

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 01/ 2017 OF 6TH JANUARY, 2017

BETWEEN

NOMADS CONSTRUCTION

COMPANY LIMITED APPLICANT

AND

KENYA NATIONAL HIGHWAYS

AUTHORITY..... PROCURING ENTITY

M/S NORTHERN FRONTIER

ENTERPRISES INTERESTED PARTY

Review against the decision of the Kenya National Highways Authority in the matter of Tender No. KeNHA/1466/2016 for Performance Based Road Contract for the Maintenance of Merille River- Marsabit (A2) Road.

BOARD MEMBERS PRESENT

1. Mrs. Josephine Mong'are - Chairman
2. Mr. Peter B. Ondieki, MBS - Member
3. Mrs. Gilda Odera - Member
4. Mr. Nelson Orgut - Member
5. Mr. Hussein Were - Member

IN ATTENDANCE

1. Philip Okumu - Holding Brief for Secretary
2. Maureen Namadi - Secretariat

PRESENT BY INVITATION

Applicant – Nomads Construction Company Limited

1. Jacob AumaOkoth - Advocate
2. Lenguro A. L. - Director
3. Susan Nyawira - P.A.

Procuring Entity – Kenya National Highways Authority

1. Lawrence Maruti - Legal Officer
2. Richard Kilel - SPO
3. Winnie Kakai - PA

Interested Party

1. Mohamed Hussein - Director, Northern Frontier Ent.
2. Ruth Jelimo - Employee, Northern Frontier
3. Felix Kipsang - Employee, Northern Frontier

BOARD'S DECISION

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

BACKGROUND OF AWARD

The Kenya National Highways Authority (KeNHA) is a State Corporation established under the Kenya Roads Act, 2007, with the responsibility for the management, development, rehabilitation and maintenance of national roads.

The Authority had invited bids from eligible construction companies registered with the National Construction Authority (NCA) in Category 3, 4 & 5 for the Performance Based Road Contract for the Maintenance of Merille River-Marsabit (A2) Road funded through the Fuel Levy. The project is located in Upper Eastern Region under Manager Corridor 'C'. The road starts at the Merille River and proceeds to Marsabit. The total road length is approximately 120 Km.

The extent of works under this particular contract entails:-

- Inspect road, identify and remove all obstructions to
Passage of traffic
- Clear side drains, mitre drains, cut-off drains
- Repair and replace scour checks
- Repair eroded ditches
- Clean cross culverts, access culverts, outlets and inlets
- Headwall repairs

- Clear stream channels
- Vegetation control: grass slashing, bush clearing, tree pruning
- De-silt drifts
- Grading and repairs of shoulders to carriageway
- Maintenance and minor repairs to bridges.
- Reinstatement of road furniture
- Any other works that may be instructed by the Engineer

Advertisement

An invitation notice to all road contractors was placed through advertisement notices in the *Star* and *TheStandard* newspapers of Tuesday 15th November, 2016 inviting bids from eligible contractors for Performance Based Road Contract for the Maintenance of Merille River- Marsabit (A2) Road. The same was also uploaded onto KeNHA website and IFMIS portal.

One bidder purchased the tender document from KeNHA Head office while the rest of the bidders downloaded the tender document from either IFMIS or KeNHA websites.

Pre-Bid Site Visit & Addendum

A mandatory pre-bid site visit was conducted on 24th November, 2016 starting from Marsabit (A2) Town at 11.00 am by the KeNHA

representatives and a total of thirteen (13) bidders were represented in the pre-tender site meeting.

Closing/Opening:

Tenders were received and opened on 1st December, 2016 at 11.00. The opening session involved opening of the Bids, announcing the names of the bidders, bid prices and their respective bid securities.

Six (6) bidders responded as shown in Table 1 below;

Table 1: Tender Response

Bidder No	Name of Bidder	Tender Sums (Kshs)
1	Northern Frontier Enterprises	68,619,800.00
2	Gombo Trading Co. Ltd	45,792,624.00
3	Halgo Traders Ltd	70,325,000.00
4	Precision Civil Engineering Ltd	70,999,540.00
5	Kiteri Limited	74,402,400.00
6	Nomads Construction Ltd	69,449,200.00

EVALUATION

PRELIMINARY EVALUATION (MANDATORY)

Prior to detailed evaluation, the bids were checked for responsiveness and completeness.

COMPLETENESS OF BIDS

Each tender was checked for completeness. A complete tender was one which complied in all respects with the Conditions of the bid and the Instructions to Bidders, all amendments issued during the period of bidding and all other requirements embodied in the bidding documents.

RESPONSIVENESS

For the purpose of evaluation, a responsive bid was considered as one which met all responsiveness and completeness criteria, which was the minimum requirements of bidding documents and which did not limit the rights of the Employer or the obligations of the Bidder or affect unfairly the competitive position of other responsive Bidders.

The conditions laid down in the Invitation to tender and the Tender Document required that a bidder must provide the information below in order to meet the minimum responsiveness requirement:-.

1. Duly filled and signed Form of Bid.
2. Duly signed appendix to Form of Bid.
3. Duly Filled and Signed Schedule of Qualification Criteria (Schedule of equipment holding).
4. Duly filled Confidential Business Questionnaire form, Declaration of any Conflict of interest and provision of certified copies of National Identification Card (ID) or Passport for all Directors.
5. Bid Security in form of dully filled Tender securing declaration.
6. Duly filled and signed power of Attorney form and provision of copies of IDs of person given power of attorney.

7. Certified Copy of Current Single Business Permit.
8. Valid Tax Compliance Certificate.
9. Certified Copy of Registration Certificate with the National Construction Authority (NCA) in either category 3, 4 & 5.
10. Certified copy of Certificate of Incorporation.
11. Duly filled Bill of Quantities and any alterations countersigned.
12. Eligibility: Certified copy of CR12 form, Status on existing contracts and copies of National Identification Card (ID) or Passport for all Directors.
13. Debarment (Duly filled and signed declaration form).
14. Litigation history (Current Sworn Affidavit).
15. Duly signed certificate of pre-tender site visit.
16. Duly filled and signed Schedule of Major Items of Plant & Equipment.
17. Duly filled and signed Schedule of Key Personnel.
18. Duly filled and signed Schedule of Road Works Completed in the last three (3) years.
19. Duly filled and signed Schedule of non-completed works beyond the completion period (History of non-performance).
20. Duly filled and signed Schedule of Ongoing Projects.
21. Duly filled and signed Schedule of other Supplementary Information
22. Serialization of tender documents – all pages in the bid document must be serialized.

The following bidders did not qualify to proceed to the detailed technical evaluation stage for the following reasons;

i. Bidder number 2 (Gombo Trading Co. Ltd)

- Bidder did not attach NCA certificate

ii. Bidder number 3 (Halgo Traders Ltd)

- Tender document was not serialized.
- The Copy of NCA certificate was not duly certified by a Commissioner of Oaths.
- The Sworn Affidavit was not current i.e. executed on 14th June, 2016 which is more than three months old.

iii. Bidder number 5 (Kiteri Ltd)

- The bidder was not eligible because it was awarded a tender in the 1st Quarter 2016-17 i.e. Tender No. KeNHA/1348/2016.

iv. Bidder number 6 (Nomads construction Ltd)

- The Bid document was not serialized.
- The Litigation History was not stated.
- Conflict of interest was not stated.
- The Copy of NCA certificate was not certified by an advocate instead of Commissioner for Oaths.
- A Copy of the Certificate of Incorporation was certified by an advocate instead of a commissioner for oaths.

- The CR12 form was certified by an advocate instead of a commissioner for oaths.
- A Copy of the Single business permit was certified by an advocate instead of a commissioner for oaths.

The following firms were responsive and hence proceeded to Technical evaluation:

i. Bidder Number 1 (Northern Frontier Enterprises)

ii. Bidder number 4 (Precision Civil Engineering Ltd)

TECHNICAL EVALUATION

The above two (2) bidders were responsive to the preliminary requirements of the tender and were subjected to detailed Technical Evaluation. In order to qualify to proceed to the financial evaluation stage, Bidders were required to attain a pass mark of 75%.

The average results of the technical evaluation are as tabulated in table 2 below:-

DESCRIPTION			POINT SCORE SCALE	1	4
CURRENT COMMITMENTS			Max 10		
On-going works			0-10	10	10
KEY PERSONNEL			Max 20		
Site Agent (Max 10 marks)	Qualification	Degree	4	4	4
		Diploma/ Certificate	2		
	Relevant experience	10 years and above	6		
		4-9 years	4		
		0-3 years	1	1	1
	Qualification	Degree	2	2	2

Surveyor (Max 4 marks)		Diploma/Certificate	1		
	Relevant experience	8 years and above	2	2	2
		3-7 years	1		
		0-2years	0.5		
Foreman (Max 6 marks)	Qualification	Higher Diploma	2	2	2
		Diploma/Certificate	1		
	Relevant experience	8 years and above	4		
		3-7 years	3		3
		0-2years	1	1	
PLANT AND EQUIPMENT			Max 20		
Relevant Equipment	Owned/ Leased (Max 20 marks)		0 – 20	16.8	20
WORK METHODOLOGY			Max 35		
	Program of works		0-10	8.6	8
	Detailed Methodology		0-15	13.2	10.8
	Proposed Equipment Scheduling/Work statement.		0-5	0	0
	Methodology on safety during the construction period.		0-5	3.4	3.2
LITIGATION HISTORY			Max 15		
Without Litigation			15	15	15
With Litigation			0-9		
TOTAL			MAX 100	79	81

The following two firms attained the minimum qualifying mark of 75% and hence proceeded to the financial evaluation stage.

- i. Bidder Number 1 (Northern Frontier Enterprises)
- ii. Bidder number 4 (Precision Civil Engineering Ltd)

FINANCIAL EVALUATION

The bids that qualified to financial evaluation stage were compared with the Engineer's Estimates as shown below.

Comparison of Tender Sums with Engineer's Estimate (EE)

Comparison of bill items of the tenderers with those of the Engineer's Estimate was carried out and the results are presented in the table below:

Bill Item No.	Description	Engineer's Estimate	Bidder 1		Bidder 4	
		Amount (KShs)	Amount (KShs)	(%) of EE	Amount (KShs)	(%) of EE
1	General: Office administration and overheads / Preliminaries	10,892,500.00	10,730,000.00	98.51	12,572,500.00	115.42
7	Excavation and Filling for Structures	9,730,000.00	0.00	0.00	0.00	0.00
16	Bituminous Mixes	3,820,000.00	3,065,000.00	80.24	3,820,000.00	100.00
20	Road Furniture Repair and Maintenance	2,190,000.00	2,160,000.00	98.63	2,190,000.00	100.00
	Total Instructed Works	26,632,500.00	15,955,000.00	59.91	18,582,500.00	69.77
	Add Routine Maintenance Works	43,200,000.00	43,200,000.00	100.00	42,624,000.00	98.67
	Sub Total 1	69,832,500.00	59,155,000.00	84.71	61,206,500.00	87.65
	Add 16% for VAT	11,173,200.00	9,464,800.00	84.71	9,793,040.00	87.65
	Grand Total	81,005,700.00	68,619,800.00	84.71	70,999,540.00	87.65

CLARIFICATIONS AND ERROR ADJUSTMENTS

Errors were noted in the Bill of Quantities of M/s Northern Frontier Enterprises and M/s Precision Civil Engineering Ltd. The same were corrected and the corrections communicated to the bidders.

Ranking

The Tender Sums for the two (2) bidders who qualified to proceed to financial evaluation stage were compared and ranked as shown in the table below;

Table: Comparison of Tender Sums & Ranking

Bidder No.	Bidders Names	Amount (Kshs)	Ranking
1	Northern Frontier Enterprises	68,619,800.00	1
4	Precision Civil Engineering Ltd	70,999,540.00	2

CONCLUSION AND RECOMMENDATION

Six (6) bidders submitted their bids by the bid submission deadline and after the preliminary and technical evaluations only two (2) firms qualified to proceed to financial evaluation stage. They were: M/s. Northern Frontier Enterprises and M/s Precision Civil Engineering Ltd.

Upon completion of financial evaluation, M/s. Northern Frontier Enterprises offered the lowest evaluated tender price of KShs.68,619,800 (Kenya Shillings Sixty Eight Million, Six Hundred and Nineteen

Thousand and Eight Hundred Only) and hence was recommended for award of the tender.

RECOMMENDATION

The Director General was requested to consider and approve the award of Tender No. KeNHA/1466/2016 for the Performance Based Road Contract for the Maintenance of Merille River- Marsabit (A2) road to M/s. **Northern Frontier Enterprises**.

PROFESSIONAL OPINION

Following completion of the evaluation process and pursuant to the report by the Evaluation Committee, the Head of Procurement of the Procuring Entity gave a professional opinion on the procurement process and recommended that the Director General (Accounting Officer) consider and approve the report of the Evaluation Committee.

The Director General approved the recommendations for the award of tender to the lowest evaluated for the award of Tender No. KeNHA/1466/2016 for Performance Based Road Contract for the Maintenance of Merille River- Marsabit (A2) road to M/s. **Northern Frontier Enterprises** of P.O. Box 30-60300, Isiolo for a contract period of **twenty four (24) months** without defects liability period, at a total cost of **KShs.68,619,800 (Kenya Shillings Sixty Eight Million, Six Hundred and Nineteen Thousand and Eight Hundred Only)**.

REVIEW

The Request for Review was lodged by M/s Nomads Construction Company Limited, the above named Applicant of Post Office Box 337-60500, Marsabit, on 6th January, 2017 in the matter of Tender No. KeNHA/1466/2016 for Performance Based Road Contract for the Maintenance of Merille River-Marsabit (A2) Road.

The Applicant in this Request for Review was represented by Mr. Jacob AumaOkoth, Advocate from the firm of MsOkoth and Company Advocates while the Procuring Entity was represented Mr. Lawrence Maruti, Legal Officer.

The Applicant requests the Board for the following orders:

1. **Annul, review and/or set aside the Procuring Entity's decision to reject the Applicant's tender contained in the Procuring Entity's letter dated 23rd December, 2016;**
2. **Annul, review and/or set aside the Procuring Entity's decision to award the tender to M/s Northern Frontier Enterprises;**
3. **Award the Tender No. KeNHA/1466/2016 for Performance Based Road Contract for the Maintenance of Merille River-Marsabit (A2) Road to the Applicant;**
4. **Award the Applicant the cost of the proceedings;**
5. **Any other relief that the Board may deem appropriate to issue.**

The submissions by the parties

The Applicant's Request for Review was premised on ten (10) grounds of review but upon hearing the Request for Review, the Board found that there was only one issue for determination in this request for review ,namely;

Whether the Procuring Entity unfairly disqualified the Applicant at the preliminary stage of evaluation hence breached Clause 34 of the Tender document, Articles 159 and 227 of the Constitution and Section 80 of the Public Procurement and Disposal Act 2015.

Counsel for the Applicant, Mr. Jacob Okoth, submitted that Section III of the Invitation to Tender documents provides a two-stage evaluation where stage one had mandatory requirements to be met by all bidders, prior to proceeding to the next stage where they would be evaluated in accordance with Clause 34. In his submission, counsel for the Applicant argued that the Procuring Entity evaluated the Applicant at both two stages yet it claimed that the Applicant did not meet the mandatory requirements in stage one and used the same to reject the Applicant's bid. Counsel for Applicant maintained that the Applicant's bid was responsive and had fulfilled all the mandatory requirements hence the evaluation by the Procuring Entity in the second stage.

Counsel for Applicant further argued that the Procuring Entity unfairly rejected the Applicant bid yet it had met all the mandatory requirements. Mr. Okoth argued that in rejecting the Applicant's tender on grounds that

the Certificate of Incorporation, the NCA certificate, the CR 12 form and the Single Business Permit were not certified as true copies of the original by a Commissioner of Oaths, the Procuring Entity contravened the provisions of Articles 159 and 227 of the Constitution of Kenya. According to Mr. Okoth, all the Applicant's documents that required to be certified by a Commissioner of Oaths were duly certified by two advocates, namely Mr. Henry Kabiru and Mr. Evans Asuga and the Applicant argued that even though the stamp by Mr. Kabiru was indicating 'Advocate' and not 'Commissioner of Oaths', it had no bearing as he was a Commissioner of Oaths as per the affidavit. He further submitted that Mr. Kabiru had sworn an affidavit to confirm that he was a Commissioner of Oaths and that the same was included in his bundle of Request for Review.

Mr. Okoth further submitted that the Procuring Entity showed discrimination in the evaluation process by selecting those who should proceed to the final stage and argued that the successful bidder had not submitted a CR 12 form.

Regarding the mandatory requirements of serialization of pages, Counsel for Applicant insisted that the Applicant's documents were serialized.

Counsel for Applicant also argued that the mandatory requirement of litigation history fell in stage two of the evaluation and not the preliminary stage, indicating that the Procuring Entity evaluated them in stage two yet it claimed that their bid was rejected on stage one mandatory requirements. In light of this, Counsel for Applicant submitted that the Procuring Entity failed to adhere to the evaluation criteria as set out in their Invitation to Tender document therefore the entire tender process was

flawed and skewed in favour of the Successful Bidder who did not qualify in the first place. Counsel for Applicant prayed that the Board annul or set aside the award as well as order the Procuring Entity to pay costs.

In its response to the Applicant's submissions, Counsel for the Procuring Entity argued that the Procuring Entity complied with the provisions Constitution of Kenya, 2010 as well as the Procurement laws. Mr. Lawrence Maruti counsel for the Procuring Entity referred the Board to the Invitation to Tender documents under the 'Key Items for Pre-qualifications' section which listed the completeness and responsive criteria, references within the tender and requirements. He referred the Board to items no. 7, 8 and 12 of the pre-qualification items which required submission of a certified copy of registration with National Construction Authority, a certified copy of the Certificate of Incorporation, and a CR 12 Form respectively, all certified by a Commissioner of Oaths. According to the Counsel for the Procuring Entity, the Applicant was declared non responsive at preliminary evaluation stage since the stamps on all these mandatory documents indicated that they were certified by an Advocates and not Commissioner of Oaths. Mr. Maruti argued that there was no evidence from the Applicant to show that Mr. Kabiru and Mr. Asuga were Commissioners of Oaths given that they both used stamps that only indicated 'Advocate'.

Counsel for Procuring Entity further argued that there was a requirement at the preliminary evaluation stage for bidders to indicate by ticking either 'Yes' or 'No' on whether they had any conflict of interest yet the Applicant failed to give any such indication. He further argued that the litigation

history appeared at the preliminary but that the Applicant did not fill the form that was a mandatory requirement in the preliminary stage to provide information on any current litigation. Counsel for Procuring Entity also argued that the Applicant did not serialize the bid documents as required in the mandatory requirements in the preliminary stage.

Mr. Maruti stated that having failed to meet all these mandatory requirements, the Applicant was disqualified at the preliminary state and did not proceed to the next stage as alleged by the Applicant since the evaluation criteria had to be strictly followed.

On the issue raised by the Applicant that the Successful Bidder did not submit a CR 12 Form, Counsel for Procuring Entity challenged the Applicant to state how he would be privy of confidential information.

Counsel for the Procuring Entity argued that the Procuring Entity did not breach Clause 34 of the Tender document as alleged by the Applicant and that the evaluation was transparent and fair.

In their Right of Reply, Counsel for the Applicant argued that there was no requirement in the tender documents for a certificate to prove that an Advocate was also a Commissioner of Oaths.

The Board also gave the Successful Bidder an opportunity to make any comments on the submission. The Successful Bidder stated that he was in agreement with the Procuring Entity's submissions.

BOARD'S FINDINGS

Having heard the submissions by all parties as well as perused the information in the documents provided to the Board, the Board makes the following findings.

Upon perusal of the Applicant's bid document as submitted by the Procuring Entity to the Board, the Board notes that the Applicant's copy of the Certificate of Incorporation produced by the Applicant was certified by one Evans Asuga Ongicho- Advocate, the copy of the NCA Certificate of Registration was certified by one H. M. Kabiru- Advocate, the copy of the CR12 was certified by one Evans Asuga Ongicho- Advocate and the copy of the Single Business Permit is certified by one H. M. Kabiru- Advocate. None of the documents mentioned above indicate whether the certifiers are Commissioners of Oaths.

The Board observed that the above documents are stamped 'Advocate' against the name of the certifier and not 'Commissioner of Oaths'. The Board further noted that the Invitation to Tender states as follows, under the Mandatory Requirements: *'Note: Certification of documents shall be original and executed by a Commissioner for Oaths or Notaries Public'*.

The Board notes that although the Applicant submitted in the Request for Review an affidavit by Mr. H.M. Kabiru, and Advocate, confirming that he is a licensed Commissioner of Oaths, the Applicant did not submit the same with their tender documents to enable the Procuring Entity to be

aware that the certifier was a licensed Commissioner of Oaths in the absence of using a Commissioner of Oaths stamp.

It is the Board's opinion that it was upon the Applicant to ensure that they strictly adhered to the mandatory requirements and although the Applicant argued that there was no such requirement for bidders to submit an affidavit, the Board finds that the Applicant failed to meet the mandatory requirements by submitting documents stamped 'Advocate' and not 'Commissioner of Oaths' as was required.

The Board wishes to refer to Clause 34 of the Invitation to tender which states as follows:

"34 Evaluation of Bids

34.1 The Employer shall use the criteria and methodologies listed in this Clause. No other evaluation criteria or methodologies shall be permitted.

34.2 To evaluate a bid, the Employer shall consider the following:
(a) the tender price, excluding Provisional Sums and the provision, if any, for contingencies in the Summary Bill of Quantities;

(b) Price adjustment for correction of arithmetic errors in accordance with ITT 31.1;

(c) Price adjustment due to discounts offered in accordance with ITT 14.4;

(d) Converting the amount resulting from applying (a) to (c) above, if relevant, to a single currency in accordance with ITT 32;

(e) Adjustment for nonconformities in accordance with ITT 30.3;

(f) The evaluation factors indicated in Section III, Evaluation and Qualification Criteria;

34.3 The estimated effect of the price adjustment provisions of the Conditions of Contract, applied over the period of execution of the Contract, shall not be taken into account in tender evaluation.

34.4 If these Tendering Documents allows Tenderers to quote separate prices for different lots (contracts), and the award to a single Tenderer of multiple lots (contracts), the methodology to determine the lowest evaluated price of the lot (contract) combinations, including any discounts offered in the Form of Bid, is specified in Section III, Evaluation and Qualification Criteria.

34.5 If the bid, which results in the lowest Evaluated Tender Price, is seriously unbalanced or front loaded in the opinion of the Employer, the Employer may require the Tenderer to produce detailed price analyses for any or all items of the Bill of Quantities, to demonstrate the internal consistency of those prices with the construction methods and schedule proposed. After evaluation of the price analyses, taking into

consideration the schedule of estimated Contract payments, the Employer may require that the amount of the performance security be increased at the expense of the Tenderer to a level sufficient to protect the Employer against financial loss in the event of default of the successful Tenderer under the Contract.

- 34.6 *The price of the Rehabilitation and Improvement Works included in each tender shall not be higher than the threshold indicated in the TDS. If the Tenderer estimates that its costs for the Rehabilitation and Improvement Works are higher than the threshold indicated in the TDS, it shall include the portion above the threshold in its price for the Maintenance Services. If the tender which results in the lowest Evaluated Tender Price is above the threshold indicated in the TDS for the Rehabilitation and Improvement Works, the Employer may reject the bid."*

The Board further finds that the mandatory requirements in this tender were listed in the Invitation to tender and they were as

"QUALIFICATION FOR TENDERING

Mandatory Requirements

The following must be submitted together with bid:

- 1. A Certified copy of a Certificate of incorporation***
- 2. A Certified copy of the Registration Certificate with the National Construction Authority (NCA) in Category 3,4&5***
- 3. A Copy of Valid Tax Compliance Certificate***
- 4. A Certified copy of a Single Business Permit***

5. *A Certified copy of CR 12 form*

6. *Certified copy of Certificate of Registration for access to government procurement opportunities, from the ministry of national treasury or the county government for women; category small works and engineering*

7. *Bidders shall serialise all pages for each tender submitted.*

Other Requirements As specified in the tender documents covering the following:-

a. Professional and Technical Personnel

b. Current work load

c. Litigation history (Sworn Affidavit)

d. Eligibility

i. Bidders who have been awarded works in the current FY 2016/17 are not eligible to apply

ii. Only those bidders registered in the Class as indicated in the tender document shall bid for the respective tenders.

iii. Bidders with history of Non-performance (Termination of contracts in the last Two (2) years) will be disqualified.

iv. Any form of Canvassing will lead to disqualification

Procurement shall be based on the post qualification method and the above details will be submitted with the priced bid. There shall be a Mandatory Pre-Tender Site Visit as indicated on the tender notice."

On the issue of litigation history, the Board has noted from the Invitation to Tender that the Procuring Entity required bidders at the Preliminary and Technical evaluation stage to submit information setting out their litigation history .The Board has perused the tender documents submitted by the Applicant and finds that, the Applicant did not complete the required information on litigation history in the required form yet this was a mandatory requirement. The Board therefore finds that the Applicant failed to meet this mandatory requirement.

A mandatory requirement set out in the tender document cannot be waived and once a bidder fails to comply with it, then its tender must be declared non responsive at the preliminary evaluation stage and cannot proceed for further evaluation.

On further perusal of the Applicant's tender document, the Board noted that the Applicant failed to indicate by ticking either 'Yes' or 'No' to confirm its position as to whether it had any conflict of interest in as far as the tender was concerned. This was also a mandatory requirement which the Applicant failed to comply with.

In view of the several failures by the Applicant to comply with mandatory requirements, the Board's hands are tied since the requirements cannot be treated as minor deviations and cannot also be waived .The Applicant had no option other than to comply with them and the failure to comply with the requirements could only have one ultimate result, namely to have the Applicant's bid disqualified at the Preliminary evaluation stage as the Procuring Entity did.

Under the provisions of Section 80(2) of the Public Procurement and Asset Disposal Act, 2015, a Procuring Entity is bound to comply with the evaluation criteria set out in the tender document and once a bidder submits himself /itself to said process, then it is bound to comply with the criteria.

Section 80 (2) of the said Act which is now in force provides as follows:-

“The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered”

The requirement that a Procuring Entity cannot apply a criteria other than that set out in the Tender Document has been the subject of several decisions such as the case of *Civicon Limited=vs= Kenya Pipeline limited*(PPARB 26 of 2014) where the Board held as follows:-

“The Applicant in this tender had several options open to it.If any provision in the tender document was not clear, the Applicant had the option of seeking for clarification using the time window allowed in the tender document or challenging the criteria promptly through the filing of a request for review ;assembling a bid through strategic partnership or not tendering on realizing it had no capacity or would not qualify.

The Board also reiterates that the duty to draw up atender document and the evaluation criteria is vested in the Procuring Entity and

having formulated a tender document providing for the criteria for the evaluation of the tenders, the Procuring Entity cannot be said to have breached any of the provisions of the Act or the Regulations and more particularly the provisions of Section 64(1) of the act and or Regulations 48(1) and 49 (1) of the Regulations

Once the Procuring Entity had prepared tender documents containing the relevant criteria, it would not be practical for every bidder to come up with its own evaluation criteria any more than candidates in an examination would each come up with his or her own marking scheme...

The Board having perused the tender document notes that the Procuring entity applied the criteria in the manner set out in the tender document"

Although the Board was dealing with the provisions Sections 64 and 66(2) of the repealed Public Procurement and Disposal Act, 2005 in the case of **Civicon limited** cited above, the said Section 66(2) of the repealed Act is in substantially the terms as Sections 80(2) of the new Act and the authority referred to above is therefore relevant.

In view of all the above findings, the Applicant's request for review therefore fails and is disallowed in the terms of the following orders.

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public

1. This Request for Review dated 6th January 2016 filed by M/S Nomads Construction Company Limited against the decision of Kenya National Highways Authority in the matter of Tender No.KeNHA/1466/2016 for the maintenance of Merille River-Marsabit (A2) Road hereby fails and is disallowed.
2. The Procuring Entity is therefore at liberty to proceed with the procurement process in respect of the award of the tender.
3. The Board makes no orders as to costs on this request for review.

Dated at Nairobi on this 26th day of January, 2017.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

