

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

**APPLICATION NO. 30 & 32 / 2013 OF 4TH SEPTEMBER, 2013 &
6TH SEPTEMBER, 2013**

BETWEEN

**EPCO BUILDERS LTD AND MILICON'S
LIMITED / SVEC CONSTRUCTION CO. JV.....APPLICANT**

AND

**PARLIAMENTARY
SERVICE COMMISSION.....PROCURING ENTITY**

Review against the decision of the Tender Committee of the Parliamentary Service Commission dated 26th August, 2013 in the matter of Tender No. NA/018/2011-2012 for Proposed Multi-Storey Office Block for Kenya National Assembly, Nairobi - Item No. D29 NB 901 - Job No. 7753C.

MEMBERS PRESENT

- | | | |
|-----------------------|---|-----------------------|
| 1. Ms. Judith Guserwa | - | Member (in the Chair) |
| 2. Mr. Akich Okola | - | Member |
| 3. Mr. Sospeter Kioko | - | Member |
| 4. Ms. Natasha Mutai | - | Member |
| 5. Amb. Charles Amira | - | Member |

- | | | |
|------------------------|---|---------|
| 6. Eng. Christine Ogut | - | Member. |
| 7. Mrs Loise Ruhu | - | Member |

IN ATTENDANCE

- | | | |
|--------------------|---|-----------------------------|
| 1. Philemon Kiprop | - | Holding brief for Secretary |
| 2. Shelmith Miano | - | Secretariat |

PRESENT BY INVITATION:

Procuring Entity – Parliamentary Service Commission

- | | | |
|----------------------|---|----------------------------|
| 1. Sherrttam Mwendwa | - | Legal Counsel |
| 2. Keith Kisinguh | - | Senior Procurement Officer |

Applicant for Application 30/2013 – EpcO Builders Ltd

- | | | |
|---------------------|---|-----------------|
| 1. Dickens M. Ouma | - | Advocate. |
| 2. Gilbert Kowuocha | - | Project Manager |

Applicant for 32/2013– Milicon’s Ltd / Svec Construction JV

- | | | |
|------------------------|---|-------------------|
| 1. Austin Odoyo | - | Advocate |
| 2. Roham Paruchuri | - | General Manager |
| 3. Sai Prasad Parchuri | - | Managing Director |

Interested Party

- | | | |
|----------------------|---|-------------------------------|
| 1. Andrew Wandabwa | - | Advocate, China Wu Yi |
| 2. Josephat Onsongo | - | Legal Officer, China Wu Yi |
| 3. Muthomi Thionkalu | - | Advocate, China Jiangxi. |
| 4. Paul Kiriinya | - | Legal Assitant, China Jiangxi |
| 5. Xia Xinogim | - | China Jiannngxi |

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

The Procuring Entity advertised Tender No. NA/018/2011-2012 for the proposed multi-storey block for the Parliamentary Service Commission W.P. Item No. D29 NB/NB 901-Job No. 7753C in the Standard and Daily Nation Newspapers of 15th June, 2012.

Closing/Opening:

The tender closed and opened on 23rd July, 2012 at 11.00 am. The following twelve (12) firms submitted their bids as shown in table 1 below:

Table 1: Tender Opening Results.

S/No.	Firm	Bid Security
01	M/s Epcu Builders Ltd	Did not attach bid bond on the technical bid
02	M/s Dinesh Construction Co. Ltd.	Ksh.2,000,000.00 (Occidental Insurance)
03	M/s Parbat Siyani Construction Co. Ltd.	Did not attach bid bond on the technical bid.

04	M/s China National Aero-Technology International Engineering.	Ksh.2,000,000.00 (Jubilee Insurance Co Ltd.)
05	M/s N.K. Brothers Ltd.	Did not attach bid bond on the technical bid
06	M/s Hydroelectric Construction Bureau	Ksh. 2,000,000.00 (Cannon Assurance)
07	M/s Seyani Brothers and Co. Ltd.	Did not attach bid bond on the technical bid.
08	M/s China Railway No. 5 Engineering Group	Ksh 2,000,000.00 (Diamond Trust Bank)
09	M/s China Overseas Engineering Group	Ksh. 2,000,000.00 (CFC Stanbic Bank)
10	M/s China Jiangxi International (K) Ltd.	Ksh. 2,000,000.00 (Standard Chartered Bank)
11	M/s Milicons Ltd / SVEC Co. Jv	Did not attach bid bond on the technical bid.
12	M/s China Wu Yi Co. Ltd.	Ksh. 2,000,000.00 (Equity Bank Ltd)

EVALUATION

Evaluation of the received bids was carried out by an Evaluation Committee of sixteen members under the Chairmanship of Qs F.M. King'ori. The committee comprised of officers from Ministry of Public Works (MOPW), Kenya National Assembly (KNA) and the Consultants.

The evaluation was carried out in three stages namely; Preliminary, Technical and Financial evaluation stages.

Preliminary Examination of the Bids

The bids were evaluated based on whether they had met the mandatory criteria to qualify for detailed evaluation as set out in the advertisement and bid documents. Any bidder not meeting the mandatory criteria would not proceed for detailed technical evaluation. The mandatory criteria included the following:

1. Certificate of registration from the Registrar of Companies either as a limited liability company, partnership or sole proprietorship.
2. Copy of valid Tax Compliance Certificate by KRA.
3. Copy of PIN Certificate.
4. Copy of Audited Financial Accounts for the last two years.
5. Must provide litigation history for the last ten years.
6. Proof of ownership of major items of plant and equipment.
7. Proof of registration with the Ministry of Public Works as Category 'A' contractor for General builder's works.
8. Bid Security in the form of Bank guarantee or bid bond from an insurance company approved by (PPOA) of Kshs. 2,000,000.00 and valid for 150 days from the date of tender opening.
9. Company Profile / List of Directors.
10. Proof of completion of one high rise building of at least 10 floors.

11. Proof of works of similar magnitude and complexity undertaken in the last 5 years.

Observations:

- i) The committee noted that it was not expressly stated where the Bid Bond should be placed in the Technical bid or Financial bid. Consequently the committee did not disqualify bidders whose Bid bonds were not placed in the Technical bids and as such final decision was to be made once financial bids were opened.
- ii) All the Tax Compliance Certificates provided by the bidders were verified for authenticity via KRA's online services as provided on KRA's website - www.kra.go.ke.

Any bidder who did not meet any of the above requirements was considered **Non-Responsive** and did not qualify to proceed to the next stage of detailed evaluation. Table 2 below shows the summarized results of the Preliminary evaluation.

Table 2: Results of the Preliminary Evaluation are summarized below:-

S/No	Evaluation Criteria	Bidders											
		B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11	B12
1	Certificate of registration from registrar of Companies	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

S/No	Evaluation Criteria	Bidders											
		B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11	B12
2	Copy of Valid Tax Compliance Certificate by KRA	Yes	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
3	Copy of PIN certificate	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
4	Copy of Audited Financial Accounts for the last two years	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
5	Litigation history for the last 10 years	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
6	Proof of ownership of Major items of Plant and Equipment	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
7	Registration with Ministry of Public Works as category 'A' contractor	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
8	Bid Security of Kshs. 2,000,000.00 as Bank guarantee or bid bond.	—	Yes	—	Yes	—	Yes	—	Yes	Yes	Yes	—	Yes
9	Company profile	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

S/No	Evaluation Criteria	Bidders											
		B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11	B12
10	Proof of completion of one high rise building of at least 10 floors.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
11	Proof of works of similar magnitude and complexity in the last 5 years	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Evaluator's comment		R	NR	NR	NR	R	NR	R	R	NR	R	R	R

Key

R : Responsive

NR : Not Responsive

— : Did not attach bid bond on technical bid.

Under listed below are Explanatory Notes by the Committee

From table 2 above, five (5No.) bidders were not responsive to the mandatory requirements of the tender as stated below;-

a) Bid (02) - M/s Dinesh Construction Co. Ltd.

The bidder provided a copy of Tax Compliance Certificate that had expired on 27th January, 2012 thus invalid at close of the initial Tender opening date of 9th July, 2012.

b) Bid (03) - M/s Parbat Siyani Construction Ltd.

The bidder provided a copy of Tax Compliance Certificate that had expired on 16th June, 2012 thus invalid at close of the first initial Tender opening date of 9th July, 2012.

c) Bid (04) - M/s China National Aero-Technology International Engineering.

- i) The bidder provided a copy of Tax Compliance Certificate that had expired on 24th May, 2012 thus invalid at close of the first initial Tender opening date of 9th July, 2012.
- ii) The bidder did not provide a copy of current registration certificate from the Ministry of Public Works.

d) Bid (06) - Ghuangxi Hydroelectric Construction Bureau.

The bidder did not provide a copy of Audited Financial results for 2011 and therefore did not qualify for further evaluation.

e) Bid (09) - M/s China Overseas Engineering Group Ltd.

- i) The bidder did not state whether they have any litigation history.

- ii) The bidder did provide proof of completion of any high rise building of at least 10 floors.
- iii) The bidder did not provide proof of completion of works of similar complexity and nature in the last 5 years.

From the above observations and analysis the following seven **(7 No.)** bids met all the mandatory requirements for the tender and therefore qualified for further evaluation.

- a) (01) - M/s Epcobuilders Ltd.
- b) (05) - M/s N.K. Brothers Ltd.
- c) (07) - M/s Seyani Brothers & Co. Ltd
- d) (08) - M/s China Railway No. 5 Engineering Group
- e) (10) - M/s China Jiangxi International (K) Ltd
- f) (11) - M/s Milicons Ltd /SVEC Construction Jv
- g) (12) - M/s China Wu Yi Co. Ltd.

Detailed Technical Evaluation.

The seven bids that qualified for detailed evaluation were evaluated based on the following evaluation criteria :-

(A) Staff Qualifications:

- Adequacy of staff in accordance with minimum requirements.
- Qualification of Directors (1 no Director or partner).
- Experience of Directors (1 no Director or Partner).

(B) Plant and Equipment:

- Equipment owned by the firm
- Proof of ownership of at least four of the listed equipment.
- Adequacy of the equipment
- Age and condition of the equipment

(C) Office and service facilities of the firm:

- Own premises
- Own functional workshop.

(D) Experience of the firm:

- 2no completed projects.
- Litigation or history of claims.

(E) Financial status of the firm:

- Average annual turnover of the firm.
- Liquidity (cash in bank or redeemable securities).
- Fixed assets of the firm.

Each bid was examined independently by each evaluator, scored and averaged. Table 3 below shows the results of the technical evaluation based on the above criteria.

Table 3: Detailed Technical Evaluation Scores

Bid No.	Bidders	Evaluators								Average score	Remarks
		E1	E2	E3	E4	E5	E6	E7	E8		
01	M/s Epcu Builders	88	95	99	100	96	100	100	90	96.8	Pass

05	M/s N.K. Brothers Ltd.	90	86	84	92	100	92	83	86	89.1	Pass
07	M/s Seyani Brothers & Co. Ltd.	73	91	77	79	71.5	76	85	66	77.3	Pass
08	M/s China Railway No. 5 Engineering Group.	79	92	88	88	96	100	88	90	90.1	Pass
10	M/s China Jiangxi International (K) Ltd.	98	96	98	100	98	98	98	95	98.0	Pass
11	M/s Milicons Ltd / SVEC Co. Jv.	97	85	92	96	78	100	70	96	88.3	Pass
12	M/s China Wu Yi Co. Ltd.	100	98	98	100	99	100	100	100	99.3	Pass

From the scores in the above table, all the seven (7No) bidders scored above the pass mark of **65%** as stipulated in the tender document and therefore qualified for financial evaluation.

As part of the technical evaluation, the committee resolved to undertake due diligence on the following issues:

1. Bidders capacity: A select committee was given the task of visiting ongoing sites within Nairobi and also confirming their projects progress and availability of offices and workshops.
2. The committee also sought to obtain confirmation from the following bodies concerning details given by the bidders.
 - a. Ministry of Public Works - Registration status of the contractors.
 - b. Registrar of companies - To verify registration status / directors.
 - c. Registrar of Judiciary - To confirm Litigation history if any.
 - d. Chinese and Indian Embassies - Authenticity of international projects.

FINANCIAL EVALUATION

The Financial Proposals for the technically qualified bidders were opened on 14th September, 2012.

The bid amounts as contained in the Form of tenders opened were as shown in table 4 below

Table 4: Bid amounts for evaluated firms.

Bid	Tenderer	Tendered Amount	Bid Bond	Remarks
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No.		(Kshs)		
12	M/s China Wu Yi Co. Ltd.	5,648,000,000.00	Equity Bank	Valid
10	M/s China Jiangxi International (K) Ltd.	5,893,646,849.67	Standard Chartered Bank	Valid
1	M/s EpcO Builders Ltd.	6,027,527,200.00	Mayfair Insurance	Valid
11	M/s Milicons Ltd & SVEC Co. Jv.	6,077,088,099.00	Canon Assurance	Valid
05	M/s N.K Brothers Ltd.	6,555,909,101.00	Intra Africa Insurance	Valid
07	M/s Seyani Brothers & Co Ltd.	6,754,567,612.00	Intra Africa Insurance	Valid
08	M/s China Railway No. 5 Engineering Group Ltd.	7,797,172,381.58	Diamond Trust Bank	Valid
-	Official estimates	5,946,831,661.00	-	-

Observation.

M/s EpcO builders Co Ltd. and M/s N.K. Brothers Ltd. gave their tender validity for 60 days ending on 23rd September, 2012 contrary to the 120 days stipulated in the Appendix to conditions of contract.

The table below indicates the comparison between the tendered amounts and the estimated amount for all the bidders above.

Table 5 – Tenders received from the bidders and their comparison with the estimate.

Bid No.	Tenderer	Tendered Amount (Kshs)	Estimated Amount (Kshs)	Bid % of Estimate	Variance %
12	M/s China Wu Yi Co. Ltd.	5,648,000,000.0 0	5,946,831,66 1	94.97%	(-)5.03%
10	M/s China Jiangxi International (K) Ltd.	5,893,646,849.6 7	5,946,831,66 1	99.10%	(-)0.9%
11	M/s Milicons Ltd & SVEC Co. Jv.	6,077,088,099.0 0	5,946,831,66 1	102.19%	2.19%
07	M/s Seyani Brothers & Co Ltd.	6,754,567,612.0 0	5,946,831,66 1	113.58%	13.58%
08	M/s China Railway No. 5 Engineering Group Ltd.	7,797,172,381.5 8	5,946,831,66 1	131.11%	31.11%

The bids are fairly competitive as observed from the tenders submitted and outlined in Table 5 above. However **M/s Seyani Brothers & Co Ltd** and

M/s China Railway No 5 engineering group have a variance of above 10% to the official estimates.

Due diligence.

The tender evaluation committee also set-out to carry due diligence on the firms that had been responsive to the technical criteria as set out in the technical bid.

The information required is mandatory as set out in the mandatory requirements in the technical bid and failure to comply leads to automatic disqualification. Table 06 below shows the findings.

Table 06 Results on Due diligence.

Bid No.	Tenderer	Company Registration	Litigation History	Ongoing works of similar nature & complexity
12	M/s China Wu Yi Co. Ltd.	✓	x	✓
10	M/s China Jiangxi International (K) Ltd.	✓	✓	✓
11	M/s Milicons Ltd / SVEC Co. Jv.	✓	✓	✓
07	M/s Seyani Brothers & Co. Ltd.	✓	x	✓
08	M/s China Railway No. 5 Engineering Group Ltd.	✓	✓	X

Key:-

✓ :Responsive / correct information

X :Non-Responsive / declared incorrect information

Observations

Company Registration

Upon Writing to the registrar of companies to confirm registration status of the five bidders, three firms namely; **M/s Milicons Ld / SVES Co. Jv, Ms Seyani brothers and company Ltd, M/s China Railway No. 5 Engineering group co. ltd** were confirmed to be dully registered. However the registrar of companies requested the committee to give them the registration numbers of **M/s China Wu Yi Co Ltd and M/s China Jiangxi International (K) Ltd.** for confirmation of their registration. These firms were also confirmed to be registered vide letter dated **18/9/2012**

Experience in works of a similar nature & complexity

Where the foreign contractors had cited such works as having been performed in their source countries, the tender evaluation committee sought information from the relevant consulates. However this information could not be established from the consulates.

Litigation History

The Judiciary advised the tender evaluation committee to confirm with the Kenya Law Reports regarding the cases filed in court by the bidders. The committee checked the details online and established as below;

China Wu Yi Co. Ltd

- They have cases which they failed to declare as part of their litigation history

M/s China Wu Yi Co. Ltd are therefore adjudged non-responsive and disqualified from further evaluation.

Seyani Brothers Co. Ltd

- They have cases which they failed to declare as part of their litigation history

M/s Seyani Brothers Co. Ltd are therefore adjudged non-responsive and disqualified from further evaluation.

From the above analysis, the following bidders qualified for further evaluation;

- 1) M/s China Jiangxi International (K) Ltd.
- 2) M/s Milicons Ltd / SVEC Co. Jv.
- 3) M/s China Railway No. 5 Engineering Group Ltd.

Detailed Tender Analysis

The detailed analysis includes:-

- Arithmetic check

➤ Analysis of pricing

Arithmetic Check

The bid comparison to the official estimate as well as the arithmetic errors upon correction vis-à-vis the tender sum are tabulated in Table 7 :

Table 7 - Comparison of the corrected tender of the responsive bidders

	Tenderer	Tendered Amount (Kshs)	Variance from Estimate %	Corrected Tender Amount (Kshs)	% Error
1	M/s China Jiangxi Int. (K) Ltd.	5,893,646,849. 67	(-)0.9%	5,893,595,230. 82	0.00167 %
2	M/s Milicons Ltd / SVEC Co. Jv.	6,077,088,099. 00	2.19%	6,077,088,099. 00	NIL
3	M/s China Railway No. 5 Eng. Co. Ltd.	7,797,172,381. 58	31.11%	7,797,172,381. 58	NIL

From Table 7 above, the tender bids offered by the responsive tenderers range from (-) 0.9% above estimate to 31.11% below the estimate.

(a) Arithmetic Errors

The responsive bids were subjected to arithmetic check in accordance with Clause 5.7 (d, e &f) of the "Instructions To Bidders" in order to establish the error adjustment factor. Error adjustment factor is the factor by which the tender rates would be adjusted if the respective tender is successful.

Tender No.2 and No. 3 had no errors whereas bidder number 01 had a negligible error.

Analysis of Pricing

Table 08: summary of rates

Item	Estimate	Unit	Tendered Rates		
			M/S China Jiangxi	M/S China Rail No. 5	M/S Milicons
Normal Excavation	375	CM	200	300	325
Excavation in rock	2,200	CM	2,400	145	2200
Reinforced Concrete Class 30/20	14,200	CM	15,543	18,355	14,400
Reinforced Concrete Class 25/20	13,000	CM	14,350	17,764	12,300

Steel Reinforcement	140	KG	120	230	142
Sawn Formwork	500	SM	600	2,145	675
200 mm thick Solid Block Walling	2,100	SM	1,512	3,108.9	1,950
Structural Steel	200	KG	300	210.14	190
Aluminum doors	12,000	SM	12,760	13,074	12,600
Aluminum windows	12,000	SM	10,754	16,261	13,250
Porcelain tiles	2,600	SM	1580	4,919.67	2,600
Alluco bond	14,500	SM	9558	11,898.97	16,000
Curtain Walling	12,100	SM	27,480	8,276.31	15,500
Plaster	300	SM	230	383.39	300

From Table 8 above, the tender rates for M/s China Jiangxi Co. Ltd & M/s Milicons Ltd. / SVEC JV Ltd are very competitive and compare well with the estimate. The rates in the bids by M/s China Railway No. 5 Eng. Co. Ltd are very high as compared to the estimate are considered **non-competitive**.

The above overview is also borne out of the overall tender sum. This can be observed from their tabulated variances with the estimate as outlined previously in Table 5 where the bidders have a variance from 0.9% below the estimate to 31.11% above respectively.

Conclusion

China Jiangxi International (K) Ltd

- M/s China Jiangxi Int. Co. (K) Ltd have submitted the lowest responsive financial bid of **Kshs. 5,893,646,849.67** (*Five billion, Eight hundred & Ninety Three million, Six hundred Forty Six thousands, Eight hundred & Forty Nine Kenya Shillings & Sixty Seven Cents*).
- The bid is 0.9% below the estimate.
- Their arithmetic error is negligible and their rates compare well with the estimate.

Milicons Ltd/SVEC Co. JV Ltd

- M/s Milicons Ltd/SVEC Co. JV Ltd have submitted the second lowest financial bid of **Kshs. 6,077,088,099.00** (*Six billion, Seventy Seven million, Eighty Eight thousands & Ninety Nine Only*),
- The bid is 2.19% above the estimate.
- They have no arithmetic error and their rates compare well with the estimate.

China Railway No. 5 Eng. Co. Ltd

- M/s China Railway No.5 Eng. Co. Ltd have submitted the third lowest financial bid of **Kshs. 7,797,172,381.58** (*Seven billion, Seven hundred & Ninety Seven million, One hundred & Seventy Two thousands & Three hundred & Eighty One Kenya Shillings & Fifty Eight Cents*)
- The bid is 31.11% above the estimate.
- They had no arithmetic error in their financial bid.
- Their rates are very high when compared to the estimate and to the bids submitted by the two lowest responsive tenderers and therefore non-competitive.

RECOMMENDATION

From the above analysis the lowest responsive bid submitted by **M/s. China Jiangxi International (K) Ltd** with a tender amount of **Kshs. 5,893,646,849.67** (*Five billion, Eight hundred & Ninety Three million, Six hundred Forty Six thousands, Eight hundred & Forty Nine Kenya Shillings & Sixty Seven Cents*) was recommended for award of this tender.

TENDER COMMITTEE DECISION

The National Assembly Tender Committee at its 19th 2012-2013 meeting held on 13th December, 2012 discussed the report presented before it by Mr. Njoroge and by consensus resolved that the works be retendered as none of the bidders met all the mandatory requirements as indicated in the Tender documents.

THE REVIEW

The Request for Review was lodged by EPCO BUILDERS LTD AND MILICON'S LIMITED /SVEC CONSTRUCTION CO. JV on 4th and 6th September,2013 in the matter of Tender No: NA/018/2011-2012 for Proposed Multi-Storey Office Block for Kenya National Assembly, Nairobi Item No. D29 NB 901 Job No. 7753C.

The Applicant for Application No.30/2013 was represented by Dickens M. Ouma Advocate, whereas Applicant for Application No.32/2013 was represented by Austin Odoyo, Advocate and the Procuring Entity was represented by Mr. Sherittsam Mwendwa, Legal Counsel. Interested parties present were China Jiangxi International (K) Ltd represented by Mr. Muthomi Thiankolu and China Wu Yi Ltd represented by Mr. Andrew Wandabwa.

The Applicant for Application No.30/2013 requested the Board for the following orders:

- (a) The decision of the Procuring Entity is illegal and the same be annulled in whole;***
- (b) The Procuring Entity be ordered to pay the costs for this Application.***

The Applicant for Application No.32/2013 requested the Board for the following orders:

1. *The Respondent be directed to re-evaluate the tenders.*
2. *The Respondent be directed to award the tender to the applicant under Section 98 of the Act.*
3. *Any other remedies the board may decide on under Section 98.*
4. *Cost be provided for.*

These two Applications have been consolidated and heard together as they arise from the same tender being Tender No. NA 018/2011 - 2012 for the Construction of Proposed Multi Storeyed Office Block for Parliamentary Service Commission. The two Appeals by M/s EpcO Builders Ltd and Milicon's Ltd were filed on the 4th and 6th September, 2013 respectively.

PRELIMINARY OBJECTION

At the commencement of the proceedings, the successful bidder i.e. China Jiangxi International (k) Ltd, the Interested Party through its Advocate on record Mr. Muthomi Thiankolu informed the court that it had filed a Preliminary Objection which it proposed to prosecute before the Board could hear the applications for review on merit. The Board directed Counsel to prosecute the said Preliminary Objection in responding to the arguments of the Applicants in order to save on time as the Board was pressed for time as its term was drawing to an end.

The Applicant in application No. 30/2013 M/S. EPCO argued as follows:-
It stated that the application was premised on the Board's decision in Application No. 71/2012 which was delivered on the 17th January, 2013. It stated that the Procuring Entity acted in breach of Section 52 (3) (h) of the Act as read together with Regulations 42 (1) by awarding the tender to the Successful Bidder when the tender validity period for the same tender had expired.

It argued that the Procuring Entity had also breached Section 61 of the Act by failing to request the bidders to extend their bid bonds which had not expired by the time the Board delivered its ruling. It maintained that although the Procuring Entity had filed a Judicial Review Application in the High Court, the same was determined on 30th June, 2013 and time started to run then.

He added that the Procuring Entity had awarded the tender 2 1/2 months after the High Court ruling. It submitted that the period for the award of the tender was therefore not valid. It referred the Board to its decision in Application No. 2/2007 in which it was held that the Procuring Entity cannot extend the life of a tender that had expired. It further submitted that the validity of the subject tender had expired on 20th November, 2012 and therefore there was nothing to award. It asked the Board to find that the Procuring Entity had breached the Act and therefore should order for the annulment of the award.

The Applicant in Application No. 32/2013, (M/S. Milicons) argued as follows:-

That the Procuring Entity had breached Sections 2, 32, 39, 66 and Regulations 50 by failing to awarding tender in time with the Board's decision in Application 71 of 2012 to the effect that the award was to be given to the bidder who was declared the lowest evaluated in accordance with the recommendations of the Evaluation Committee and the provisions of the Act.

It argued that the Procuring Entity overlooked the provisions of Section 2 (f) as its actions did not promote local industry and economic development. It stated that the Procuring Entity merely proceeded to award the tender to the Successful Bidder without looking at the evaluation exercise which would have revealed that the Procuring Entity did not apply preferences as provided under Clause 5.12 of the Tender Document and L.N 58/2005.

It argued that the Procuring Entity's failure to apply preferences frustrated the Applicant's Legitimate expectations based on the ruling of the Board in the Application 71/2012. It added that the Procuring Entity was required to review, verify and ascertain that the procurement had been undertaken in accordance with the Act and Regulation. It referred the Board to the case of Njama Ltd vs Northern Water Services Board Application 7/2012 of 27th February, 2012 in which the Board held that the Procuring Entity had failed to subject the bids to evaluation. It further cited the decision of the High Court in the Republic vs Public Procurement Administrative Review Board and Kenya Revenue Authority in which Justice Nyamu held "*Where the*

margin of Preference consideration is to be considered the same ought to be applied as the precautionary measures least the Procuring Entity is held to be in breach of such requirements”.

It stated that if preferences were applied to its bid in the subject tender, its bid would have emerged the lowest evaluated bid in accordance with its assessment at page 20 of its bundle of documents. It submitted that the Procuring Entity overlooked the provisions of the Act and hence its award was null and void and the issue of Res Judicata, as claimed by the Interested Party, did not arise as it was challenging the award and not the process.

In response, the P.E. stated as follows:-

The Board had given its decision in Application 71/2012 of 17th January, 2013 against which it had lodged an Application for Judicial Review in terms of Section 100 (10) of the Act. It stated that the Judicial Review Application was determined on the 3rd of June, 2013 where Justice Odunga dismissed it on technicality.

It added that after the High Court ruling, the Parliamentary Service Commission met to deliberate on the ruling and directed the Procuring Entity to award the tender in accordance with the Board's decision. It stated that the award was made on 26th August, 2013 by the Tender Committee after it held its meeting on the said date.

It argued that it was not in breach of any law and in fact had implemented the decision of the Board. It formed the Board that when it delivered its decision on 17th January, 2013, the Procuring Entity had completed its evaluation exercise there was nothing outstanding to evaluate nor reconsider. It submitted that the matter was made closed and the two Applications for Review were improperly before the Board and ought to be dismissed.

On its part, the Interested Party argued as follows:-

On the part of the 1st Interested Party being the Successful Bidder, it stated that it had filed its grounds of objection raising the issues of Jurisdiction, the doctrine of Res Judicata and the frivolity of the two applications for determination before the Board.

It indicated that the Board had no Jurisdiction to entertain the two Applications given that it had already determined matters arising from the subject tender in Application 71/2012.

It stated that the Board should not allow a party to litigate in installments over the same subject matter in respect to matters that ought to have been filed but were not due to negligence, omission or otherwise by parties or their Counsels. He argued that Application No. 32 of 2013 was filed in breach of the principle of Res Judicata especially with regard to Section 39 on Preferences which issue should have been raised in Application 71/2012 in which M/s Millicon's participated and supported the Applicant therein.

It argued that the party did not exercise any due diligence as it failed to file its request for review based on Preference in the earlier Application. It referred the Board to the holding in the decision of Henderson vs Henderson a 1823 case page 90 in which the Court upheld the Application of the doctrine of Res Judicata. It stressed that there ought to be an end to litigation and in that regard the instant Applications were ill advised and misconceived. It also referred the Board to the case of Intex Constructions Ltd vs Kenya Rural Roads Authority Application No. 1/2011 of 14th January, 2011 in which the Board held that the doctrine of Res Judicata was available even in Quasi Judicial bodies like itself.

It submitted that both Applications appeared before the Board in 71/2012 and they cannot re-open the issue relating to the subject tender as this would be against the doctrine of Res Judicata. It argued that in Application No. 71/2012, the Board ruled that the lowest evaluated bidder, China Jiangxi, who is one of the Interested Parties herein, would be awarded the tender and therefore the Board should not sit again in the matter to adjudicate as it was *functus officio*. It added that if the Board allowed the two Applications to be argued before it, it would set a bad precedent and violate Public Policy as it would open up litigation to any bidder who participated in the tender irrespective of the time lapse and other decisions touching on the subject tender.

Finally it submitted that once the Board delivered its decision on the 17th January, 2013 any party who was aggrieved by it ought to have moved the

High Court and not come back to the Board as the Applicants were attempting to do.

On its part, the 2nd Interested Party (Ms China Wu Yi Co. Ltd) stated that the tender validity of the subject tender had expired and as such the Procuring Entity had breached the Act by awarding the tender outside the tender validity of 60 days. It argued that the Procuring Entity violated the requirements of Section 67 (1) of the Act which required extension of tender validity before its expiry and also notification of the bidders.

It argued that the notification of the award on 26th August 2013 gave rise to a new cause of action and hence the filing of the two applications which were lawfully before the Board for determination. It argued that there was a risk that the tender validity period having expired, the Procuring Entity could award the tender to a bidder who was likely to change the price in violation of the letter and spirit of the Act. It added that a bidder is not bound by its bid bond because it had also expired and thus it could vary its prices resulting in loss of public funds.

It urged the Board to rectify its decision to allow the process to be relooked into as the bid securities had now lapsed and the tender validity period had also expired.

It further stated that it received its notification letter through registered mail of 28th August 2013 but had not filed a challenge to the award due to

time constraints. It argued that the Board did not have powers to apply the doctrine of Res Judicata as required under common law practice unlike the conventional courts which applied it based on the provisions of the Judicature Act. It therefore urged the Board to allow the two Applications which in its opinion were meritorious and would pave way for nullification of the award of tender as well as retendering.

The Board has carefully considered the representations of the Applicants in both applications, the Procuring Entity, the Interested Parties and examined the documents submitted before it. The issues that arise for the Board to determine are:-

- i) Whether the Board has jurisdiction to entertain the applications as filed.
- ii) Whether the Board should consider the issues relating to the Tender validity period of the subject tender.
- iii) Whether the applications under consideration are subject to the doctrine Res Judicata.
- iv) Whether the Board can determine the application of Preference during the evaluation process at this stage.

In determining the foregoing issues, the Board notes as follows:-

1. The Procuring entity advertised Tender No. NA/018/2011-2012 for the proposed Multi-storey block for the PSC W.P. item No. D29 NB/NB 901- Job No. 7753C in the Standard and Daily Nation Newspapers of 15th June, 2012.

2. The tender closed/opened on 23rd July 2012 at 11.00 a.m. and attracted 12 bidders.
3. The evaluation of the bids was carried out in three stages namely the Preliminary Technical and Financial evaluation stages.
4. At the close of the preliminary stage 5 bidders were disqualified as being non responsive leaving 7 bidders to proceed to the technical evaluation stage the two Applicants are among those who proceeded to the next stage.
5. The Seven bids that had qualified for the detailed technical evaluation were evaluated based on the criteria set out in the bid documents at Clause 1.5 of the Instruction To Tenderers
6. That all the Seven (7) bidders scored above the 65% pass mark and qualified for the financial evaluation.
7. Further the Seven(7) bids were evaluated on the following criteria:-
 - a. Due diligence
 - b. Company registration
 - c. Experience in works of a similar nature and complexity
 - d. Litigation history
8. The Applicant and two other bidders M/S. Milicons Ltd/SVEC Co. Jv. And M/S. China Railway No. 5 Eng. Co. Ltd were qualified for further evaluation after the foregoing analysis and Applicant in application 30/2013, M/S. Epco Builders Co. Ltd was disqualified at this stage as it gave a tender validity for 60 days and not the requested 60 days.

9. The three (3) bidder's price proposals were subjected to arithmetic checks and analysis of the pricing.
10. At the conclusion of the Financial Evaluation the applicant's bid of Kshs.5,893,646,849.67 was found to be the **lowest** responsive financial bid, while the other 2 bidders namely M/S. Millicons Hill SVEC-Co. JV Ltd and M/S. China Railway No.5 Eng. Co. Ltd were declared to be the second and third lowest responsive bidders respectively.
11. That at the financial evaluation stage, the bid prices were compared with the estimate and the results were as follows:-

	Tenderer	Tendered Amount (Kshs.)	Variance From Estimate %	Corrected Tender Amount Kshs.	% Error
1	M/s China Jiangxi Int. Co. Ltd	5,893,646,849.67	(-)0.9%	5,893,595,230.82	0.00167 %
2	M/s.Millicons Ltd/SVEC Co.Jv.	6,077,088,099.00	2.19%	6,077,088,099.00	NIL
3	M/s.China Railway No.5 Eng. Co. Ltd	7,797,172,381.58	31.11%	7,797,172,381.58	NIL

12. The Procuring Entity's Evaluation committee recommended the Applicant to the Tender Committee for the award of the tender.
13. That when the evaluation report recommending the Applicant was placed before the Tender Committee on the 13th December, 2012 the said Committee recommended the retendering of the works on the basis that none of the bidders met all the mandatory requirements as set out in the tender documents.
14. That at that point in time the subject tender was neither terminated nor awarded by the Tender committee which instead ordered for a retender.
15. That the evaluation of the tender was conducted from 24th July, 2012 to 29th August, 2012 and as at the 13th day of December 2012 when a decision to retender was made the tender validity period had lapsed, save that the bidders' bid bonds for all the bidders were still valid.
16. That as at the 13th day of December, 2012 when the Tender committee was discussing the evaluation report, it had already received another report from a 3 member committee whom it had directed to re-evaluate the tenders on the criteria of litigation history.
17. That a Request for Review was on the 18th day of December 2012 as Application 71/2012 was served on the Procuring Entity the same day namely 18th December, 2012.
18. The Procuring Entity then decided to issue the notification of the termination of the tenders on 19th day of December, 2012 after being served with the Board's letter of notification of the filing of Application 71/2012 which directed it in part as follows:-

"Please note that according to the Public Procurement and disposal Act 2005, the procurement process should be stopped and no contract subject to the Regulations can be signed between the Procuring Entity and the successful tenderer until the appeal has been finalized".

19. That the Board gave its decision in Application 71/2013 of 18th December, 2013, on 17th January, 2013. It held as follows:

"In view of the foregoing the Board holds that the Procuring Entity and specifically the Tender committee has failed to observe the provisions of the Act and Regulations, thereby leading to a flawed procurement process.

In the premises the Board holds as follows:-

- i. Having found that as at the time the application was filed before the Board all the bid bonds were still valid, the Board holds that the bidders prices are still valid as time stopped running upon filing of the Request for Review on the 18th December, 2012. In the circumstances the Board orders that the Procuring Entity should proceed to award the tender to the bidder whose bid was declared to be the lowest evaluated in accordance with the recommendation of the Evaluation committee and the Provisions of the Act.*
- ii. There are no orders as to costs."*

20. That the Procuring Entity exercised its right to Judicial Review to the High Court when it filed a Notice of Motion on 31st January, 2013 at the High Court under (Msc) Application No.32 of 2013 arising from the Board's aforestated decision.

21. The Applicant in Application No. 32/2013 who had participated in the hearing of Review Application No. 71 of 2012 in which it sought M/s Milcons Ltd the following orders:-

1) *" The Respondent be directed to evaluate and/or report to the Board on the evaluation of the tenders in Tender No. NA/018/2011-2012 for Proposed Multi-Storey Office Block for Kenya National Assembly, Nairobi WP Item. No. D29 NB 901 Job No. 7753C.*

2) *Any other remedy that the Board may deem fit to give under section 98 of the Act including but not limited to awarding the tender to the Applicant.*

3) *Costs be provided for"*

22. The Applicant if dissatisfied with the decision of the Board in Application No. 71 of 2012 should have appealed against the same or filed an Application challenging the evaluation of the tender given that it had become aware that L. N. 58/2005 on Preferences had not been applied by the Procuring Entity.

23. That the High court held that the Review Board had delivered the ruling on the preliminary objection and therefore the application for

judicial review should have been made within fourteen (14) days of this date, that is, 29th January, 2013. The High Court thereafter proceeded to dismiss that application for judicial review in a Judgment delivered on 3rd June, 2013

24. That the Procurement Entity thereafter filed a Notice of Appeal against the Judgment of the High Court on 5th June, 2013, to the Court of Appeal.

25. That Procuring Entity decided to abandon the appeal to the Court of Appeal paving way to the implementation of the decision of the Procurement Administrative Review Board.

26. That in its 178th meeting on 1st August, 2013, the Commission considered Paper No.568 on the tender for the Proposed office block and resolved that:-

- i) The Parliamentary Service Commission complies with the court order and proceed to award the tender for the proposed office block to the bidder in accordance with the recommendation of the Evaluation committee and the Provision of the Act, Subject to the Terms and condition of the Tender Documents: and
- ii) The Bidder be requested to waive the cost incurred at the High Court.

Board noted that the deliberation of 178th meeting were not submitted to the Board but captured in the Tender committee meeting held on 26th August, 2013.

27. That the 6th Parliamentary Tender Committee held 8th August, 2013 requested for a legal opinion from the Director, Litigation and Compliance on the issue of Tender Validity viz a viz compliance with Court order (No records submitted to the Board on the proceeding of the above meeting).

28. That on 22nd August, 2013 Mr. Anthony Njoroge Director, Litigation & Compliance, presented his opinion, to the Committee to with the following directions:-

"That the PPARB has therefore given direction to the Procurement Entity on what is to be done with regard to procurement for the main works contractor of the proposed office block. The review Board held that the tender is still valid. So long as the direction of the Board has not been overturned by the Courts then the Procuring Entity is bound to obey the same"

29. That at 7th Parliamentary Tender Committee held on 28th August, 2013 the Legal Opinion was tabled and the Director took the members through the report. He informed the Committee that PPARB in its ruling No. 71/2012 of 18th December had resolved that the Tender

- validity had not lapsed since the bidders bind bonds were valid by the time the Application for review was filed on 18th December, 2012.
30. That in the same meeting, the Committee in Compliance with Public Procurement and Administrative Review Board and High Court Judgment and the resolution of the Parliamentary Service Commission at its 178th August, the Tender Committee resolved "that the tender for the office Block stands awarded to the bidder whose bid was declared to be the lowest evaluated".
31. That the Procuring Entity issued letter of notification to the Successful Bidder dated 26th August, 2013 stating that, Pursuant to the ruling of 17th January, 2013 of Public Procurement and Administrative Review Board it had accepted its bid of 5,893,646,849.67 and that the contract will be signed after 14 days. It further requested the Successful Bidder to waive the cost awarded to it at the High Court under Misc Application No. 32 of 2013, the unsuccessful bidders were notified also on the same date.
32. That the acceptance letter by the Successful Bidders is dated 2nd September, 2013 accepting all the conditions set out in the notification of the award from the Procuring Entity.
33. That the Applicant in Application No. 30/2013 filed its application on 4th September, 2013.
34. That the Applicant in Application No. 32/2013 filed its application on 6th September, 2013.

Arising from the above facts, the Board makes the following findings and decision.

In respect to Application No. 32/21013, the Board finds that the letter of notification dated 26th August, 2013 was dispatched by the Procuring Entity vide registered mail on 28th August, 2013 and received by it, according to its stamp, on 30th August, 2013. As noted above, the Applicant filed its request for review on 6th September, 2013.

The issue which arises is whether the Application was filed within the statutory period of seven days as prescribed in paragraph 20 of Legal Notice No 106 of 2013. The letter of notification having been mailed on 28th August 2012, the appeal window opened on 29th August, 2013, and closed on 4th August, 2013. This is consistent with the previous rulings by the Board, according to which, the appeal window opens one day after postage of the notice of notification. This is supported by the cases of *Ongata Works Ltd v. Kenyatta University [Application No. 42/2008]* and *Otieno Odongo & Partners v. Northern Water Services Board [Application No 13/2008]*. This being the case, the Board finds that the application having been filed on 6th September, 2013, was statutorily time barred,

Having made this finding, the Board therefore rules that it has no jurisdiction to hear Application No. 32/2013. Accordingly it is not necessary to hear and determine the case on its merit.

Turning to Application No.30/2013, the Applicant's case is that at the time of the award of the tender by the Procuring Entity, the tender validity period had expired, and the Procuring Entity having not requested the bidders to extend their respective tender validity period in accordance with 52 (3) (h) of the Act as read together with Regulations 42 (1) of the Act, there was no tender to award.

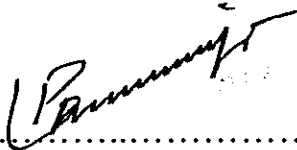
The Board finds that the very issue of validity of tenders was the subject of the finding by the Board in Application No. 71/2013. In that Application, the Board did in fact find that indeed, the tender validity period for the tenders had expired, but ruled that since the bid bonds were still valid, the tenders were not extinguished. To this end, it directed the Procuring Entity to evaluate the tenders and award the same in accordance with the recommendation of the Evaluation Committee, the Act and the Regulations. It is therefore, clear that the issue of tender validity has been the subject of a previous application and the Board has made its ruling on it. It is further the case that the tender in question was the subject of judicial review as stated above, and that the High Court upheld the decision of the Board in (Msc) Application No.32 of 2013.

Consequently, the Board finds and holds that at this point in time it lacks the jurisdiction to hear and determine the issues relating to Application of , preferences, the Tender Validity Period insofar as the matter is Res Judicata.

Consequently, both Requests for Review fail. The procurement process may proceed.

There will be no orders as to cost.

Dated at Nairobi on this 16th day of ^{September} ~~August~~, 2013



CHAIRMAN
PPARB

SECRETARY
PPARB

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