

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 66/2015 OF 30TH DECEMBER, 2015

BETWEEN

SOSIAN ENERGY CONSORTIUM..... APPLICANT

AND

**KERIO VALLEY DEVELOPMENT AUTHORITY PROCURING
ENTITY**

Review against the decision of the Tender Committee of the Kerio Valley Development Authority in the matter of Tender No. KVDA/RFP/38/2014-2015 for Request for Proposals for Funding, Design, Build and Transfer for the Proposed Embobut Multipurpose Dam Project

BOARD MEMBERS PRESENT

- | | |
|----------------------|----------|
| 1. Paul Gicheru | - Chair |
| 2. Nelson Orgut | - Member |
| 3. Peter Ondieki | - Member |
| 4. Josephine Mongare | - Member |
| 5. Hussein Were | - Member |

In attendance

1. Philip Okumu - Secretariat
2. Shelmith Miano - Secretariat

Present by invitation

Applicant - Sosian Energy Consortium

1. Alphonse Muema Mbidyo - Advocate
2. Henry Rotich - Consortium Representative

Procuring Entity - Kerio Valley Development Authority

1. Austine Odoyo - Advocate
2. Esther Koriri - Legal Officer
3. William Maina - SPM
4. Paul Serem - MES
5. Francis Kipkech - MTSO
6. Moses Kipchumba - CMF

Interested Parties

1. Shane Morgan - Legal Manager, CMC Di Ravenna
2. Stanely Muthama - Technical Staff

THE BOARD'S DECISION

Upon hearing presentations from the parties and interested candidates and upon consideration the information in the documents before it, the Board decides as follows:

Background of award

The Kerio Valley Development Authority (KVDA) is a parastatal under the Ministry of Environment, Water and Natural Resources and is mandated to plan and coordinate implementation of projects and programs within its area of jurisdiction made up of Baringo, Elgeyo Marakwet, West Pokot, Turkana, Samburu and parts of Nakuru County.

The Authority (KVDA) invited proposals from both national and international consortia of contractors and consultants who are capable of sourcing for funds, design, build and transfer the project whose scope included dam construction (HEP - 45MW), developing 2,000 ha of land under irrigation, development of water supply and storage system to support 500,000 people, and catchment conservation.

The KVDA advertised the Request for Proposals in the *Standard* and the *Daily Nation* newspapers of 19th and 24th December, 2014 respectively, and also on its website and the IFMIS portal. The initial closing date of the tender was 17th February, 2015 but the KVDA extended it to 18th March, 2015 through a newspaper advertisement in the *Standard* on 12th February, 2015.

The tenders were opened on 18th March, 2015 at the KVDA Boardroom in the presence of bidders' representatives who chose to attend, and the following bids received and opened:-

BIDDER NO.	BIDDER NAME	ADDRESS
B1	M/s China Gezhouba Group Ltd	P.O. BOX 430033 China; Gezhouba Hotel No. 558 Jiefeng Avenue
B2	M/s Irrico International Ltd	P.O. BOX 38974-00623 Nairobi
B3	M/s Nari Group Corporation Ltd	Address:No.8Nari Road, Nanjing, P.R. China,210003
B4	M/s China CAMC Engineering Ltd	Address: No.3 Danling street, Haidian District.
B5	M/s Sino Hydro corporation ltd	P.O. BOX 2446-00100 Nairobi
B6	M/S Sosian Energy Ltd	P.O. BOX 2548-00606, Penthouse, Nivina Towers, Westlands Roads Nairobi
B7	M/s Magnolia Innovation Ltd/ LR Group Venture Ltd	Address: 34 GregoriAfxention Avenue Carithers Building, Block E, Office C 6021 Larnaca, Cyprus
B8	M/s ComperativaMuratori&Cememtsi (CMC DI Ravenna) Ltd	Address: No.05 Osborne Lane, EOH Business Park;2 nd floor, Block A; Code:2007,Johannesburg-South Africa
B9	M/s China Railway Construction Corporation (International) Ltd	Address: No.40,Fuxing Road, Beijing 100855, P.R. China

EVALUATION PROCESS

The KVDA evaluated the RFPs received from 7th to 16th April, 2015 and the evaluation was done using the following criteria:-

1.0	MANDATORY REQUIREMENTS
	OWNERSHIP
	Single Entity
	Joint Venture
1.1	Registration /Incorporation Certificate fromthe RegistrarofCompanies in the tenderer's Country OR Valid registration of companies in respective country along with annual Audited financial reports of the last 3 years .
1.2	A tenderer; single entity or lead partner contractor or sponsor shall submit only one application in the same qualification process, either individually or joint venture partner
1.3	Not having been declaredineligible/blacklisted byanyEmployer(Affidavit)
1.3.1	Tax compliance (A must for local companies)
1.4	Firm to provide a bid bond of 1% of cost valid for 120 days (addendum 2-pre bidding meeting of 4 th march 2015)
1.5	a) A tenderer shall provide evidence of Registration with their professional bodies in respective countries (clause 6.1.4.3) b) Financial institution or any other firm in the capacity of sponsor being the JV partner shall be required to have evidence of registration equivalent to that of security and exchange commission of Kenya (Central bank or equivalent in home country .clause 6.1.4.3)
1.6	Language of application shall be in English (clause 6.3.2.1)

2.0 TECHNICALQUALIFICATIONS (60 MARKS)

No.	Subject	BusinessStructure Requirement	ComplianceReq uirement		MaximumMark
			Single Entity	Joint venture	
2.1	BioData	LegalName oftheFirm(s)			1
		Detailedaddress(es)			1
		Descriptionofthefirms organisationsandactivities			1
		CompanyBrochures oranyothersimilarinformation			1
2.2	Professi onalPer sonnel (10Mar ks)	Numberand classificationoffulltime and parttimeEmployeesexpected tobe assigned onthe projectifawarded.			1
		Thepersonnel,forall the followingactivitiesshall beevaluatedconsideringtheirqu alifications and experience:			
		Design			1
		Construction			1
		Finance			1
		Management(BT)			1
2.3	Physical Resource	TheTenderermustlisthisphysicalresou rces[includingequipmentandavailabi lity]toexecutethesaidproject.			1

	s	The equipment required for the project and available with the firm must be listed down or any proposed arrangement, if required			
SUB – TOTAL					10
Performance of the Tenderer					
3.1	Performance of the tenderer	The performance of the Tenderer on all completed and on-going projects shall also be checked. If poor performances are undeclared but are found, then not only zero (0) marks shall be awarded but the Tenderer may also be declared as ineligible or disqualified.			10
3.2	Disputes, Arbitration and Litigation	A Tenderer involved in DAB, DRB, Arbitration or Litigation with his employer on his past projects shall provide full detail and their outcome, or a certificate of no DAB, DRB, Arbitration or Litigation in past.			NO/YES
	SUB-TOTAL				10 Marks
EXPERIENCE					
4.1	General Construction and Management Experience	Experience under construction contracts in the role of Contractor, or Management Contractor for at least the last Ten (10) years prior to the application submission deadline. Note: Letter of Award / Acceptance and Completion Certificate must be provided with the Documents.			5 Marks
4.2	Specific Construction Experience	The Tenderer [Contractor for the Construction Works] must have successfully executed and completed at least three (03) contracts within the last Ten (10) years. The contracts must be similar to the proposed works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics. e.g. Dam size and type, tunnel construction > 5km, underground powerhouse cavern, installation of HEP plant and so forth. Note: Letter of Award / Acceptance and Completion Certificate must be provided with the Documents.			15
4.3	Specific Experience of Management of BT Projects	The Tenderer or any of the parties must have successfully and substantially completed at least three (03) Contracts within the last Ten (10) years, in the capacity of BT Management party.			10
4.4	Specific	The Tenderer or any of the parties must have			10

	Design Experience	ave the experience of designing similar projects. The Design skills shall be evaluated in detail. In this aspect the Tenderer is encouraged to have a design consultant to meet the state of the art design requirements of the project.			
	SUB - TOTAL				40
FINANCIAL QUALIFICATIONS (40 MARKS)					
<i>Submission of audited balance sheets, for the last five (5) years to demonstrate: The current soundness of the Tenderer's financial position and his prospective long term profitability, to evaluate;</i>					
5.1	Financial Requirements [30%]	The Tenderer is required to provide the evidence of finance available amounting to 30% estimated cost of the project. For this purpose the Tenderer can evidence it either by producing an Insurance bond of the same amount OR By establishing that the Net Worth/Working Capital/Running Capital is of same amount.			15
5.2	Average Annual Turnover	The Average annual Turnover for the last five (5) years of the Tenderer shall also be analysed to evaluate the financial soundness of the firm.			5
5.3	Letter of Intent from a Financial Institution to secure loan (for 70% of project cost)	The Tenderer is required to produce a Letter of Intent from a Financial Institution as evidence to secure loan from the Financial Institution for the 70% of the project cost. This Letter of Intent must be Project and Part specific and must be designed to evidence the success of the future Financial Close to be submitted by the Tenderer for the project if awarded.			20
SUB -TOTAL					40
	TOTAL				100

The Evaluation Team made the following observations:-

OBSERVATIONS

B1 : M/s Gezhouba Group Ltd is a Chinese registered firm

- The firm was disqualified for not attaching the Bid Bond.
-

B2 : M/s Irrico International is a Kenyan registered firm

- Firm disqualified for not attaching the bid Bond.

B3 : M/s Nari Group Corporation is a Chinese/Kenyan registered firm

- The Firm is a single entity.
- The Firm attached a bid Bond of 2.5M US dollars from Xplico Insurance.

B4 : M/s China CAMC Engineering Company Ltd is a Chinese registered firm.

- The firm is disqualified for not attaching Bid Bond

B5: M/s Sinohydro Corporation Ltd is a Chinese/Kenyan registered Company

- Firm attached bid bond of Kshs.230M from Cannon Assurance
-

B6: M/s Sosian energy is a Kenyan incorporated company. The firm is in consortium with the following firms:-

- M/s Shalivana Green Energy Ltd.
 - M/s Shalivana Estates private Ltd
 - M/s Fitchner GMBH
 - M/s Farab Company
 - M/s Andritz Hydro
-

The firm attached a bid bond from Heritage Insurance of 1.25 Million US dollars

B7: M/s Magnolia Innovations Ltd did not attach bid bond and was disqualified.

B8: M/s CooperativaMuratori-Cementisti Di ravena is an Italian Company with a branch in South Africa.

The firm has a tax compliance from Kenya.

The firm attached a bid security of 1,116,000US Dollars from Lombard Insurance Company Ltd

B9: Did not attach the bid bond, and language of application was not adequately interpreted. The bidder was disqualified

NB: Bidder No. 1,2,4,7 & 9 were disqualified for not meeting the mandatory requirements.

Bidder 3,5, 6 and 8 met the mandatory requirements and the summary of the technical scores are as follows:-

SUMMARY OF BIDDER SCORES

BIDDER No.	Name	Technical scores	Rank
B3	M/s Nari Group Corporation	90.7	3
B5	M/s Sinohydro Corporation Ltd	92.8	2
B6	M/s Sosian energy	90.0	4
B8	M/s CooperativaMuratori-Cementisti Di ravena	96	1

AD HOC TECHNICAL AND FINANCIAL EVALUATION COMMITTEE RECOMMENDATION

The Kerio Valley Development Authority's Technical and Financial Evaluation Committee in its meeting held on 7th to 16th April 2015, Minute No.4/4/2014-2015 analyzed the bids and recommended firms no:

B8- M/s Cooperativa Muratori-Cementisti Di ravena,

B5- M/s Sinohydro Corporation Ltd,

B3- M/s Nari Group Corporation and

B6- M/s Sosian energy for further negotiations for entering into a concession contract (ref: 8.1.4 of the tender document)subject to relevant government approvals.

The KVDA's Tender Committee met on 13th May, 2015 for its Meeting No. 10/05/2014-2015 deferred the award of the tender with the reason that the information provided by the Evaluation Committee was not adequate for award towards negotiations with the successful bidders, and therefore reverted the report to the technical evaluation committee to review the recommendations. The review was to be done with the view to allow the best three or so qualified bidders to submit their proposals on actual technical designs, BQs, cost of project and actual funding commitment of the project by their financiers.

The Technical and Financial Evaluation Committee met on 19th May, 2015 to discuss the Tender Committee's decision, and agreed with the recommendations of the Tender Committee. The Tender Committee later approved that the four bidders recommended by the Evaluation

Committee be invited to submit adequate information on Technical designs, BOQs and respective costing of the project to allow further negotiation and further decision making.

The procurement process was then carried at Stage II in which the KVDA invited the qualified bidders through letters dated 9th June, 2015 to submit detailed proposals for design, priced BoQs and funding commitment for development of the Embobut Multipurpose project. The Bidders were also provided with tender documents for Stage II for which they were to submit by 15th September, 2015. The deadline for submission was later extended to 30th October, 2015, on which date they bids were duly opened. Three bid documents were received from the following bidders:

BID NO.	BID NAME
B1	M/S Sosian Energy Ltd
B2	M/s Sino Hydro corporation ltd
B3	M/s Cooperativa Muratori& Cementisti(CMC DI RAVENA) ltd

The invited firm M/s Nari Group Corporation Ltd did not submit a bid document.

The KVDA Technical & Financial Evaluation Committee met from 5th to 15th November, 2015 to evaluate the bids at the Stage II using the criteria as follows:-

1.TECHNICAL PROPOSAL:	ACTIVITY	MAXIMUM SCORE
a) Carry out further investigations at project site. The exact coordinates of site and elevations of the river should be provided.	Site visit	2
	Coordinates	2
	Site elevations	2
b) Review the current designs and propose the best alternative in terms of designs, hydro-mechanical works and cost.	Reviewed designs:-	3
	- Catchment conservation (0.5 Marks)	
	- Dam/Hydro mechanical works(1Marks)	
	- Irrigation(1 Marks)	
	- Water supply(0.5 Marks)	
	Hydro mechanical equipment	1
Hydro mechanical cost	1	
c) Determine full technical parameters including capacity and annual generation of hydro power. The tenderer shall avail updated feasibility reports of construction of hydropower plant and all related documents including surveys and designs.	Dam capacity	2
	Installed capacity:-	
	• Above 45 megawatt (2 Marks)	2
	• Below 45megawatt (1 mark)	
	Updated feasibility report including surveys and designs	
	• Reservoir (1 Mark)	1
• Power house(1Mark)	1	
d) The bidder to demonstrate the ability to financially undertake the assignment	Funding model	4
	Positive working capital for the last 3 years (Attach duly signed audited financial statement)	3
	Certified list and value of similar works in the last 5 years	3
	SUB-TOTAL	10
e) Provide a work and time schedule indicating commencement to completion of project works. Commencement of operation of hydro power plant, hand over and management plan should be indicated.	Programme of works:-	
	• Commencement date -within 1yr from award (1Mark);Beyond one yr. No mark	1
	• Completion period –within 3yr from award (1Mark); beyond 3yrs No mark)	1
	Hydropower operation plan	2
	Management plan	2
	SUB-TOTAL	6
f) Provide personnel representation of the tenderers organization, including the total number of staff employed, a list of the staff proposed for the execution of the contract, with the	Organization structure	2
	List of personnel	2
	CVs of Key personnel for the project:-	2
	• Project Manager- Degree and 10yrs	

CVs of key staff.	experience	
	• Project Engineer(civil/structural)- Degree and 10yrs Experience	
	• Land Surveyor – Diploma and 5yrs Experience	
	• Electromechanical Engineer-Degree and 5yrs Experience	
	• Irrigation Engineer- Degree and 5yrs Experience	
	• Environmentalist- Degree and 5yrs Experience NB: Proposal with all key staff (2marks) ,at least three (1mark) ,less than three (No mark)	
	Specific professional experience in developing countries	2
	SUB-TOTAL	8
g) Provide detailed recommendation on how the local community would participate in project implementation.	Employment:-	
	• Skilled personnel (2 Marks)	2
	• Unskilled Personnel (Reserved within the locality) (2 Marks)	2
	Sub-contracts to local	4
	SUB-TOTAL	8
h) Provide an environmental and social impact assessment plan	ESIA Plan:-	
	• Availability of EIA/EA Plan	0.5
	• Cost of implementation	0.5
	• Resettlement plan provided	1
i) Provide an outline of quality assurance systems to be used.	Quality standards outlined	1
	International standards and specification used	1
j) The bidder must provide the methodology of carrying out the assignment	Organization and methodology	3
k) Provide a marketing strategy for the power produced.	Marketing plan	4
	SUB-TOTAL	10
TOTAL SCORE FOR TECHNICAL PROPOSAL		60

TECHNICAL SCORES OF BIDDERS

BID NO	BID NAME	TECHNICAL SCORE	REMARKS
B1	M/S Sosian Energy Ltd	37.47	Qualified to proceed to the next stage-scored above the set pass mark
B2	M/s Sino Hydro corporation ltd	54.87	Qualified to proceed to the next stage-scored above the set pass mark
B3	M/s CooperativaMuratori& Cementisti(CMC DI RAVENA) ltd	52.53	Qualified to proceed to the next stage-scored above the set pass mark

The three bidders qualified the technical evaluation criteria and were subjected to the financial evaluation criteria.

PRELIMINARY EVALUATION CRITERIA (FINANCIAL PROPOSAL)

BID NO.	CRITERIA	EXPECTED	ACTUAL	REMARKS(RESPONSIVE/ NON RESPONSIVE)
	Bid bond (1 % Of Estimated Project Cost)			
	Expiry Date	Not earlier than 14 th April,2016		
	Form of Bid	Bank guarantee		
	Currency	USD		

FINANCIAL PROPOSAL	ACTIVITY	MAXIMUM SCORE
a) Prepare detailed cost estimates capital and recurring for all works including construction cost, engineering, project management and owner cost operation and maintenance.	Capital cost	4
	Recurrent cost	4
	Operation and maintenance cost	4
b) (i) Indicate and demonstrate sources and cost of financing.	Source of capital	4
	Cost of capital:-	4
	- Negotiation fees(1 Mark)	
	- Insurance of capital(1 Mark)	
	- Legal fees (1 Mark)	
	- Interest rates (1Marks)	
c) For any loan arrangements interest rates must be shown, repayment period, grace period and irrevocable letter of commitment from a financial institution equivalent to that of	Loan amount:	2
	Interest rates :	2
	- above 10%- (No mark)	
	- Below 10% (1mark)	

security and exchange commission of Kenya (Central bank or equivalent in home country).	- Repayment period- (15yrs and above 1mark; below 15yrs-No mark)		
	Grace period:-	2	
	- Below 4yrs – (No Mark)		
	- 4-5yrs- (1 Mark)		
	- Above 5yrs- (2Marks)		
	Letter of commitment from financier (a must for all bidders to attain)	2	
d) Provide cash flows to a quarter-annual disbursement schedule, separating major items/contracts into foreign and local cost components and showing separate allowances for physical and price contingencies	Cash flow statement for the all of implementation period of the project		
	- Quarterly disbursement schedule	2	
	- Cost separated into foreign and local- 60:40 Below 60:40 (No Mark)	1	
	- Physical and price contingencies- 1Marks	1	
e) Provide internal rates of return of the project.	Rates (comparative)	4	
f) Demonstrate that the project is financially viable	Viability of project (cost benefit analysis)	4	
	TOTAL SCORE FOR FINANCIAL PROPOSAL	40	

PRELIMINARY EVALUATION (FINANCIAL PROPOSAL)

BID NO.	CRITERIA	EXPECTED	ACTUAL	REMARKS(RESPONSIVE/NON RESPONSIVE)
B1	Bid bond(1 % Of Estimated Project Cost)	USD 1,124,604.64	USD 1,124,605	Responsive
	Expiry Date	Not earlier than 14 th April,2016	29 th May ,2016	Responsive
	Form of Bid	Bank guarantee	Bank Guarantee (Eco-Bank)	Responsive
	Currency	USD	USD	Responsive
B2	Bid bond(1 % Of Estimated	USD 2,989,101.00	USD3,600,000	Responsive

	Project Cost)			
	Expiry Date	Not earlier than 14 th April,2016	31 st May 2016	Responsive
	Form of Bid	Bank guarantee	Bank Guarantee (ICBC Bank)	Responsive
	Currency	USD	USD	Responsive
B3	Bid bond(1 % Of Estimated Project Cost)	USD2,498,684	USD2,500,000	Responsive
	Expiry Date	Not earlier than 14 th April,2016	28 th May 2016	Responsive
	Form of Bid	Bank guarantee	Bank Guarantee(Intesa san Paolo)	Responsive
	Currency	USD	USD	Responsive

SUMMARY OF FINANCIAL SCORES

BID NO	BID NAME	FINANCIAL SCORE
B1	M/S Sosian Energy Ltd	30.85
B2	M/s Sino Hydro corporation ltd	33.92
B3	M/s CooperativaMuratori& Cementisti(CMC DI RAVENA) ltd	37.00

COMBINED TECHNICAL AND FINANCIAL SCORES

BIDDER	B1	B2	B3
Technical Score (Out of 60%)	37.47	54.87	52.53
Financial Score (Out of 40%)	30.85	33.92	37.00
Total Score (Out of 100%)	68.32	88.79	89.53
RANKING	3	2	1

1. DAM DEVELOPMENT

BIDDER NO.	BIDDER NAME	DAM TYPE	DAM HEIGHT (M)	RESERVOIR STORAGE CAPACITY (MILLION M ³)	DESIGN, DISCHARGE THROUGH INTAKE (M ³ /S)	COST (USD)	REMARKS
B1	M/s Sosian Energy	Rockfill concrete	40	7.933	2.5	112,460,464	Preliminary – Not provided
		Rockfill concrete	15	0.2265	3		
B2	M/s Sinohydro Corporation Ltd	Rockfill with asphalt concrete core	Upper-40m	3.55	3.8	298,910,174.9	3.1% Preliminary 99.1km ² Catchment
			Lower-40m	0.35			
B3	CMC DI Ravena	Clay core rock fill	46.5	13.97	3.22-Upper 3.22-Lower	281,151,874.3(Inclusive of VAT)	25.1% Preliminary

2. HYDRO-POWER DEVELOPMENT

PROPOSED INSTALLED CAPACITY : 45MW (UPPER -25; LOWER -20)

BIDDER NO	BIDDER NAME	INSTALLED CAPACITY (MW)	ANNUAL ENERGY GENERATED (GWH)	COST OF CONSTRUCTION (USD)	UNIT COST (USD/MW)	REMARKS
B1	M/s Sosian Energy	60	215.4	-	-	
B2	M/s Sinohydro Corporation Ltd	45.1	358	298,910,117.49	-	
B3	M/s CMC DI Ravena	40	127	-	-	Generated 127 GWH less 1.5, less 3.5=122GWH

3. IRRIGATION SCHEME DEVELOPMENT

PROJECTED ACREAGE (HA): 2,000Ha

BIDDER NO.	BIDDER NAME	INTAKE TYPE AND CAPACITY (M ³ /S)	IRRIGATED AREA (HA)	WATER APPLICATION METHOD	COST (USD)	UNIT COST (USD/HA)	REMARKS
------------	-------------	--	---------------------	--------------------------	------------	--------------------	---------

B1	M/s Sosian Energy	-	2,000	-	-	-	-
B2	M/s Sinohydro Corporation Ltd	2.6	2,000	Sprinkler	-	-	-
B3	M/s CMC DI Ravenna	-	-	-	-	-	94,000M ³ regulating pond
4. WATER SUPPLY DEVELOPMENT							
TARGET POPULATION: 500,000							
BIDDER NO.	BIDDER NAME	DESIGN CAPACITY (M³/DAY)	POPULATION	PER CAPITA (L/DAY)	COST (USD)	UNIT COST(USD)	REMARKS
B1	M/s Sosian Energy	-	-	-	-	-	
B2	M/s Sinohydro Corporation Ltd	50,000m ³	500,000				-Individual connections. -1000 stand pipes -3 water kiosks
B3	M/s CMC DI Ravenna	200 L/S	40,000				150 L/S – domestic 50 L/S -livestock

REMARKS AND RECOMMENDATIONS

TECHNICAL AND FINANCIAL EVALUATION COMMITTEE'S RECOMMENDATION

The Kerio Valley Development Authority's ad hoc Technical and Financial Evaluation Committee in its meeting held at the Kerio River lodge; thoroughly evaluated the above stated tender as stated in the above analysis and agreed to recommend **M/s Comperativa Muratori & Cementisti (CMC DI RAVENA) Ltd** to be considered for further discussions towards entering into a concession agreement contract to fund, design, build and transfer of the proposed Embobut multipurpose project; being the best technically and financially evaluated bidder.

THE TENDER COMMITTEE DECISION

The KVDA Tender Committee met on 16th and 17th November, 2015 and agreed to award the tender to M/s Comperativa Muratori&Cementisti (CMC DI RAVENA) Ltd at a total cost of USD 281,151,874.3 (inclusive of 16% VAT) to fund, design, build and transfer the proposed Embobut Multipurpose Project, being the best technically and financially evaluated bidder, subject to successful negotiation.

The Request for Review

This Request for Review was filed by the firm of M/s Sosian Energy Consortium seeking to challenge the decision of the Kerio Valley Development Authority in relation to the tender for funding, design and transfer of the Proposed Embobut Multipurpose Dam Project under Tender No. KVDA/RFP/38/2014 - 2015 to M/s Competitive Muraturi & Cementisti (CMC Di Revena) Ltd of NO. 05 Osborne lane, EOH Business Park, 2nd Floor Block A, Code 2007 Johannesburg - Southafrica.

During the hearing of the Request for Review the Applicant was represented by Mr. Alphonse Muema Mbindyo Advocate while the Procuring Entity was represented by Mr. Austine Odoyo Advocate. The successful bidder appeared in these proceedings through Mr. Shane Morgan it's Legal Manager and Mr. Stanley Mutama.

The Applicant sought for the following reliefs against the Procuring Entity:-

- a) The Respondent's decision awarding TENDER NO. KVDA/RFP/38/2014 - 2015 to the successful bidder be and is hereby set aside and nullified.**
- b) The Board be pleased to substitute the decision notifying the Applicant that it had been successful in the TENDER NO. KVDA/RFP/38/2014 - 2015 by a letter dated 14th December, 2015 be set aside and nullified.**
- c) The Board be pleased to substitute the decision of the Respondent and award the tender to the Applicant and thus negotiate and sign a contract with the Applicant as per the tender and the Board's decision.**
- d) The tender process be nullified and the Respondent be ordered to pay costs of this proceedings.**
- e) Such other or further relief as the Board shall deem just and expedient.**

The Applicant's case

The Applicant's case was set out in its Request for Review dated 30th December, 2015 which was expressed to have been brought under the Provisions of Article 227 of the Constitution of Kenya 2010, Section 2, 34, 52, 53, 62, 66 and 98 of The Public Procurement and Disposal Act and Regulations 45, 47, 49 and 50 of the Regulations.

It was the Applicant's case based on the Request for Review that based on an invitation in December, 2014 by the Procuring Entity, it purchased the subject tender and submitted its bid to the Procuring Entity on 16th March, 2015. The Applicant further stated that on 9th June, 2015, the Applicant requested the Procuring Entity to submit a detailed proposal for design, priced Bill of Quantities and funding commitment for the development of the project upon advising the Applicant that it had scored 90% upon evaluation on preliminaries and had been shortlisted among other three bidders to proceed to the second qualification state.

It was the Applicant's further case that it submitted a detailed Technical design, Bill of Quantities, a funding commitment and other details to the Procuring Entity.

The Applicant stated in paragraph 9 of the Request for Review that the tender was opened on 30th October, 2015 when the Applicant's representatives attended the tender opening when bids and financial offers from three bidders were read out.

The Applicant stated that on the basis of the unevaluated financial submissions, the Applicant was clearly the lowest and most competitive bidder but surprisingly by a letter dated 14th December, 2015 but received by the Applicant on 23rd December, 2015, the Applicant was declared as unsuccessful.

Counsel for the Applicant submitted that whereas it had presented a bid of 112 Million USD, the successful bidder had submitted a tender sum of 281

Million USD which represented a variance in price between that offered by the Applicant and the successful bidder. He submitted that the difference between the two bids was so disproportionate and therefore contravened the Provisions of Article 227 of the Constitution, Section 2 of the Act and Section 30(3) of the Public Procurement and disposal Act which provides that standard goods, services and other works shall be procured at the prevailing market rates. He further submitted that under the Provisions of Section 30(4) of the Act, any public officials who was involved in the Procurement of goods and services or works at excessively high prices shall in addition to other sanctions prescribed by the Act or the Regulations be required to pay the Procuring Entity the losses resulting from the said actions.

On the issue of the method of procurement used, Counsel for the Applicant submitted that this was an international public open tender which had to be evaluated using the criteria set out in the tender document under the Provisions of Section 66 of the Act and no other criteria ought to have been used.

Counsel for the Applicant therefore prayed that the award of the tender to the successful bidder be nullified and the same be awarded to the Applicant or be cancelled in it's entirety.

The Procuring Entity's Response

The Procuring Entity both in it's response filed on 11th June, 2016 and the submissions made by it's advocates opposed the Request for Review and

stated that though the Applicant's Request for Review and the submissions made by Counsel for Applicant were couched in such away as to allege that this was an open tender, the true position was however that this tender was conducted through the Request for Proposals (RFP) method. He urged the Board to find that the criteria for the award of a tender under an open tender method was governed by the Provisions of Section 66(4) of the Act while the procedure governing Procurement through a Request for Proposals was to be found at Sections 76 to 87 of The Public Procurement and Disposal Act 2005 and not Section 66 of the Act as stated by Counsel for the Applicant.

Counsel for the Procuring Entity submitted that in this particular tender, the technical evaluation carried a total of 60 marks while the financial aspect of the evaluation carried a total of 40 marks and that the eventual winner was to be arrived at after aggregating the marks obtained at the technical and the financial evaluation stages and the successful bidder having obtained the highest combined scores was rightly declared as the successful bidder.

Counsel for the Procuring Entity submitted that this tender had 4 components namely, the Construction of a dam to generate power of 45 megawatts, development of 2,000 hectares of land under irrigation and development of water supply and storage to support 500,000 people and lastly catchment conservation.

Counsel for the Procuring Entity submitted while referring the Board to the Applicant's tender document that the Applicant had included in it's bid

document a letter dated 21st October, 2015 from the Standard Chartered Bank Ltd where it had indicated that the cost estimate for the project would have been 230 Million USD and by presenting a bid of 112 Million USD and stating that it was enough to undertake the project of that magnitude while having given an estimate of 230 Million USD in it's project estimate contained in it's own tender document, the Applicant clearly meant to mislead the Procuring Entity.

He reiterated that the lowest price which was the main issue in this Request for Review was not the determining factors for award but there were other determinant factors in a Request for Proposals other than the price which is only a consideration under Section 66(4) of the Act which deals with open tenders but not Requests for Proposals. He stated that by transposing the Provisions of an open tender into a Request for Proposal, then the Board would be acting in clear violation of the law.

Counsel for the Procuring Entity finally submitted that the three bidders who made it to the final stage of evaluation attained the following combined technical and financial scores.

- a) The Applicant 68.32
- b) Sino Hydro Corporation Ltd - 88.79
- c) The successful bidder 89.53

He therefore stated that under the criteria for the evaluation of Requests for Proposals, the successful bidder was therefore rightly declared as the

winner and the process was therefore fair and transparent and in accordance with the law.

He therefore urged the Board to dismiss the Request for Review with costs.

The successful bidders submissions

Mr. Shane Morgan on behalf of the successful bidder fully associated himself with the submissions made by Counsel for the Procuring Entity and stated that the Procuring Entity had satisfactorily explained the process and requested that the Applicant's Request for Review be similarly dismissed with costs.

The Applicant's Response

While responding to the issues raised by Counsel for the Procuring Entity, Counsel for the Applicant submitted that the process under Request for Proposals is governed by among others the Provisions of Section 78 of the Act which requires that the Procuring Entity ought to have issued an expression of interest to pre-qualify tenders. He submitted that no expression of interest was issued in this case. He therefore submitted that the Procuring Entity used the wrong document to even prequalify and qualify tenders. He submitted that in this particular case there were two stages in the Request for Proposals namely stage 1 and 2 and that according to his reading and understanding of the law, he had not come across a Request for Proposals with 2 stages.

Counsel for the Applicant while referring to appendix 5 and 19 of the Procuring Entity's response stated that according to those documents the financial bids for the bidders were only signed but were not opened.

He therefore urged the Board to allow the Request for Review since the Procurement process was based on a defective document and process.

The Board's Decision

The Board has perused the Request for Review filed by the Applicant herein on 30th December, 2015 and the Response filed by the Procuring Entity on 11th January, 2016 together with all the annexures thereto.

The Board finds from the Applicant's Request for Review that the Applicant raised a total of 17 grounds in support of the Request for Review which were largely factual.

It is apparent on the face of the Request for Review that the Applicant proceeded on the basis that it had participated in an open tender process where it had gone through all stages and was the lowest evaluated bidder at the end of the day. The Applicant's case was therefore that being the bidder which had submitted the lowest bid of 112 Million USD it ought to have been awarded the tender but submitted that contrary to the above position the Procuring Entity had awarded the tender to the successful bidder which had offered a price of 281 Million USD which was too high.

The Procuring Entity on the other hand submitted that the Applicant's case was based on the wrong premise that this was an open tender while in fact

it was a tender conducted through the Request for Proposals method. The Procuring Entity contended that under the Request for Proposals method, the law applicable was different and that the successful bid was the bid that had obtained the highest combined technical and financial score.

It was the Procuring Entity's further contention that the Applicant had deliberately underquoted for this project and its own financing proposal from the Standard Chartered Bank Ltd gave its financial estimate as 230 Million USD.

Arising from the above summary and from the nature of both the Applicant and the Procuring Entity's cases, the Board finds that there are two issues that fall for consideration and which are sufficient to determine this Request for Review, namely:-

a) What procurement method was used in this procurement process.

b) Depending on the determination on issue No. (a) above whether the Applicant was the lowest evaluated bidder in terms of the law and what reliefs should the Board therefore grant in the circumstances of this Request for Review.

a) What procurement method was used in this procurement process.

On the first issue framed for determination, the Board has perused the tender document produced by the Procuring Entity as Appendix 6 and finds that the said document is headed as a Request for Proposals. A further perusal of clause 8.1.2 and 8.1.3 shows that the Procuring Entity

assigned 60 marks to the technical aspect of the project while the same document assigned 40 marks to the financial aspect.

The Board therefore finds on the basis of the said document which speaks for itself that the method used by the Procuring Entity was that of a Request for Proposal but not an open tender. This finding is supported by the final result and award criteria.

Section 82(5) of the Act stipulates that for the purposes of a Request for Proposals, the successful candidate should be the tenderer with the highest combined Technical and financial score. It does not state that such tenderer shall be the tenderer with the lowest evaluated tender price.

Section 84 of the Act then requires that the Procuring Entity invites the successful tenderer for negotiations and that in the event that the negotiations are not successful, the Procuring Entity should then invite the tenderer whose proposal would have been successful had the successful proposal not been submitted.

It was held in the cases of Landor Associates =vs = Kenya Power and Lighting Company Ltd (PRB Application NO. 42 of 2009) and in the case of Runji & Partners Consulting Engineers Limited = vs = Kenya Rural Roads Authority (PRB Application No. 35 of 2010) that where the procurement was undertaken under a Request for proposal, the procurement was entirely to be governed by the provisions of Sections 76 to 87 of the Act and that the provisions of Section 66 of the Act were not applicable to it.

In both the above cases the Board further held that a recommendation of an award of a tender to a successful bidder could only be made in favour of the bidder that scored the highest aggregate combined Technical and financial score in accordance with Section 82 (5) of the Act.

A look at the final report shows that the Applicant scored a total combined score of 68.32% while the successful bidder scored a total combined score of 89.53%

In terms of Section 82(5) of the Act the Board therefore finds that the successful bidder's bid was rightly declared as the successful bid.

b) Whether the Applicant was the lowest evaluated bidder in terms of the law and what reliefs should the Board therefore grant in the circumstances of this Request for Review

The Board has considered the issue of what method was used in this Procurement and having done so the Board finds that the Procuring Entity could not award the tender under the Provisions of Section 66(4) of the Act which governs the award of tenders conducted by way of an open tender which are governed by different Provisions of the law.

In the now well established case of **Republic vs The Public Procurement Administrative Review Board & Kenya Railways Corporation (JR NO. 92 of 2011)** the High Court held that where a bidder

who realizes that a tender document is defective and yet elects to proceed with the entire tender process to the end, he cannot later complain about the defect after he loses the tender.

The Board adopted the above decision in the case of **Civicon Ltd vs Kenya Pipeline Co. Ltd (PPARB NO. 26 of 2014)** in support of the same proposition.

The Board has looked at paragraphs 1 to 11 of the Request for review and finds that the Applicant fully participated in this process and complied with every step and states at paragraphs 9 and 10 of its Request for Review that its representatives attended the tender opening meeting of 30th October, 2015 where it established that its unevaluated tender price was the lowest and the more competitive price.

Unfortunately however this being procurement conducted through a Request for Proposal it is the combined score which was the determinant and which could only carry the day.

In view of all the foregoing findings this Request for Review therefore fails and is dismissed but with no order as to costs.

FINAL ORDERS

In the above circumstances and in the exercise of the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal 2005, the Board makes the following orders on this Request for Review:-

- a) The Request for Review dated 30th December, 2015 and filed by the Applicant on the same day be and is hereby dismissed.
- b) Each party shall however bear its own costs of this Request for Review.

Dated at Nairobi this 27th day of January 2016


.....

CHAIRMAN
PPARB


.....

SECRETARY
PPARB

