

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 44/2013 OF 12TH NOVEMBER, 2013.

BETWEEN

DOHWA ENGINEERING COMPANY LIMITED.....APPLICANT

AND

KENYA RAILWAYS CORPORATIONPROCURING ENTITY

Review against the decision of the Kenya Railways Corporation in the matter of Tender No. KR/PLM/009/13-14 for Consultancy Services for the Design Review and Construction Supervision for the Construction of a Standard Gauge Railway Line from Mombasa to Nairobi, Kenya and Procurement and Installation of Facilities, Locomotive and Rolling Stock.

BOARD MEMBERS PRESENT

Mrs. Josephine W. Mong'are	- Member (in the chair)
Mr. Hussein Were	- Member
Mr. Paul Ngotho	- Member
Mrs. Gilda Odera	- Member
Mr. Peter Ondieki	- Member

IN ATTENDANCE

Mr. Philemon Kiprop	- Secretariat
Mr. Philip Okumu	- Secretariat
Ms. Judy Maina	- Secretariat

PRESENT BY INVITATION

Applicant - Dohwa Engineering Co. Ltd

Mr. John Wananda	- Advocate
Mr. Destirio Oyatsi	- Advocate
Mr. David Ohenga	- Advocate
Mr. James I. Gitonga	- Advocate
Mr. Jang Geanchang	- Executive Director
Mr. Thomas Ndeda	- Engineer

Procuring Entity - Kenya Railways Corporation

Prof. Albert Mumma	- Advocate
Mr. Charles Agwara	- Advocate
Ms. Hellen Mungania	- Corporation Secretary
Ms. Lucy Njoroge	- Procurement Manager
Mr. Brian Ochieng	- Pupil

Interested Parties

Dr. Simeon Kanani	- Korea Rail Network Authority
Mr. David Kimingi	- SMEC International

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

1. The Kenya Railways Mandate

Following the concession of Kenya Railways on 1st November 2006, the Kenya Railways Mandate was revised to include the following activities:

- i) Management of the Concession Agreement;
- ii) Management of Non-Conceded Assets;
- iii) *Planning and development of metropolitan rail transport systems;*
- iv) *Promotion and facilitation of national railway network development;*
- v) Development and Management of inland waterways;
- vi) Development and Management of the Railway Training Institute.

In order to meet some of the objectives of Mandate (iv), GoK and Kenya Railways Corporation (KRC) proposed to develop a modern high capacity standard gauge railway between Mombasa and Malaba /Kisumu. The Railway will be developed in two phases: Phase 1 Mombasa - Nairobi, Phase 2: Nairobi - Malaba/Kisumu. The Government is currently in the process of identifying suitable funding model to support the construction of the project. In the meantime, in order to ensure that the project is delivered as per quality and scope described in the Feasibility Study and Preliminary Design Report, KRC intends to engage a qualified consultant to undertake the designs review and construction supervision.

2. Advertisement

On 19th July, 2013, KR advertised for qualified consulting firms to submit bids for the Design Review and Construction Supervision for the development of the Mombasa – Nairobi standard gauge railway.

On 22nd August, 2013, bidders briefing was conducted.

Tender closing/ opening

The closing /opening date/time for the submissions was 10th October, 2013 at 12.00 pm East African Time. Nine (9) Bidders submitted their proposals.

EVALUATION OF THE MANDATORY REQUIREMENTS

According to the RFP Document, the bidders were requested to provide the information listed below, failing which the “the entire bid (by the firm or consortium) would be deemed non-responsive”.

Mandatory requirements (general)

	Item
1.	Technical Proposal - One (1) original and five (5) copies
2.	Financial Proposal - One (1) original and five (5) copies
3.	Details of the of the Bidder's particulars (Form 2)
4.	Notarised constitution/Registration of the Firm and Consortium Members in English
5.	Audited accounts for the last five (5) consecutive years
6.	Notarised evidence of minimum total turnover of US\$ Twenty (20) million of the Firm for the last five (5) consecutive years.
7.	Bid Bond of US\$ eighty thousand (80,000)
8.	Notarised Bidder's experience (Form 3)

9.	Key members of the project team with the skills and experience specified in the Table ensuring that supporting documents for the CRITICAL REQUIREMENTS are submitted. The personnel to be available throughout the project.
10.	Notarised copies of agreements between lead consultant and consortium firms including <u>Power of Attorney</u> for the Authorised Representative of the Lead Consultant to represent the Consortium
11.	Draft Work Plan

Mandatory requirements (personnel)

In the RFP Document under paragraph 2.3.3 (v), it was mandatory that “the consultant shall appoint expert team that includes as a minimum the following key experts”:

	Experts
1.	Project Team Leader
2.	Expert in railway track (permanent way) design and construction
3.	Quality Assurance Expert (Materials Engineer)
4.	Expert in Civil Engineering contracts
5.	Geotechnical Engineer
6.	Expert in bridges and structures
7.	Senior hydrology/hydraulics Engineer
8.	Expert in railway signalling/train control
9.	Expert in telecommunication & ICT
10.	Expert in railway electrification
11.	Expert in transport logistics and operations
12.	Locomotives and Rolling Stock Expert (Mechanical Engineer)
13.	Expert in Engineering and Land Surveying
14.	Senior Architect

15	Senior Quantity surveyor
16.	Environment Expert
17.	Social Impact & Resettlement Expert
18.	Five Resident Engineers – Civil (Team Leaders for each part of contract)

Critical requirements on personnel

- i) Attach copy of relevant degree certificate;
- ii) Attach copy of professional registration or practicing certificate or corporate membership in professional organisation of country of origin or practice (if any);
- iii) Number of years of post qualification experience.

Below are the results for the evaluation of the Mandatory Requirements for the Personnel for each of the eight (8) proposals that submitted Mandatory Requirements. The 9th proposal from Messrs Jososemy Construction did not contain a submission of the Mandatory Requirements.

	Expert	Team Engineering	TSDI/ APEC/EDON	SMEC International	China Railway Eryuan Engineering Group	Hill International	China Railway First Survey Design Ltd	DOHWA/ SIYUAN/ BALJI/ GIBB	Korea Rail Network Authority
1.	Project Team Leader	YES	YES	NO	NO	NO	NO	NO	YES
2.	Expert In Railway Track (Permanent Way) Design and Construction	YES	YES	YES	NO	YES	NO	NO	YES
3.	Quality Assurance Expert (Materials Engineer)	YES	YES	YES	NO	YES	NO	NO	YES

4.	Expert In Civil Engineering Contracts	YES	YES	YES	NO	YES	NO	NO	YES
5.	Geotechnical Engineer	YES	YES	YES	NO	NO	NO	NO	YES
6.	Expert In Bridges And Structures	YES	YES	YES	NO	NO	NO	NO	YES
7.	Senior Hydrology/ Hydraulics Engineer	YES	YES	YES	NO	NO	YES	NO	YES
8.	Expert In Railway Signalling/Train Control	YES	YES	YES	NO	YES	NO	NO	YES
9.	Expert In Telecommunication & ICT	YES	YES	YES	NO	YES	NO	NO	YES
10.	Expert In Railway Electrification	YES	YES	NO	NO	YES	YES	NO	YES
11.	Expert In Transport Logistics And Operations	YES	YES	YES	NO	YES	NO	NO	YES
12.	Locomotives And Rolling Stock Expert (Mechanical Engineer)	YES	YES	YES	NO	YES	NO	NO	YES
13.	Expert In Engineering And Land Surveying	YES	YES	YES	NO	NO	NO	NO	YES
14.	Senior Architect	YES	YES	YES	NO	NO	NO	NO	YES
15.	Senior Quantity Surveyor								
16.	Environment Expert	YES	YES	YES	NO	NO	NO	NO	YES
17.	Social Impact & Resettlement Expert	YES	YES	YES	NO	NO	NO	NO	YES
18.	Five (5) Resident Engineers - Civil (Team Leaders For Each Part Of Contract	YES	YES	NO	YES	YES	YES	YES	YES
	SUMMARY	YES	YES	NO	NO	NO	NO	NO	YES

1. Analysis of performance on personnel Mandatory requirements

1. Team Engineering

The Bidder met all the mandatory requirements on personnel

2. TSDI/APEC/EDON

The Bidder met all the mandatory requirements on personnel

3. SMEC International

- Expert in Railway Electrification: Professional Registration Certificate not provided.
- Five (5) Resident Engineers - Civil: Professional Registration Certificate not provided.

4. China Railway Eryuan Engineering Group

- Social Impact & Resettlement Expert: Professional registration certificates not provided.
- Commitment on availability: None of the experts provided commitment on availability.

5. Hill International

Degree certificates and professional registrations not provided for:

- Project Team Leader
- Geotechnical Engineer
- Expert in bridges and structures
- Senior hydrology/ hydraulics Engineer
- Expert in Engineering and land Surveying

- Senior Architect
- Senior Quantity Surveyor
- Environment Expert
- Social Impact & Resettlement Expert

6. **China Railway First Survey Design Ltd**

Degree certificate and professional registration not provided for:

- Senior Architect
- Environmental expert
- Social Impact & Resettlement Expert

Professional registration certificate not provided for:

- Project Team leader
- Expert in railway track (permanent way) design and construction

Commitment on availability: None of the experts provided commitment on availability.

7. **DOHWA/SIYUAN/BALJI/GIBB**

Professional registration not provided for:

- Expert in railway signaling/train control
- Expert in Telecommunications & ICT
- Expert in Railway Electrification
- Locomotives and Rolling Stock Expert (Mechanical Engineer)
- Senior Architect
- Senior Quantity Surveyor

Expert in railway track (permanent way) design and construction: MSc degree certificate and professional registration certificates not provided

Five (5) Resident Engineers - Civil: Not provided.

Commitment on availability: None of the experts provided commitment on availability.

8. Korea Rail Network Authority

Below are the results for the complete evaluation of the Mandatory Requirements for eight (8) proposals that were submitted.

	Expert	Team Engineering	TSDI/APEC/EDON	SMEC International	China Railway Eryuan Engineering Group	Hill International	China Railway First Survey Design Ltd	DOHWA/SIYUAN/BALJI/GIBB	Korea Rail Network Authority
1.	Technical Proposal - One (1) original and five (5) copies	YES	YES	YES	YES	YES	YES	YES	YES
2.	Financial Proposal - One (1) original and five (5) copies	YES	YES	NO	YES	YES	YES	YES	YES
3.	Details of the of the Bidder's particulars (Form 2)	YES	YES	NO	YES	YES		YES	YES
4.	Notarised constitution/Registration of the Firm and Consortium Members in English	YES	YES	NO	YES	YES	YES	NO	YES

5.	Audited accounts for the last five (5) consecutive years	YES	YES	NO	YES	NO	YES	YES	YES
6.	Notarised evidence of minimum total turnover of US\$ Twenty (20) million of the Firm for the last five(5) consecutive years.	YES	YES	NO	YES	NO	YES	NO	YES
7.	Bid Bond of US\$ eighty Thousand (80,000)	YES	YES	NO	YES	YES	YES	YES	YES
8.	Notarised Bidder's experience (Form 3)	YES	YES	NO	YES	YES	YES	NO	YES
9.	Key members of the project team	YES	YES	NO	NO	NO	NO	NO	YES
10.	Notarised copies of <i>agreements</i> between lead consultant and consortium firms including <u>Power of Attorney</u> for the Authorised Representative of the Lead Consultant to represent the Consortium	YES	YES	NO	NO	NO	NO	NO	YES
11.	Draft Work Plan	YES	YES	YES	YES	YES	YES	YES	YES
	SUMMARY	YES	YES	NO	NO	NO	NO	NO	YES

2. Analysis of performance on the complete Mandatory Requirements

1. TEAM ENGINEERING SPA

The Bidder met all the mandatory requirements

2. THE THIRD RAILWAY SURVEY & GROUP INC WITH APEC

The Bidder met all the Mandatory Requirements.

3. **SMEC INTERNATIONAL PTY LTD WITH INTERFLEET TECHNOLOGY**
 - Mandatory requirement on personnel not fully met.
 - Copies of *Agreements* between lead consultant and consortium firms including Power of Attorney not notarised

4. **CHINA RAILWAY ERYUAN ENGINEERING GROUP CO LTD**
 - Mandatory requirement on personnel not fully met.

5. **HILL INT'L & GUANGZHOU WANAN**
 - Mandatory requirement on personnel not fully met.
 - Copies of *Agreements* between lead consultant and consortium firms including Power of Attorney not notarised

6. **CHINA RAILWAY FIRST SURVEY & DESIGN INSTITUTE GROUP LTD**
 - Mandatory requirement on personnel not fully met

7. **DOHWA/SIYUAN/BALAJI/GIBB**
 - Mandatory requirement on personnel not fully met.
 - Copies of *Agreements* between lead consultant and consortium firms including Power of Attorney not notarised

8. **KOREA NETWORK AUTHORITY CONSORTIUM & TESO/SAMAN/PRSM**

The Bidder met all the Mandatory requirements.

JOSOSEMY CONSTRUCTION: The Bidder's submission did not contain Technical Proposal

3. Conclusion on Evaluation on the Mandatory Requirements

The following firms met all the "mandatory requirements" and therefore proceeded to the Technical Evaluation:

Team Engineering; TSDI/APEC/EDON and Korea Rail Network Authority.

TECHNICAL EVALUATION

All the three (3) firms: **Team Engineering, TSDI/APEC/EDON and Korea Rail Network Authority** qualified to proceed on to Technical Evaluation.

Evaluation Criteria

The evaluation criteria are as spelled out in Paragraph 2.7.1 of the RFP Document).

	Section	Maximum points
1.	Specific experience of the consultant related to the assignment	10
2.	Adequacy of the proposed work plan and methodology in responding to the terms of reference	32
3.	Qualifications and competence of key staff for the assignment	50
4.	Suitability to the Capacity Building Programme and training	8
	TOTAL	100

4.0 Summary of Technical Evaluation score

Below is the summary of the technical evaluation for each bidder. **Annex 5** contains the breakdown of the details of scores from each evaluator for each of the Bidders evaluated.

	Evaluation Criteria	Maximum score	Team Engineering	TSDI/APEC/EDON	Korea Rail Network Authority
			Actual score		
1.	Specific experience of the consultant related to the assignment	10	7.5	8.0	6.7
2.	Adequacy of the proposed work plan and methodology in responding to the terms of reference	32	24.0	26.7	27.0
3.	Qualifications and competence of key staff for the assignment	50	37.4	46.7	42.7
4.	Suitability to the Capacity Building Programme and training	8	7.0	7.2	7.0
	TOTALS		75.9	88.6	83.4

5.0 Comments on the Technical Evaluation score

1. Team Engineering

- **Specific experience of the consultant related to the assignment:**
 - Projects presented are low valued and within Southern Africa Region only
 - Projects lack variety – mostly about PRASA and Gautrain

- **Adequacy of the proposed work plan and methodology in responding to the terms of reference:**
 - Comments on TOR are not detailed and lack suggestions
 - Details on environmental considerations missing
 - Details on scope of work and timelines not properly defined
- **Qualifications and competence of key staff for the assignment:**
 - Staff involved in low value projects with little to no relevance to commuter rail development
 - The firm provided an environmental expert from outside the country with a commitment that the consultant will team up with a local registered expert.

Where the firm is the successful bidder, it will need to provide a local environmental expert with the required qualification (registered with NEMA as lead EIA expert) before it is awarded the contract.

- **Suitability to the Capacity Building Programme and training:**
 - Training of trainers not considered in depth

2. TSDI/APEC/EDON

No major weakness identified.

3. Korea Rail Network Authority

- **Specific experience of the consultant related to the assignment:**
 - Lead firm lacks experience in similar regions

- Lead firm experience in commuter rail development is limited
- **Qualifications and competence of key staff for the assignment:**
 - Personnel lack experience in commuter rail development
- **Suitability of the Transfer of Technology including suitable training Programme:**
 - Programmes stated in narrative form and lacks detail

6.0 Findings of the Technical Evaluation

	Bidder	Score (%)
1.	Team Engineering	75.9
2.	TSDI/APEC/EDON	88.6
3.	Korea Rail Network Authority	83.4

CONCLUSIONS AND RECOMMENDATIONS

1.0 Conclusions

The following firms scored above 70% in the Technical Evaluation and therefore qualify to proceed to Financial Evaluation stage.

- **Team Engineering**
- **TSDI/APEC/EDON**
- **Korea Rail Network Authority**

2.0 Recommendations

The Technical Evaluation Committee recommended that the following firms proceed to financial evaluation stage:

- **Team Engineering**
- **TSDI/APEC/EDON**
- **Korea Rail Network Authority**

FINANCIAL EVALUATION

The Financial proposal for the technically qualified bidders, were yet to be as at the time this Request for Review was filed on 12th November, 2013.

TENDER COMMITTEE DECISION

The Tender Committee is yet to meet and adjudicate on this tender.

THE REVIEW

This request was lodged by Dohwa Engineering on 12th November, 2013 in the matter of Tender No: KR/PLM/009/13-14 for Consultancy Services for the Design Review and Construction Supervision for the Construction of a Standard Gauge Railway Line from Mombasa to Nairobi, Kenya and Procurement & Installation of Facilities, Locomotive and Rolling Stock.)

The Applicant was represented by Mr. Desterio Oyatsi and Mr. John Wananda , Advocates while the Procuring Entity was represented Professor Albert Mumma, Advocate. Two other Interested Parties were represented by Dr. Simeon Kanani for Korea Rail Network Authority and Mr. David Kimingi for SMEC International.

The Applicant requested the Board for the following orders:

- a) that the decision to reject the Applicant's technical proposal be annulled.***
- b) that the Tender be advertised afresh.***
- c) that the Procuring Entity pays all the costs incurred by the Applicant in preparing and submitting the said tender plus the cost of this review.***

When the matter first came up for hearing on 26th November, 2013, the Interested Parties stated that they would only observe the process and not make any presentations to the Board.

The Procuring Entity on the other hand registered its concern in respect to the submissions served on it by the Applicant on the day of the hearing. It submitted that as per the Applicant's submission, the Applicant had specifically carried out

an evaluation based on the technical evaluation report which the Procuring Entity made available to the Board. It submitted that the technical evaluation report was made available to the Applicant in error because under the law the Applicant is not entitled to technical evaluation report but the summary of that report. The Procuring Entity averred that under Section 45 (2) (e) of the Act the Applicant is only entitled to the summary of the evaluation and not the evaluation report. It submitted that Regulations 66 (3) provides quite expressly that if reasons are given to tenderers who have requested for the reasons, they shall not contain any information on any other tenderer other than information that is publicly available from tender opening.

In response, the Applicant submitted that it was received the response together with the evaluation document on 20th November, 2013. It further submitted that since the Procuring Entity in its response seemed to have referred to the evaluation report in its arguments, the Applicant was made to believe that it is part of the pleadings to this Request for Review. The Applicant alleged that the evaluation document was a confirmation of the manipulations in complained of.

The Board notes that among the documents that were filed before by the Procuring Entity on 18th November, 2013 is a document titled Memorandum of Response and another bundle of the documents referred to in the memorandum of response. The Board notes that these are the documents that were availed to the Applicant in response to its Request for Review. The Board further notes that these documents were prepared by the Procuring Entity and it was within the confine of the Procuring Entity to decide which of the documents they wished to be shared with the Applicant because the Procuring Entity is expected to separately provide the rest of the confidential document to the Board for the hearing. The Board therefore holds that the said documents were not served by

error but they were served because they formed part of the response. Further the Board has not found any prejudice that will be suffered by the Procuring Entity by the said document being served to the Applicant. The Board also points out that it does not sit as evaluation committee and therefore shall not deal with matters that are supposed to be undertaken by either of the parties before it but shall hear the matter on merit, look at the law and make a decision. The Board observed that its mandate is set out in the Act and it shall confine itself to the provisions of the Act.

Taking into account all the foregoing, the Board holds that the Applicant would be allowed to make submissions based on the contested documents since the same were already before the Board.

The hearing was adjourned to 4th December, 2013 to give the Procuring Entity the opportunity to address the issues that were raised in the Applicant's submissions because they were not part of the Request for Review that was initially filed.

The Hearing resumed on 4th December, 2013 as planned.

The Request for Review filed on 12th November, 2013 contained eight (8) grounds for review supported by written submissions. The Applicant also made submissions in response to the Memorandum of Response filed by the Procuring Entity.

The Board, upon hearing the submissions by the Parties and considering the documents presented before it narrowed down the grounds for review to two issues for determination as follows:

1. **Whether failure to disclose technical scores by the Procuring Entity to the Applicant was in breach of Section 44(3) of the Act thus denying the Applicant its statutory right as per the Public Procurement and Disposal Act, 2005 (Grounds 1 & 2).**
2. **Whether the evaluation process adopted by the Procuring Entity was in accordance with the Act and the Request for Proposals and whether the Applicant suffered prejudice as a result (Grounds 3, 4, 5, 6, 7, & 8).**

ISSUE NO.1

Whether failure to disclose technical scores by the Procuring Entity to the Applicant was in breach of Section 44(3) of the Act thus denying the Applicant its statutory right as per the Public Procurement and Disposal Act, 2005.

The Applicant submitted that the Procuring Entity breached Sections 82 and 83 of the Act, by giving the Applicant a notification letter stating that they were not successful in the tender prior to providing them with the technical scores. The Applicant stated that Section 82 of the Act requires that a score be assigned to the Technical evaluation carried out by the Procuring Entity whereas Section 83 requires disclosure of the scores to both the successful bidder and the unsuccessful ones.

The Applicant stated that this action impeded it not to exercise its rights under Section 93 of the Act which provides for the process of bringing a Request for Review before the Board. It stated that it is only after it applied for a Review by the Board that it got the Technical Evaluation Report. It further argued that the Procuring Entity had a duty to comply with the law by drawing proper Tender

Documents and stated that it suffered from the breach of unlawful disqualification. The Applicant alleged that the tender processing committee had departed from the restricted criteria under the law making it fatal and that the committee had no absolute discretion.

The Procuring Entity in its response reiterated its position that despite the Board's earlier ruling that the Technical Evaluation Report was admissible; it maintained its position that the Applicant was only entitled to a summary of the same report, pursuant to the Section 45 of the Act. It argued that the Applicant had suffered no prejudice arising out of fact that they did not have the technical scores at the time of receiving the notification letter. It further submitted that the Tender Document contained provisions on how the Notification was to be made and that the Notification done pursuant to Clause 2.8.1 of the Tender Document was only for purposes of advising the unsuccessful bidders that their financial proposals would not be opened and that they needed not to attend the financial opening. Referring to Clause 2.8.1, which states that **"after the technical evaluation the client shall notify the consultant whose proposal has not met the requirement"**, the Procuring Entity argued that this indicated that the unsuccessful bidder's Financial Proposals would be returned. The Procuring Entity stated that it was relying on the standard request for proposal documents prepared by the Public Procurement Oversight Authority, pursuant to Section 29(4) of the Act.

The Procuring Entity referred the Board to the Board own decision in the matter of **MS/Gibb Africa Ltd / Canarail vs. Kenya Railways Corporation, Review Number 48 of 2010** where the Board ruled that it was mandatory for a Procuring Entity to use standard tender documents and failure to do so was a breach of the Law. In the same ruling, the Board had stated that failure to incorporate clause

2.8.2 in the standard request for proposals was a breach of Section 29(4) of the Act.

The Procuring Entity further submitted that in this tender, there are two kinds of unsuccessful bidders; those who failed mandatory requirements and technical evaluation and those who may not be successful after the Financial Bids are evaluated and therefore Section 83 of the Act should not be read in isolation. The Procuring Entity submitted that in complying with provisions of the Standard Request for Proposal Document it did not breach the Act because in any event after it completed the financial evaluation it would be bound to communicate the results to all bidders who participated in the tender process.

Having considered the submitted documents, the Provisions of the Public Procurement and Disposal Act, 2005 and Regulations, 2006, as well as having listened to the submissions by both parties, the Board observes the following:

1. That Section 44(1) of the Act prohibits a Procuring Entity from disclosing information during or after procurement proceedings which would impede law enforcement or would not be in the public interest; or whose disclosure would prejudice legitimate commercial interests or inhibit fair competitions; or relating to the evaluation, comparison or clarification of tenders, proposals or quotations or the contents of tenders, proposals or quotations.
2. The Tender Document issued to the Bidders put a caveat that no disclosure will be made to any bidder until a winning bidder is identified. However, Section 44(3) compels the Procuring Entity to disclose summary of evaluation and comparison of tenders to a party who intends to seek

Administrative Review but Section 45(5) cautions disclosure which will go against paragraph (b) to (d) of Section 44(1).

The Board notes that the Applicant in its application is requesting for the scores of all the bidders who were responsive to the technical proposals. In normal circumstances, the summary of disclosure is only limited to the scores of the Applicant and not those of other bidders as it may result in disclosure of confidential information.

3. That the letters of notification dated 5th November 2013 and 11th November 2013 fell short of what Regulation 19(2) envisaged as it failed to indicate to unsuccessful bidder the reasons why its tender did not attain the minimum Technical qualifying marks. The Regulation envisages transparency in Procurement Process and as such giving reason in the notification letter would enhance the same.

The Board however finds that the Procuring Entity is not in breach of Section 44(3) by failing to meet the demand of the Applicant's letter dated 8th November 2013 as it was premature for the Applicant to request for the disclosure of technical scores of all bidders before the end of the process. The Board observes that the Applicant has not suffered prejudice since the tender evaluation process is not yet complete. At the end of the tender process, the Applicant will be duly informed and be entitled to receive relevant information required. The totality of this finding is that this limb of the Request for Review fails.

ISSUE NO.2

Whether the evaluation process adopted by the Procuring Entity was in accordance with the Act and the Request for Proposals and whether the Applicant suffered prejudice as a result (Grounds 3, 4, 5, 6, 7, & 8).

The Applicant stated that after receiving the Technical Evaluation Report from the Board it found errors committed by the Procuring Entity in the evaluation of the Applicant's proposals. It submitted that the Procuring Entity's lack of response to this issue in their reply amounted to distortions and manipulation of the scores. It further alleged that some of the documents they had provided in the tender were marked as not provided.

The Applicant also raised the issue that one member of the technical evaluation committee signed the tender evaluation report on 12th November 2013, yet the other three members signed it on 5th November 2013. The Applicant argues that pursuant to Regulation 16 (5) as amended by the Legal Notice No. 106 of 18th June, 2013, the evaluation exercise should have been completed on the same day. It added that this should have been on 12th November 2013 since one member of the evaluation team signed the results on 12th November 2013 while others three members had signed the document on 5th November, 2013. It further argued that the fact that the Procuring Entity sent the notification letter to the Applicant on 5th November 2013 informing them that the technical evaluation was complete was premature. The Applicant proceeded to submit on the errors that it came across on the evaluation process and referred the Board to its written submissions where it had enumerated errors on the evaluation process by the Procuring Entity's Tender Processing Committee. It submitted that as a result of the said errors the evaluation process was not transparent and was not done in accordance with the provisions of the Act.

The Procuring Entity in its response defended the evaluation process. It submitted that the process was carried out properly and in accordance with the Law. It further argued that the fact that one Member signed the minutes on 12th November, 2013 while the others signed on 5th November 2013 did not mean that the process was incomplete by the time of Notification letters were sent out to the bidders. Regarding the issue of one technical evaluation committee member signing the document seven days after the rest of the team, the Procuring Entity stated that it is normal for an officer to be away prior to the report being typed hence such an occurrence. It further submitted that the Applicant could not evaluate itself as that was a task assigned by law to the Procuring Entity through its Tender Processing Committee. It submitted that neither could the Board be called in to reevaluate a tender at the hearing as that would be assuming another role other than that of an arbiter. It referred to a decision of the **Court of Appeal in Civil Appeal No. 127 of 2009 - The Kenya National Examinations Council vs. Republic, Ex Parte Kemunto Regina Ouru**, where in similar line of argument for this case, it was held that the Applicant should not bring before the Board how they think they should have scored as this is the work of the technical evaluation committee. The Procuring Entity further submitted that the Applicant was only raising these issues because it was unsuccessful and yet it had the opportunity as provided for in the Tender Document to seek for clarification before the process was closed on any issue that was not clear to it. The Procuring Entity referred to a decision of the High Court in the case of the **JR. NO. 92 OF 2011, Republic Vs Public Procurement Review Board (1st Respondent) and Kenya Railways Corporation (2nd Respondent), Ex parte Gibb Africa Ltd & Canarail Consulting Inc**; where Justice Korir held that where an Applicant believes a document is flawed, it should give the Procuring Entity a chance to address it and not wait for the outcome.

On being questioned whether the Applicant had ever raised any queries or sought clarification on the Tender Documents, the Applicant responded that the process was done in accordance with the Request for Proposals and that the rules of the Act cannot override the Act and stated that if the rules have an omission that contradicts the Act then it is unlawful.

The Board notes the following on the above issues regarding whether or not the evaluation process by the Procuring Entity breached the law:

1. The Procuring Entity followed due process to advertise the tender.
2. The Bids were subjected to three stages, namely Preliminary, Technical and Financial. The initial Preliminary stage involved confirmation of the provision of mandatory requirements by the bidders.
3. There is no evidence or letter from the Applicant prior to opening of the tender raising concern about the evaluation criteria provided for in the Tender Document.
4. The signing by a technical evaluation committee member on a different date from other members does not necessarily mean the evaluation report is invalid.
5. The Procuring Entity on evaluating the Tenders adopted a criteria and scoring which was stipulated in the Tender Document in compliance with Section 81(2) (e) of the Act. However, the Board notes that the Procuring Entity ought to have enhanced its format of evaluation by bringing out clear parameters that are required for each mandatory requirement and what is required of each item. It is important to note that the Board does not find this to be a major deviation of the evaluation process which would invalidate the process.
6. It is not the mandate of the Board to conduct evaluation as that that would require it to summon the entire evaluation committee and cross examine it

on its process. Such an act by the Board would be outside its mandate as provided by the Law. Neither can a bidder reevaluate itself in a tender process as that is a function by Law assigned to the Procuring Entity only.

The Board therefore holds that the Procuring Entity carried out this task in accordance with the provisions of the Act and as such these grounds of the Request for Review fail.

Having considered all the above factors, the Board rules as follows:

1. That the Request for Review is hereby dismissed.
2. That the Procuring Entity is directed to proceed with the tender evaluation process to its conclusion and notify all the bidders of the outcome.
3. The Board makes no orders as to costs.

Dated at Nairobi on this 9th day of December, 2013.


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CHAIRMAN
PPARB


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SECRETARY
PPARB