

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATIONS NO. 21/2013 OF 18<sup>TH</sup> JUNE, 2013**

**BETWEEN**

**GLOBALTEC DESARROLLOS E INGENIERIA S.A**

.....**APPLICANT**

**AND**

**MINISTRY OF FISHERIES.....PROCURING ENTITY**

Review against the decision of the Tender Committee of the Ministry of Fisheries dated 13<sup>th</sup> May, 2013 in the matter of Tender No. MOFD/01/2012-2013 for Construction Fish Quality Control Laboratories in Kenya.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. Judith Guserwa	-	Member
Eng Christine Ogut	-	Member
Amb. C. M. Amira	-	Member
Mr. Sospeter Kioko	-	Member

### IN ATTENDANCE

Mr. Philemon chemoiywo - Holding brief for the Secretary  
Ms. Judy Maina - Secretariat

### PRESENT BY INVITATION

#### **Applicant, GLOBAL TEC DESARROLLOS SA**

Mr. Gitonga Muriuki - Advocate  
Ms. Jacobo Marino - Project manager

#### **Procuring Entity, Ministry Of Fisheries**

Mr. Koome Eliud - Chief Supply Chain Officer  
Ms Margaret Riungu - PSC  
Mr. David Munyingi -SSE

#### **Interested Candidates**

Mr. Job Momanyi -Advocate, Makiber S.A  
Mr. Alex Masika - Advocate, Makiber S.A  
Mr. Pedro Suldana -Project Manager, Makiber  
Ms. Diana Villarraga -Project Manager Fomento

## BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates

and upon considering the information in all documents before it, the Board decides as follows: -

## BACKGROUND

The Spanish Ministry of Industry, Tourism and Commerce, nowadays Ministry of Economy and Competitiveness, made financial facilities available to the Ministry of Finance of the Republic of Kenya, by means of a concessional loan charged against the Fund for the Internationalization of the Spanish Companies (FIEM) in order to finance the contracting of "Fish Quality Control Laboratories in Kenya" .

The Ministry of Fisheries Development of the Republic of Kenya

( Contracting Authority), invited only eligible Spanish Companies, or its Joint Ventures or Consortia to submit their sealed Bids in order to execute the Project under a "turnkey" modality including:

- Works:
  - a. Construction works of a national fish quality and safety control laboratory in Nairobi with an approximate 400 m<sup>2</sup> area.

- b. Construction works of a fish quality and safety control laboratory in Mombasa with an approximate 300 m<sup>2</sup> area.
  - c. Refurbishment works of a quality control and fishing products safety laboratories in Kisumu (with an approximate 300 m<sup>2</sup> area).
- Goods including: Supply of Laboratory Equipment, Spare Parts, Consumables and Special Tools.
  - Services including: Design and all supplementary services related to the Goods to be supplied, including delivery and transport to Project Site, inspection prior to delivery, installation, commissioning, start up, preventive maintenance, technical guarantee for 24 (twenty four) months, after-sales service and training.

The maximum budget available for this Contract is EUR 5,750,000.00 (five million seven hundred and fifty thousand Euros).

### **Advertisement**

Invitations for Bids were advertised in the Daily Nation newspaper, websites of the Ministry of Fisheries Development and Spanish State Secretariat for Trade of the Ministry Economy and Competitiveness of Spain on 26<sup>th</sup> September, 2012.

## Tender Closing/ Opening

The bids closed/opened on 17<sup>th</sup> January, 2013 at 10.00 a.m. East Africa time at Maji House, Nairobi, Kenya by a committee of three members.

The bid prices as read out during the opening are presented in Table 1 below.

TABLE 1: BID PRICES (AS READ OUT)

Bidders Identification			Read-out Bid Prices	
Code	Name	Country	Currency	Amount
1	Globaltec	Spain	Euros(€)	5,453,714.59
2	Makiber S.A	Spain	Euros(€)	5,740,824
3	Fomento/Urban Food	Spain	Euros(€)	5,749,500

## EVALUATION

A committee consisting of eight officers Chaired by Mr. Daniel Mungai carried out the evaluation from 11-15<sup>th</sup> February, 2013.

## EVALUATION CRITERIA

Prior to the detailed evaluation, a preliminary examination was conducted as presented in table 2 on the bids to establish the responsiveness and firms that passed this stage were recommended for detailed evaluation.

In the technical evaluation, bids were evaluated pursuant to the criteria set out in the bidding document.

**TABLE 2 : PRELIMINARY EXAMINATION**

<b>RESPONSIVENESS OF BIDS</b>				
	<b>ITEM</b>	<b>BIDDER 1 (Globatec)</b>	<b>BIDDER 2 (Makiber)</b>	<b>BIDDER 3 (Fomento/Urban)</b>
1	Bid Form Duly signed by the person with legal powers to oblige the Bidder	Yes	Yes	Yes
2	Validity of the bid (120 days)	Yes	Yes	Yes
3	Provided the required Bid Bond and valid for 150 days (100,000 Euros)	Yes	Yes	Yes
4	Contains the Price Proposal (≤5,750,000 Euros)	Yes	Yes	Yes
5	Meets eligibility criteria as well as minimum technical and financial solvency conditions			Fomento Urban

a) Bidder information(Form 2) Completed	Yes	Yes	Yes	Yes	Yes
b) Authenticated copy (notarized) of the deed of incorporation or of amendment duly recorded	Yes	Yes	Yes	Yes	Yes
c) Tax and Social Security Compliance certificates(6months from Publication of bids)	Yes	Yes	Yes	Yes	Yes
d) A solemn declaration signed by an authorized representative of the Bidder stating that no enforced settlement, bankruptcy or liquidation proceedings have been initiated against the Bidder by virtue of a court decision or some other enforceable decision including also that the Bidder is not under supervision of the court, having the business activities suspended, and/or executive directors acting for and on behalf of companies are not serving criminal sanction	Yes	Yes	Yes	Yes	Yes
e) A solemn declaration evidencing that the Bidder is not under a declaration of ineligibility to contract in accordance with Article 49 of the Spanish Law 30/2007 on Public Procurement and that they had not been punished with the prohibition of being awarded a project or contract financed by the FIEM and the Development Aid Fund (FAD)	Yes	Yes	Yes	Yes	Yes
f) Evidence of, technical, economic and financial eligibility					
(i) Economic and Financial Capacity according to the Form 3					



<p>- Current Ratio <math>\geq</math> 1 (compliance with this ratio for the last 3 (three) available audited financial years)</p> <p>- Solvency Ratio <math>\geq</math> 10% (compliance with this ratio for the last 3 (three) available audited financial years)</p> <p>- Minimum Annual Turnover (average annual turnover of at least EUR 5,000,000.00 (five million euro) for the last 3 (three) available audited financial years)</p>	Yes	Yes	Yes	Yes
(ii) Bank references from at least two (2) first class financial entities with whom the Bidder operates. These references must state the number of years of the Bidder's relationship with the Bank	No <sup>2</sup>	Yes	Yes	Yes
(iii) The ISO 9001 Certificate in force(valid)	Yes	Yes	N/A	
g) Bids submitted by a Joint Venture or Consortium shall comply with the following requirements:				
(i) Any members comprising at least 50% (fifty percent) of the Joint Venture or Consortium or bearing the role of leader must provide evidence of holding the ISO 9001 Certificate in force	N/A	N/A	Yes	
(ii) One of the members shall be appointed as main partner responsible for the Contract and the appointment confirmed by submission of	N/A	N/A	Yes	

	powers of representation (i.e. original or authenticated copy) duly signed by legally authorised signatories representing each of the members.				
6	Substantially prepared according to the Bidding Documents				
	(a) Each Bid shall include the Administrative Documents, Technical Proposal and Price Proposal placed in the three (3) envelopes identified under Clause 13 (Documents Comprising the Bid) of these Instruction to Bidders (Envelopes A, B and C)	Yes	Yes	Yes	Yes
	(i) Administrative Documents	Yes	Yes	Yes	Yes
	- Filled forms 1,2,3	Yes	Yes	Yes	Yes
	- Bank references from at least two (2) first class financial entities with whom the Bidder operates pursuant to Clause 14.2.2 of these Instructions to Bidders	No <sup>2</sup>	Yes	Yes	Yes
	- The ISO 9001 Certificate pursuant to Clause 14.2.3 of these Instructions to Bidders	Yes	Yes	Yes	Yes
	- Bid Bond, pursuant to Clause 17 of these Instructions to Bidders and as required in Form 9 "Bid Bond" (SECTION 4 of these Bidding Documents)	Yes	Yes	Yes	Yes

- Official Site Visit and Clarification Meeting attendance certificate duly signed and stamped by the Contracting Authority.	Yes	Yes	Yes
(ii) Technical Proposal			
- Form 4 "Bidder Experience	Yes	Yes	Yes
- Form 5 "Performance Schedule"	Yes	Yes	Yes
- Form 6 "Bidder Personnel"	Yes	Yes	Yes
- Form 7 "Manufacturer/Official Distributor Authorisation"	Yes	Yes	Yes
Documents as evidence that Goods, Services and Works of the Project, are in compliance with Clause 15 of these Instructions to Bidders.	Yes	Yes	Yes
• Conceptual Design of the Project;	Yes	Yes	Yes
• Technical Specification of the Laboratory Equipment;	Yes	Yes	Yes
• Performance Schedule;	Yes	Yes	Yes
• Warranty, Preventive Maintenance and After-sales Service Programme;	Yes	Yes	Yes
• Training Programme	Yes	Yes	Yes
(iii) Price Proposal - Form 8 "Price Lists"	Yes	Yes	Yes

(b) The original and all copies of the Bid must be typed up and signed by the person having sufficient powers at law to oblige the Bidder. All pages must be sequentially numbered by hand, typed or in any other manner acceptable to the Contracting Authority	Yes	Yes	Yes
(c) Any text between lines, amendments, crossings out or overwritten words will only be valid if signed or initiated by the person signing the Bid.	Yes	Yes	Yes
<b>Remarks</b>	<b>Not Responsive</b>	<b>Responsive</b>	<b>Responsive</b>

**KEY**

**YES: COMPLIANT**

**NO: NOT COMPLIANT**

**NON RESPONSIVE BIDDER (GLOBALTEC)**

M/s Globaltec was considered non responsive due to the following issues:-

- No<sup>1</sup>: The solvency ratio for two years namely; year 2011 & 2009 for Bidder No. 1 i.e. M/s Globaltec was less than 10%

- No<sup>2</sup> : One of the bank references (from BBVA) failed to state the number of years they had a relationship with the bidder which was mandatory

M/s Globaltec was, therefore, disqualified at preliminary Stage. The remaining two firms namely M/s Makiber and Fomento/Urban Biofood proceeded for further evaluation.

#### DETAILED EVALUATION

The bids for the two (2No.) bidders M/s Makiber and Fomento/Urban Biofood who were declared responsive were subjected to detailed evaluation as shown in Table 3 below. The detailed Evaluation was based on the following key parameters specified in the Bidding Document:-

- |  |              |
|--|--------------|
| 1. General Experience of the firms   | - 40 Points  |
| 2. Specific Experience of the firms  | - 60 Points  |
| 3. Design  | - 150 Points |
| 4. Performance schedule  | - 25 Points  |
| 5. Technical warranty, Preventive Maintenance and After sale service programme | - 25 Points  |
| 6. <u>Training Programme</u>   | - 75 Points  |

Total Technical Score

600 Points

**TABLE 3: DETAILED TECHNICAL EVALUATION**

EVALUATED CONCEPTS	MAXIMUM POINTS	BIDDER 2 Makiber	BIDDER 3 Fomento/Urban
<b>TECHNICAL PROPOSAL EVALUATION</b>	600	523.5	570.875
<b>Bidder's Experience</b>	100	100	100
<u>General Experience</u>	40		
4 or more completed projects that exceed a value of 2,500,000 €	40	40	40
From 1 to 3 completed projects that exceed a value of 2,500,000 €	20		
None	0		
<u>Specific Experience</u>	60		
Experience in African countries( 5 references for only projects above 250,000 € with each scoring 6 points)	30	30	30

Experience in similar nature or related Projects(5 references for only projects above 250,000 € with each scoring 6 points)	30	30	30
<b>Technical Requirements</b>	<b>500</b>		<b>470.875</b>
<u>Design</u>	150	105.625	145.875
Submission of Conceptual Design	20	20	20
Adequacy and Completeness of the Conceptual Design	80	53.125	76.625
Design Flow and Consistency	50	32.5	49.25
<u>Technical Specification of the Laboratory Equipment</u>	225		
• Major improvement of Technical Requirements (>50% Key Equipment)	225		
• Medium improvement of Technical Requirements (≥25% <50% Key Equipment)	200	200	200
• Minor improvement of Technical Requirements (≥10%<25 Key Equipment)	175		
• Substantially complies the Technical Requirements	150		
• Fails to substantially comply the Technical Requirements	Rejected		
<u>Performance Schedule</u>	25	19	25

<ul style="list-style-type: none"> <li>• dequacy of work Programme in performing the contract works</li> <li>• Works Schedule for acceptance of tasks</li> <li>• Adequacy of methodology proposed to execute the works</li> <li>• Adequacy of personnel assigned to execute the works</li> </ul>	<p style="text-align: center;">10</p>	<p style="text-align: center;">5.75</p>	<p style="text-align: center;">10</p>
	<p style="text-align: center;">5</p>	<p style="text-align: center;">4.375</p>	<p style="text-align: center;">5</p>
	<p style="text-align: center;">5</p>	<p style="text-align: center;">4.125</p>	<p style="text-align: center;">5</p>
	<p style="text-align: center;">5</p>	<p style="text-align: center;">4.75</p>	<p style="text-align: center;">5</p>



<p><u>Technical Warranty, Preventive Maintenance and After-sales Service Programme</u></p> <ul style="list-style-type: none"> <li>• Technical warranty ≥24 Months</li> <li>• Adequate protective maintenance program (atleast three visits per year during warranty period)</li> <li>• Availability of local after sale service (proof of 5 years availability of spares after installation)</li> </ul>	<p>25</p> <p>8</p> <p>8</p> <p>9</p>	<p>23.875</p> <p>8</p> <p>6.875</p> <p>9</p>	<p>25</p> <p>8</p> <p>8</p> <p>9</p>
<p><u>Training Programme</u></p> <ul style="list-style-type: none"> <li>• Organization's chart and Curriculum Vitae of the each member of the training team for all courses.</li> <li>• Detailed Schedule of the proposed training program to be included in the Project Delivery Schedule.</li> <li>• Chart indicating the number and characteristics of beneficiaries for each training course.</li> <li>• Details of the location of the training courses and the specific course subjects.</li> </ul>	<p>75</p> <p>25</p> <p>20</p> <p>15</p> <p>15</p>	<p>75</p> <p>25</p> <p>20</p> <p>15</p> <p>15</p>	<p>75</p> <p>25</p> <p>20</p> <p>15</p> <p>15</p>

	15		
	15		
<b>TECHNICAL PROPOSAL EVALUATION SCORES</b>	<b>600</b>	<b>523.5</b>	<b>570.875</b>

**TECHNICAL SCORE RESULTS**

As indicated in Table 3 the following were the scores:-

- (i) Ms Makiber - 523.5 out of 600 points
- (ii) Ms Fomenta/ Urban - 570.875 out of 600 Points

**COMPLIANCE WITH TECHNICAL SPECIFICATIONS FOR KEY EQUIPMENTS**

In accordance with the requirements the Bidders were expected to Comply with Technical Specifications for Key Equipments as shown in Table 4 below:-

**TABLE 4 - Key equipments Compliance**

	KEY EQUIPMENT	BIDDER (Makiber) 2	BIDDER (Fomento/Urban) 3
1	AA spectrophotometer	Compliant	Compliant
2	Autoclave 140 litres	Improvement	Improvement
3	Automatic Image Analysis Colony Counter	Compliant	Improvement
4	Band saw	Compliant	Compliant
5	Colorimeter (digital display)	Compliant	Compliant
6	Cooling chamber	Improvement	Improvement
7	Deep Freezer -80°C	Improvement	Improvement
8	Demineralisator 250 l/h	Compliant	Improvement
9	Digestion vessel for microwave systems with cover	Compliant	Compliant
10	Embossing unit	Compliant	Compliant
11	Freezer for sample	Improvement	Improvement
12	Freezing chamber -20°C	Improvement	Improvement
13	Gas and Fume Hood	Improvement	Improvement
14	GC system	Compliant	Improvement
15	High-speed refrigerated centrifuge	Improvement	Improvement
16	HPLC system	Compliant	Improvement
17	Incinerator (electrical)	Improvement	Compliant
18	Laboratory instruments wash	Improvement	Improvement
19	Laboratory washing machine	Non Compliant	Compliant
20	Laminar flow cabinet	Improvement	Improvement
21	Letter set A-2 (capitals)	Compliant	Compliant

22	Media Preparation System. Complete version	Improvement	Compliant
23	Microscope	Improvement	Compliant
24	Microscope (Stereo type)	Non Compliant	Compliant
25	Microwave sample preparation system	Compliant	Improvement
26	Safety cabinet for acids and lyes	Compliant	Compliant
27	Safety cabinet for chemicals	Compliant	Compliant
28	Safety cabinet for inflammables	Compliant	Compliant
29	Spectrometer FTIR	Improvement	Improvement
30	Ultra violet spectrophotometer	Improvement	Improvement
31	Ultrapure water System	Compliant	Compliant
32	Ultrasonic pipette washer	Improvement	Compliant
	Remarks	More than $\geq 25\%$ $\leq 49\%$ of the Equipment have been improved thus scoring 200 points	More than $\geq 25\%$ $< 50\%$ of the Equipment have been improved thus scoring 200 points

M/s Makiber and M/s Fomento/Urban Food met the minimum qualifying points of 400 and were therefore recommended for Price Proposal evaluation.

## **STRENGTHS AND WEAKNESS OF THE TECHNICAL PROPOSALS**

### **M/s Makiber (Bidder 2)**

#### **Strengths**

- Have vast experience in Africa – Angola, Senegal , Cameroon
- Have handled similar and related Projects and specifically Fisheries
- They possess adequate personnel with relevant qualifications
- They have made Improvements on Equipment

#### **Weaknesses**

- Design needs improvement to capture training room, space utilization
- Shower and Changing Rooms not provided in Chemical Laboratory

### **M/s Fomento/ Urban Food ( Bidder 3)**

#### **Strengths**

- Have vast experience in Africa –Kenya, Senegal , Angola, Algeria, Ghana
- They have made Improvements on Equipment
- They possess adequate personnel with relevant qualifications
- Availability of Local after Sales Services
- Local participation in his bidding document

#### **Weaknesses**

- Microbial parameters for analysis in the laboratory were document. However, chemical parameters for analysis were not documented.

## PRICE PROPOSAL EVALUATION

The Two (2) Bidding Documents were further subjected to Price Proposal evaluation in accordance with formula as set out in the Bidding documents.

The Documents were checked for arithmetic errors/ discounts. The results are as shown in Table 5.

TABLE 5. CORRECTIONS AND UNCONDITIONAL DISCOUNTS

Bidder  (a)	Read-out Bid Price(s)		Corrections		Corrected Bid Price(s)  (f) = (c) + (d) - (e)	Unconditional Discounts		Corrected/ Discounted Bid Price(s)  (i) = (f) - (h)
	Currency  (b)	Amount(s)  (c)	Computational Errors  (d)	Provisional Sums  (e)		Percent  (g)	Amount(s)  (h)	
M/s Makiber	Euros	5,740,824	0	0	5,740,824		0	5,740,824
M/s Fomento/Urban Food	Euros	5,749,500	0	0	5,749,500		0	5,749,500

The Score for the Total Bid Price offered by the Bidder was calculated using the following formulae:-

$$\text{Bidder's Price Score} = \frac{\text{LPP}}{400 \times \text{BPP}}$$

Where:

- "LPP" is the Lowest Price Proposal measured in Euros;
- "BPP" is the Price Proposal in Euros proposed by the Bidder being evaluated

**TABLE 6 : EVALUATED PRICE PROPOSAL**

The scores were as follows:-

EVALUATED CONCEITS PRICE PROPOSAL EVALUATION	MAXIMUM POINTS	BID SCORE = $\frac{LPP}{BPP}$	BID POINTS
TOTAL SCORE		400	399.4
EVALUATED BID SCORE = $\frac{LPP}{BPP}$	1000	399.4	971.25



**TABLE 7: PROPOSED CONTRACT AWARD**

1. Highest scoring bidder (proposed for contract award). (a) name (b) address	M/s Fomento/Urban	
2. Estimated delivery to project site/completion period.		
	<b>Currency(ies)</b>	<b>Amount(s) or %</b>
Bid Price(s) (Read-out)	<b>Euros</b>	<b>5,749,500</b>
8. Corrections for Errors		<b>None</b>
9. Discounts		<b>None</b>
11. Proposed Award		<b>5,749,500</b>

### Re-Evaluation Report of 26<sup>th</sup> April, 2013

The evaluation committee went through the issues raised by the 5<sup>th</sup> Ministerial Tender Committee held on 8<sup>th</sup> April, 2013 and underscored the following facts:

1. The evaluation report was as a result of compliance with the evaluation criteria set out in the tender document.
2. A comprehensive financial analysis was not carried out as the financial evaluation criteria only provided a formulae to be applied in computing the financial scores.

However, those facts notwithstanding the committee agreed to scrutinize the MTC's observations to determine their validity and their value addition. The committee addressed the issues as follows:

1. Project Management fees

The committee agreed the project management fees as charged by M/s Fomento were high as per the observations of the MTC.

2. Design fees

The committee concurred that the design cost was high. However, the committee did not agree that the detailed design was provided by the client because what was provided was conceptual design and there were other components to the design which will be provided at the project implementation stage.

3. Rates for Project Management and Design for M/s Makiber S.A

The MTC had observed that M/s Makiber S.A had not charged for design and evaluation committee differed with this observation and noted that cost was inbuilt under the item logistics, quality control and coordination. The committee agreed that their pricing on the services was fair as compared to M/s Fomento.

4. Technical Qualifications

The committee agreed that both bidders were technically qualified having met the technical qualifying score of 400 points as per clause 2.1 of the evaluation and qualification criteria.

## **Conclusion and Recommendation for Award**

The committee agreed that the issues raised by the MTC were valid and their consideration was important. The committee therefore, recommends the award of contract to M/s Makiber S.A having met the technical qualifying score of 400 points as per clause 2.1 of the evaluation and qualification criteria and being the lowest on price. The contract amount is 5,740,824 Euros.

## **TENDER COMMITTEE DECISION**

The Company Tender Committee in its meeting held on 13<sup>th</sup> May, 2012 Minute No.: MOFD/01/2012-2013 Construction of Fish Quality Control Laboratories in Kenya. TC APPROVED as follows that

Award for the contract to Construction of Fish Quality Control Laboratories in Kenya to M/s Makiber Dragadoc of Spain at evaluated contract value Euros Five Million ,Seven Hundred and forty thousands ,Eight Hundred and Twenty Four Only € 5,7040,824.00.

## THE REVIEW

The Request for Review was lodged on 18<sup>th</sup> June, 2013 by GLOBAL TEC DESARROLLOS ENGINEERING SA against the Decision of the Tender Committee of Ministry of Fisheries in the Construction of Fish Quality Control Laboratories in Kenya.

At the hearing, the Applicant was represented by Mr. Gitonga Mwaniki, Advocate while the Procuring Entity was represented by Mr. Eliud Koome, Chief Supply Chain Management Officer. The Interested Party, Makibar S.A was represented by Mr. Alex Masika Advocate.

The Applicant requested the Board for the following orders:

1. *Stop/annul the award.*
2. *Review/substitute the above decision to award the tender.*
3. *Reconsider our bid that was declared unsuccessful.*

## PRELIMINARY OBJECTION

The Request for Review Application No. 21 of 2013 was scheduled for hearing on the 8<sup>th</sup> of July, 2013 before the Review Board. The Successful Bidder/Interested Party filed its Response to the application on the 8<sup>th</sup> of July, 2013 in which it raised under ground No. 1 the following issues:-

*"From the onset the Request for Review herein is time barred under Section 67 of the Public Procurement and Disposal Act, 2005 (No. 3 of 2005) as*

*read together with regulation 73 (2) (c) of The Public Procurement and Disposal (Amendment) Regulations, 2006 by virtue of Legal Notice No. 106/2013 the award notification having been issued on the 4th June 2013"*

The Interested Party informed the Board that it had a Preliminary Objection touching on the Jurisdiction of the Board which it wished to take up before the Application was heard on merit. The Applicant agreed to have the Preliminary Objection argued before the main hearing of the Application on merit.

The Interested Party argued that the Board lacked jurisdiction to entertain the instant Application in view of the provisions of Regulation. 73 (2) (c) of Legal Notice. 106/2013. It further argued that the Notification of the award was effected on the 4<sup>th</sup> of June, 2013 through email followed by the delivery of hard copies which were dispatched to the bidders on the same date. It stated that under the aforementioned provision of the law which was gazetted on the 18<sup>th</sup> of June, 2013, the Applicant ought to have filed its application within 7 days from the date of notification that is the 14<sup>th</sup> of June, 2013 and therefore the filing of the application on the 18<sup>th</sup> of June, 2013 was outside the appeal window.

It maintained that the cited Legal Notice took effect on the same date that it was published in accordance with the requirements of Section 27 of Chapter 2 of the Laws of Kenya. It urged the Board to find that since the application was filed out of time, it lacked jurisdiction to entertain the same.

In response, the Applicant stated that the issue raised by the Interested Party was not on a point of law as the Counsel had merely sought to adduce evidence from the bar with regard to when the notification was effected. It further argued that it had received its notification of the award on 11<sup>th</sup> of June, 2013. It added that although the Legal Notice. 106/2013 was gazetted on the 18<sup>th</sup> of June, 2013 being the same date when it filed its application, it was not clear at what time the gazettelement was done. Further, it argued that Article 159(2) of the Constitution of Kenya had empowered courts and quasi judicial tribunals to deliver substantive justice and not to give undue reliance on legal technicalities. It prayed for the dismissal of the Preliminary Objection as lacking in merit and having been filed too late in the day on the scheduled hearing of its application.

On its part, the Procuring Entity informed the Board that it notified the bidders of the award of Tender on the 4<sup>th</sup> of June, 2013 through email. It further informed the Board that the hard copies of the Notification were posted to the bidders although it was not sure when that was done.

The Board has carefully considered the submissions by the parties and the documents placed before it. The main issue for determination by the Board is whether it has jurisdiction to entertain the instant application in the light of Regulation 73 (2) (c) of Legal Notice. 106/2013.

The Board notes the following

1. That notification of award of the subject tender was made on the 13<sup>th</sup> May, 2013. As regards notification to the Bidders the Board notes that

all Bidders were notified through the emails addresses provided to the Procuring Entity.

2. That at the time this tender was being adjudicated and a notification was being done, the appeal window was governed by Regulations 73(2) (c) of the Public Procurement and disposal Regulations 2006(herein after called regulation 2006).

Upon notifications on the 4<sup>th</sup> of June, 2013 the Applicant had 14 days to file its Request for Review counting the 14 days from the 5<sup>th</sup> of June,2013 the Appeal window closed on the 18<sup>th</sup> of June,2013 consequently the Applicant was within time when it filed the Request for Review on the 18<sup>th</sup> June,2013

3. Regarding Legal Notice 106/2013 the Board notes that the said Legal Notice was gazetted on the 18<sup>th</sup> June, 2013 together with Legal Notice No.109/2013 both of which carried amendment to the regulations of 2006.

The two legal Notices appear to be contradictory but that is not the issue before the Board. What is significant is that as per Section 27 of Cap 2 the legal Notice No.106/2013 and 109/2013 become operational on the date of publication on the 18<sup>th</sup> June, 2013.Since their publication they could not have retrospective effect on the tender that had been adjudicated and notified under the Act of 2006.the Board further notes that Section 28 of cap 2 provides that;

## *D - Subsidiary Legislation*

### *Section 28.*

*Subsidiary legislation may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which the subsidiary legislation is made, but no person shall be made or become liable to any penalty whatsoever in respect of an act committed or of the failure to do anything before the day on which that subsidiary legislation is published in the Gazette.*

The Board notes that the two Legal Notices did not state that they had a retrospective application and therefore it is clear they could only affect the tenders that were adjudicated and notified thereafter.

Therefore the Board finds that it has jurisdiction to hear and determine the instant application and the Preliminary Objection is overruled and the Board will proceed to hear the Request for Review on its merit.

The Board deals with the six grounds of review as follows:

### **Grounds 1, 2,3,4,5 and 6**

These grounds have been consolidated as they raise similar issues on integrity, fairness and transparency of the of the procurement process which the Applicant alleges was unfair and biased as it was based on prejudicial comments made by the two other bidders at the bid opening



meeting. The Applicant argued that the comments by the Successful Bidder and the 2<sup>nd</sup> bidder influenced the Procuring Entity's rejection of its bid. It further argued that the procurement process was not transparent as it was placed with irregularities and other malpractices which made the Procuring Entity to reject its bid on the basis of the "Solvency Ratio" that it alleged did not meet the threshold as set out in the Instruction to Tenderer.

The Applicant added that the Procuring Entity was not truthful, candid nor honest in the tender process as it kept the Applicant in the dark about the ongoing process despite requesting it to extend its bid bond on more than two occasions.

It argued that its bid was not considered for evaluation at all despite having given the Procuring Entity, certified financial documents which reflected that it had met the criteria on the solvency ratio as it had an average of 10.6% for the three years covering 2009 to 2011. The Applicant stated that its solvency Ratio was the average of the three years i.e. 2009-6%, 2010-18 % and 2011-10.6% which was in compliance with the Procuring Entity's requirements as set out in the Instruction to Tenderer. It argued that if there was any ambiguity in Clause 5.1.3 which provided for the Solvency Ratio, the ambiguity should be taken against the Procuring Entity. Who had prepared the Bid Documents. It further stated that one of the Bidders' turnovers was not as submitted in the Bid Documents following a search it had done on the company at the company registry in Spain. It added that it had the best price compared to its competitors.

It stated that the procurement process was flawed from inception as it was unfair and tainted with illegality, interference and prejudicial to it.

It accused the Procuring Entity of failing to carry out due diligence on the other bidders who were its competitors in the tender.

In response the Procuring Entity stated that the procurement process was conducted in a fair and transparent manner as the same was indeed approved by the Spanish Government as this was a donor funded project.

It further stated that whereas it was true that during the tender opening meeting two of the bidders had digressed and commented on the Applicant's Bid. It had reprimanded the two bidders against their attempts to evaluate a fellow bidder's Applicant's bid and had openly done so in the presence of all the parties.

It stated that despite this reaction the comments had not affected the evaluation of the Applicant's bid which in any event was carried out by a different team.

It argued that its Tender Committee was a decision making organ in the Ministry and was not engaged in communication with bidders which was prohibited by Section 44(1) of the Act, which deals with the confidentiality of the tender process.

It added that the Instruction to Tenderer were not ambiguous in any way and the Applicant did not seek any clarification on the same if it thought they were.

It stated that the Applicant price may have been the lowest but it was not the lowest evaluated price to warrant the award of tender to it. It argued that there was no need for due diligence as the submitted documents were verified and certified.

Finally it submitted that it did not misadvise the Applicant through the extension of the bid bonds but advised all bidders who had participated in the tender to extent their bid bonds in order to protect the process. It stated that the Applicant's bid was properly rejected at the preliminary stage as it did not comply with the mandatory requirements relating to the "Solvency Ratio" as set out at Clause 5.1.3 of the Instruction to Tenderer as well as the letters from the Bank referees.

On its part the interested party associated itself with the Procuring Entity's arguments and added that the subject procurement process was fairly carried out and transparent. It stated that the Applicant's bid was rejected as it was not responsive due to its "Solvency Ratio" as well as the failure to comply with Clause No. 5.1.3 of the Instructions to the bidders. It argued that whereas the Applicant's price may have been the lowest, it was not the lowest evaluated price to warrant it being awarded the tender as required by Section 64 of the Act. It argued that the Instruction to Tenderer did not provide for the average of the "Solvency ratio" over the three years as alleged by the Applicant. It maintained that the Applicant had not sited any breach of the Act nor its regulations which was a requirement of Section 73 of the Act.

The Board has considered the presentations of the parties and perused the following documents presented before it : a copy of the Tender Document that was issued by the Procuring Entity to the bidders, the Evaluation Report ,as well as the original bid documents submitted by the three bidders and notes as follows:-

- 1) That the Tender document at page 25 and 26 provided for the following in terms of mandatory requirements, general requirements and technical requirements that were to be considered during the evaluation. And includes the following among other:-
  - a) .....
  - b) .....
  - c) *Contains price Proposal;*
  - d) *Meets eligibility criteria as well minimum technical and financial solvency conditions;(Clause 5 of the ITT)*
  - e) *Is substantially prepared according to the bidding documents*
- 2) That the Procuring Entity advertised the tenders on 26<sup>th</sup> October, 2012 and closed/opened on 17<sup>th</sup> January, 2013.
- 3) That the tender attracted three (3) bidders from Spain.
- 4) That validity period for the subject tender was 120 days from the date of tender opening.
- 5) That the tender closed/opened on 17<sup>th</sup> January, 2013. The 120 days tender validity period started running from 18<sup>th</sup> January, 2012 and lapsed on 18<sup>th</sup> May, 2013.

- 6) That the 5<sup>th</sup> Ministerial Tender Committee meeting to adjudicate on the tender MOFD/01/2012-2013 was held on 8<sup>th</sup> April, 2013 and differed the award and referred the evaluation report back to the committee to consider issues observed by Ministerial Tender Committee.
- 7) That re-evaluation was carried out on 26<sup>th</sup> April, 2012 pursuant to Ministerial Tender Committee observation.
- 8) That the Procuring Entity extended the Tender validity for 15 days to 1<sup>st</sup> June, 2013 vide its letter dated 17<sup>th</sup> May, 2013 to all tenderers and a further 5 days from 1<sup>st</sup> of June, 2013.
- 9) That the Procuring Entity further extended the tender validity by another 5 days to 6<sup>th</sup> June, 2013 to all tenderers.
- 10) That the 6<sup>th</sup> Ministerial Tender Committee meeting that re-adjudicated on the tender MOFD/01/2012-2013 was held on 13<sup>th</sup> May, 2013 and approved the award. Both the successful and unsuccessful bidders were notified on 4<sup>th</sup> June, 2013.
- 11) The request for "no objection" was granted by financiers on 30<sup>th</sup> May, 2013 by Ministry of Economy and Competitiveness.
- 12) That the request for review was filed on 18<sup>th</sup> June, 2013.
- 13) The Board further notes that the Procuring Entity carried out the evaluation in three stages namely the Preliminary, Technical and Financial stages.
- 14) The Applicant was disqualified at the preliminary stage because of non-conformity to the following requirements:

(a) *The solvency ratio for two years namely; year 2011 and 2009 for Bidder M/S. Globaltec was less than  $\geq 10\%$*

(b) *One of the bank references (from BBVA) failed to state the number of years they had a relationship with the bidder which was mandatory.*

15) The letter submitted by the Applicant did not indicate the duration which the Applicant has had a relationship with the bank (from BBVA) as required by the Tender Documents.

16) The Board is alive to the Provisions of Sections 64(1) & (2) of the Act as well as clauses 5.1.2 and 5.1.5 and to 14.2.2 which states

Section 64. (1) *A tender is responsive if it conforms to all the*

*Mandatory requirements in the tender documents.*

(2) *The following do not affect whether a tender is Responsive –*

(a) *Minor deviations that do not materially depart from the requirements set out in the tender documents; or*

(b) *Errors or oversights that can be corrected without affecting the substance of the tender.*

Tender Document

*Clause 5.1.3 of the Solvency ratio  $\geq 10\%$*

*'Bidders must comply with Solvency ratio (=total equity/total current liabilities  $> 10\%$ )'*

*Bidders must provide evidence of compliance with this ration for the last 3( three)available audited financial years as set down under clause 14.2 .In case a bid is submitted by a Joint venture or Consortium this minimum requirement is to be filled by each of the members of the Joint Venture or Consortium.*

*Clause 5.1.5 Bank references*

*'Bidders must submit bank references from two major financial institution of renowned international prestige with which the bidder customary does business'*

*Paragraph 14 documents establishing the eligibility of the bidders*

*Clause 14.2 the bidders shall submit the following documents as evidence of technical, economic and financial eligibility, as stipulated under clause 5 of these instruction to bidders to bidders, together with the bid.*

*Clause 14.2.1 bidders shall submit the following*

*"Economic and Financial Capacity accordingly to the Form 3 ... ..and auditor's report for the last 3 (fiscal) years."*

*Clause 14.2.2 'Bank references from at least two (2) first class entities with whom the bidder operates. These references must*

*state the number of years of the bidder's relationship with the Bank'*

The Board notes that the main issues raised by the Applicant are as follows:

1. The comments made by the bidders at the Tender Opening that it did not meet the solvency ratio were prejudicial to it and therefore the Tender Process was not done fairly
2. Whether the Applicant met the condition on solvency ratio and whether clause 5.1.3 was ambiguous.

Regarding the first issue the Board has perused the minutes of the Tender Opening and notes that indeed the other two bidders made comments that the Applicant was not qualified as it did not meet the solvency ratio.

The Board also notes that the members of the Tender Opening Committee informed the two bidders that their comments were out order as that was Tender opening exercise and not an evaluation meeting.

The Board has perused the minutes of the evaluation meeting and notes that those comments were not considered during the evaluation and there is no evidence to suggest that those comments influenced the evaluation and the subsequent award of the tender in any manner.

In any event the Board further notes that the members of evaluation committee were substantially different from those of the Tender Committee as only the Secretary who has no voting rights and one other Member Mr. Daniel Mungai were members of that committee.



The Board notes that the evaluation committee was properly constituted in accordance with regulation 16 of the Public procurement and Disposal Regulations of 2006.

On the issue on the solvency ratio the Board notes that Clause 5.1.3 provides as follows

*'... ..Bidders must provide evidence of compliance with this ration for the last 3(three) available audited financial years as set down under clause 14.2... ..'*

The Board notes that the contention of the Applicant was that the said clause was ambiguous and using international best practices that Procuring Entity should have taken an average of the three years and not individual year in determining the solvency ratio.

The Board notes that the Applicant admits that it did not meet the ration in 2009 and 2011 and was only compliant in the year 2010.It urged the Board to consider the average of the ration for the 3 years .The Board has carefully considered the wording of the aforesaid Clause 5.1.3 of the Instruction to Tenderers and notes that there is no ambiguity as indeed bidders were required to comply and provide evidence of the three years using their audited financial accounts for the said three years as provided in Clause 14.2.1 of the Instruction to Tenderer.

It is clear that the two Clauses 5.1.3 and 14.2.1 did not require an average of the solvency ratio for the three years .Further the applicant has not placed

any material before the Board to support the allegation that an average would be taken in any if the Applicant was in doubt it was free to seek clarification at the Pre -Bid meeting or any time thereafter in accordance with Paragraph 7 of the Bidding schedule and the provisions of the Act.

Finally on the issue of Accounts, the Applicant alleged that the Procuring Entity did not do a due diligence on M/s Formento which it alleged did not meet the turnover requirement.

The Board has perused the Evaluation minutes and notes that the tender was not awarded M/s Formento and notes that the tender was not awarded to the Formento but to M/s Makiber S.A

From the foregoing, the Board notes that in conducting the Preliminary Evaluation, the Procuring Entity only used the mandatory requirements/criteria as provided for in the Tender Document since all the bidders provided the documentary evidence showing that they indeed meet the mandatory requirement.

The Board further finds, that the Applicant's bid was properly declared non responsive and rejected at the Preliminary Stage as it did not comply with Clauses 5.1.3 as read together with clause 14.2 of the Instruction To Tenderers as set out above, in that its bid did not meet the required solvency ratio of  $\geq 10\%$  and it as well failed to supply Bank reference letters with details relating to the numbers of years as required by the mandatory requirements of the tender.

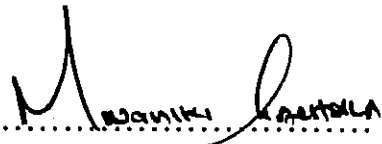
As to whether the procurement process was conducted in a fair and transparent manner the Board finds that the Procuring Entity evaluated the tenders on the same requirements set out in the Instruction to Tenderers. There was no material placed before the Board to support the allegations of bias and/or prejudice on the part of the Procuring Entity. Therefore the Board finds no merit in the assertion by the Applicant and hereby dismisses the allegations made in that regard.

Accordingly the Board finds no fault on the part of the Procuring Entity. and therefore all the grounds of appeal fail.

Taking into account all the above the Request for Review fail and pursuant to Section 98 of the Act the Board Orders that the procurement process may proceed.

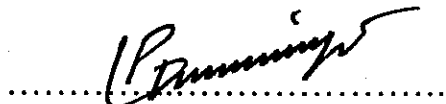
There will be no order as to cost

Dated at Nairobi on this 15<sup>th</sup> day of July, 2013



MWANIKI RAFTOLA

CHAIRMAN  
PPARB



P. Mwangi

SECRETARY  
PPARB

