

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 41/2013 OF 24TH OCTOBER 2013

BETWEEN

H YOUNG AND CO. (EA) LTD..... APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Airports Authority dated 28th June, 2013 in the matter of Tender No. KAA/ES/JKIA/898/C for JKIA Restoration - Civil Works for the Interim Passenger Terminal

BOARD MEMBERS PRESENT

Mrs. Josephine W. Mongare	- Member (in the chair)
Mr. Peter Bitia Ondieki , MBS	- Member
Eng. Weche R.Okubo, OGW	- Member
Mr. Nelson Orgut	- Member
Mrs. Rosemary Gituma	- Member

IN ATTENDANCE

Ms. Pauline Opiyo	- Secretary
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PRESENT BY INVITATION

Applicant - H.Young and Co. (E.A) Ltd

Mr. Muthomi Thiankolu - Advocates

Mr. Samuel Karanja - Advocate

Procuring Entity -Kenya Airports Authority

Mr. George Kamau - Legal Officer

Mr. Hobadiah Orora - Ag General Manager Procurement

Mr. David Kamau - Engineer

Ms. Margaret Muraya - Manager Procurement

Mr. Sammy Kemboi - Procurement Officer

Ms. Judy Chepkor - Procurement Officer

Interested Parties -Kiu Construction Company

Andrew Wandabwa - Advocate

Munyasa Khasiani - Advocate

Julia Kariuki - Business Lady

Kariuki Theuri - Business Man

Fiona Kakai - Pupil

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

Advertisement

Tender No. KAA/ES/JKIA/898/C for JKIA Restoration – Civil Works for the Interim Terminal at Jomo Kenyatta International Airport was advertised in The Standard Newspaper of 21st September 2013.

Closing/Opening:

Tender closing / opening was conducted on 7th October, 2013 at 11 a.m. Out of 42 bidding documents purchased, bids were submitted by 12 firms namely:

1. Pacific Edge Company Limited
2. Bonfide General Contractors Ltd
3. Monaco Engineering Ltd
4. Magic General Contractors
5. Civicon Ltd
6. El-Noor General Contractors Ltd
7. Kiu Construction Ltd
8. Jipsy Civil and Building Contractors Ltd
9. Don-Woods Co. Ltd
10. Nyoro Construction Co. Ltd
11. H. Young & Co. (EA) Ltd
12. NGM Company Ltd

EVALUATION OF BIDS

The bids submitted were subjected to evaluation in accordance with the eligibility and qualification requirements of the bidding document. This included preliminary mandatory evaluation, technical mandatory evaluation and financial evaluation.

Preliminary Evaluation

To be eligible for award of the contract a tenderer had to provide evidence satisfactory to the Employer of their eligibility by submitting the following mandatory requirements.

- Be a citizen contractor as per Clause 3(1) of the Public Procurement & Disposal act, 2005.
- Be registered with the National Construction Authority as a Paved Roads Works Contractor in NCA 2 or Higher.
- Form of Bid & Appendix to be duly completed and signed by the bid signatory.
- Bid Security of Kshs. 5,000,000.00 in the form of either of the following;
 - a) Cash.
 - b) A Bank Guarantee;
 - c) An insurance Bond issued by an insurance firm approved by PPOA.

Where the bid security is provided by an insurance company, the policy number must be quoted.

- Copies of original documents certified by an officer of oaths defining the;
 - a) Legal status of the firm and the ownership structure i.e. Registration Certificate, Memorandum and articles of Association
 - b) Current tax compliance certificate issued by the Kenya Revenue Authority.

- Original Written Power of Attorney authorizing the signatory of the Tender to commit the Tenderer.
- Audited financial reports for the last Three (3) Years (2010, 2011, 2012) to demonstrate minimum annual works turnover.
- Authority to seek references from the bidders bankers
- All standard forms and confidential business questionnaire must be completed and signed by the bid signatory as appropriate.
- A signed Certificate of Site Visit by the Bidder

Eleven (11) bidders were disqualified at the preliminary stage for not having fulfilled all the requirements indicated in the preliminary requirements. Reasons for the disqualification are shown below.

Non-Responsive Bidders

PACIFIC EDGE CO. LTD (BID AMOUNT KSHS 424,893,940.80)

- The bidder did not meet the following mandatory requirements:
 - Did not meet the requirement for citizen contractor since they did not provide proof of citizen for the company directors.
 - Did not provide certified incorporation certificate and Memorandum & articles of association
 - Did not attach a certified copy of KRA Tax Compliance Certificate.
 - Did not provide copies of audited accounts
 - Did not provide authority to seek reference from the bidder's bankers.

BONFIDE GENERAL CONTRACTORS LTD (BID AMOUNT KSHS. 325,852,806.00)

- The bidder did not meet the following mandatory requirements:
 - Did not meet the requirement for citizen contractor since they did not provide proof of citizen for the company directors.
 - Did not provide proof of registration with NCA for the required category 1 or 2.
 - Did not sign the Appendix to form of tender as required.
 - Did not provide certified copies of company registration certificate as well as memorandum and articles of association.
 - Did not attach a certified copy of KRA tax compliance certificate.
 - Did not provide power of attorney authorizing the signatory of tender to commit the tenderer.
 - Provided One original and one copy of the tender instead of the required three copies.
 - Did not provide authority to seek reference from the bidder's bankers.
 - Did not complete all the standard forms of the tender documents as required.

MONACO ENGINEERING LTD (BID AMOUNT KSHS. 746,756,124.80)

- The bidder did not meet the following mandatory requirements:
 - Did not meet the requirement for citizen contractor since they did not provide proof of citizen for the company directors.
 - Provided proof of registration with NCA for category 4 for roads and civil works instead of the required category 1 or 2.
 - Provided an incomplete form of tender and also did not sign the Appendix to form of tender as required.

- Did not provide certified copies of memorandum and articles of association.
- Did not attach a certified copy of KRA tax compliance certificate.
- Did not provide power of attorney authorizing the signatory of tender to commit the tenderer.
- Provided One original and one copy of the tender instead of the required three copies.
- Did not provide authority to seek reference from the bidder's bankers.
- Provided accounts for the year 2010 which have not been audited.
- Completed the standard forms of the tender documents but did not sign as required.

MAGIC GENERAL CONTRACTORS LTD (BID AMOUNT KSHS. 455,306,473.00)

- The bidder did not meet the following mandatory requirements:
 - Provided a form of tender not addressed Kenya Airports Authority.
 - Did not provide certified copies of company registration certificate as well as memorandum and articles of association.
 - Did not attach a certified copy of KRA tax compliance certificate.
 - Did not provide power of attorney authorizing the signatory of tender to commit the tenderer.
 - Did not provide authority to seek reference from the bidder's bankers.
 - Did not complete all the standard forms of the tender documents as required.

CIVICON LTD (BID AMOUNT KSHS. 611,545,417.23)

- The bidder did not meet the following mandatory requirements:
 - Did not meet the requirement for a citizen contractor.
 - Did not provide certified copies of memorandum and articles of association.
 - Provided a copy of KRA tax compliance certificate that is not valid i.e it expired on 03rd October 2013.
 - Did not provide a valid authority to seek reference from the bidder's bankers.
 - Provided accounts for the year 2010 which have not been audited.

EL-NOOR GENERAL CONTRACTORS LTD (BID AMOUNT KSHS. 539,226,211.70)

- The bidder did not meet the following mandatory requirements:
 - Did not attach the Appendix to form of tender.
 - Did not provide certified copies of company registration certificate as well as memorandum and articles of association.
 - Did not attach a certified copy of KRA tax compliance certificate.
 - Did not provide authority to seek reference from the bidder's bankers.
 - Did not submit a completed confidential business questionnaire documents as required.

JIPSY CIVIL AND BUILDING CONTRACTORS LTD (BID AMOUNT KSHS. 412,354,834.38)

- The bidder did not meet the following mandatory requirements:

- Did not provide a valid power of attorney authorizing the signatory of tender to commit the tenderer.
- Did not provide authority to seek reference from the bidder's bankers.

DON-WOODS CO LTD (BID AMOUNT KSHS. 545,900,000.00)

- The bidder did not meet the following mandatory requirements:
 - Did not meet the requirement for citizen contractor since they did not provide proof of citizen for the company directors.
 - The form of bid was not signed by the authorized signatory.
 - Provided a bid validity which expires on 03rd January 2014 instead of 05th January 2014.
 - Did not provide a valid authority to seek reference from the bidder's bankers.
 - Completed the standard forms of the tender documents but did not sign by authorized signatory as required.

NYORO CONSTRUCTION CO LTD (BID AMOUNT KSHS. 468,525,162.00)

- The bidder did not meet the following mandatory requirements:
 - Did not attach a certified copy of KRA tax compliance certificate.
 - Did not provide power of attorney authorizing the signatory of tender to commit the tenderer.
 - Did not provide authority to seek reference from the bidder's bankers.
 - Did not provide audited accounts for 2012.

H. YOUNG & CO LTD (BID AMOUNT KSHS. 546,258,166.00)

- The bidder did not meet the following mandatory requirements:
 - Did not meet the requirement for a citizen contractor.
 - Did not provide a valid authority to seek reference from the bidder's bankers.

NGM COMPANY LTD (BID AMOUNT KSHS. 514,206,775.00)

- The bidder did not meet the following mandatory requirements:
 - Provided insurance tender security without the policy number as required.
 - Did not provide certified copies of company registration certificate as well as memorandum and articles of association.
 - Did not attach a certified copy of KRA tax compliance certificate.
 - Did not provide authority to seek reference from the bidder's bankers.
 - Did not submit audited accounts.
 - Did not complete all the standard forms of the tender documents as required.

From above, it can be deduced that only one (1) bidder namely M/s Kiu Construction Ltd, qualified for further evaluation.

Technical Evaluation

The bidder was then subjected to technical evaluation and had to provide evidence satisfactory to the Employer of their capability and adequacy of resources to effectively carry out the contract by submitting the following:

- Proof of ability to raise Kshs. 30million working capital in form of financiers lines of credit or available funds held in fixed deposit account

- Minimum Annual turnover volume of construction works of not less than Kshs. 500million for the last three (2010 – 2012) years.
- Work methodology
- Have adequate suitable equipment in good working condition to carry out the works.
- Have adequate personnel (Attach up to date CVs and copies of Certificates and testimonials)
- Program of works.
- Proof of 2 similar works or projects previously undertaken for the last three years (2010 to date. Bidders to attach certificates of completion.
- Details of works to be subcontracted and names of subcontractors.

The results of the Technical Evaluation are as tabulated in Tables 1, 2 and 3 below:

Table 1 - Technical Evaluation as per Clause 1.6 of the Instructions to Tenderers

Item No	Criteria	Bidder's Score KIU Construction (7)
1	Ability to raise Kshs. 30 million working capital by producing financiers documentary evidence of available lines of credit or available funds held in fixed deposit account	Yes
2	Minimum Annual turnover volume of construction works of not less than Kshs. 500 million for the last three years (2010-2012)	Yes
3	Work methodology	Yes
4	Have adequate equipment in good working condition to carry out the works as per minimum requirements.	Yes

5	Have adequate personnel (Attach up to date CVs signed by the nominee and copies of Certificates and testimonials.	Yes
6	Program of works	Yes
7	Proof of 2 similar works or projects previously undertaken for the last three years. Bidders to attach certificates of completion	Yes
8	Details of works to be subcontracted and names of subcontractors.	Yes
	OVERALL REMARKS	Yes

Table 2 - Contractors Plant and Equipment Requirements

Item	Description	Min Quantity Required	Remarks
1	Motor Grader – CAT 140H or Equivalent	4 No.	Yes
2	Water Bowser (8000 lts)	3 No.	Yes
3	Tippers - 15 Tons	8 No.	Yes
4	Pneumatic Roller – 10 Tons	2 No	Yes
5	Steel Drum Roller – 8 Tons	2 No.	Yes
6	Vibrating Drum Roller – (16-18 Tons)	2 No	Yes
7	Pick-ups trucks	2 No.	Yes
8	Bitumen Distributors – (8000 LTS)	2 No.	Yes

9	Single direction vibratory plates compactors	2 no.	Yes
10	Concrete Truck Mixers (5 m ³)	1 No.	Yes
11	Wheel Loader (CAT 950G or Equivalent)	2 No.	Yes
12	Compressor - 250 CFM	2 No.	Yes
13	Mechanical Broom	2 No.	Yes
14	Excavator 1.7m ³ with loading attached	2 No.	Yes
15	Dozer as CAT 6 or equivalent	1 No.	Yes
16	Poker Vibrator	2 No	Yes
17	Asphalt concrete milling machine	1 no	Yes
18	Asphalt Paver	1 No.	Yes

Table 3 - Contractors Personnel Requirements:

Item	Title	Min. Number	Minimum Qualification	Remarks
1	Site Agent	1 No.	Registered Civil Engineer with minimum 10 years relevant experience	Yes
2	Foreman Bitumen Works	1 No.	National Diploma in Civil Engineering and at least 10 years relevant experience Bitumen works .	Yes
3	Foreman Earthworks	1 no	National Diploma in Civil Engineering and at least 10 years relevant experience in earthworks.	Yes
4	Foreman Sewers	1no	National Diploma in Civil Engineering and at least 10 years relevant experience one in gravity sewers.	Yes

5	Engineering Surveyor	1 No.	National Diploma in Survey / Civil Engineering and not less than 10 years experience in survey work on road or similar projects	Yes
6	Lab Technician	3 No.	Civil Engineering Diploma and at least Five years experience in Material sampling and testing.	Yes

From tables 1, 2 and 3 above, it was concluded that M/s Kiu Construction Ltd met all the technical evaluation requirements and should therefore proceed to financial evaluation.

Financial Evaluation

The remaining firm was subjected to detailed financial evaluation based on the following:-

- ❖ Arithmetic errors
- ❖ Comparison with pre-bid estimate

Arithmetic errors

The bidder had no arithmetic errors in the bill of quantities.

Thus, the bid from M/s Kiu Construction Ltd is the best evaluated tender.

Comparison with pre-bid estimate

The quote from the best evaluated bidder was compared with the pre-bid estimate, and was found to be 11% above the estimates of Kshs. 533,228,947.90.

RECOMMENDATIONS

Thus the Evaluation Committee recommends that the tender for **JKIA Restoration Project - Civil Works for the Interim Passenger Terminal; Tender No. KAA/ES/JKIA/898/C** be awarded to the lowest evaluated bidder **M/s KIU CONSTRUCTION LTD** Of P.O. Box 10564-00100 Nairobi at the sum of **Kshs. 593,094,799.20 (Kenya Shillings Five Hundred Ninety Three Million, Ninety Four Thousand, Seven Hundred Ninety Nine Cents Twenty only)** which is inclusive of **15% Contingencies and 16% VAT.**

TENDER COMMITTEE'S DECISION

The Tender Committee at its Meeting No 281 held on 17th October, 2013 adjudicated Tender No. KAA/ES/JKIA/898/C for JKIA Restoration - Civil Works for the Interim Passenger Terminal and awarded the tender to **M/s KIU Construction Ltd** at the tender sum of **Kshs 593,094,799.20 (five hundred eighty-nine million, ninety-four thousand, seven hundred and ninety-nine and twenty cents only)** inclusive of 15% contingencies and 16% VAT.

The Successful Bidder and unsuccessful bidders, including the Applicant were notified vide letters dated 17th October, 2013.

THE REVIEW

The Applicant, M/s H. Young and Co. (EA) Ltd lodged this Request for Review on 24th October, 2013 against the decision of the Tender Committee of Kenya Airports Authority in the matter of Tender No. KAA/ES/JKIA/898/C for JKIA Restoration - Civil Works for the Interim Passenger Terminal.

The Request emanated from the Procuring Entity's letter of Notification to the Applicant dated 17th October, 2013 advising it of the reasons as to why its bid was found unsuccessful. The reasons given by the Procuring Entity were that the Applicant's bid was found to be unsuccessful because;

- a. It did not meet the requirement for a citizen contractor*
- b. It did not provide a valid authority to seek reference from its bankers to the Procuring Entity.*

The Applicant was represented by Mr. Muthomi Thiankolu, Advocate and Mr. Samson Karanja Advocate, while the Procuring Entity was represented by Mr. George Kamau, Legal Officer. The Interested Party, M/s Kiu Construction Ltd was represented by Mr. Andrew Wandabwa, Advocate.

The Applicant requested the Board for the following orders:-

- (a) That the Procuring Entity's Decision to the effect that the Applicant's tender was unsuccessful is hereby annulled; and**
- (b) That the award to the successful Tenderer (if any) is hereby annulled; and**

- (c) That the Procuring Entity is hereby ordered to re-evaluate and award the Tender in compliance with the Act, the 2011 Regulations and the criteria set out in the Tender Document; and
- (d) That the Procuring Entity is hereby ordered to pay the Applicant the costs of and incidental to this Request for Review; and
- (e) Such other, additional, further, incidental and/or alternative orders as the Honourable Board may deem just and expedient.

The Applicant raised three (3) grounds of review which the Board deals with as follows:

Grounds 1, 2 and 3 - Breach of Sections 2, 3,31,34,39 64 and 66 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act"), Regulations 5, 7, 13 and 15 of the Public Procurement Preference and Reservations Regulations 2011 (hereafter referred to as "the 2011 Regulations") and Article 227 of the Constitution.

The three grounds for Review have been consolidated as they raise related issues on allegations of breaches of various Sections of the Law and the Constitution as cited above.

The Applicant submitted that on 18th October 2013, it received a letter from the Procuring Entity (dated 17th October 2013) informing it that its bid for the Tender was unsuccessful. It further submits that **on 22nd October 2013**, the Applicant wrote to the Procuring Entity pointing out that the reasons given for the rejection of its tender were factually incorrect.

The Applicant stated that on 22nd October 2013, the Procuring Entity wrote to it reiterating the contents of the Notification Letter and, additionally, stating—

- (a) that the Applicant's Eng. J. Schwartzman held 100% of the shares leaving the other directors or any other shareholder without any shareholding in the bidding entity; and
- (b) that the information provided excluded the Applicant from the definition of a company both in law and in fact.

The Applicant contended that the position taken by the Procuring Entity in its letter of 22nd October 2013 is untenable in law and in fact because, *inter alia*—

- (a) the Applicant holds a valid certificate of incorporation, submitted to the Procuring Entity as part of the Applicant's bid documents;
- (b) the Procuring Entity has no jurisdiction to question, reject or impugn the Applicant's certificate of incorporation or registration status
- (c) besides the certificate of incorporation, the Applicant holds many other current valid statutory registrations, documents, instruments and certificates from various government agencies—including the Kenya Revenue Authority and the National Construction Authority. Some of these documents were submitted to the Procuring Entity as part of the Applicant's bid;
- (d) there is no legal requirement for each or all the directors or members of a company to hold shares—whether nominally or beneficially—in the company;
- (e) being a company "*in law or in fact*" was not a requirement for the award of the Tender. On the contrary, the requirement was that the bidder should be a "*citizen contractor*";

(f) Section 3 (1) of the Act defines "citizen contractor" as "*a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Kenya.*" Since the director who holds 100% of the Applicant's shares is a natural person, and a Kenyan citizen, it is immaterial whether the Applicant is a company in law or in fact for purposes of the award of the Tender;

(g) it is a matter of common knowledge and notoriety, worthy of judicial notice by the Honourable Board, that the Applicant is a leading Kenyan contractor that has successfully bid for and completed multiple projects for various public agencies in Kenya and within the East African region.

The Applicant averred that whereas the Notification Letter stated that it was not a citizen contractor within the meaning of the Act, Section 3 (1) of the Act defines "*citizen contractor*" as "*a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Kenya.*"

It submitted that the requirements for citizen contractors are also set out Regulations 5 and 7 of the 2011 Regulations which restate the provisions of Section 31 of the Act and limits the Application of preferences and reservations to citizen contractors and local contractors.

The Applicant averred that it is a "*citizen contractor*" within the meaning of the Act because (*inter alia*):

(a) it (i.e. the Applicant) is an incorporated company, of which the certificate of incorporation is conclusive proof as per Section 17 (1) of the Companies Act); and

(b) the Applicant's Eng. J. Schwartzman, who owns and controls the Applicant, is a natural person and citizen of the Republic of Kenya.

The Applicant submitted that in view of the foregoing, the Procuring Entity erred in law by concluding that the Applicant was not a citizen contractor within the meaning of the Act.

The Applicant argued that as per documents attached to its bid, it met each and all the qualifications for award of the Tender as required under Section 31 of the Act. It submitted that the Procuring Entity's decision to the effect that it was not a citizen contractor effectively disqualified a qualified bidder, contrary to the provisions of Section 31 of the Act.

The Applicant averred that Section 34 (1) of the Act requires procuring entities to prepare tender documents *"that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."* It submitted that although it did not give a valid authority to seek references from its bankers, it gave its bankers' contacts in the format provided in the Tender Document in form of the Applicant's data as entered on Schedule XVIII of the Tender Document titled *"Other Supplementary Information."* It averred that if the Procuring Entity wanted the authority to obtain bankers references to be given in a format other than that set out in the Tender Document, it should have issued an addendum giving the correct format. It submitted that the Procuring Entity cannot blame or penalize the Applicant for complying with or supplying information in the format provided in the Tender Document.

The Applicant submitted that the Procuring Entity breached the provisions of Section 34 of the Act by failing to give clear requirements on the giving of authority to obtain bankers' references.

The Applicant submitted that Section 39 (8) (a) of the Act obliges procuring entities to give exclusive preference to Kenyan citizens where—

- a. the funding is 100% from the Government of Kenya; and
- b. the amounts **are below** the prescribed threshold.

It argued that the two conditions set out under section 39 (8) (a) *are couched in a conjunctive (rather than disjunctive) language*, the effect of which is that **exclusive preference CANNOT be given** to Kenyan citizens (or citizen contractors) where—

- c. the project is not wholly funded by the Government or a Kenyan body;
or
- d. the value of the tender is above the prescribed threshold.

The Applicant averred that in the instant case, *the Procuring Entity's engineer's estimate on the value of the tender as disclosed at the Tender Opening was Kshs. 533,228,947.90* which is higher than the threshold prescribed under Regulation 13 of the 2011 Regulations. It argued that the Procuring Entity was therefore not legally entitled to include the requirement of citizen contractors in the Tender Document in the first place leave alone disqualifying the Applicant for the purported non-compliance with the requirement.

The Applicant submitted that Section 39 (8) (b) (ii) of the Act obliges procuring entities to give a margin of preference to bidders based on the percentage of shareholding of locals on a graduating scale as prescribed. Further Regulation 15 (ii) (c) of the 2011 Regulations obliges procuring

entities to give citizen contractors a 10% margin of preference over the lowest evaluated price where the percentage of shareholding of Kenyan citizens is more than 50%. The Applicant argues that in practical terms, this means where a citizen contractor's evaluated price is the second lowest evaluated price, but not more than 10% higher than the lowest evaluated price, the contract must be awarded to the citizen contractor. The submits that in the instant case, it was entitled to be given a 10% margin of preference over the lowest evaluated price based on the fact that it is wholly owned and controlled by a Kenyan citizen. It submits that instead of giving the Applicant this margin of preference, the Procuring Entity disqualified the Applicant for not being a citizen contractor.

The Applicant submitted that since Section 62 of the Act obliges the Procuring Entity to seek clarification of a tender to assist in the evaluation and comparison of tenders, it would have been prudent therefore for the Procuring Entity to seek clarifications from the Applicant before taking the drastic step of locking it from the tender process without giving it a hearing.

The Applicant submitted that in view of the foregoing, the Procuring Entity's decision offends the provisions of Section 39 of the Act as read together with Regulations 5, 7, 13 and 15 of the 2011 Regulations.

The Applicant submitted in view of the matters set out in its statements above, the Procuring Entity had breached Section 2 of the Act and Article 227 of the Constitution. It therefore urged the Board to grant its Request for Review.

In response, the Procuring Entity averred that the bidder did not meet criteria 2.1 (1) on page 22 of the Tender Document which states: "**Be a**

citizen Contractor (Section 3) (1) of the Public procurement & Disposal Act, 2005".

It submitted that in the Confidential Business Questionnaire, the bidder was required to state particulars on the type of business that it was bidding under to which the Applicant stated that it falls under Part 2 (c) thereof, meaning that it is a registered company. The Procuring Entity further submitted that in filling the Confidential Business Questionnaire, the Applicant stated as follows:

a. That the nominal and issued capital for the Applicant is as follows:-

- i) Nominal Kshs 250,000.00
- ii) Issued Kshs 250,000.00

b. That its details of all directors are as follows:-

1. Eng. J. Schwartzman - 100% shares
2. Eng. Jacob Lerner - nil shares
3. Mr. G. Balakumer - nil shares
4. Mr. Puneet Shamsbery - nil shares

The Procuring Entity averred that from the foregoing, it is clear that Eng. J. Schwartzman holds 100% shares leaving the other directors or any other shareholder thereof without any shareholding in the bidding entity. It

submitted that the above information was accompanied by a copy of Certificate of Incorporation No. C 2424 which shows that the Applicant Company was incorporated on 24th November 1951 as a Limited Company.

Further, the Applicant stated in the Confidential Business Questionnaire that it is a Private Limited Company.

The Procuring Entity averred that, the Applicant having been registered as a Private Limited Company, could not have one member taking 100% shareholding and leaving other members with no shareholding contrary to statutory requirements. The Procurement Entity further averred that the information that one shareholder held 100% of the Applicant company was mischievous and misleading and only intended to enable the Applicant to meet the statutory requirements of a Citizen Contractor as required under the Tender.

The Procuring Entity averred that the mischief was further perpetrated through presentation of a Power of Attorney by the Tenderer where persons purportedly having no control of the Applicant Company, and who were not Kenyan Citizens authorized the person with 100% ownership of the company to submit the tender on behalf of the Applicant.

The Procuring Entity further stated as follows:

- (a) That, the definition of a "Citizen Contractor" under the Section 3 (1) of the Act is as follows:

"citizen contractor" means a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Kenya;"

- (b) That it was a further requirement under Clause 2.1 (v) that the Tenderers do present copies of documents defining the legal status of the firm and ownership structure, that is, Registration Certificate, Memorandum and Articles of Association. The Applicant provided a Certificate of Incorporation and Memorandum and Articles of Association in compliance with the clause.

The Procuring Entity submitted that it is therefore inaccurate to state that the conclusive requirement was that of a "Citizen Contractor" without more, since the Procuring Entity was required under the Tender to verify the legal status of all Tenderers.

The Procuring Entity averred that, in undertaking its evaluation, it was guided by the evaluation criteria set out in the tender document and in accordance with the Act and the Regulations and the amendments to the Act and Regulations that are currently in force. It averred that M/s H. Young & Co. (EA) Ltd did not give authority to seek reference from their bankers as required in criteria 2.1 (1) and (viii) on page 22 of the Tender Document.

The Procuring Entity submitted that while the Applicant provided the details of its bankers, it did not provide the Procuring Entity with any authority to access any information from its bankers. It averred that the submission of Applicant's Banker's details under Schedule XVIII does not suffice as authority to the Procuring Entity to obtain any information from the Applicant's bankers. It argued that under Schedule XVIII, the tenderers were required to provide information on names, address, telephone, telex, fax numbers of their bankers who may provide reference if contacted by the Procuring Entity and that the provision of this information without authority as required under Clause 2.1(viii) therefore does not fulfill the requirements of the tender.

The Procuring Entity submitted that it acted in accordance with the Act and the 2011 Regulations as amended in undertaking evaluation of all tenders where it was mandatory that it procures a citizen contractor for this nature of works. It further averred that, at that stage, there was no requirement for the Procuring Entity to seek clarification from the Applicant to assist in the

evaluation and comparison of the tenders when in fact, it was the duty of the Applicant to ensure that they complied with all requirements of the tender as laid out in the Tender Document.

The Procuring Entity submitted that the entire tendering process was undertaken in accordance with the law including evaluation of the tender which was carried out fairly only applying the requirements set out in the Tender Document.

The Interested Party, M/S Kiu Construction Ltd, submitted that Section 31 of the Act confirms who is 'a citizen contractor'. It submitted that one can either bid as a natural person or as a company controlled by Kenyan citizens but not both. It argued that it is M/S H. Young Co. (E.A) Ltd the company that bid, but in its documents, Eng. Schwartzman holds 100% shareholdings contrary to Section 33 of the companies Act. It argued that whereas legally under Section 17 of the Companies Act, a company exists with perpetual succession, all its liabilities cannot be borne by the company but by the shareholder who owns 100%. He observed that this is key in this procurement in that the actual bidder bears no responsibility or liability for the contract he is bidding for since the person liable is Eng. Schwartzman

In regards to the threshold for exclusive preference, the Interested Party submitted that at no particular moment did the Applicant write to the Procuring Entity to object to that condition, and having participated in the tender aware of this, it is too late for them now, after they have lost the tender to come and say that was not a proper criteria. It averred that under the Act, if a person is unhappy with the procurement process, he can file his case within seven days to this Board.

The Interested Party submitted provision of authority to the Procuring Entity to seek information from a bidder's Bank, is a mandatory requirement and that no authority has been provided by the Applicant hence the Applicant did not comply with the mandatory requirement.

The Board has considered the submissions of all the Parties and the Documents before it. The arguments by the parties narrow down to two issues for determination by the Board namely:-

- i. Whether the procuring entity was justified in holding that the Applicant did not meet the requirements set out in law to bid as citizen Contractor;*
- ii. Whether the Procuring entity was justified in holding that applicant failed to meet a Mandatory requirement of the tender document by its failure to provide authority to seek reference from its bankers.*

The Board notes the provision of Section 3 of the Act which gives the definition of a citizen contractor as follows;

"3(1) In this Act, unless the context otherwise requires –

.....
.....

"citizen contractor" means a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Kenya".

The notes that the Public Procurement and Disposal Act 2005 envisions a **Citizen Contractor** to be either a natural person who is a citizen of Kenya or a company wholly owned and controlled by Kenyan citizens. The Board

also notes that the Applicant is a limited liability company duly incorporated in Kenya and that Engineer J. Schwartzman, who is a Kenyan citizen by naturalization, owns 100% shares of the Applicant Company.

The Board having scrutinized copies of the Applicant's company registration papers agrees with the Applicant that indeed it's a limited liability company incorporated in Kenya in 1951. The Board notes that at incorporation of the company, Eng. Schwartzman was not a shareholder. It is therefore assumed that since a company has perpetual succession in law unless wound up legally, then Eng. Schwartzman bought shares somewhere along the way and became a shareholder of the Applicant Company. This information is derived from the Confidential Business Questionnaire forming part of the Applicant's bid documents. Engineer Schwartzman has also annexed his Kenyan Identity Card to prove his nationality. The Confidential Business Questionnaire further states that the Applicant Company has three other directors, namely; Mr. Jacob Lerner - an Israeli national with Nil Shares; Mr. G. Balakumar - an Indian National with Nil shares and Mr. Puneet Shamsbery - an Indian National with Nil Shares. From the said document, it appears therefore that Eng. J. Schwartzman is the only shareholder of the Applicant Company. The Board notes the Applicant's submission that the Companies Act and especially Section 33 of CAP 486, Laws of Kenya has made provisions for a Limited Liability Company to exist even where it has reduced members. The Companies Act provides as follows;

"Reduction of Number of Members below Legal Minimum

33. Members severally liable for debts where business carried on with fewer than seven, or in case of private company, two members.

If at any time the number of members of a company is reduced, in the case of a private company, below two, or, in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with fewer than two members, or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

The Board notes that the effect of reduced number of shareholders in a company is that such reduction renders the corporate veil invalid as it imposes obligations to pay the debts of the Company to the existing shareholder where the Company has only one member for a period of more than six months and where the situation continues unabated. In this case the Board notes that all liabilities of the company if what is stated is the correct position would therefore vest on Eng. J Schwartzman and not on the Applicant as a corporate person. In the absence of a copy of records (CR. 12) from the Registrar of Companies confirming who indeed are the shareholders of the Applicant Company, then the Board can only rely on the information provided by the Applicant in its bid documents. The Board therefore notes that it is not in a position to independently confirm whether or not the said Eng. J. Schwartzman owns 100% shares of the Applicant Company. It is therefore not possible on the part of the Board to hold that the Applicant Company is fully owned by Kenyan Citizen(s).

The Board is satisfied with the Applicant's submission that it participated in the tender as a Private Limited Liability Company. However, having a

reduced number of shareholders as envisioned by Section 33 of the Companies Act removes the corporate veil and leaves the existing shareholder to shoulder all the liabilities of the company. The Board therefore agrees with the Procuring Entity and the Interested Party that the effect of reduction is to afford Engineer Schwartzman the opportunity to bid as natural person without the rigours of having to undergo the mandatory evaluation as a bidder.

With regard to the issue of whether the Company is fully **owned** and **controlled** by Kenyan Citizens, the Board notes that the Applicant in its bid document has provided an extract of the Board of Directors minutes authorizing Eng. Joseph Schwartzman *"to negotiate and sign the tender document, negotiate and sign the contract and all other related legal documents on behalf of H. Young & Co. (E.A) Limited."* The question that the Board must answer then is whether these other directors have a role to play in the day to day affairs of the Company. The Board notes that the Companies Act creates duties and obligations for directors of a company which include hiring of key personnel and providing strategic direction of the company while acting in good faith to protect the interest of the investors. This is a clear indication that the Law envisions a scenario whereby investors must surrender the control and management of companies to the directors so appointed. The Board notes that the fact that the other directors of the company were called upon to give a power of attorney to Engineer Schwartzman is a clear indication that they were in control of the company.

In view of the foregoing, the Board's finding on the issue of *whether the Applicant was a "citizen Contractor"* is that it was not. The Board therefore finds that the Applicant did not meet the criteria for a citizen contractor

under Section 3 of the Act as a company ***wholly owned and controlled*** by Kenyan citizens as provided for under Section 3 of the Act by virtue of the fact that it was not possible to independently verify ownership of the Applicant Company in the absence of records from the Registrar of Companies and also in view of the fact that the Board of Directors consisted of foreign nationals who were in control of the day to day affairs of the Applicant Company.

The second issue that the Board must address is whether ***“the Applicant met a Mandatory requirement of the tender document which required it to provide authority to the Procuring Entity to seek reference from its bankers.”*** The Board notes that the Applicant provided detailed information of its bankers and the contact persons thereof. It however did not expressly advise / authorize the Procuring Entity to seek reference from its bankers as envisioned by the Instructions to Tenderers Clause 2.2 and 2.3 (viii). The Board notes that the Law requires a Procuring Entity to provide clear and specific guidelines in its Tender Document and in the instructions therein to the Bidders. Section 34 of the Public Procurement and Disposal Act states;

“34(1)The procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

(2) The specific requirements shall include all the procuring entity’s technical requirements with respect to the goods, works or services being procured.

(3) The technical requirements shall, where appropriate –

(a) relate to performance rather than to design or descriptive characteristics; and

(b) be based on national or international standards.

.....”

Having perused the Tender Document and having heard all the parties, the Board notes that indeed bidders were expected to provide some form of authority to the Procuring Entity and that this requirement was couched in clear and concise language and that there was no ambiguity in the Tender Document with regard to this requirement as claimed by the Applicant. The Board also notes that the Tender Document contained a clause that allowed a bidder to seek clarification of any issue in the Tender Document that was not clear to it. The Board therefore holds the view that it was incumbent upon the Applicant to seek a clarification of any condition contained in the Tender Document that was unclear to it. The fact that the Applicant did not do so meant that it understood the conditions and terms of the Tender Document and was duty bound to comply with all of them especially the ones that were mandatory. The Board notes that the Applicant did not seek any such clarification from the Procuring Entity. It is therefore correct to assume that the Applicant on its part understood the Tender Document and all the requirements therein and was therefore expected to comply. In holding this view, the Board is guided by its previous decisions in ***Review No. 61 of 2010 (MFI Leasing Ltd Versus Kenya Rural Roads Authority)*** and ***Review No.10 of 2013 (Magal Security Systems Limited Versus Kenya Airports Authority)*** where the Board held that mandatory requirements must be complied with.

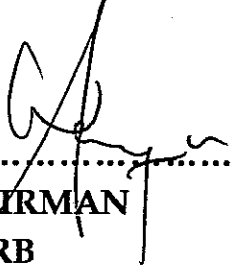
From the foregoing, the Board is satisfied that the Procuring Entity was justified in rejecting the Applicant’s bid at the preliminary evaluation stage of the tender. The finding of the Board is that the requirement that bidder must be citizen contactors and must provide authority to the Procuring Entity to

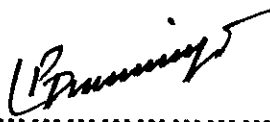
seek information from its bankers were mandatory in nature and failure to comply with the same rendered the Applicant's bid non responsive and hence the Applicant's bid could not proceed to the next stage of evaluation.

The sum total of the above is that the Applicant's Request for Review therefore fails in its totality and is hereby dismissed. The Board directs that the Procuring Entity may proceed to complete the procurement process.

The Board makes no orders as to costs.

Dated at Nairobi on this 18th day of November, 2013.


.....
CHAIRMAN
PPARB


.....
SECRETARY
PPARB

