m³/day water treatment plant, installation testing and Commissioning of pumps
3. Capability of Contractor in terms of critical equipments - 1 no excavator, 2 no concrete mixers (350Lts), compressor, tipper and a pick up

The bidder performed as follows in the evaluation of the above described criteria:

Proposed key personnel

Bidder No. 4 (Toddy Merchants) proposed a site manager with 18 years experience in construction of similar works

Specific Experience of the firm for the last 2 years

Bidder No. 4 listed three previous similar works awarded but no proof of completion of the same. The bidder also listed 2 ongoing projects with similar nature

Capability of Contractor in terms of critical equipments - 1 No. Excavator, 2 no concrete mixers (350Lts), compressor, tipper and a pick up

Bidder No. 4 showed proof of ownership of pick up, tipper and crawler tractor (excavator). The Bidder however mentioned without proof ownership of concrete mixer and compressor

Conclusion on Detailed examination

Since only one firm qualified from technical evaluation the firm was subjected to financial evaluation

Financial Evaluation

Under financial evaluation, the following factors were considered

Evidence of adequate working capital

Based on the company's audited financial statement for the years ending 2010 and 2011 it's evident that bidder No. 4 has adequate working capital.

Turnover

From the similar works carried and the company's annual turnover for the past two years, the bidder achieves the threshold of 80 million shilling value of works done in the last 2 years.

CONCLUSION AND RECOMMENDATION

Conclusion

From the above evaluation only one firm M/S Toddy merchants meets requirements.

Recommendation of Evaluation Committee

The evaluation committee therefore recommends that the Tender for Construction of West Karachuonyo Water Supply in Homa-Bay County within LVSWSB Region be awarded to **Toddy Merchants Ltd** at the quoted Tender sum of Kenya Shillings **One Hundred and Thirteen Million, Four Hundred Seventeen Thousand Two Hundred and Sixteen Only (113,417,216.00)**

TENDER COMMITTEE'S DECISION

The Tender Committee at its Meeting held on 19th April 2013 under Minute No. 7 reviewed Tender No. LVSWSB/T/27/2012-2013 for Construction of West Karachuonyo Water Supply Project and noted the following:

- That the above tender was awarded to M/s Benicia International Ltd of P.O. Box 63700, Nairobi at a tender sum of Kshs 82, 469,354.66 on 7th February, 2013.
- That upon sharing the Evaluation Report with the Ministry of Water and Irrigation, as was required by their letter Ref. MWI/KIDDP/LVSWSB/ VOL. 1/(17) dated 28th November 2012, the

ministry confirmed that the awarded firm was no a registered contractor with them and was therefore not eligible for the construction of KIDDP supported water project.

- That by a letter dated 1st March 2013, the Ministry requested the Procuring Entity to revisit the evaluation process and award to an eligible contractor.
- That the communication from the Ministry was relayed to the Evaluation Committee to undertake a repeat evaluation taking into consideration the new information.
- That the repeat evaluation was conducted between 5th and 8th April 2013 and all the relevant correspondence were attached for reference.

The tender committee was briefed on the repeat evaluation report in which the evaluation committee found that only one firm M/s Toddy Merchants met the criteria for Technical evaluation and was therefore recommended for award at its tender sum of Kshs 113, 417, 216.

The Tender Committee further noted as follows:

1. That the recommended bidder M/s Toddy Merchants Limited of P.O. Box 30382-00100, Nairobi was the second highest bidder.
2. That the funds available for this project under the Kenya - Italy project are Kshs 80,000,000.
3. That the Procuring Entity had not set aside the shortfall of Kshs 33, 417, 216 in its current budget estimates.
4. That the tender be considered non responsive owing to the tender sum quoted by the only eligible tenderer.

Having noted the above, the Tender Committee deferred the above tender and advised that the tender be re-advertised and the tendering process repeated.

THE REVIEW

The Request for Review was lodged by M/s Benicia International Limited on 26th April, 2013 in the matter of Tender No: No. LVSWSB/T/27/2012-13 for Construction of West Karachuonyo Water Supply Project in Homabay County under Italy/GOK Funding.

The Applicant was represented by Mr Alex Gichui, the Engineers representative while the Procuring Entity was represented by Ms. Phylis Chepkemboi, Legal Officer. The interested candidates present were M/s Toddy Merchants Ltd represented by Mr. Anthony Mwaura, Director and M/s Uday Patel & Company Ltd represented by Mr. Peter Mwangi, Director.

The Applicant requests the Board for the following order:

- 1. To stop the tender awarding process to any contractor as stipulated under Section 68 of the Public Procurement and Disposal Act, 2005 which states that no contract may be signed between the Procuring Entity and the tenderer awarded the contract unless the appeal has been finalized.*

The Applicant raised the following ground of Appeal:-

Ground 1 - Allegations of wrongful cancellation of award of Tender No. LVSWSB/T/27/2012-2013 after notification of award.

The applicant submitted as follows;-

- 1) THAT it participated in the tender and after the process of evaluation, it emerged as the lowest evaluated bidder. Consequently, it was

awarded the tender and was notified through a letter dated 8th February 2013.

- 2) THAT upon receipt of the letter it provided the Procuring Entity with a performance bond of **Kenya Shillings Eight Million Two Hundred Thousand (Kshs.8,200,000.00)** being 10% of the contract sum. Further, it obtained an insurance policy of **Kenya Shillings One Million Five Hundred Thousand Kshs.1,500,000.00**).
- 3) THAT on 4th April 2013, it received a letter from the Procuring Entity which stated that the award of the tender had been cancelled. The reason for cancellation was that the Ministry of Water and Irrigation had written to the Procuring Entity stating that the Application was not a licensed water contractor.
- 4) THAT the Applicant stated that it is a licensed water contractor. It stated that it applied for the licence in the year 2011 and it was issued with a licence on 12th June 2012.
- 5) It stated that since the year 2012, it has undertaken a number of projects using the certificate which is dated 12th June 2012 that was issued by the Ministry of Water and Irrigation.
- 6) It stated that it is aware that after the cancellation of the award, a re-evaluation was done and the tender was awarded to another bidder, Toddy Merchants Ltd. It stated that at tender opening, Toddy Merchants Ltd had quoted a price of **Kenya Shillings One Hundred and Thirteen Million Four Hundred and Seventeen Two Hundred and Sixteen (Kshs.113,417,216)**. However, the said firm had been awarded a tender at a price of **Kenya Shillings Eighty Million (Kshs.80,000,000.00)** which is a counter offer. It stated that such a counter offer amounts to a breach of the Public Procurement and

Disposal Act 2005, since a Procuring Entity is not allowed to change a tender price offered by a bidder.

- 7) In conclusion, the Applicant stated that it will incur huge losses if the Procuring Entity is allowed to cancel the tender. It urged the Board to reverse the decision of the Procuring Entity and to direct that the tender be awarded to it.

On its part, the Procuring Entity submitted as follows;-

- 1) It stated that it received funds amounting to **Kenya Shillings Eighty Million (Kshs.80,000,000.00)** from the Ministry of Water and Irrigation. It further stated that the said money was a grant from the Government of Italy and that the funds were channeled through the Ministry. Consequently, it was required to provide the Ministry the results of the evaluation process.
- 2) It stated that after the evaluation, the Application emerged as the lowest evaluated and was awarded the tender at its quoted tender sum of **Kenya Shillings Eighty Two Million Four Hundred and Sixty Nine Three Hundred and Fifty Four and Sixty Six Cents (Kshs.84,469,354.66)**. It stated that it notified the Applicant of the award and also notified the Ministry of Water and Irrigation about the award.
- 3) It stated that on 18th March 2013, it received a letter dated 18th March 2013 which stated that the Applicant was not a registered water contractor. The letter stated that the Applicant lodged an Application for a license on 10th May 2011 but the said Application had undergone technical evaluation but it was yet to be tabled before the Ministerial Technical Advisory Committee.

4) The Procuring Entity stated that upon receipt of the letter dated 18th March 2013 from the Ministry it conducted a fresh evaluation. In the second evaluation, Toddy Merchants Ltd emerged the winner. It stated that the said bidder had quoted a tender sum of **Kenya Shillings One Hundred and Thirteen Million Four Hundred and Seventeen Two Hundred and Sixteen (Kshs.113,417,216)**.

It stated that it notified the Ministry that it had carried out a fresh evaluation and that it had recommended the award of the tender to Toddy Merchants Ltd.

5) The Ministry wrote back and advised that since the grant was for a sum of **Kenya Shillings Eighty Million (Kshs.80,000,000.00)**, negotiations should be held with Toddy Merchants Ltd to negotiate the tender sum downwards to a sum of **Kenya Shillings Eighty Million (Kshs.80,000,000.00)**.

6) The Procuring Entity stated that upon receipt of the said instructions from the Ministry, the Tender Committee deliberated on the matter and made a decision that the tender be canceled and be re-advertised afresh.

7) It stated that the decision to cancel the tender award to the Applicant was done after the Ministry indicated that the Applicant was not a licensed water contractor. It stated that the decision to cancel the tender and start the process afresh was done in Public Interest.

An interested candidate, todody Merchants Ltd, stated that it was not aware that it had been recommended for award that it had not even received a letter of notification after the first evaluation. It stated that it only became aware of the outcome of tender upon receiving notification from the Board on this request for Review.

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

The Board notes as follows:-

1. The tender was opened on 31st January 2013 and the process of evaluation was completed on 6th February, 2013. The Tender Committee awarded the tender to the Applicant as per the recommendation of the Evaluation Committee.
2. The source of funds for this tender is a grant from the Government of Italy and the funds are being channeled through the Ministry of Water and Irrigation.
3. The Ministry which is releasing the funds stated by a letter dated 1st March, 2013, that the Applicant is not a licensed water contractor. The said letter stated as follows;-

"Ref No. MWI/KIDDP/LVSWB Vol. 1/(19)

Date: 1st March 2013

The Chief Executive Officer

Lake Victoria South Water Services Board

P.O Box 3325

KISUMU

RE: CONSTRUCTION OF WEST KARACHUONYO WATER SUPPLY PROJECT

Reference is made to letter Ref No. LVSWB/FIN/PROC/VOL.IX/(350) of 12th February 2013 on the award of tender for the construction of West Karachuonyo Water Project.

Be informed that the awarded contractor M/s Benicia International Company Limited P.O Box 2537-00625 Nairobi is not a registered contractor with the Ministry of Water and Irrigation. Subsequently, the firm is not eligible for the construction of KIDDP supported Water and Sanitation Projects. The firm should not be awarded this contract as the Ministry has not concurred with the award decision by the board.

It is requested that the Board revisits the evaluation process and awards to an eligible contractor.

Please deal accordingly

F.K KYENGO

For: PERMANENT SECRETARY"

4. By a further letter dated 18th March 2013 the Ministry reiterated that same position and stated as follows;-

"Ref No. WD/WC/1253(37)

Date: 18th March, 2013

The Ag. Chief Executive Officer,

Lake Victoria South Water Services Board,

P.O Box 3325 – 40100,

KISUMU

**RE: VERIFICATION OF REGISTRATION DOCUMENTS
FOR BENICIA INTERNATIONAL LIMITED**

Your letter Ref No.LVSWSB/FIN/.PROC 3/8/VOL.IX/(395) dated 13th March,2013 refers.

According to our records, we wish to confirm that;-

- 1. Benicia International Limited of P.O Box 63700-00619, NAIROBI launched their application for water contractor licence with us on 10th May, 2011.*
- 2. The application has been evaluated by the relevant technical departments.*
- 3. The application is waiting to be tabled in our next Ministerial Technical Advisory Committee Meeting.*

Following on the above therefore, we wish to further confirm that no Licence or certificate has been issued as indicated in your letter.

Patrick Oloo

For; DIRECTOOR WATER RESOURCES"

5. By a letter dated 2nd April 2013, the Procuring Entity wrote to the Ministry of Water and Irrigation forwarding the registration documents of the Bidders who had participated in the tender for verification. By a letter dated 3rd April 2012 (*sic*) the Ministry acknowledged the letter dated 2nd April 2013 and gave a report on all eight Bidders who had participated in the tender and yet again it stated that the Applicant is not a licensed water contractor.
6. The Board notes that the Applicant in its tender document provided a licence dated 25th June 2012 issued by Ministry of Water and Irrigation.

7. It is indeed intriguing that the Applicant has provided a licence allegedly issued by the Ministry of Water and Irrigation and yet on three occasions, the Ministry has disowned the licensing of the contractor.

It is also noted that on 4th April, 2013 the Procuring Entity informed the Applicant in writing that the award of the tender to it had been cancelled as it was not licensed as a water contractor.

Upon questioning by the Board on what action it took upon receipt of the said letter, the Applicant stated that it wrote to the Ministry on the issue. However, it did not have possession of the letter it claimed to have written to the Ministry of Water and Irrigation at the time of the hearing.

8. It is clear to the Board that the Applicant was issued with a letter of award for this tender. Under normal circumstances, the letter of award is binding on the Procuring Entity and the Board would not hesitate to enforce the award. However, the source of funds for this project is a grant from the Government of Italy which are being channeled through the Ministry of Water and Irrigation. The Ministry has stated categorically that the tender cannot be awarded to the Applicant as it is not a licensed contractor.

It is therefore clear, that the Procuring Entity is ready to work with the Applicant but the Ministry has withheld the funds.

The Board further notes that the Procuring Entity acted correctly when it rejected the directive by the Ministry to negotiate with the Bidder who had been recommended after the re-evaluation to reduce the tender sum from **Kenya Shillings One Hundred and Thirteen**

Million Four Hundred and Seventeen Two Hundred and Sixteen (Kshs.113,417,216) to Kenya Shillings Eighty Million (Kshs.80,000,000.00).

This would have amounted to making a counter offer to a tenderer which would be contrary to Regulation 11(2)(a) which states as follows:-

“The Tender Committee shall not:- modify any submission, with respect to the recommendations for a contract award or in any other respect.”

9. In view of the fact that the applicant had been issued with a letter of award the Board has power to direct that this tender be awarded to the Applicant. However, the Board takes note of the following:-

Section 31 of the Act states as follows:-

“(1) A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria: –

- (a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;*
- (b) the person has the legal capacity to enter into a contract for the procurement;*

.....

(e).....

(2) The procuring entity may require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

.....

(5) The procuring entity may disqualify a person for submitting false, inaccurate or incomplete information about his qualifications.

.....”

It is a clear indication that for a Bidder to be awarded a tender it must be qualified. It is not clear, whether the Applicant is a licensed contractor or not. The letter dated 18th March 2013 from the Ministry states that the Applicant applied for a licence on 10th May 2011.

The Applicant stated that it applied for a licence in the year 2011. It did not provide a copy of the Application. This is critical as the certificate of incorporation of the Applicant was issued on 24th November 2011 as per the documents filed together with the Request for Review.

The Board has perused the tender documents of the Applicant and noted that it provided the Audited Accounts for the year 2009, 2010, 2011 and 2012.

The Board notes that this is a bit intriguing as the copy of the certificate of incorporation which is annexed to the Request for Review was issued on 24th November 2011. The Board further notes that a copy of the certificate of incorporation which was included in the Tender Documents was issued on 24th November 2008. The two certificates bear the same number CPR/2011/61013. Therefore, the question arises as to the authenticity of the certificate of incorporation and the statements of accounts provided by the Applicant.

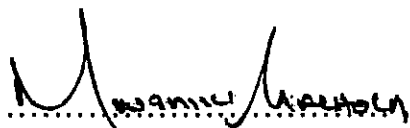
In view of this fact, the Board which is faced with two conflicting positions on the registration and the licensing status of the Applicant is unable to give the benefit of doubt to the Applicant. The Board holds that taking into account the peculiar circumstances of this tender, it is in the public interest that the tender be done afresh and that the Procuring Entity should thoroughly confirm the registration and licensing of all the bidders before an award is made.

In view of the foregoing, the Board holds that the decision of the Procuring Entity to commence this tender afresh is the option that promotes the objectives of the Act as defined in Section 2. The Applicant will be at liberty to participate and will also be able to clear the issue of its licensing with the Ministry.

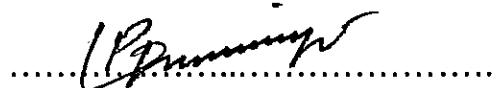
In view of the foregoing, the Board holds that the decision of the Procuring Entity to commence the tender afresh is upheld and the Request for Review fails.

Consequently the Request for Review is dismissed with no orders as to costs.

Dated at Nairobi on this 20th day of May, 2013



CHAIRMAN
PPARB



Ag. SECRETARY
PPARB

