

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 29/2013 OF 4TH SEPTEMBER 2013

BETWEEN

CHINA WU YI CO. LIMITEDAPPLICANT

AND

KENYA SCHOOL OF MONETARY STUDIESPROCURING ENTITY

Review against the decision of the Tender Committee of Central Bank of Kenya dated 22nd August, 2013 for Proposed Remodeling, Expansion and Modernization of Hospitality Building at the Kenya School of Monetary Studies

BOARD MEMBERS PRESENT

Mr. P. M Gachoka	-Chairman
Mr. Akich Okola	- Member
Amb. Charles Amira	- Member
Eng.Christine Ogut	- Member
Ms. Natasha Mutai	- Member
Mrs. Loise Rihui	-Member
Mr. Sospeter Kioko	-Member

IN ATTENDANCE

Susan Chesang	-Secretariat
Shelmith Miano	-Secretariat

PRESENT BY INVITATION

Applicant- China Wu Yi Co. Limited

Alex Masika – Masika and Koross Advocate

Procuring Entity – Kenya School of Monetary Studies

Jane Kariuki	-Officer
Amos Mbugua	-Officer
Kennedy K. Abuga	-Advocate
Jared Momanyi	- Officer
Dicksons M.Ouma	-Okwach and Co. Advocate

Interested Party-EPCO Builders Ltd

Gilbert Kowuocha
Victor J. Mbelesha

BOARD'S DECISION

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

BACKGROUND

Invitation to tender

The Procuring Entity advertised the Tender No. KSMS/PROC/38/12-13 for the Supply, Proposed Remodeling, Expansion And Modernization Of Hospitality

Building At The Kenya School Of Monetary Studies in the Daily Nation Newspapers, Standard and The East African News of 27th and 28th March, 2013 and 6th April,2013 respectively.

Closing/Opening:

The tender closed and opened on 29th April, 2013 at 10.30 am with the following seven firms responding:

1. Sietco Development African Limited
2. EpcO Builders Limited
3. China Wu Yi Co. Limited

A Mandatory pre-bid meeting/conference was held on 11th April, 2013 where prospective tenderers were briefed on the tender document requirements and any clarifications on the same sought.

EVALUATION

The evaluation was carried out by an Evaluation Committee composed of six members chaired by Mr. Ciru Koinange , The evaluation was undertaken in four stages namely; Preliminary, Technical, Examination of samples & due diligence, and Financial evaluation.

Bids were evaluated based on the following criteria:

- Step 1:** Overview of the tender opening minutes and procedures;
- Step 2:** To conduct a Preliminary Evaluation as provided under Regulation 47 of the Public Procurement and Disposal Regulations, 2006;

- Step 3:** Evaluation of the tenders for compliance against Mandatory Requirements set out in the tender document;
- Step 4:** To carry out Technical Evaluation in accordance with the Evaluation Criteria set out in the tender documents for those tenderers who complied with all the Mandatory Requirements;
- Step 5:** Opening and Evaluation of the Financial Bids;
- Step 6:** To draw and write conclusions;
- Step 7:** To make recommendations for award.

OBSERVATIONS ON THE TENDER INVITATION AND OPENING PROCESS

1. The Tenders were advertised in two National Newspapers (The Nation and The Standard) in addition to the Website of Kenya School of Monetary Studies where willing Tenderers were invited to bid.
2. A mandatory pre-bid meeting/conference was held on 11th April 2013 where nine (9) prospective bidders attended. They were briefed on the tender document, tender requirements and site specifics.
3. Three (3) bids were received before the closing time as stated in the tender invitation notice.

Table Nö.1: Summary of 3 No. Received Bids

	Bidder Identification	Bid Bond Amount (Kshs)	Bank Providing Bid Bond / Insurance	Submission		Remarks
	Name of Firm			Technical	Financial	
1.	EpcO Builders Ltd	10,000,000	Mayfair Insurance Co. Ltd	Yes	Yes	Bid Bond Acceptable
2.	Sietco Development African Ltd	10,000,000	Monarch Insurance Co. Ltd	Yes	Yes	Bid Bond Acceptable
3.	China Wu Yi Co Ltd	10,000,000	Standard Chartered Bank	Yes	Yes	Bid Bond Acceptable

STEP 2: PRELIMINARY EVALUATION

Preliminary Evaluation was conducted in accordance with regulation 47 (1) of Public Procurement and Disposal Regulation, 2006.

The three Bidders, qualified to be evaluated on Mandatory Requirements as set out in the Tender Document.

4 STEP 3: EVALUATION OF THE TENDERS FOR COMPLIANCE AGAINST MANDATORY REQUIREMENTS

Table No.2: Mandatory Requirements

No	Requirements	Compliance	Remarks
MR 1	Provide documentary evidence of the bidder Company's Certificate of Incorporation/ registration (legal structure).		
MR 2	Provide certified copy of the company's current Certificate of Tax Compliance issued by Kenya Revenue Authority (KRA).		
MR 3	Submit a completed company's profile using the Confidential Business Questionnaire attached.		
MR 4	Provide documentary evidence in form of certified audited accounts for the company for the last three years to indicate the company has had an annual turnover of over Kenya shillings one billion (Kshs.1 billion).		
MR 5	Provide certified documentary evidence of the company's Certificate of Registration with the Ministry of Public Works as a building construction contractor minimum Category A.		
MR 6	Provide a bid security in the amount of Kshs.10 Million (Kenya Shillings Ten Million Only) in form a Bank Guarantee or insurance bond from an Insurance Company approved by the Public Procurement Oversight Authority (PPOA) valid for one hundred and eighty (180) days from the date of tender opening.		

MR 7	Provide documentary evidence of having cash in the bank net of any advance payments which may be made under this Contract, of at least one hundred fifty million (Kshs.150 million). Attach bank statement and letter from the bank as proof of availability of these funds. The documents so provided shall be verified for authenticity.		
MR 8	Provide documentary evidence of having successfully undertaken at least two (2) building construction works each valued at over Kenya shillings one billion (Kshs.1 billion) in the last ten (10) years. For a project to qualify it must be over 70% complete. Letters of reference from clients/consultants stating the project cost, project scope and period, must be attached. If complete, completion certificates, final accounts etc. must be attached. Contacts of lead consultants/project managers must be provided for verification of information given.		
MR 9	Provide documentary evidence of having attended a mandatory site visit on the date and time stated in this document.		

Table No.3: Result of Evaluation on Mandatory Requirements

No	Epc Builders Ltd	Sietco Development African Ltd	China Wu Yi Co. Limited
MR 1	√ Registered on 13/11/1977	√ Registered on 26/6/1984	√ Registered on 8/1/2000

MR 2	√ Expiry on 11/7/2013	√ Expiry on 22/7/2013	√ Expiry on 21/7/2013
MR 3	√	√	√
MR 4	√ KShs. 2009 = 1.935 b 2010 = 2.416 b 2011 = 3.371 b	√ USD \$ 2008 = 508 m 2009 = 541 m 2010 = 573 m 2011 = 563 m	√ KShs. 2009 = 2.728 b 2010 = 1.882 b 2011 = 1.424 b
MR 5	√ Category A	√ Category A	√ Category A
MR 6	√ - Mayfair Insurance Co. Ltd	√ - Monarch Insurance Co. Ltd	√ - Standard Bank
MR 7	√ Letters from Diamond Trust & Barclays Bank	√ Bank statement provided from Standard Bank	√ Letter from Standard Bank

MR 8	√ KShs. • NSSF = 1.159 b • NSSF = 2.59 b • KMA 1.1 b	√ USD \$ • Savannah = 50 m • Jacaranda = 28 m	√ KShs. • Suraya = 1.172 b • KSMS = 1.646 b • KCB =1.88 b
MR 9	√	√	√

Key

- √ - Complied
X - Did not comply

All the three Bidders; Sietco Development African Ltd, Epcu Builders Ltd and China Wu Yi Co. Limited complied with all the mandatory requirements, and qualified to proceed to technical evaluation stage in accordance with criteria set out in the Tender Document.

3.0 STEP 4: TECHNICAL EVALUATION

Table No.4: Technical Evaluation

	Evaluation Attribute	Response	Weighting %	Score %
1	Certified documentary evidence of registration with relevant professional bodies. <i>Each body to score 1 mark</i>		2	
2	Certified documentary evidence of registration and payment of NSSF and NHIF for employees. <i>Each body to score 1 mark</i>		2	
3	Professionally qualified and experienced Technical Staff in the company relevant to the building construction industry who will be actively involved in the proposed project . To qualify, the academic qualifications of attached CVS must be a degree as a minimum and must attach detailed CV, relevant academic and professional certificates. Telephone contacts must be provided. The personnel so provided will be contacted to verify the information given. <i>Each technical staff to score 3 marks maximum of 4 staff</i>		12	

	Evaluation Attribute	Response	Weighting %	Score %
4	<p>Qualified Management Staff in the company relevant to business management who will be actively involved in the proposed project . To qualify, the academic qualifications of attached CVS must be a degree as a minimum and must attach detailed CV, relevant academic and professional certificates. Telephone contacts must be provided. The personnel so provided will be contacted to verify the information given.</p> <p><i>Each technical staff to score 3 marks maximum of 2staff</i></p>		6	
5	Accomplishments: (previous & current projects) similar		25	
	<p>Details of building projects undertaken successfully within the last 10 years each worth at least Kshs. 500 Million (Kenya shillings five hundred million) evidenced by</p>			

	Evaluation Attribute	Response	Weighting %	Score %
	<p>letters of reference from architects/project managers, clients etc. Certificates of occupation, completion certificates and/or final accounts for the respective projects must be attached. (For a project to qualify it must be at least 70% complete. For Projects that are not completed, letters of reference from the respective Architects and Clients must be provided) Contacts for the lead consultants/project managers involved in the projects must be given. Such contacts will be contacted for verification of the information given.</p> <p><i>Each to score 5 to a maximum of five projects.</i></p>			
6	<p>Number of years in operation as an active building construction company evidenced by projects undertaken.</p> <p><i>Each year to score 1 mark starting from the 10th year of registration. 19 years and above years will earn the maximum 10 marks.</i></p>		10	

	Evaluation Attribute	Response	Weighting %	Score %
7	<p>Insurance covers</p> <p>Provide documentary evidence of having the following valid insurance covers</p> <p>a) Group personal accident cover</p> <p>b) Public liability cover</p> <p><i>Each to save 1 mark</i></p>		2	
8	<p>Provide documentary evidence of having cash in the bank net of other contractual commitments and exclusive of any advance payments which may be made under this Contract, of at least one hundred and fifty million (Kshs. 150Million). Attach bank statement and letter from the bank as proof of availability of these funds. The documents so provided shall be verified for authenticity.</p> <p><i>Minimum score of 1 mark for Kshs. Cash Assets of 150-200 million, 2marks for cash assets of 201-299 million and 5 marks for cash assets of above 300 million.</i></p>		5	

	Evaluation Attribute	Response	Weighting %	Score %
9	Certified financial statements for the latest consecutive three years starting from 2009. <i>Evaluation shall consider Profitability Ratios and Liquidity Ratios. Marks will be allocated on pro-rata basis from the highest to the lowest scoring bidders on item 9.</i>		5	
10	Proposed construction period for the project accompanied by a proposed Works Program Chart and critical path analysis. <i>To be evaluated on its practicality and marks to be pro-rated amongst bidders.</i>		6	
11	Proposed project implementation methodology for the bidder identifying key considerations, processes and mechanisms that the bidder intends to put in place in order to achieve the objectives of the project.		5	

	Evaluation Attribute	Response	Weighting %	Score %
12.	<p>Due diligence :</p> <p>The evaluation committee shall visit at least Four previous sites of similar works each amounting to over Kshs 300 Million (three hundred million) done by the bidder to establish the quality of work, materials and equipment supplied, client satisfaction and after work defects correction. All bidders are advised to provide current functional contact address including email and telephone for the clients/site that are of similar nature to the proposed works. Each bidder must make arrangements for the project lead consultants/ project managers and/or client representatives to be present during the visit. Attach practical completion certificate, contract agreements and letters of confirmation from respective clients. At least one of the projects given by the bidder for visitation by the committee must be worth over Kenya shillings one billion (Kshs. 1 billion)</p> <p><i>Each project to score a maximum of 5 marks to a maximum of 4 projects.</i></p>		20	

	Evaluation Attribute	Response	Weighting %	Score %
	TOTAL		100	

The tender document provided that only Bidders whose bid attained a score of 70% and above in technical evaluation out of the maximum 100% proceed to the financial bid opening evaluation stage.

3.1 RESULTS FOR TECHNICAL EVALUATION

The Evaluation Committee evaluated the bids and the results are shown in the table No. 6 below.

Table No.5: Technical Evaluation

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
1	Certified documentary evidence of registration with relevant professional bodies. <i>Each body to score 1 mark</i>	2	<ul style="list-style-type: none"> • MOPW • MTC Score = 2	<ul style="list-style-type: none"> • ISO9001:2008 Score = 1	<ul style="list-style-type: none"> • MOPW • ISO9001:2008 Score = 2

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
2	Certified documentary evidence of registration and payment of NSSF and NHIF for employees. <i>Each body to score 1 mark</i>	2	Provided Score = 2	Provided Score = 1	Provided Score = 2

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
3	<p>Professionally qualified and experienced Technical Staff in the company relevant to the building construction industry who will be actively involved in the proposed project . To qualify, the academic qualifications of attached CVS must be a degree as a minimum and must attach detailed CV, relevant academic and professional certificates.</p> <p>Telephone contacts must be provided. The personnel so provided will be contacted to verify the information given.</p> <p><i>Each technical staff to score 3 marks maximum of 4 staff</i></p>	12	<p>Two technical staff (CVs and requisite certificates) provided.</p> <p>Score = 6</p>	<p>Five technical staff (CVs and requisite certificates) provided.</p> <p>Score = 12</p>	<p>Eight technical staff (CVs and requisite certificates) provided.</p> <p>Score = 12</p>

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
4	<p>Qualified Management Staff in the company relevant to business management who will be actively involved in the proposed project. To qualify, the academic qualifications of attached CVS must be a degree as a minimum and must attach detailed CV, relevant academic and professional certificates.</p> <p>Telephone contacts must be provided. The personnel so provided will be contacted to verify the information given.</p> <p><i>Each technical staff to score 3 marks maximum of 2staff</i></p>	6	<p>One technical staff (CVs and requisite certificates) provided</p> <p>Score = 3</p>	<p>CVs without certificates</p> <p>Score = 0</p>	<p>Four technical staff (CVs and requisite certificates) provided.</p> <p>Score = 6</p>

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
5	<p>Accomplishments: (previous & current projects) similar</p> <p>Details of building projects undertaken successfully within the last 10 years each worth at least Kshs. 500 Million (Kenya shillings five hundred million) evidenced by letters of reference from architects/project managers, clients etc. Certificates of occupation, completion certificates and/or final accounts for the respective projects must be attached. (For a project to qualify it must be at least 70% complete. For Projects that are not completed, letters of</p>	25	<p>USD \$</p> <ul style="list-style-type: none"> Savannah = 50 m Jacaranda = 28 m <p>Kshs.</p> <ul style="list-style-type: none"> Kileleshwa Executive Apartments = 817m Gold Rock Office Block = 730m <p>Score = 25</p>	<p>Kshs</p> <ul style="list-style-type: none"> NSSF Nyayo Embakasi = 1.15b KCB Pension = 770m Flame Tree (Anfield Holdings) = 767m NSSF Annex = 590m KPA Pensions = 680m <p>Score = 25</p>	<p>Kshs</p> <ul style="list-style-type: none"> NSSF Nyayo Embakasi = 1.15b KCB Pension = 770m Flame Tree (Anfield Holdings) = 767m NSSF Annex = 590m KPA Pensions = 680m <p>Score = 25</p>

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
	reference from the respective Architects and Clients must be provided) Contacts for the lead consultants/ project managers involved in the projects must be given. Such contacts will be contacted for verification of the information given. <i>Each to score 5 to a maximum of five projects.</i>				
6	Number of years in operation as an active building construction company evidenced by projects undertaken. <i>Each year to score 1 mark starting from the 10th year of registration. 19 years and above years will earn the maximum 10 marks.</i>	10	Over 19 years Score = 10	18 years Score = 8	Over 19 years Score = 10

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
7	<p>Insurance covers</p> <p>Provide documentary evidence of having the following valid insurance covers</p> <p>a) Group personal accident cover</p> <p>b) Public liability cover</p> <p><i>Each to save 1 mark</i></p>	2	<p>Provided from Occidental Insurance Company Limited</p> <p>Score = 2</p>	<p>Provided from Hill-Stone Insurance Broker Limited</p> <p>Score = 2</p>	<p>Provided from Monarch Insurance</p> <p>Score = 2</p>

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
8	<p>Provide documentary evidence of having cash in the bank net of other contractual commitments and exclusive of any advance payments which may be made under this Contract, of at least one hundred and fifty million (Kshs. 150Million). Attach bank statement and letter from the bank as proof of availability of these funds. The documents so provided shall be verified for authenticity.</p> <p><i>Minimum score of 1 mark for Kshs. Cash Assets of 150-200 million, 2marks for cash assets of 201-299 million and 5 marks for cash assets of above 300 million.</i></p>	5	<p>Provided</p> <p>Score = 5</p>	<p>Provided</p> <p>Score = 5</p>	<p>Provided</p> <p>Score = 5</p>

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
9	<p>Certified financial statements for the latest consecutive three years starting from 2009.</p> <p><i>Evaluation shall consider Profitability Ratios and Liquidity Ratios. Marks will be allocated on pro-rata basis from the highest to the lowest scoring bidders on item 9.</i></p>	5	Score = 3.8	Score = 4.8	Score = 2
10	<p>Proposed construction period for the project accompanied by a proposed Works Program Chart and critical path analysis. <i>To be evaluated on its practicality and marks to be pro-rated amongst bidders.</i></p>	6	<p>Not provided</p> <p>Score = 0</p>	<p>24 months</p> <p>Score = 6</p>	<p>34 months</p> <p>Score = 4</p>

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
1	Proposed project implementation methodology for the bidder identifying key considerations, processes and mechanisms that the bidder intends to put in place in order to achieve the objectives of the project.	5	Not provided Score = 0	Provided Score = 4	Provided Score = 3

Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
<p>Due diligence : The evaluation committee shall visit at least Four previous sites of similar works each amounting to over Kshs 300 Million (three hundred million) done by the bidder to establish the quality of work, materials and equipment supplied, client satisfaction and after work defects correction. All bidders are advised to provide current functional contact address including email and telephone for the clients/site that are of similar nature to the proposed works. Each bidder must make arrangements for the project lead consultants/ project managers and/or client representatives to be present during the visit.</p>	<p>20</p>	<ul style="list-style-type: none"> • Moi Sports Complex, Kasarani • Safari Park Hotel (Barbeque Ranch & Conference Centre) • Jacaranda Gardens, Kasarani <p>Score = 14 (Refer to table No. 6)</p>	<ul style="list-style-type: none"> • CIC Insurance • Proposed office block for Upward Scale Investments, 4th Ngong Avenue in Upper Hill • KMA Plaza <p>Score = 10 (Refer to table No. 6)</p>	<ul style="list-style-type: none"> • KCB Tower, Upper Hill • KSMS <p>Score = 17 (Refer to table No. 6)</p>

	Evaluation Attribute	Weighting %	Sietco Development African Ltd	Epc Builders Ltd	China Wu Yi Co. Limited
	TOTAL	100	72.8	78.8	90

3.2 DUE DILIGENCE

The Evaluation Committee carried out due diligence as required in the Tender Documents by inspecting works of similar complexity carried out by the three bidders in the recent past. Each of the Bidders had provided a list of sites to be assessed by the evaluation committee.

3.2.1 SIMILAR WORKS DONE BY THE THREE CONTRACTORS

Table No.6: Buildings and Sites Visited and Summary of Findings

	Contractor	Building	Comments
1.	Epcu Builders Ltd	CIC Insurance	<ul style="list-style-type: none">• Construction is on-going, about 80% complete;• Site management was found to be average;• The workmanship was not satisfactory.
		Proposed office block for Upward Scale Investments, 4 th Ngong Avenue in Upper Hill.	<ul style="list-style-type: none">• Construction just commenced;• Site organization was found to be average.

		KMA Plaza	<ul style="list-style-type: none"> • Building was recently completed and occupied; • There were many incomplete elements of the building such as tiling, windows and washrooms etc.; • The workmanship was found to be poor.
2.	Sietco Development African Ltd	Moi Sports Complex, Kasarani	<ul style="list-style-type: none"> • The workmanship was found to be good.
		Safari Park Hotel (Barbeque Ranch & Conference Centre)	<ul style="list-style-type: none"> • The workmanship was found to be good.
		Jacaranda Gardens, Kasarani	<ul style="list-style-type: none"> • This a newly built residential complex; • The workmanship was found to be good.
3.	China Wu Yi Co. Limited	KCB Tower, Upper Hill	<ul style="list-style-type: none"> • This is a 22 storey building under construction, about 80% complete; • The workmanship was found to be good.
		KSMS	<ul style="list-style-type: none"> • The construction is about 90% complete; • The workmanship was found to be good.

The Tender Evaluation Committee noted that Section I (Invitation to Tenders) **Clause 1.7** of the tender document states in part that:

Tenderers are advised to note that further to the mandatory qualifications listed in the tender documents, tenders from the following tenderers shall be considered NON-RESPONSIVE and therefore subject to automatic disqualification in various stages of evaluation.

- *A tender from a tenderer whose on-going project is/are behind schedule and without any approved extension of time.*
- *A tender from a tenderer who has been served with default notice on on-going project or terminated in previous projects.*

The Evaluation Committee established that none of the projects visited for the three bidders were behind schedule without approved extension of time and that none of the projects visited for the three bidders had been terminated.

From the foregoing observation, the Evaluation Committee was satisfied that the three bidders had the capacity to undertake the proposed project.

3.3 SUMMARY OF TECHNICAL EVALUATION

Following the completion of due diligence exercise, the Evaluation Committee finalized Technical Evaluation and the scores as summarized in table

Table No.7: Summary of Scores for Companies that were subjected to Technical Evaluation

	Tenderer	Percentage Scores
1.	Sietco Development African Ltd	72.8
2.	Epc Builders Ltd	78.8
3.	China Wu Yi Co. Limited	90.0

The tender document provided that only bidders whose bid attained a score of **70%** and above out of the maximum 100% proceed to the financial bid Opening Evaluation Stage.

From the forgoing, all the three bidders attained a score above the minimum 70% as set out in the Evaluation Criteria and therefore qualified for financial bid opening.

4.0 STEP 5: OPENING OF FINANCIAL BIDS

The three Bidders who qualified after Technical Evaluation were formally invited to attend Financial Bid Opening. The Financial Bids were opened on 13th June 2013 at 10.00 am in the COMESA Board Room in the presence of representatives of the three tenderers. The outcome of the financial bid opening is summarized in table No. 8.

Table No.8: Summary of the opened Financial Bids

	Tenderer/Bidder	Read Out Bid/Price (Kshs.)	Remarks
1.	Sietco Development African Ltd	4,376,291,769.00	None
2.	EpcO Builders Ltd	3,635,057,551.50	None
3.	China Wu Yi Co. Limited	3,764,462,908.00	None
4.	Consultants Estimates	4,135,000,000.00	None

4.1 EVALUATION OF THE FINANCIAL BIDS

The Evaluation Committee systematically analyzed the Financial Bids in line with Section IV and section 6.7 (c) of the Tender Document which states that *'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 Bill of Quantities, the corrected amount shall prevail'.

The results of the evaluation are summarized in table No. 9.

Table No.9: Summary of Tender Errors and Corrections

	Bidder	Tendered Sum	Corrected Sum	Difference /Error	% Error
1.	Sietco Development African Ltd	4,376,291,769. 00	4,475,968,023	99,676,254	2.23%
2.	Epc Builders Ltd	3,635,057,551. 50	3,631,289,040	3,768,512	0.10%
3.	China Wu Yi Co. Limited	3,764,462,908. 00	3,818,875,530	54,412,622	1.42%

The information on errors and corrections was communicated in writing to the respective bidders for concurrence or rejection as provided for in **Clause 6.7** of the tender document and section 63 of the Public Procurement and Disposal Act, 2005.

The response of the bidders is as follows:

1. Sietco Development African Ltd accepted the corrected tender sum of Kshs. 4,376,291,769.

2. Epco Builders Ltd rejected the corrected tender sum of Kshs.3,631,289,040 and instead gave a counter offer amounting to Kshs.3,747,289,039.76. It was noted that the bidder who had initially given a discount of Kshs.150,000,000 reduced the discount to Kshs.50,000,000 in the counter offer. Further, the bidder admitted to have noted that they had not priced some items in the Bills of Quantities.

3. China Wu Yi Co. Limited accepted the corrected tender sum.

4.2 COMPARISON OF CORRECTED FIGURES BETWEEN THE THREE BIDDERS

A detailed breakdown of the corrected figures for the three bidders is as shown in table 10.

Table No.10: Comparison of Corrected Figures for the three Bidders

ITEM	DESCRIPTION		Epc Ltd	China Wu Yi Co. Limited	Sietco Development African Ltd
A	Preliminaries from page GP 13	Volume 2	105,600,000	322,806,000	394,747,500
B	Remodelling, expansion and modernization to the Reception Building from page RB S/S	Volume 2	171,669,655	169,052,912	183,308,936
C	Remodelling, expansion and modernization to the Residential Buildings from page RS S/S	Volume 2	970,690,580	972,839,107	1,087,055,264
D	Remodelling, expansion and modernization to the Restaurant Building from page CF S/S	Volume 2	670,563,860	640,117,839	726,591,671
E	Service Building from page SB S/S	Volume 2	382,722,941	335,999,444	370,651,216
F	Apartment blocks from page AP S/S	Volume 2	421,439,680	423,768,213	472,325,576

	Sub-total volume 2		2,722,686,716	2,864,583,515	3,234,680,163
G	Electrical works	Volume 3	220,587,154	244,761,705	328,047,350
H	Air conditioning, kitchen cold rooms and mechanical ventilation	Volume 4	136,699,410	63,173,237	174,674,334
I	Plumbing and drainage installations	Volume 5	200,448,306	119,615,620	121,191,276
	Sub- Total		3,280,421,586.0	3,292,134,077	3,858,593,123
	Discount		150,000,000	-	-
	Sub-Total Volume 2, 3, 4 & 5		3,130,421,586	3,292,134,077	3,858,593,123
	ADD 16% V.A.T ON (A,B,C, D, E, F, G & H)		500,867,454	526,741,452	617,374,900
	Total Corrected Amount		3,631,289,040	3,818,875,530	4,475,968,023

4.3 COMPARISON OF FINANCIAL BIDS WITH THE OFFICIAL CONSULTANT'S ESTIMATES

The Evaluation Committee compared the bidder's corrected tender sums against the official estimates for the purpose of ascertaining the credibility of the bids. Whereas the Consultants Official Estimate was Kshs. 4,135,000,000 the bidder's corrected tender sums were as tabulated in table No. 11.

Table No.11: Summary of Bidder's corrected sums against official estimates

	Bidder	Corrected Sum	Variance from the official estimate of Kshs.4,135,000,000	% variance from the official estimates
1	Sietco Development African Ltd	4,475,968,023	340,968,022.68	8.25% above official estimate
2	Epcobuilders Ltd	3,631,289,040	(503,710,960)	12.18% below official estimate
3	China Wu Yi Co. Limited	3,818,875,530	(316,124,470.41)	7.65% below official estimate

From the foregoing analysis, the Evaluation Committee considered bids within a variance of 10% of the official estimate to be credible.

5.0 STEP 6: OBSERVATIONS AND CONCLUSIONS

Following the comprehensive Tender Evaluation process, the Evaluation Committee made the following observations and conclusions in regard to this tender:

- 1) That **Tender No. KSMS/PROC/38/12-13 for the Remodelling and Expansion of Hospitality Buildings for Kenya School of Monetary Studies** which was an open tender attracted nine (9) interested bidders. However, three (3) returned their bids.
- 2) The three bidders were evaluated in accordance to the evaluation criteria and other requirements set out in the tender documents.
- 3) The three bidders complied with all Mandatory Requirements. After technical evaluation the three bidders qualified for financial evaluation.
- 4) After evaluation of the financial bids, arithmetic errors were noted in each of the three bids. The information on errors and corrections was communicated in writing to the respective bidders for concurrence or rejection as provided for in Clause 6.7 of the tender document and Section 63 of the Public Procurement and Disposal Act, 2005.

- 5) Upon notification, Sietco Development African Ltd and China Wu Yi Co. Limited accepted the corrected tender sums. However, Epco Builders Ltd instead wrote a letter stating as follows;
- a) They changed the discount initially offered from Kshs. 150,000,000 to Kshs. 50,000,000. This revised their bid price upwards from the corrected figure of Kshs. 3,631,289,040 to Kshs. 3,747,289,039.76, a difference of Kshs. 116,000,000.
 - b) They noted a few items had not been priced in their bid.
 - c) They shall stand by their own revised tender sum of Kshs. 3,747,289,039.76 instead of the Tender Evaluation Committee corrected tender sum of Kshs. 3,631,289,040
- 6) *Section 63 (3) of the Public Procurement and Disposal Act, 2005 states that if a person who submitted a tender rejects the correction, the tender shall be rejected. Further, Section 59 (2) of the Public Procurement and Disposal Act, 2005 states that after the deadline for submitting the tenders, a person who submitted a tender shall not change, or offer to change the substance of the tender.*
- 7) From the foregoing, the Evaluation Committee concluded that the bid from Epco Builders Ltd be rejected in accordance to Section 59 (2) and Section 63 (3) of the Public Procurement and Disposal Act, 2005.
- 8) Of the two remaining bidders, Sietco Development Africa Ltd and China Wu Yi Co. Ltd, the tender with the lowest evaluated price was China Wu Yi Co. Limited at Kshs. 3,818,875,298.59 with a completion

date of 34 months which is within the Consultants Official Estimate for the project of Kshs. 4,135,000,000.00 and a completion period of 30 months.

- 9) The procurement process was undertaken in accordance with the Public Procurement and Disposal Act, 2005 and regulation 2006.

6.0 STEP 7: RECOMMENDATIONS

The Tender Evaluation Committee having undertaken comprehensive evaluation of **Tender No. KSMS/PROC/38/12-13 for the Remodeling and Expansion of Hospitality Buildings for Kenya School of Monetary Studies** considered the lowest evaluated tender of M/s China Wu Yi Co. Limited, at their corrected sum of **KShs.3,818,875,530 (Kenya Shillings Three Billion Eight Hundred Eighteen Million Eight Hundred Seventy Five Thousand Five Hundred Thirty Only)** with a completion period of **34 months** to be responsive to the tender as provided for in the Tender Document.

The Evaluation Committee, recommended award of **Tender No. KSMS/PROC/38/12-13** for the **Remodeling and Expansion of Hospitality Buildings for Kenya School of Monetary Studies** to **M/s China Wu Yi Co. Limited** at their evaluated tender sum of **KShs.3,818,875,530 (Kenya Shillings Three Billion Eight Hundred Eighteen Million Eight Hundred Seventy Five Thousand Five Hundred Thirty Only)** with a completion period of 34 months.

TENDER COMMITTEE DECISION

The Central Bank of Kenya Tender Committee in its 169th Meeting held on 6th August, 2013 rejected by terminating the recommendation of the evaluation committee on the ground that the evaluation took almost 60 days to evaluate the tenders since it is in contravention of Regulations 46 of the Public Procurement and Disposal Regulations, 2006.

The Tender Committee decision was communicated to the bidders vide letter dated 22nd August, 2013.

THE REVIEW

The Request for Review was lodged by M/s China Wu Yi Co. Limited on 4th September 2013 in the matter of Tender No: KSMS/PROC/038/12/13 for Proposed Remodeling, Expansion and Modernization of Hospitality Building at the Kenya School of Monetary Studies

The Applicant was represented by Mr. Alex Masika Advocate while the Procuring Entity was represented by Mr. Dicksons M. Ouma, Advocate. The interested candidate present was ECO Builders Ltd.

The Applicant raised two (2) grounds of review which the Board deals with as follows:

Grounds 1 and 2 - Breach of Sections 2 and 36 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act")

These grounds of the review have been consolidated since they raise related issues on the termination of the tender by the Procuring Entity.

The Applicant averred that the Procuring Entity had acted in Breach of Section 2 of the Act by unfairly and for ulterior/improper purposes setting in motion Section 36 of the Act which action gravely offended the fundamental overriding objectives of the Act, and contravened the provisions of the Act and the Regulations by failing to comply with specific requirements of the Tender Document.

The Applicant further averred that in light of the circumstances of the tender, it lamented that the Procuring Entity's decision to terminate the tender was done for ulterior purposes contrary to the letter and spirit of the aforesaid section.

The Applicant at the hearing presented the Public Procurement Oversight Authority's Circular No. 3/2008 of 26th August 2008 which contained the directive from the Authority on the report required for termination of procurement proceedings under Section 36(7) of the Act. The Applicant averred that the Procuring Entity's report submitted to the Authority as shown in the Procuring Entity's filed response to the instant application for review, did not conform to the requirements. He further indicated that the Public Entity did not report as per the format provided by the authority which required them to provide the tender number, the title of the tender, the chronology of events of the procurement up to the step preceding termination backed up by enough documentation and reasons for termination and supporting documentation.

In its response, the Procuring Entity submitted that all the bids were successful to the extent that they had met all the mandatory

requirements, passed the technical evaluation and preceded to the final stage of financial evaluation.

The Procuring Entity further submitted that after the evaluation of the financial bids, arithmetic errors were noted in each of the bids including the Applicant's. The information on errors and corrections were communicated in writing to the Bidders and three Bidders including the Applicant responded to the corrections. It stated that after a comprehensive evaluation, the Evaluation Committee made its recommendation to the Tender Committee.

The Procuring Entity further stated that when its Tender Committee sat on 6th August 2013, it noted that the evaluation had been done in 60 days from Tender Opening contrary to the 30 days stipulated in Regulation 46 and thus decided to terminate the tender.

The Procuring Entity submitted that it had sent notices of termination to all the Bidders including the Applicant notifying them of the termination of the proceedings, and that the same was also reported to Public Procurement Oversight Authority.

In conclusion, the Procuring Entity asserted that it had terminated the tender under Section 36 of the Act before entering into contract with any of the Bidders, and that Section 36 (1) of the Act gave the Procuring Entity the authority to terminate procurement proceedings at any time before entering into a contract.

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

The issue for determination by the Board is whether the Procuring Entity properly terminated the tender in accordance with Section 36 of the Act and therefore whether the Board has jurisdiction or not to give orders on the way forward under the powers conferred to it under Section 98 of the Act.

The Board notes the decision by Justice Nyamu in the *Selex Systemi* case (***Misc. Application No.1260 of 2007***) where he disagreed with the Board's view that Section 36 of the Act was absolute and that it could not therefore go behind it to find out the reasons for termination of the tender. Justice Nyamu's ruling was that the Board and the Court can interrogate the reasons for termination and that a termination was not an absolute ouster of jurisdiction.

Therefore, in this instant case, the Board needs to interrogate how the Procuring Entity invoked Section 36 of the Act and the reasons for doing so.

The Board finds that the only reason for termination, as submitted by the Procuring Entity at the hearing and upon review of the minutes of the Tender Committee meeting of 6th August 2013, was that the evaluation was carried out beyond the 30 days stipulated in Regulation 46; but is this reason enough to terminate a tender?

The Board is guided on this question by the High Court's decision in a Judicial Review Civil Application No. 540, where Justice Nyamu's decision required the Board to have investigated the reasons as to why a Procuring Entity had taken longer than the stipulated period for evaluation.

Looking at the manner in which Section 36 was invoked by the Procuring Entity, the Board questions why Bidders who bought tender

documents, took time to complete and submit tenders should be prejudiced by the Procuring Entity's internal issues.

The Board finds that this action by the Procuring Entity is not fair on the Bidders and as such does not meet the objectives of Section 2 of the Act.

The Board further notes that the tender validity period was 180 days and there was still 120 days remaining in this period. The Board also notes the Procuring Entity's advocate's submission at the hearing that his instructions were that the delay in evaluation beyond the 30 days was because of the size and voluminous nature of the bid.

On the issue of who should terminate a tender, the Board notes the powers conferred to the Tender Committee by Regulations 11 of Public Procurement and Disposal Regulations, 2006:-

Regulations 11(1) *In considering the submissions made by the Procurement Unit or Evaluation Committee, the Tender Committee may reject a submission with reasons.*

Regulations 11(2) (b) *The Tender Committee shall not reject any submission without justifiable and objective reason*

Regulations 11(3) *Where the Tender Committee rejects the recommendation of the Evaluation Committee the decision shall be reported to the head of the Procuring Entity or to the Accounting Officer.*

The Board finds that the Regulations require a Tender Committee that has rejected the recommendations of the Evaluation Committee to report the same to the Accounting Officer; the Regulations do not give the Tender Committee powers to terminate tenders.

The Board notes that Section 36(2) requires the Procuring Entity to give prompt notice of a termination to each Bidder. The Board notes that the Tender Committee decided to terminate the tender on 6th August 2013, but the notification letter to the Bidders on the same was dated 22nd August 2013 – 16 days after the purported termination. The Board finds that this was not prompt notification.

The Board further notes that Section 36(7) and (8), requires the Procuring Entity to give the Authority (PPOA) a written report on the termination; and that the report shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due.

The Board observes that the Authority issued a circular dated 24th June 2009, PPOA Circular No. 4/2009, in which it included a directive on the content, format and duration within which a report on termination of procurement proceedings should be submitted to it. The Board further observes that this is the same as contained in PPOA Circular No. 3/2008 produced at the hearing by the Applicant.

The Board notes that the report is required to be submitted to the PPOA within 14 days of termination of procurement proceedings and shall contain the following details.

- a. Tender number*
- b. Title of the tender*
- c. Chronology of events of the procurement up to the step preceding termination backed up by enough documentation.*
- d. Reasons for termination and supporting documentation e.g. tender committee minutes of the meeting that terminated the tender.*

The Board further notes the Procuring Entity's letter to the PPOA on the termination of proceedings as below.



KENYA SCHOOL OF MONETARY STUDIES
P.O. Box 65041 - 00608, Tel: 8646000, 0727-600668, 0733-600668, Fax: 8560430, NAIROBI, KENYA
E-mail: info@ksms.co.ke

29th August 2013.

THE DIRECTOR GENERAL

THE PUBLIC PROCUREMENT OVERSIGHT AUTHORITY

P.O. BOX 58535-00200

NAIROBI.

Dear Sir,

RE: TERMINATION OF TENDER NO. KSMS/PROC/038/12/13 FOR PROPOSED REMODELLING, EXPANSION AND MODERNIZATION OF HOSPITALITY BUILDINGS AT KENYA SCHOOL OF MONETARY STUDIES (KSMS)

Reference is made to the above captioned tender.

Kenya School of Monetary Studies (KSMS) publicly advertised the above tender in the media and it was closed on 29th April 2013. However, the School was not able to complete the evaluation exercise within the required time of 30 days as required under section 66 (6) of the Public Procurement & Disposal Act, 2005 and Regulation 46 of the Public Procurement and Disposal Regulations, 2006.

The evaluation exercise was instead completed on 28th June 2013. In view of the legal requirements on completion of evaluation, ~~the School has decided to terminate the tender~~ and has informed the participating bidders accordingly.

Yours faithfully,

NAHASHON MUSE

FOR: PROCUREMENT MANAGER

The Board finds that the Procuring Entity's letter was dated 29th August 2013 which was 23 days after the purported termination, contrary to the 14 days required by the Authority.

The Board further finds that the content and format of the Procuring Entity's report on the purported termination did not conform to the content and format required by the Authority.

Taking into account the foregoing, the Board finds that the Procuring Entity did not terminate the tender in accordance with Section 36 of the Act and as such the Board has jurisdiction to give orders on the way forward under the powers conferred to it by Section 98 of the Act. Accordingly, the appeal succeeds and the Board orders, pursuant to Section 98 of the Act, that:-

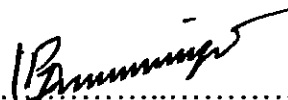
- 1) The termination of the tender by the Procuring Entity's Tender Committee, is hereby nullified; and
- 2) The Procuring Entity through its Tender Committee is directed to sit and consider the Evaluation Report submitted by the Evaluation Committee, and finalize the process within the next 15 days, in accordance with Legal Notice No.106

With regard to costs, the Board has held severally that the cost of tendering is a commercial risk taken by all bidders and as such each party should bear its own costs.

Dated at Nairobi on this 16th day of September, 2013



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.....

for

CHAIRMAN

PPARB

SECRETARY

PPARB

