

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 38/2013 OF 10TH OCTOBER, 2013

BETWEEN

MABEY BRIDGE LIMITED.....APPLICANT

AND

THE KENYA NATIONAL

HIGHWAYS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of The Kenya National Highways Authority dated 17th December, 2012 in the matter of Tender No. ICB No. KENHA/364/2011 for the Supply of Portable Steel Modular Bridges and Corrugated Steel Pipe Culverts.

BOARD MEMBERS PRESENT

- | | |
|-------------------------------|-------------------------|
| 1. Mrs. Josephine W. Mong'are | - Member (in the Chair) |
| 2. Mr. Paul Ngotho | - Member |
| 3. Mr. Peter Bitu Ondieki | - Member |
| 4. Eng. Weche R.Okubo | - Member |
| 5. Mr. Hussein Were | - Member |
| 6. Mr. Nelson Orgut | - Member |
| 7. Mrs. Gilda Odera | - Member |
| 8. Mrs Rosemary Gituma | - Member |

IN ATTENDANCE

- | | |
|---------------------|-------------------------------|
| Mr. Philemon Kiprop | - Holding brief for Secretary |
|---------------------|-------------------------------|

PRESENT BY INVITATION

Procuring Entity-Kenya National Highways Authority

Fredrick Orego	- Advocate
Jessica Mbae	- Legal Officer
Eng.K. Ndugu	- M-SP
Eng N. Mugwala	- M-SP
Richard Kilel	- Procurement Officer
Nasra Hussein	- Procurement Officer
Levina Wanyonyi	- Procurement Manager

Applicant-Mabey Bridge Limited

Nazima Malik	- Advocate
Cosima Watende	- Advocate
Dareen Keep	- Manager
Giuseppe Paladin	- Manager

Interested Party- Dijkstaal International B.V

Ian Van Dijk	- Managing Director
LisEtrevan Dijk	- Director
Chatursen Libasant	- Director

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 OF AWARD

Project Details

The Government of the Republic of Kenya received a credit from the International Development Association toward the cost of the Northern Corridor Transport Improvement Project and it applied part of the proceeds of this credit to payments under the Contract for Supply of Portable Steel Modular Bridges and Corrugated Steel Pipe Culverts.

Description of Goods

The goods to be procured are in two lots as follows:

Lot	Description of Goods	Unit	Quantity	Physical Unit
1	Portable Modular Steel Bridges	Metres	500M	165 pieces
2.	Modular Corrugated Steel pipe Culverts (1200mm internal diameter)	Metres	2,000M	1,000 pieces
	Modular Corrugated Steel pipe Culverts (1500mm internal diameter)	Metres	1,000M	1,000 pieces

THE BIDDING PROCESS

General

The Bidding process was conducted using the International Competitive Bidding (ICB) procedures specified in the World Bank's Guidelines: Procurement under IBRD Loans and IDA Credits, Edition of May 2004 Revised October 1, 2006 & May 1, 2010.

Procurement Notices

An invitation for bids was made through a Specific Procurement Notice (SPN) which appeared in the local newspapers on 14th and 18th October 2011.

Bid notices/ addendums

Two addendums to bid documents were issued. Addendum no. 1 was issued on 18th November, 2011 and addendum 2 was issued on 19th December, 2011.

Bid Submission and Opening

The closing time for the submission of the Bids was extended from the initial submission date of 30th November, 2011 to 27th January, 2012 at 11:30 hours. The Bids were opened immediately thereafter. Ten (10) applicants submitted their Bids as listed below.

List of Bidders as read out

No.	Name	Country of Incorporation
1	Unit Export limited	Kenya
2	I.ME.VA SPA	Italy
3	Acrow Corporation of America	USA
4	Dijkstaal International B.V.	Netherlands
5	Gogni-Rajope Construction Co. Limited	Kenya
6	Equip Agencies Limited	Kenya
7	Unibridge Trading France	UK
8	Mabey Bridge Limited	UK
9	Fontana Enterprises Limited	Kenya
10	Unicom Limited	Kenya

Bid Evaluation Committee

Bid Evaluation Committee Comprising eight members was constituted under the chairmanship of Eng. K. Ndungu, Manager -NCTIP.

PRELIMINARY EXAMINATION

The preliminary examination was carried out to confirm eligibility of Goods and the firms bidding for the project, the validity of the Bid Documents and the completeness of the documents presented by each of the bidder.

Reasons for rejection of the Bids after preliminary examination are as listed below.

Bidder No. 2**I.ME.VA.SpA**

Bid Security	Bid security expiry date is 28/5/2012 instead of 23/6/2012 as specified in the bid.
--------------	---

TECHNICAL EVALUATION AND SUBSTANTIAL RESPONSIVENESS

Having rejected 1(one) bidder in the preliminary examination stage the Evaluation Committee proceeded to the Technical Evaluation of the following Bidders under each of the Lots.

LOT 1

Bidder No.	Bidder Name
1	Unit Export Limited
3	Acrow Corporation of America
4	Dijkstaal International B.V.
6	Equip Agencies Limited
7	Unibridge Trading France
8	Mabey Bridge Limited
10	Unicom Limited

The result of the technical evaluation was that all the above listed Bidders were found to be technically responsive except for M/s Equip Agencies Limited, bidder number 6, and Unicom Ltd, Bidder No.10 due to the reasons below:

M/s Equip Agencies Limited

The deflection specified by the supplier is very high L/160. The acceptable range in deflection is L/360 to 400 as per the designer's manual.

The bidder has proposed to provide extra width which is not in conformity with HS-25-44 ASHTO. Bidder No. 6 proposed modular bridge is in conformity HS-20-44 AASHTO.

And not HS-25-44 AASHTO

Unicom Ltd

It did not provide specification on deflection, bridge dividing kit, bridge bearing and weight components this was regarded as major deviation

LOT II

Bidder No.	Bidder Name
3	Acrow Corporation of America
5	Gogni - Rajope Construction Co. Ltd
6	Equip Agencies Limited
9	Fontana Enterprises Ltd.
10	Unicom Limited

The five (5) bidders were found to be technically responsive to all the specifications as required in the bid document.

DETAILED EXAMINATION

Correction of arithmetic errors

For the bids which passed the preliminary examination and determination of substantial responsiveness, detailed arithmetic checks were conducted on the price schedules and none had arithmetic errors.

Comparison of Bids

Following the results from the Technical Evaluation a comparison of all substantially responsive bids was carried out to determine the lowest evaluated bid for each of the Lots.

Lot	Name of Bidder	Bid Price	Ranking
Lot 1	Dijkstaal International B.V	340,335,165.00	2
	Mabey Bridge Limited	336,992,750.45	1
	Acrow Corporation of America	382,163,416.32	3
	Unit Export Limited	544,352,706.18	4
	Unibridge Trading France	556,614,062.71	5

Lot	Name of Bidder	Bid Price	Ranking
Lot 2	Gogni - Rajope Construction Co. Ltd	116,964,692.16	1
	Equip Agencies Limited	122,699,155.80	2
	Acrow Corporation of America	161,045,881.65	3
	Unicom Limited	198,631,481.60	4
	Fontana Enterprises Limited	248,523,460.00	5

POST QUALIFICATION OF LOWEST EVALUATED BIDDERS

Bids subjected to post qualification

Post qualification was carried out against the requirements which were also contained in the specific procurement notice.

(a) Financial Capability

Bidders were to prove their financial soundness as evidenced by audited accounts for each of the last three years. That it meets the following financial requirements:

- 1) **Lot 1: Turnover** of at least Kshs 450 million per annum or USD 5,000,000 or an equivalent amount of freely convertible currency as evidenced by audited accounts for each of the last five years.
- 2) **Lot 2: Turnover** of at least Kshs 135 million per annum or USD 1,500,000 or an equivalent amount of freely convertible currency as evidenced by audited accounts for each of the last five years.

(b) Experience and Technical Capacity

Bidders must provide proof of **10 years' experience in sales and support of portable modular steel bridges** or corrugated steel pipes in Kenya or in countries of similar climatic conditions. Bidder must also submit documentary evidence that it has supplied one (1) similar contract of minimum value of USD 3,000,000 within the last five (5) years.

(c) Technical specifications

The bidders were required to furnish documentary evidence to demonstrate that the goods it offers meet the usage requirement as specified in the technical specification.

The post qualification results were as follows:

Post Qualification of Lowest Evaluated Bidders for Lot 1

MABEY BRIDGES LTD

Criterion	Requirements	Bidders Particulars
Financial Capability	Turnover of at least Kshs 450 million per annum or USD 5,000,000 or an equivalent amount of freely convertible currency as evidenced by audited accounts for each of the last five years.	<p>Bidders demonstrated turnover:</p> <p>-2009 (KES 10,837,800,157.19)</p> <p>-2008 (KES 7,358,092,639.73)</p> <p>-2007 (KES 12,186,146,061.85)</p> <p>-2006 (KES 9,291,635,259.96)</p> <p>-2005 (KES 11,274,156,433.69)</p> <p>The bidder demonstrated turnover exceeds USD 5,000,000, for all five (5) years.</p>
Technical Capability	10 years' experience in sales and support of portable modular steel bridges and has successfully completed at least 1 similar contract of minimum value USD 3,000,000 within the last five years.	<p>The Bidder has over ten (10) yrs experience in supply of modular steel bridge to various countries including Kenya and in 2010 supplied Modular bridges to Canadian Commercial Corporation of Pakistan at a cost of USD 5,274,965.</p>

Mabey and Bridge Limited was the lowest bidder however the committee did not recommend it for award because of the following reasons:

- Director and major shareholder of Mabey and Johnson whose certificate of incorporation is attached in the bid and whose accounts are used to demonstrate financial capability was convicted by serious fraud office (SFO)-UK for making illegal payments in Iraq.
- While the bidder has demonstrated financial capability for five(5) years it omitted financial statements for Yr 2010 and Yr 2011
- The Bidder has attached two (2) certificates of incorporations for Mabey and Johnson Ltd and Penspring Limited which was registered in 2001 and later changed its name to Mabey and Bridge Limited in the same year.
- The experience and financial capability demonstrated by the bidder are those of Mabey and Johnson Ltd and not of Mabey and Bridge Ltd.
- Based on the above reasons the committee concluded that Mabey and Bridge Ltd was not qualified for the award of Contract.

Post Qualification of Second Lowest Evaluated Bidders for Lot 1

DIJKSTAAL INTERNATIONAL B.V

Criterion	Requirements	Bidders Particulars
Financial Capability	Turnover of at least Kshs 450 million per annum or USD 5,000,000 or an equivalent amount of freely convertible currency as evidenced by audited accounts for each of the last five years.	<p>Bidders demonstrated turnover:</p> <p>-2010 (KES 493,568,785.54)</p> <p>-2009 (KES 570,776,997.90)</p> <p>-2008 (KES 1,630,433,967.04)</p> <p>-2007 (KES 1,043,130,516.70)</p> <p>-2006 (KES 1,008,000,897.80)</p> <p>The bidder demonstrated turnover exceeds USD 5,000,000, for all five (5) years.</p>

Technical Capability	10 years' experience in sales and support of portable modular steel bridges and has successfully completed at least 1 similar contract of minimum value USD 3,000,000 within the last five years.	The Bidder has over ten (10) yrs experience in supply of modular steel bridge to various countries including Ghana and in 2003 they were contracted to supply 194 bridges to Republic of Ghana at a cost of 16.5m Euros.
----------------------	---	--

Post Qualification of Lowest Evaluated Bidders for Lot 2

Gogni-RajopeConstruction Company Limited

Criterion	Requirements	Bidders Particulars
Financial Capability	Turnover of at least KES135,000,000 per annum or an equivalent amount in a freely convertible currency, as evidenced by audited accounts for each of the last five years	Bidders demonstrated turnover: -2011 (KES 1,220,246,000) -2010 (KES 1,119,615,000) -2009 (KES 1,316,551,000) -2008 (KES1,216,973,000) -2007 (KES1, 153,054,000) The bidder demonstrated turnover exceeds Kshs135, 000,000, for all the five (5) years.
Technical Capability	10 years' experience in sales and support of corrugated steel pipes culverts.	Construction of Mwitasyanno Bridge Superstructure on road (D511) in Kitui; Construction of Otigo Bridge Superstructure on road (C18) in Homa Bay.

The evaluation committee therefore recommended that tender no KeNHA/364/2011; Supply of Corrugated Steel Pipe Culverts under Lot 2, be awarded to **Gogni-Rajope Construction Company Limited** at their quoted price of **Kenya Shillings 34,129,835.68** and **Euros 742,345.60** (**Thirty Four Million One Hundred and Twenty Nine Thousand Eight Hundred and Thirty Five shillings and Sixty Eight Cents and Euros Seven Hundred and Forty Two Thousand Three Hundred and Forty Five Thousand and Sixty Cents**).

Recommendation

Following the preliminary examination, detailed evaluation and assessment of qualification in accordance with the Guidelines and the bid document, the Evaluation Committee recommends award of the tender for Supply of Portable Steel Modular Bridges and Corrugated Steel Pipe Culverts as follows:

Lot 1 – Supply of Portable Modular Steel Bridges be awarded to **DIJKSTAAL INTERNATIONAL B.V** of Netherlands at their quoted price of **Euro 3,050,000.00** (**Three Million and Fifty Thousand Only**).

Lot 2 – Supply of Modular Corrugated Steel Pipe Culvertsof (a) 2,000 meters of 1200 mm internal diameter and (b) 1,000 meters of 1500 mm internal diameter be awarded to **M/s Gogni - Rajope Construction Company limited** at total contract price **Kenya Shillings 34,129,835.68** and **Euros 742,345.60** (**Thirty Four Million One Hundred and Twenty Nine Thousand Eight Hundred and Thirty Five shillings and Sixty Eight Cents and Euros Seven Hundred and Forty Two Thousand Three Hundred and Forty Five Thousand and Sixty Cents**).

For Lot 2, the Evaluation Committee noted that the above prices were quoted on CIP basis in accordance with the requirements of the bid documents and hence do not include local taxes. The amount of taxes payable shall be determined after award based on actual applicable local taxes and stated in the price indicated in the contract to be signed by the parties.

TENDER COMMITTEE DECISION

The 94th KENHA Tender Committee in its meeting held on 17th December, 2012 Min No.2116/2012: For the Supply of Portable Steel Modular Bridges and Corrugated Steel Pipe Culverts Approved award of **LOT 1** - Supply of Portable Modular Steel Bridges be awarded to **DIJKSTAAL INTERNATIONAL B.V** of Netherlands at their quoted price of **Euro 3,050,000.00 (Three Million and Fifty Thousand Only)**.

THE REVIEW

The Request for Review was lodged by M/s Mabey Bridge Ltd on 10TH October, 2013 in the matter of Tender No. ICB No.KENHA/364/2011 for the Supply of Portable Steel Modular Bridges and Corrugated Steel Pipe Culverts.

The Applicant was represented by Ms. Nazima Malik, Advocate, while the Procuring Entity was represented by Mr. Fredrick Orego, Advocate. The Interested Party present was M/s Dijkstraal Ltd represented by Mr. Ian van Dijk, Managing Director.

The Applicant requested the Board for the following orders:

- 1. That Dijkstraal be required to demonstrate its compliance with the requirements at Section I, Part 3, Clause 3(b) and Section VI, Part 3 of the Instruction To Bidders to the Public Procurement Oversight Authority;***
- 2. That The Kenya National Highways Authority be required to demonstrate to the Public Procurement Oversight Authority that Dijkstraal complied with the bid security requirements in the Instruction To Bidders;***
- 3. That The Kenya National Highways Authority be required to demonstrate to the Public Procurement Oversight Authority why Dijkstraal's contract price was increased between bid opening and contract award;***

4. *That the performance of the contract be suspended to allow the unsuccessful bidders to request the Public Procurement Administrative Board to review the process; and*
5. *That to the extent any irregularities are found, to overturn the award of the contract and order The Kenya National Highways Authority to repeat the tender process*

PRELIMINARY OBJECTION

The Procuring Entity filed a Notice of Preliminary objection pursuant to Sections 93(2) (c) and 95 of the Public Procurement and Disposal Act, 2005 (hereafter referred to as "the Act") and Regulation 77 of the Public Procurement and Disposal Regulations, 2006 (hereafter referred to as the Regulations).

The nature and scope of a "preliminary issue" is cogently defined in the statement of Law J.A., in the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 696 at 700:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or to refer the dispute to litigation."

The Preliminary Objection is premised on five grounds, to wit;

1. ***THAT the Respondent and Successful Applicant signed a contract on 24th July 2013. The Request for Review is incompetent in consideration of section 68 of the Public Procurement and Disposal Act, 2005.***

2. ***THAT the Respondent duly and diligently complied with the International Competitive Bidding Procedures Specified in the World Bank Guidelines, 2010 in particular to Clauses 42 and 43 of the Invitation to Bid document.***
3. ***THAT the Review Board lack the jurisdiction to adjudicate on the Request for Review.***
4. ***THAT the instant Request for Review is frivolous, vexatious and made solely to frustrate the Respondent in implementing the project herein.***
5. ***THAT the Request for Review ought to be summarily dismissed on a point of Law.***

Counsel for the Procuring Entity submitted that the Preliminary Objection was to be canvassed on two broad heads;

- a) ***Whether the Board has jurisdiction to deliberate on the Request for Review in view of the fact this was an International Tender funded by the World Bank and in accordance with Section 93 of the Act a contract has already been signed on 24th July 2013 between the Respondent and the Successful Bidder?***
- b) ***Whether the Board has Jurisdiction to hear a Request for Review that has been filed before it 62 days after notification and in contravention of Regulation 73 of the Public Procurement and Disposal regulations, 2006 as amended by regulation 20 of Legal Notice No.106 of 18th June 2013.***

Counsel for the Procuring Entity submitted that once a bidding Contract had been entered into then the Board had no jurisdiction in the matter since the law clearly states that the Board cannot adjudicate on a matter where a contract has been entered into. In opposition to this ground Counsel for the

Applicant submitted that the Contract that was deemed to have been signed was a nullity in that it was signed before prior notification of all participants to the tender by the Procuring Entity and in clear contravention of Section 67 of the Act.

Section 67 of the Act states as follows;

- 67(1) Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.**
- (2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.**
- (3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security.**

The Applicant went on to argue that the Board should therefore find that since it was informed of the status of its Bid in September 2013, the contract that was signed in July 2013 cannot be used to lock out it out and in any event, the said contract was signed with the intent to lock other bidders from challenging the outcome of the tender. It urged the Board to find that the contract as such was nullity. The Applicant further argued that in any event the Tender validity period had expired in May, 2013 and as such in the absence of an extension of the same by the Procuring Entity the Contract ought not to have been signed.

In its response the Procuring Entity submitted that the tender was subject to World Bank procurement guidelines and this having been an international contract, the only relevant section of the law that it was bound to comply with

was Section 71(f) of the Act that required it to advertise the Tender. The Procuring Entity further submitted that it complied with the Instructions to Bidders Clauses 42 and 43 which directed the procedure of issuing the notification of award and contract.

The Board has considered the arguments advanced by both parties to this point and being guided by the Law the Board finds as follows;

1. *That it is not in dispute that a contract has been signed.*
2. *That it is not in dispute that the tender was an international one funded by the World Bank and as such to a certain extent bound by guidelines and directions issued by the World Bank.*

The issue of whether not the contract signed was valid or not cannot be determined at this preliminary stage. The issue does not form part of the grounds of the Request for Review and the same has been introduced here as an afterthought. The Board holds that the same cannot be conclusively canvassed and discussed at a preliminary stage, which the Preliminary Objection is.

The Board is alive to the provisions of Section 93 of the Act which states as follows;

- "93(1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.***
- (2) The following matters shall not be subject to the review under subsection (1)-***
- (a) the choice of a procurement procedure pursuant to Part IV;***

- (b) a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;*
- (c) where a contract is signed in accordance to section 68; and*
- (d) where an appeal is frivolous."*

The Board notes that issues of Jurisdiction are weighty matters that courts or quasi judicial tribunals must first deal with and determine before it proceeds to hear any evidence in any matter before it. The Board is alive to decisions emanating from the Courts of law on this matter and in particular to the decision of the Court of Appeal in the case of " **Owners of the Motor Vessel "Lillians" v. Caltex Oil (K) Ltd (C. A. No.50 of 1989)** where Justice Nyarangi ruled that the first thing that a court or a quasi judicial body must determine before hearing an Application is whether it has jurisdiction to hear a matter brought before it. In the said case, the Judge held as follows:-

"Jurisdiction is everything and without it the court has no juris power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence A court of law downs its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction."

Similarly, the Board has in its own decisions observed the above principle of law as it relates to jurisdiction and has had in several matters before it been forced to down its tools where it felt that it lacked jurisdiction to hear a Request before it. In the matter of **Gowharrud Construction Company Limited Versus Kenya National Highways Authority & Intex Construction Company(Review No. 2 of 2012)**, the Board held that *"where the Procuring Entity has already entered into a contract the hands of the Board are tied by*

The second issue upon which the Procuring Entity sought to have the Request for Review dismissed was on account of time. The Procuring Entity stated that the Board had no Jurisdiction to entertain a matter filed before it outside the timelines set under the Act. The Procuring Entity submitted that the Applicant's Request for Review was filed before the Board (62) days after the notification to bidders of the outcome of the tender and that it contravened Regulation 73 (2) (c)(ii) of the Public Procurement and Disposal Regulations, 2006 as amended by Regulation 20 of Legal Notice No.106 of 18th June, 2013. It averred that Regulation 73 (2) (c)(ii) as amended requires that a Request for Review be filed before the Board within Seven (7) days from the date of notification.

The Procuring Entity further argued that even if the Applicant was to claim not to have received the notification on time the results were published in the UNDB Online and the Dgmarket as required by Clause 43 of the Tender Document on 19th September 2013, a fact admitted by the Applicant in its Request for Review.

The Applicant did not oppose this ground and admitted that it had filed its papers out of time.

The Board has considered this arguments and is guided by its own previous decisions especially in the case of **Airport Research Centre Vs Kenya Airports Authority (PPARB Application No. 3 of 2008)** in which the Board held that it lacked Jurisdiction to hear a matter that had been filed one day outside the appeal window period.

Similarly, in the matter of **Voith Hydro GMBH & Co. Vs Kenya Electricity Generating Co. Ltd (PPARB Review No. 55 of 2009)**, the Board held that it


lacked Jurisdiction to hear a matter where the Request for Review was filed outside the period set by Law .


Accordingly this limb of the Preliminary Objection also succeeds.

In view of the foregoing, the Board finds that it has no jurisdiction pursuant to Section 93(2)(c) of the Act and Regulation 73(2)(c)(ii) as amended by Regulation 20 of the Legal Notice No. 106 of 18th June 2013.

Accordingly the Board holds that it is therefore not necessary to interrogate the Request for Review any further. The Request for Review is therefore hereby dismissed with no orders as to costs. The Procurement process may proceed.

Dated at Nairobi on this 1st day of November, 2013.


.....
CHAIRMAN
PPARB


.....
SECRETARY
PPARB