

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD

APPLICATION NO. 05/2016 OF 4TH FEBRUARY, 2016

BETWEEN

MACHIRI LIMITED(Applicant)

AND

COAST WATER SERVICES BOARD(Procuring Entity)

Review against the decision of the Tender Committee of the Coast Water Services Board in the matter of Tender No. CWSB/WaSSIP-AF/W/1/2014/LOT-3 for Supply and Construction of Kakuyuni to Gongoni and Kakuyuni to Kilifi Pipeline works, Baricho Immediate Works- Lot 3,

Board members present

- | | |
|---------------------|----------|
| 1. Paul Gicheru | - Chair |
| 2. Nelson Orgut | - Member |
| 3. Paul Ngotho | - Member |
| 4. Mrs. Gilda Odera | - Member |

In attendance

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

PRESENT BY INVITATION

Applicant - Machiri Limited

1. Charles Njuguna - Advocate
2. Gabriel Maina - Pupil
3. Eng. J. M. Macharia - Director
4. Eng. Philip Owuoti - General Manager

Procuring Entity - COAST WATER SERVICES BOARD

1. K. N. Kibara - Advocate
2. Joseph Omwange - Ag. CEO
3. Eng. J. M. Machiri - Director
4. Robert Ojwang' - DPE
5. Martin Tsuma - Ag. TM
6. Ambrose Magige - P/Officer

Interested Parties

1. George Kashindi - Advocate, China Henan
2. Dan Okutta - Advocate, China Henan
3. Kelvin Maina - Pupil, China Henan
4. Celestine Opiyo - Advocate, Toddy Civil Engineering

5. James Wainaina - Engineer, Toddy Civil Engineering
6. Wilfred O. Lusi - Advocate ASP Company
7. Gidraph Wanyaga - Lawyer, ASP Company
8. Ann Kiama - Sales Officer, ASP Company
9. Berthald Rath - Team Leader, Fichter W & T
10. James Ochola - Contracts Director ASP Company
11. Morgan Tan - OM, NFEC
12. Andrew Nicko - Cost Engineer, SOGEA SATOM,

The board's decision

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

Background of award

The Government of Kenya, on behalf of the Coast Water Services Board (CWSB), received a credit from the International Development Association (IDA) towards the cost of Water and Sanitation Service Improvement Project - Additional Financing (WaSSIP - AF).

It is intended that part of the proceeds of this credit will be applied to eligible payments under the contract for the Supply & Construction of Kakuyuni to Gongoni & Kakuyuni to Kilifi Pipeline Works, Baricho

Immediate Works- Lot 3, under Contract No. CWSB/WaSSIP-AF/W/1/2014/LOT 3.

The Works include but are not limited to:

Construction of Kakuyuni to Gongoni Pipeline Works

- Laying of transmission main from Kakuyuni reservoir to Gongoni area (DN400 DI, 37 km)
- Construction of new Gongoni reservoir (2,500 m³)
- Sabaki River Crossing

Construction of Kakuyuni to Kilifi Pipeline Works

- Laying of transmission main from Kakuyuni to Kilifi (DN500 DI, 56 km)
- Rehabilitation of existing Kilifi reservoir,
- Construction of new reservoir (5,000m³)
- Throttling works of the existing DN250 main between Sokoke reservoir and Kilifi reservoir

Advertisement

The CWSB invited International Competitive Bidding for the Supply & Construction of the Kakuyuni to Gongoni and Kakuyuni to Kilifi Pipeline Works, Baricho Immediate Works – Lot 3. The tender was advertised on 27th August, 2015 in *The Star* and *The Standard* newspapers and on the CWSB website. The tender was also published in the DgMarket on 26th August, 2015.

Forty Five (45) firms bought the bid documents. The initial submission deadline date for the bids was 14th October, 2015 but was extended to 27th October, 2015.

Pre-Bid Site Visit

There was a pre-bid meeting and site visit conducted on 10th September, 2015 as per the Instructions to Bidders in the Tender Document.

Clarifications on the Bidding Documents

A total of four (4) No. clarifications were issued to bidders following requests for clarifications on the bidding documents by some bidders.

Closing/Opening:

The tenders were received and opened on 27th October, 2015 at 1205hrs at the CWSB's Board Room in the presence of tenderers who chose to attend and CWSB's officers. Twenty two (22) bidders submitted their bids which were read out as listed below:-

No.	Name of Bidder	Read out Bid Price (Kshs.)	Bid Security (Ksh. 27,000,000)
1	MAZ Eng. & Construction Co. Limited	3,193,563,300.00	XPlico Insurance Co. 27,000,000.00
2	Zaisco Construction & Eng. Ltd JV ZAC Construction Botswana PTY Ltd	2,407,100,000.00	Ecobank 27,000,000.00
3	Interways Works Ltd	2,463,109,830.00	Jamii Bora Bank 27,000,000.00
4	Sinohydro Tianjin Eng. Co. Ltd JV Machiri Ltd	1,685,288,891.60	NIC Bank 27,000,000.00
5	Nanchang Foreign Eng. Co. Limited	2,349,853,081.60	Credit Bank 27,000,000.00
6	VEL JV Sorathia Velji Ratna & Co.	3,308,304,929.39	Credit Bank 27,000,000.00
7	Toddy Civil Engineering Co. Limited	1,943,342,782.40	NIC Bank 27,000,000.00
8	SMK UlusalInsaat VE Ticaret A.S	2,794,934,840.26	YapiKredi USD 275,000.00
9	SOGEA Satom JV H Young	3,482,821,861.80	SocieteGenerale 27,000,000.00
10	China Henan Intl. Corp. Group Co. Ltd	2,314,799,735.00	Standard Chartered Bank 27,000,000.00

No.	Name of Bidder	Read out Bid Price (Kshs.)	Bid Security (Ksh. 27,000,000)
11	Njuca Consolidated Co. Ltd JV China Machinery Industry Construction Group Inc.	1,392,291,688.25	Equity Bank 27,000,000.00
12	Parbat Siyani Construction Ltd	2,716,713,880.25	I & M Bank 27,000,000.00
13.	Ludwing Pfeiffer Hoch und Tiefbau GmbH & Co.	2,847,773,558.36	NORD/LB EURO 230,000.00
14.	Zhonghao Overseas Construction Eng. Co.	2,790,043,243.50	DTB 27,000,000.00
15.	Zhongmei Eng. Group Ltd	2,285,416,967.61	Equity Bank 27,000,000.00
16.	SPML Infra Ltd	2,770,831,099.00	NIC Bank 27,000,000.00
17.	Prakla EA Ltd	2,312,248,350.35	Equity Bank 27,000,000.00
18.	Kayson Inc. JV International Corp.of Consultants & Contractors (ICON)	2,410,887,391.06	Ecobank 27,000,000.00
19.	Technofab-Gammon JV	2,729,872,449.00	Bank of India 27,000,000.00
20.	Civicon Ltd	2,958,416,475.82	Equity Bank 27,000,000.00
21	CGCOC Group Co. Ltd JV Shanxi Geological Engineering Exploration Institute	2,330,919,669.48	UBA Kenya Bank Ltd 27,000,000.00
22.	Strabag/Vambeco Enterprises JV	3,224,938,835.00	Bank of Austria 27,000,000.00

EVALUATION

Preliminary examination of bids

General

Bids from the twenty two (22) Bidders were examined to determine if they were complete and responsive to the requirements of the bidding documents.

The following items were examined:

1. Letter of Bid (in the required format) duly signed by an authorised signatory;
2. Power of attorney duly sealed;
3. Bid security in the specified form;
4. Duly filled and priced Bill of Quantities;
5. Duly filled Qualification Information Form and required attached documents, and any other material required to be completed and submitted by the Bidder as specified in the Bidding Documents;
6. Joint Venture Agreement in the case of a joint venture bid;
7. One original bid and three matching copies orderly organised;
8. Bid in English language.

The following six (6) bidders failed at the verification stage based on the reasons given below:-

- MAZ Eng. & Construction Co. Limited (Bidder 1)

Major deviations: The Bid security was from an insurance company and not a bank, qualification forms were not filled, no supplementary qualification materials and no material details were given.

Minor deviations: Missing power of attorney

- Njuca Consolidated Co. Ltd JV China Machinery Industry Construction Group Inc (Bidder 11)

Major deviations: Letter of bid not signed and material details not provided

Minor deviations: The Bid security was not in the required format i.e. important elements deleted/changed however dates and amounts okay; letter of intent for joint venture provided but power of attorney and letter of bid shows only one firm.

- Parbat Siyani Construction Ltd (Bidder 12)

Major deviation: The Bid security was valid for a shorter period (i.e. up to 10th March, 2016 instead of 22nd March, 2016) contrary to ITB 19.3 of the Bidding Document

- Ludwing Pfeiffer Hoch und Tiefbau GmbH& Co (Bidder 13)

Major deviation: The Bid security of EURO 230,000 (Kshs. 25,879,851) from NRD/LB was less than the required Kshs. 27,000,000

- Prakla EA Ltd

Major deviation: Qualification information forms FIN 3.1, FIN 3.2, FIN 3.4, EXP 4.1, EXP 4.2(a) and EXP 4.2(b) not filled, no supplementary qualification materials e.g. financial statements attached only for 2015, no attachments on specific experience among other things.

Minor deviation: The Bid security was not in the required format i.e. important elements deleted/changed however dates and amounts were okay.

- Civicon Ltd

Major deviation: No material details. It was not possible to determine the source, specifications, and whether it's quote was based on ductile iron or steel.

The following two (2) bidders had minor deviations as explained below:

- VEL JV Sorathia Velji Ratna & Co: The Bid security was not in the required format i.e. important elements were deleted/changed however dates and amounts were okay.
- Kayson Inc. JV International Corp. of Consultants & Contractors (ICON): Form EXP 4.2 for specific construction experience not filled but attached details on construction experience such as signed contracts. For Power of Attorney only one member (Kayson) gives authority (yet it's a JV) for signature which is contrary to ITB 20.3 and ITB 20.2(b) of the BDS. Furthermore, the power of attorney is valid only up to 30.12.15 despite the fact that the bid validity period runs up to 24th February 2016. This means the signature and by extension the bidder's bid was not valid beyond 31.12.15. However the two JV firms jointly signed the bid with the partially authorized signatory initialing BOQ pages.

The remaining fourteen (14) bidders did not have deviations noted.

TECHNICAL EVALUATION

Eligibility

The bids were examined in accordance with Clause 4 of the Instructions to Bidders to verify if the Bidders:

- a) Were from eligible countries as provided for under the *Guidelines: Procurement under IBRD Loans and IDA Credits*;
- b) Do not have conflict of interest on the project;
- c) Were not under a declaration of ineligibility for corrupt and fraudulent practices;

- d) Are not government owned entities, however if government owned should be financially autonomous and operate under commercial law;
- e) If the borrower's country prohibits commercial relations with the Bidder's country and;
- f) If the borrower's country prohibits any import of goods or contracting of Works or services from the Bidder's country or any payments to persons or entities in the Bidder's country by an act of compliance with a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations.

In making the above assessments, reference was made to the evaluation guidelines in the *World Bank Standard Bid Evaluation Form for Procurement of Goods or Works* dated April 1996. The examination revealed the following:

All Bidders were found to be from eligible countries as provided for under the *Guidelines: Procurement under IBRD Loans and IDA Credits*; All Bidders were found not to have conflict of interest with the project;

- i) All Bidders were found not to be under a declaration of ineligibility for corrupt and fraudulent practices;
- ii) All Bidders were duly registered legal entities as per the submitted registration documents;
- iii) All Bidder's countries were not prohibited from commercial relations with Kenya;
- iv) All Bidders' countries were not barred by any act of compliance (by Kenya) with any decision of the United Nations.

Eligibility of all materials and equipment was also examined as required in Clause 5 of the Instructions to Bidders and Section III (under sub-numeral 2.1).

Nineteen (19) bidders met the eligibility criteria except the following three: MAZ Eng. & Construction Co. Limited; Njuca/China Machinery JV and Civicon Ltd as they did not indicate the source of the key materials.

Bid Security

The bids were examined in accordance with Clause 19 of the Instructions to Bidders to verify if the Bidders had furnished bid securities (Bank Guarantee from reputable banks) in the amount of Kshs. 27,000,000 (Kenya Shillings Twenty Seven million) and valid for twenty eight (28) days beyond the bid validity period i.e. up to 22nd March, 2016. The format (wording and meaning) of the submitted bid securities was also checked. The bidders were assessed as follows:

The deviations noted in the bid securities were as follows.

- ¹MAZ Eng. & Construction Limited submitted bid security from an Insurance Company contrary to ITB 19.1 of the BDS. This is a major deviation and unacceptable.
- ²VEL JV Sorathia Velji Ratna & Co submitted bid security in format different from that provided for in Section IV, Bidding Forms - Form of Bid Security. The wording of the bid security has been changed and the statement on URDG (2010 revision) and ICC publication No. 758 has also been deleted. However the amounts and dates were okay. This was considered a minor deviation.
- ³China Henan Intl. Corp. Group Co. Ltd submitted a bid security in the correct format but there was an additional statement "*this*

guarantee is personal to yourselves and is not transferrable or assignable" which was considered non-material hence acceptable.

- ⁴Njuca consolidated Company Ltd submitted a bid security in format different from that provided for in Section IV, Bidding Forms -Form of Bid Security. The wording of the bid security had been changed and the statement on URDG (2010 revision) and ICC publication No. 758 had also been deleted. However the amounts and dates were okay hence considered a minor deviation.
- ⁵Parbat Siyani Construction Ltd submitted a bid security with a shorter validity period i.e.10th March, 2016 instead of 22nd March, 2016. This was a major deviation and unacceptable.
- ⁶Ludwing Pfeiffer Hoch und Tiefbau GmbH & Co submitted a bid security of EURO 230,000 from NRD/LB which is Kshs. 25,879,853 (converted at the rate of 112.5211). This is less than the required Kshs.27, 000,000. This is a major deviation and unacceptable.
- ⁷Prakla EA Ltd submitted a bid security in a format different from that provided for in Section IV, Bidding Forms -Form of Bid Security. The wording of the bid security had been changed and the statement on URDG (2010 revision) and ICC publication No. 758 had also been deleted. However the amounts and dates were okay hence this was considered a minor deviation.

Completeness of Bids

The bids were further examined for completeness to verify if:

1. They were complete;

2. If items had been inserted that were not specified/ required by the Bidding Documents;
3. Whether erasures, interlineations, additions or other changes made were initialed by the authorized signatory to the bid.

Only MAZ Eng. & Construction Co. Limited failed because erasures in the BOQ were not initialed or countersigned contrary to ITB 20.4 of the bidding document. Furthermore, BOQ pages were also not initialed by the authorized signatory as required.

Responsiveness of Bids

The bids were examined for substantial responsiveness on the basis of the preliminary examination and as required under the evaluation guidelines in the *World Bank Standard Bid Evaluation Form for Procurement of Goods or Works* dated April 1996 (Par. 5(e) Annex I). The bids were examined as to whether:

1. Any Bidder failed to respond to specifications by offering instead a differing design or product without substantial equivalence in the specifications in the bidding documents;
2. Any Bidder objected to bear required responsibilities and liabilities (i.e. performance guarantee, insurance coverage etc.);
3. Subcontracting in a substantially different amount or a manner than that permitted;
4. Any Bidder took exception to critical provisions such as applicable laws, taxes and duties.

The following fourteen bidders offered ductile iron: Interways Works Ltd, Nanchang Foreign Eng. Co. Limited, VEL JV Sorathia Velji Ratna & Co., SMK UlusalInsaat VE Ticaret A.S, China Henan Intl. Corp. Group Co. Ltd, Parbat Siyani Construction Ltd, Ludwing Pfeiffer Hoch und Tiefbau GmbH& Co., SPML Infra Ltd, Prakla EA Ltd, Kayson Inc. JV International Corp.of Consultants & Contractors (ICON), Technofab-Gammon JV, CGCOC Group Co. Ltd JV Shanxi Geological Engineering Exploration Institute and Strabag/Vambeco Enterprises JV.

On the other hand the following five bidders offered steel as an alternative material: Zaisco Construction & Eng. Ltd JV ZAC Construction Botswana PTY Ltd, Sinohydro Tianjin Eng. Co. Ltd JV Machiri Ltd, Toddy Civil Engineering Co. Limited, Zhongmei Eng. Group Ltd and SOGEA Satom JV H Young. None of these five bidders provided the required designs and drawings as allegedly required under ITB 13.3, 13.4 and clarification 3 and therefore their bids could not be accepted.

Three bidders namely: MAZ Eng. & Construction Co. Limited, Njuca Consolidated Co. Ltd JV China Machinery Industry Construction Group Inc. and Civicon Ltd did not provided details of what they quoted for.

Results of Preliminary Evaluation

The examination indicates that eleven (11) out of the twenty two (22) bidders passed the preliminary evaluation namely:

1. Interways Works Ltd (Bidder 3)
2. Nanchang Foreign Eng. Co. Limited (Bidder 5)

3. VEL JV Sorathia Velji Ratna & Co. (Bidder 6)
4. SMK UlusalInsaat VE Ticaret A.S (Bidder 8)
5. China Henan Intl. Corp. Group Co. Ltd (Bidder 10)
6. Zhonghao Overseas Construction Engineering Co. (Bidder 14)
7. SPML Infra Ltd (Bidder 16)
8. Kayson Inc. JV International Corp.of Consultants & Contractors -
ICON (Bidder 18)
9. Technofab-Gammon JV (Bidder 19)
- 10.CGCOC Group Co. Ltd JV Shanxi Geological Engineering
Exploration Institute (Bidder 21)
- 11.Strabag/Vambeco Enterprises JV (Bidder 22)

DETAILED EXAMINATION OF BIDS

Arithmetical Errors

The arithmetical errors found in each bid are presented in the table below:-

Table: Summary of errors

Bidder No	Bidder Name	Error (Kshs)	Remarks
3	Interways Works Ltd	+21,560,000.00	To be added to the read out bid price
5	Nanchang Foreign Eng. Co. Limited	0	No Error
6	VEL JV Sorathia Velji Ratna & Co	-297,569,084.34	To be subtracted from the read out bid price
8	SMK Ulusallnsaat VE Ticaret A.S	+41,882,310.87	To be added to the read out bid price
10	China Henan Intl. Corp. Group Co. Ltd	0	No Error
14	Zhonghao Overseas Construction Engineering Co.	0	No Error
16	SPML Infra Ltd	0	No Error
18	Kayson Inc. JV International Corp.of Consultants & Contractors (ICON)	+710,275,500	To be added to the read out bid price
19	Technofab-Gammon JV	-55,792.54	To be subtracted from the read out bid price
21	CGCOC Group Co. Ltd JV Shanxi Geological Engineering Exploration Institute	+211,698,042.38	To be added to the read out bid price
22	Strabag/Vambeco Enterprises JV	+43,835,935.00	To be added to the read out bid price

COMPARISON OF BID PRICES WITH ENGINEER'S ESTIMATE

Ranking of bids

The ranking of bids from the lowest to the highest evaluated bid price is shown below and compared with the Engineer's Estimate of Kshs 2,859,651,307.60

Table: Total Comparison Price

Bidder Number	Bidder Name	Total Comparison Price (Kshs.)	Difference Above/Below (+/-)	Ranking
10	China Henan Intl. Corp. Group Co. Ltd	2,307,300,693.70	-19%	1
5	Nanchang Foreign Eng. Co. Limited	2,342,705,343.56	-18%	2
3	Interways Works Ltd	2,484,669,830.00	-13%	3
21	CGCOC Group Co. Ltd JV Shanxi Geological Engineering Exploration Institute	2,532,614,211.35	-11%	4
19	Technofab-Gammon JV	2,645,549,338.06	-7%	5
16	SPML Infra Ltd	2,715,414,477.02	-5%	6
14	Zhonghao Overseas Construction Engineering Co.	2,748,131,768.88	-4%	7
8	SMK UlusalInsaat VE Ticaret A.S	2,805,978,745.34	-2%	8
18	Kayson Inc. JV Int'l Corp. of Consultants & Contractors (ICON)	2,838,725,014.60	-1%	9
6	VEL JV Sorathia Velji Ratna & Co.	3,010,735,845.05	5%	10
22	Strabag/Vambeco Enterprises JV	3,230,239,263.11	13%	11

POST QUALIFICATION**General**

Post-qualification evaluation was carried out to confirm the qualification information for the Bidder with the lowest Evaluated Bid Price.

Pursuant to Section III of the Instructions to Bidders (ITB) the lowest evaluated Bidder must meet the following minimum post qualification criteria:

1. Adequacy of technical proposal;
2. Financial resources;
3. Personnel and
4. Equipment.

Assessment of Adequacy of Technical Proposal as based on the Bid Documents Section IV – Technical Proposal which required the Bidders to provide information on:

- Site organization
- Method Statement
- Mobilization Schedule
- Construction Schedule
- Others –List of sub-contractors, schedule of cash flow based on the outline Programme for execution of the whole of the works and list of goods and material/equipment proposed by the Bidder

M/s China Henan International Cooperation Group Co. Ltd being the lowest responsive bidder was therefore subjected to post-qualification evaluation.

M/sChina Henan International Cooperation Group Co. Ltd

Assessment of Adequacy of Technical Proposal with Requirements

Analysis of the submitted bid document reveals the following:

- (1) Site Organization is presented in an organogram showing different levels of responsibility from the Project Manager to the junior level workers. The organization chart for the firm's headquarters is also provided.
- (2) Method statement is provided covering earthworks, pipe laying, road crossings, surveying, construction during rainy seasons, site investigations, site clearance, concrete works, coexistence with local communities and health and safety measures to be observed. However, the method statement did not cover environmental management issues.
- (3) Mobilization schedule is provided in tabular format showing how the personnel, equipment and materials will be mobilized and also site camp establishment. Construction schedule is also provided (Ghant Chart) by the bidder covering works mobilization, construction to commissioning and handover. However the construction schedule does not include the defects liability period.
- (4) There is a clear projected cash flow provided.
- (5) List of materials, material sources and technical specifications as required in the Bills of Specifications (BOS) and Section VII (Works requirements) have been provided by the bidder. He intends to source it's materials from China.

If the Bidder is considered for award, the minor shortcomings noted in the technical proposal can be requested. The technical proposal is considered adequate for smooth implementation of the project.

The Bidder complies with the requirements of Historical Contract Non-Performance.

The financial position of the firm was considered to be adequate to finance the Bidder's activities under the contract.

The Bidder's specific construction and contract management experience was found to be adequate.

The Bidder's proposed personnel were considered sufficient for the assignment. However, it was noted that all the staff are Chinese nationals and this may not go well with the local communities as semi-skilled jobs should at least go to the locals.

The equipment proposed by the Bidder was considered adequate to undertake the works.

Therefore the lowest evaluated Bidder, M/s China Henan International Cooperation (CHICO) met the minimum Qualification Criteria and was considered for award.

Authenticity of Line of Credit

The bidder indicated by a letter from Standard Chartered Bank availability of line of credit of USD 5Million. Since from the audited accounts the bidder demonstrated enough financial resources for the project, the authenticity of the line of credit was not investigated further.

EVALUATION COMMITTEE RECOMMENDATIONS

Recommendation for Award of Contract

It is recommended that the contract for Supply and Construction of Kakuyuni to Gongoni, and Kakuyuni to Kilifi Pipeline Works under Baricho Immediate Works – Lot 3 be awarded to *M/s China Henan International Cooperation Group Co. Ltd at a contract sum of Kshs. 2,314,799,735 (Kenya Shillings Two Billion Three Hundred and Fourteen Million Seven Hundred and Ninety Nine Thousand Seven Hundred and Thirty Five being inclusive of 10% Contingency,16% VAT and all other taxes.*

THE TENDER COMMITTEE'S DECISION

The procuring entity Tender Committee met on 26th January, 2016, deliberated the agenda and awarded M/s China Henan International Cooperation (CHICO) Group Co. Limited, the contract for the supply and construction of Kakuyuni to Gongoni and Kakuyuni to Kilifi Pipeline Works under Baricho Immediate Works – Lot 3 at a contract sum of Kshs 2,314,799,735 being inclusive of 10% Contingency, 16% VAT and all other taxes being the alleged lowest evaluated responsive bidder.

THE REVIEW

The Request for Review was lodged by M/s Machiri Limited, the above named Applicant of Post Office Box 68075-00200, Nairobi, on 4th February, 2016 in the matter of the supply and construction of Kakuyuni to Gongoni and Kakuyuni to Kilifi Pipeline Works under Baricho Immediate Works – Lot 3.

The Applicant sought for the following orders:

- (a) The Procuring Entity's award be set aside.
- (b) The Procuring Entity's decision that the bids offering to supply steel required designs and drawings set out under ITB 13.3 and 13.4 of the Bidding Document and the conditions of clarification No 3 (30th September 2015) be set aside.
- (c) The Procuring Entity's decision to reject the joint bid of the Applicant with Sinohydro Tianjin Engineering Company Ltd be set aside and the Procuring Entity be directed to re-evaluate the bids afresh.
- (d) The Board do give further order or direction as it may deem appropriate in the circumstances.

In addition to the Request for Review No. 5 of 2016 M/s Toddy Civil Engineering Company Limited which was also one of the bidders in the tender the subject matter of this application also challenged the procurement process and filed the Request for Review No. 6 of 2016.

When the two Requests for Review came up for hearing before the Board for the first time, the Board consolidated the two for the purposes of hearing but directed that each Request for Review would attract a separate decision.

The procuring entity filed Preliminary Objections to each Request for Review together with a substantive response.

In addition to consolidating the two Requests for Review for the purposes of the hearing, the Board also directed that the Preliminary Objections would be argued as part of the substantive Request for Review since the objections were based on contested issues of fact which could only be verified at the hearing of the substantive Request for Review. The Board also directed that since the Preliminary Objections raised issues touching on the jurisdiction of the Board to hear the respective Requests for Review the Board would consider and determine the Preliminary Objections first before considering the Requests for Review on the merits depending on the outcome of its determination of the Preliminary Objections. In line with the directions given by the Board, the Board will therefore first consider entity's Preliminary Objection to this Request for Review first.

The Preliminary Objection

In its notice of Preliminary Objection which was filed with the Board on 10th February, 2016, the Procuring Entity objected the Applicant's Request for Review on the following grounds:-

- a) That the Applicant did not have the *locus standi* to institute the present application in its own name since the tender submitted to the Procuring Entity was submitted by the joint venture of M/s Sinohydro Tianjin Engineering Co. Ltd and the Applicant but not by the Applicant alone.
- b) That both companies to the joint venture, namely M/s Sinohydro Tianjin Engineering Co. Limited and the Applicant herein M/s Machiri Ltd had given a power of Attorney to one Young Pin Passport NO. P. E0465543 to execute and do all such deeds and things including among others commencement of any actions,

suit or suits or defend the two companies in any action and therefore Machiri Ltd hasd no *locus standi* to institute this review.

- c) That the Applicant's Request for Review was filed out of time contrary to the Provisions of Regulation 73(2) (c) of the Public Procurement and Disposal Regulations 2006.

The Board has considered the three grounds of Preliminary Objection and finds that grounds 1 and 2 challenge the Applicant's *locus standi* to institute the application for review now before the Board while the third ground of Preliminary Objection challenges the Board's jurisdiction to hear the Request for Review on the ground that the Request for Review was filed out of time. The Board therefore finds that the proper starting point for the determination of the dispute between the parties is to first consider the issue of *locus standi* as set out under the first two grounds of Preliminary Objection.

The Procuring Entity's arguments on the issue of locus standi

Mr. K. N. Kibara advocate who appeared in this review on behalf of the Procuring Entity objected to the Applicant's Request for Review on the ground that the Applicant did not have *locus standi* to institute the present application. It was the Procuring Entity's case supported by the successful bidder that the Applicant Machiri Limited was not a candidate in the tender and that contrary to the impression that the Applicant submitted a tender to the Procuring Entity, the tender the subject matter of this dispute was submitted by a joint venture which was a legal entity known as Sinohydro Tianjin Engineering Limited and Machiri Limited.

Counsel for the Procuring Entity who was supported by Counsel for the successful bidder submitted that the Applicant which was in a joint venture with **Sinohydro Tianjin Engineering Limited** could not therefore institute the Request for Review or institute any other action or actions for that matter in its own name to the exclusion of its joint venture partner.

The Procuring Entity in its written submissions dated 22nd February, 2016 and which were filed with on the same day referred the Board to the joint venture agreement dated 6th October, 2015 containing the joint venture agreement between the Applicant and M/s sinohydor Tianjin Engineering Company Limited.

It was the Procuring Entity's position that a joint venture was a partnership and therefore a separate legal entity distinct from either of its creators.

Counsel for the Procuring Entity relied on the definition of a joint venture as set out in the **Black's Law Dictionary, 14th Edition** for the proposition that a joint venture is a business undertaking by 2 or more persons engaged in a single defined project.

Counsel for the Procuring Entity also relied in the case of **Nairobi HC MSA Application No. 999 of 2007 (JR Lithotech Exports (PTY) Limited -vs- Electrol Commission of Kenya** for the proposition that it is only the tendering entity which could lodge a complaint in respect of the subject tender, unless the party seeking to institute such proceedings could

demonstrate that it had authority from the tendering entity to take legal proceedings on it's behalf.

On the issue of authority, it was the Procuring Entity's case supported by Counsel for the successful bidder that the application had been instituted by a person without authority. Counsel for the Procuring Entity referred the Board to the Powers of Attorney by the joint venture partners both of whom appointed one Mr. Jia Yangping of Passport NO. PE0465543 to act as their lawful Attorney for the purposes of the tender. The Procuring Entity specifically referred the Board to the Power of Attorney dated 14th October, 2015 signed by the Applicant whereby it authorised the same person to act on it's behalf for among other purposes commencing any action or actions, suit or suits or defend it (Machiri Limited) in any actions arising from the tender.

It was therefore the Procuring Entity's case before the Board that the Applicant's Request for Review was incurably defective and therefore urged the Board to strike out and or dismiss the Request for Review with costs.

The successful bidders response

Mr. Kashindi who appeared on behalf of the successful bidder associated himself with the submissions made by Counsel for the procuring entity. He stated that this procurement was subject to the World Bank guidelines and that the Board should not therefore interfere with it.

He further supported the procuring entity's submissions that the tender document contemplated the use of ductile iron but he however conceded during the course of his submissions that bidders were allowed by the terms of the clarification to quote using steel. He however qualified this statement by stating that a bidder who wished to submit a bid using steel ought to have first quoted using ductile iron then provide a second bid in steel as an alternative bid. He stated that clarification No. 3 required bidders to provide information that would allow the procuring entity to cost and evaluate the alternative bid which the successful bidder contended that the Applicant did not do.

He further stated that the Applicant had been rightly declared as non-responsive and that it ought to have furnished the procuring entity with a design and drawings for the steel pipeline it intended to lay under the Provisions of ITB 13.3 and ought to have costed the employer's design according to the bid document by first providing pricing in terms of ductile iron and then giving an optional quotation using steel which was to be a technical alternative.

On the propriety of the Applicant's application, Counsel for the successful bidder submitted that the same was incompetent on the ground that the Applicant had presented a joint venture with **Synohydro Tianjin Engineering Company Limited** which was the lead bidder herein. Counsel for the successful bidder stated that instead the Applicant had filed the Request for Review alone to the exclusion of its joint venture partner. He therefore urged the Board to find that the Request for Review was incompetent on this ground alone since the Board could not force **Synohydro Tianjin Engineering Company Ltd** to

participate in a tender process which it was not interested in. He stated that the bidder/candidate for the purposes of this tender and the Request for Review was therefore the joint venture but not the Applicant acting alone. He therefore urged the Board to find that the Request for Review was incompetent on that ground.

Counsel for the successful bidder finally urged the Board to find and hold that there was no breach of the Provisions of the Act and the Regulations and that the Procurement process was fair and was undertaken in line with the Provisions of the tender document.

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

The Applicant's response to the procuring entity and the successful bidder's response.

Mr. Charles Njuguna advocate who appeared on behalf of the Applicant opposed the Procuring Entity's Preliminary Objection as supported by the successful bidder and submitted that the Applicant Machiri Limited was entitled to institute a Request for Review in its own right having been a candidate and a tenderer in the Procurement process the subject matter of this Request for Review.

Counsel for the Applicant while relying on the Provisions of Section 2 of the Public Procurement and Asset Disposal Act No. 33 of 2015 submitted that the Act now defines a candidate as a person who has obtained tender documents from the public entity pursuant to an invitation notice

by the Procuring Entity while a tenderer is defined as a person who submitted a tender pursuant to an invitation by the Procuring Entity.

Counsel for the Applicant therefore submitted on the basis of the Provisions of Section 2 that said Act that the Applicant was entitled to institute the present application in it's own name notwithstanding the fact that it had submitted it's tender as a joint venture with M/s **Sinohydro Tianjin Engineering Company Ltd.**

It was the Applicant's further case that whereas Section 93 of the repealed Public Procurement and Disposal Act 2005 limited the rights of persons who could seek for Administrative Review to persons who had submitted a tender, Section 167 of the new Act allows any bidder or candidate to seek administrative review and this in the Applicant's view therefore allows a person who has purchased the tender document or who has submitted a tender to a procuring entity to seek for administrative review.

The Applicant therefore contended on the basis of the Provisions of Sections 2 and 167 (1) of the new Act that the Applicant's Request for Review was properly before the Board and additionally submitted that Article 159 of the Constitution enjoins the Board to administer justice to all without paying undue regard to procedural technicalities.

Counsel for the Applicant while relying on the Provisions of Article 159 of the Constitution and while conceding that it had submitted its bid in joint venture with M/s **Sinohydro Tianjin Engineering Company Limited** however stated that the Procuring Entity had not demonstrated

what prejudice the Procuring Entity had suffered as a result of the Applicant's joint venture partner having not participated in the proceedings before the Board.

Counsel for the Applicant therefore urged the Board to find that the Applicant's Request for Review was properly before the Board and urged the Board to hear and determine the same on the merits.

The Board's decision

The Board has considered the Applicant's Request for Review, the notice of Preliminary Objection and all the responses placed before it by the parties regarding the issue of the Applicant's *locus standi* to institute the Request for Review. The Board has also considered the oral and the written submissions made before it by the parties and wishes to observe at the onset that it is now well settled that the issue of who are the right parties to institute and or defend any proceedings otherwise known at *locus standi* is an issue of jurisdiction and that once such an issue arises in the course of the proceedings before any judicial or quasi judicial body, then such a body is enjoined to hear and determine it at the earliest possible opportunity. This was the holding of the Court in the case of **Trustees Kenya Redeemed Church & Another -vs- Samuel M. Obuya & 5 Others (2011) eKLR** where the Court held that where a party to any proceedings lacked the legal capacity to institute proceedings before any judicial body, then the suit was incurably defective and was liable to be struck out and or be dismissed on that ground.

The Board therefore finds that contrary to the Applicant's submissions that article 159 of the Constitution is applicable to the dispute now

before it, the Board finds that the issue of *locus standi* is not an issue of form or technicality but it is an issue of substantive law that goes to the jurisdiction of the Board.

Turning to the merits of the objection on *locus standi*, the Board has looked at the tender documents submitted by the bidders in this tender and finds that the tender attracted a total of Twenty Two (22) bidders who submitted their bids singly or in joint venture. The Board has established from the said documents that the successful bidder herein **M/s China Henan International Corporation Group Company Limited** submitted its tender singly while the Applicant **M/s Machiri Limited** submitted its tender in joint venture with **M/s Sinohydro Tianjin Engineering Company Limited**.

The tender by the successful bidder and the joint venture to which the Applicant was a party were both evaluated by the Procuring Entity's tender evaluation committee with the result that the successful bidder was eventually declared the winner at the end of the process.

The Board has perused the tender document submitted to the Procuring Entity by the joint venture of which the Applicant was one of the parties and finds that the tender document was submitted in two volumes containing documents belonging to and or which were issued in favour of the two parties to the joint venture and of particular significance is the fact that the tender document submitted by the Applicant and its joint venture partner contained two Powers of Attorney executed by each of the two firms. In the two Powers of Attorney, the parties to the joint venture namely **M/s Sinohydro Tianjin Engineering Company Limited**

and M/s Machiri Limited in a Power of Attorney dated 14th October, 2015 and which was signed by one Mr. James Mbugua Macharia appointed one Mr. Jia Yangping (a citizen of China Passport number PE0465543) to act as the true and lawful representative of both joint venture partners for various purposes.

The parties to the joint venture agreement gave the Attorney the following powers in so far as the subject Procurement was concerned:-

- i) The power to negotiate contracts for works/services
- ii) The power to sign, execute and endorse all documents;
- (iii) The power to open and close accounts; and
- (iv) The power to commence any action or actions, suit or suits or defend any actions.

It is apparent from the evaluation report and all the other documents placed before the Board that the duly appointed Attorney for the joint venture continued to exercise the powers conferred upon him by the parties but upon the pronouncement of the outcome of the tender, the Applicant which was one member of the joint venture decided to institute the present application singly to the exclusion of its joint venture partner M/s Sinohydro Tianjin Engineering Limited which was the lead bidder. The Applicant's admitted at the hearing that its joint venture partner did not participate and or wish to participate in the proceedings before the Board.

It was also admitted and this is apparent from the Applicant's Request for Review that the Application before the Board was not instituted by the Attorney who was duly appointed by the parties to do so but by the

Applicant company acting solely and the question which the Board must therefore answer is whether one bidder in a tender submitted by a joint venture comprising of two or more companies can institute proceedings on behalf of the other entity more particularly where the missing party is the lead bidder and therefore bind it to the proceedings and or the outcome of any such a judicial or quasi judicial process.

The Board has considered the Provisions of Sections 167 of the Public Procurement and Asset Disposal Act No. 33 of 2015 which came into force on 7th January, 2016 and finds that the said Provision of the Act confers upon a candidate or a tenderer who has suffered or risks suffering loss or damage due to breach of a duty imposed on a Procuring Entity the right to institute proceedings before the Board.

Section 2 of the Act defines a candidate as a person who has obtained a tender document from a public entity pursuant to an invitation notice by a Procuring Entity whereas a tenderer is defined as a person who submitted a tender pursuant to an invitation by a public entity.

The Applicant sought to argue that the Provisions of Sections 2 and 167 of the new act had expanded the scope of the persons who can apply for administrative review and that one party to a joint venture agreement can lawfully institute legal proceedings to challenge the outcome of a tender to the exclusion of it's joint venture partner.

The Board has considered the above argument against the Provisions of Sections 2 and 167 of the Act and is of the respectful view that neither the Provisions of Section 2 or Section 167 of the Act empower one party

to a joint venture agreement to institute legal proceedings in its sole name to the exclusion of its joint venture partner in the absence of a written authority from the other joint venture partner authorising the party instituting the legal proceedings to do so.

The Board further finds that even going by the definitions set out under Section 2 of the Act, a candidate and or a tenderer for the purposes of the Act can only mean the party or parties who obtained or submitted a tender pursuant to an invitation by a public entity. Such an entity can be an individual, a company or any other legal entity and where there is a joint venture the joint venture must be deemed to be the candidate and or the tenderer for the purposes of the subject tender but not an individual member of the joint venture.

The High Court in the case of **Lithotech Exports (PYT) Limited -vs- The Electoral Commission of Kenya (Nai HC Misc Application NO. 999 of 2009 (JR))** gave the test for determining the proper aggrieved party in a tender process. The High Court stated as follows as regards this test at page 11 of its decision:-

“It is the finding of this Court that after due consideration that correspondences cannot oust the legal documents which are the tender documents. They spell out who the aggrieved party should be (sic) the party that tendered is the right aggrieved party. The Applicant can only complain on behalf of the tendering entity if it can be shown that there is authority from the subsidiary authorizing the present entity to take legal proceedings on its behalf. In the absence of such authority Lithotech Exports (PTY) is none suited”.

It is therefore clear from the above decision that all that one needs to do in order to determine who is the candidate or the bidder for the purposes of any tender is to look at the tender document which in law speaks for itself.

The two volumes of the tender documents submitted by the joint venture in this case show that the tender by the Applicant was obtained and submitted to the Procuring Entity by the joint venture of M/s **Sinohydro Tianjin Engineering Company Limited** and **Machiri Limited** and not by one of the two parties to the exclusion of the other. The two bidders gave a power of Attorney to one **Jia Yangping** to participate in the tender process and to institute and or defend any suits and or actions arising from the tender. **Jia Yanping** did not however institute the present application and or participate in the proceedings before the Board and in the absence of any authority from **Sinohydro Tianjin Engineering Company Ltd** authorising the Applicant to institute the present Request for Review on it's behalf, the Board holds that this Request for Review is improperly before the Board and the same ought to be struck out.

The Board finally wishes to observe that the Board just like any other judicial or quasi judicial body can only issue orders in favour of parties who are properly before it. It therefore follows that the Board cannot issue orders to one bidder to a joint venture placing obligations on that party to the joint venture agreement who is not a party before the Board because it may as well turn out that the said omitted party is no longer interested in the tender process.

Parties who elect to participate in a tender process as a joint venture must therefore know that they are "joined at the hip" so to speak and must act jointly.

FINAL ORDERS

The upshot of all the above findings is therefore that the Procuring Entity's Preliminary Objection on the ground that the Applicant lacks *locus standi* to institute the present Request for Review as contained in the Procuring Entity's notice of Preliminary Objection is hereby upheld and the Applicant's Request for Review is hereby struck out but with no order as to costs.

Dated at Nairobi on this 25th day of February, 2016.


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CHAIRMAN
PPARB


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SECRETARY
PPARB