

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 18/2015 OF 24<sup>TH</sup> MARCH, 2015

BETWEEN

CIVICON LTD..... APPLICANT

AND

KENYA PIPELINE COMPANY LTD.....ROCURING ENTIRY

JGH MARINE A/S WESTERN MARINE

SERVICES LTD CNPC NORTHEAST REFINING

& CHEMICAL ENGINEERING CO. LTD/

PRIDE ENTERPRISES.....1<sup>ST</sup>INTERESTEDPARTY/SUCCESSFUL  
BIDDER.

Review against the decision of the Tender Committee of the Kenya Pipeline Company Ltd dated 17<sup>th</sup> March 2015 in the matter of Tender No. SU/QT/786N/14 for EPC Tender for the construction of an Aviation Fuel Depot at Jomo Kenyatta International Airport, Nairobi (Greenfield), Contract No. SU/QT/786N/14.

BOARD MEMBERS PRESENT

1. Paul Gicheru - Chairman
2. Peter Ondieki - Member

3. Rosemary Gituma - Member
4. Nelson Orgut - Member

### **IN ATTENDANCE**

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

### **PRESENT BY INVITATION**

#### **APPLICANT- 18- 2015 CIVICON LTD**

1. G. M. Nyaanga Advocate
2. Joseph Kahari Advocate

#### **PROCURING ENTITY- KENYA PIPELINE CO. LTD**

1. Gloria Khafafa Legal Officer/ Advocate

### **SUCCESSFUL BIDDER**

1. Kennedy Ogeto Advocate

### **INTERESTED PARTY**

1. Pancras Oyatsi M/s 4D Engineering S. R. L (Italy)  
/Mayira Limited (Kenya)

### **BOARD'S DECISION**

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

## BACKGROUND OF THE AWARD

### Introduction

KPC has been experiencing operational constraints at Embakasi (PS9) due to the small size of the Issuing Storage facilities. In addition, the Kenya Airports Authority is undertaking an expansion project at the JKIA in order to meet future demand and to maximise the utilisation of existing airport resources.

### Advertisement

The subject tender for the EPC contract for the construction of an aviation fuel depot at JKIA Nairobi (Greenfield) was advertised in the Company's website, and the *Daily Nation* and the *Standard* newspapers on Friday 14<sup>th</sup> November, 2014.

### Closing/Opening:

The tenders were closed/opened on 16<sup>th</sup> February, 2015 and seventeen (17) bidders/consortia submitted their bids which underwent Preliminary Evaluation.

The following 17 firms/consortia responded:-

1. Litwin SA/Ekium/Stellar Builders Ltd
2. Vijay Tanks & Vessels (P) Ltd/Weld-Con Ltd

3. Sichuan Hongda Petroleum & Natural Gas Engineering Co. Ltd/Tisco Construction Co. Ltd
4. Paresa SPA/Center Star Company Ltd
- ~~5. Offshore Infrastructure Limited/ Mellech Engineering & Construction Ltd~~
6. Farab International (FZE)/ Magic Contractors Ltd
7. China Wu Yi/ China Petroleum Engineering/Marson Integrated
8. Civicon Limited/Sinopec
9. China Petroleum Engineering & Construction Corporation/Empro Electrical & Mechanical Engineers Company Limited
10. Technofab Engineering Limited/ Plancon
11. 4D Engineering S.R.L. (Italy)/ Mayira Limited (Kenya)
12. Mahathi Infra Services Private Ltd/ Seyani Brothers & Co. (K) Ltd
13. China Jiangxi International Kenya Limited/ Xinjiang Petroleum Investigation Design & Research Institute Co. Ltd/ Pinnie Agency Ltd
14. China Petroleum Pipeline Bureau (CPP)/ Nyoro Construction Company Ltd
15. Tata Projects Limited/ Landmarks Holdings Limited
16. Chemie-Tech LLC/ M/s Nariana Enterprises Limited
17. JGH Marine A/S/Western Marine Services Ltd/ CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises Limited

## EVALUATION

The following three firms did not fulfil the mandatory requirements and were deemed non-responsive and disqualified from further evaluation:-

1. Litwin SA/Ekium/Stellar Builders Ltd;
2. Farab International (FZE)/ Magic Contractors Ltd;
3. China Jiangxi International Kenya Limited/ Xinjiang Petroleum.

Fourteen (14) firms qualified to proceed to the next stage of Technical evaluation. The following two firms did not achieve the 75% overall pass mark and 50% in each of the evaluation criteria

1. China Wu Yi/ China Petroleum Engineering/Marson Integrated
2. 4D Engineering S.R.L. (Italy)/ Mayira Limited (Kenya).

Twelve (12) firms eventually qualified to proceed to the next stage of financial bid-opening.

The Results of the Preliminary and Technical Evaluation were communicated to all the bidders on 11<sup>th</sup> March 2015.

The results of the Technical Evaluation were read out at the financial bid-opening of 13<sup>th</sup> March, 2015 and were as follows:-

S/N	TENDERERS/PARTNERS	TENDER AMOUNT (USD)	FINANCIAL SCORE (%)	TECHNICAL SCORE (%)	OVERALL SCORE
1	WELDCON & VIJAY TANKS	134,404,691.59	50.93	91.00	78.98
2	SICHUANG HONGDA PETROLEUM & TISCO	75,980,543.01	90.09	82.25	84.60
3	PARESSAR & CENTRE STAR LTD	115,959,853.22	59.03	75.50	70.56
4	OFFSHORE INFRASTRUCTURE LTD & MELLECH	73,909,611.00	92.62	90.00	90.79
5	CIVION LTD & SINOPEC	68,454,567.28	100.00	86.25	90.38
6	CPEC & EMPRO MECHANICAL & ELECTRICAL ENGINEERING	76,548,005.60	89.43	92.00	91.23
7	TECHNOFAB ENGINEERING & PLANCON LTD	89,977,140.00	76.08	90.00	85.82
8	MAHATHI & SEYANI BROTHERS	83,034,858.00	82.44	90.75	88.26
9	CHINA PETROLEUM PIPELINE BUREAU & NYORO	77,014,625.00	88.89	86.50	87.22
10	TATA PROJECTS & LANDMARK HOLDINGS	78,989,887.00	86.66	89.00	88.30
11	CHEMIE –TECH & NARIANA	90,448,944.00	75.68	89.00	85.00
12	JGH/WMS/CNPCNE JV & PRIDE ENTREPRISES	78,995,147.54	86.66	98.50	94.95

The Tender Processing Committee recommended the award of the EPC tender to the partnership of JGH Marine A/S/Western Marine Services Ltd/ CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises Limited for USD 78,995,147.53 inclusive of 10% contingency and 16% VAT.

### **THE TENDER COMMITTEE'S DECISION**

The Tender Committee meeting of 17<sup>th</sup> March 2015 deliberated on the Financial Evaluation Report and made the award to the partnership of JGH Marine A/S/Western Marine Services Ltd/ CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises Limited for USD 78,995,147.53 inclusive of percentage contingency fee and all taxes.

Letters to both the successful and unsuccessful bidders were sent to all the tenderers on 18<sup>th</sup> March, 2015.

### **THE REQUEST FOR REVIEW**

This Request for Review was filed by the Applicant on 24<sup>th</sup> March 2015 and was heard to conclusion and a decision was first given by the Board in this matter on 21<sup>st</sup> April, 2015 nullifying the award of the tender to the successful bidder M/s J.G.H Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/ Pride Enterprises Ltd. The Board in it's place substituted the decision of the procuring entity to award the tender to the successful bidder with an award of the same to M/s Civicon Limited the Applicant herein on the

ground that the Applicant was the lowest evaluated bidder under the Provisions of Section 66(4) of the Public Procurement and Disposal Act 2005.

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The successful bidder was however dissatisfied with the decision of the Review Board and lodged Judicial Review application namely; **Nai H.C JR Appl. No. 137 of 2015= JGH Western Marine Services CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises =VS= The Public Procurement Administrative Review Board and 2 Others with the High Court in Nairobi.**

The said application was heard on its merits and in a Judgement dated 10<sup>th</sup> July 2015, the Honourable Justice Weldon Korir who heard the Judicial Review application allowed it and remitted back the Request for Review to the Board for re-consideration in the light of the findings made by the Court.

Pursuant to the orders made by the Judge remitting the Request for review for re-consideration, the Board reconvened for the hearing of the remitted application on 23<sup>rd</sup> July 2015 where the Applicant was represented by Mr. G.M. Nyaanga and Mr. Joseph Kahari Advocates, while the Procuring Entity was represented by M/s Glorai Khafafa Advocate. The successful bidder was on the other hand represented by Mr. Kennedy Ogeto Advocate.



Before the hearing of the remitted application, Counsel for the Applicant however filed a notice of additional submissions dated 22<sup>nd</sup> July 2015 in which the Successful Bidder sought to raise several issues, which in the Successful Bidder's view touched on the Board's jurisdiction to hear and determine the Request for Review. It is noteworthy to point-out at the onset of this decision that counsel for the Applicant took objection to the filing of the notice of additional submissions but in order to expedite the hearing of the Request for Review, the Board directed that it would allow counsel for the successful bidder to rely on the notice of additional submissions but would determine the issue of the validity of the additional submissions and depending on the determination on the issue of validity, the Board would thereafter proceed to determine the merits of the issues raised in the submissions in its final decision. When this Request for Review therefore came up for hearing before the Board for the second time, the following documents were before the Board for consideration.

- (i) The Request for Review filed by the Applicant herein which is dated 24<sup>th</sup> March, 2015 and which was filed with the Board on the same day.
- (ii) The response filed by the Procuring Entity with the Board on 2<sup>nd</sup> April, 2015 and which is dated 1<sup>st</sup> April, 2015.
- (iii) The Replying Affidavit which was sworn by one Sospeter Mwakoma on behalf of the Procuring Entity together with all the annexures thereto.

- (iv) A Replying Affidavit sworn by Mr. Andreas Gottrup on 8<sup>th</sup> April, 2015 on behalf of the Successful bidder.
- (v) The Further Supporting Affidavit/Statement sworn by Amit Patel dated 10<sup>th</sup> April, 2015 and which was filed with the Board on the same day.
- (vi) The notice of additional submissions on jurisdiction filed by the Successful bidder on 22<sup>nd</sup> July, 2015 together with the attached authorities.
- (vii) The written submissions filed by Counsel for the Applicant and Counsel for the Procuring Entity and Successful Bidder.

The Procuring Entity also supplied the Board with the original tender documents and all the other documents that a Procuring Entity is required to supply to the Board under the Provisions of Regulation 74(3) of the Public Procurement and Disposal Regulations 2006.

Mr. Nyaanga who appeared in this matter on behalf of the Applicant adopted his earlier submissions before the Board when the matter first came up for hearing and stated that the Applicant stood by its earlier position that the tender under consideration was an open tender where the award of the tender ought to have been made to the lowest evaluated bidder under the Provisions of Section 66(4) of the Act. He however submitted that instead of doing so, the Procuring Entity proceeded to award the tender to the bidder who had attained the highest combined technical and financial score thereby effectively using an award criteria that

was in contravention of the Provisions of the Act and which was reserved for the determination of the winner in a Request for Proposals method of procurement.

Mr. Nyaanga reiterated his earlier position that a Request for proposal is entirely governed by the Provisions of Sections 76 - 78 of the Act while the evaluation and the award criteria for an open tender was governed by the Provisions of Sections 50 - 71 of the Act.

Mr. Nyaanga further submitted that whereas the tender document outlined the proper criteria to be applied in technical evaluation, the award criteria set out under item 3.27 of the tender document was in conflict with the Provisions of Section 66(4) of the Act as it had purported to set out a criteria that contravened the express Provisions of the law and that it did not matter that such a criteria was contained in the tender document. He argued that even if the same was contained in the tender document, it ought to be ignored since it was contrary to statute. He therefore stated that the Board was therefore right in having awarded the tender to the Applicant which was the lowest evaluated bidder in terms of price.

Turning to notice of additional submissions filed Counsel for the Successful Bidder, Mr. Nyaanga submitted that this request for review was remitted back to the Board for re-consideration of specific issues which were set out in the Judgement of the Learned Judge. Counsel for the Applicant stated that the alleged issue of jurisdiction now sought to be introduced by the

successful bidder namely; whether the Applicant was a candidate or not was not before the Board in the first instance and was also not an issue raised before the High Court and was not therefore one of the issues remitted for reconsideration by the Court.

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Counsel for the Applicant further stated that the Applicant was the lead bidder for the proposes of this procurement and while referring to the letter at page 317 of the request for review, Counsel for the Applicant stated that it was in appreciation of this fact that the Procuring entity addressed the letter of notification to the Applicant that it's tender was unsuccessful. He further noted that that letter was not addressed to the Joint venture of Civicon Ltd and Synopec. Counsel for the Applicant also referred the Board to the letter at page 319 of the Request for Review which was a letter of notification addressed to the Applicant informing it that it's technical proposal had attained the minimum qualifying mark and that the Applicant was invited to attend the opening of the financial proposals. Counsel for the Applicant therefore stated that there was nothing wrong with the Applicant filing the Request for Review in it's own name.

Counsel for the Applicant therefore urged the Board to uphold it's earlier decision and award the tender to the Applicant since the Judge had left the final decision on the matter to the Board in his order of remission.

M/s Gloria Khafafa Advocate who appeared in this matter on behalf of the Procuring Entity submitted that under the Provisions of S.52 of the Public Procurement and Disposal Act 2005, the law empowers a Procuring Entity

to prepare tender documents setting out the criteria to be used in the evaluation of tenders and that once such a criteria had been included in the tender document, all bidders were bound to comply with it. Counsel for the Procuring Entity stated that under the Provisions of Section 52 of the Act, the law requires a Procuring Entity to not only set out the Procedures and the criteria to be used to evaluate and compare tenders but further that the issue of evaluation and the criteria set out thereunder was not the only requirement under the relevant Sections of the law and that the issue of comparison of tenders was an intergral part of the entire exercise.

Turning to the issue of comparison, Counsel for the Procuring Entity stated that this was to be found in Section 66(2) and (3) of the Act where the issue of evaluation and comparison is also mentioned and stated that under the Provisions of Section 66(2) of the Act, the comparison of tenders can only be done using the criteria set out in the tender document and no other criteria shall be used.

Counsel for the Applicant further submitted that under the Provisions of Section 66(3)(b) of the Act, each criteria must be expressed so that it is applied in accordance with the procedures taking into consideration the issue of price, quality and service for the purposes of evaluation. She stated that it would not therefore be right to only pick out the aspect of evaluation and fail to take into account price, quality and service. She further stated that on the issue of quality and service, these were to be weighed as per the needs of the procuring entity and the purpose of the procurement in the

first instance. She additionally stated that for this particular procurement, it's purpose is to be found at the beginning of the tender document namely at page 7 of page 296 and at page 8 of 296 of the tender document.

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Counsel for the Applicant further submitted that the project was meant to increase the Kenyan jet fuel capacity and that owing to the fact that the project is meant to serve International airlines it must pass the expectations of JIG and the LATA Regulations.

She stated that Section 52 of the Act allows a Procuring Entity to take into account International guidelines when preparing the tender documents. She therefore stated that in a project of this nature, one could not look at price alone or pick one set of the criteria to evaluate and then fail to compare and weigh it against the needs of the Procuring Entity. She concluded her submissions by stating that though the Applicant met the threshold and can build an aviation depot, she however stated that Judging from the criteria set out in the tender document, the depot if constructed by the Applicant would not serve the Procuring Entity's purpose and that to award the Applicant this tender would in her words **"land the Procuring Entity into a series of problems"**.

On the issue of the award criteria, counsel for the Procuring Entity urged the Board to take into account the award criteria set out in Section 3.27.2 appearing at page 35 of 296 of the tender document which in her view takes into account the issue of quality, price and service. On the issue of the

prices offered by the two bidders, counsel for the Procuring Entity submitted that both the prices of USD. 68,454,567.28 and USD 78,995,147.53 offered by the Applicant and the successful bidder respectively fell within the Engineers estimate of USD.83,145,333.93 for this project.

On the issue of Jurisdiction contained in the notice of additional submissions dated 22<sup>nd</sup> July 2015 and filed by Counsel for the successful bidder, Counsel for the Procuring Entity stated that the tender document under consideration was submitted by the joint venture of Civicon Ltd and Sinopec. Counsel for the Procuring Entity referred the Board to the written Power of Attorney in the tender document and stated that the Applicant was nominated as the lead bidder for the project. She further stated that the power of Attorney was given by Civicon Ltd to one Ben Kiilu . She further stated that the Power of Attorney appearing at page 22 of the Applicant's original bid document gave Benjamin Mutinda Kiilu and Jonathan Patrick Newman the power to execute, endorse, sign, initial and complete the request for proposals, bid, tender, expression of interest, and the bill of quantities in respect of the tender and that there was no power to institute proceedings.

On the issue of the notification letters being send to the Applicant and not the joint venture partners, Counsel for the Procuring Entity stated that the notifications had been directly addressed to the Applicant because it had been nominated as the lead bidder and that there was therefore nothing

wrong with the notifications being sent to only one member of the joint venture.

~~Counsel for the Procuring Entity finally submitted that the Procuring~~  
Entity would find itself in a difficult situation if the Board was to direct it to award the tender to the Applicant without the participation of Synopec and that since the two are separate legal entities, the Applicant would not assume that Synopec was still interested in the tender and further that Synopec should have been before the Board and should have indicated that it had given Civicon Ltd authority to file and proceed with the Request for Review.

Counsel for the Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review and to allow the procurement process to proceed.

Mr. Ogeto on behalf of the successful bidder associated himself with the submissions made by Counsel for the Procuring Entity and relied on the affidavit sworn by Mr. Andreas Gottrup on 8<sup>th</sup> April 2015 and which was filed with the Board on the same day together with the submissions made on behalf of the successful bidder when this matter first came up for hearing before the Board.

He submitted on the basis of paragraph 98 of the finding by the learned Judge, that the Judge faulted the Board for failing to take into account the



Provisions of Section 66(2) of the Act in so far as the award criteria set out in clause 3.27 of the tender document was concerned. He stated that the crux of the judgment was that the Judge directed the Board to look at the Provisions of the said clause against the Provisions of Section 66(2) of the Act and arrive at an appropriate decision after taking into account the provisions of the said clause 3.27 of the tender document. Counsel for the successful bidder further submitted that the other error that the High Court pointed out related to the failure by the Board to consider the entire Provisions of Section 66 of the Act and stated that the court took the view that the Board should not only have looked at the Provisions of the said Section 66(4) of the Act, but should have instead looked at the entirety of the provisions of Section 66 of the Act. Counsel for the successful bidder stated that under the Provisions of Section 66(3)(b) of the Act, a procuring entity was bound to take into account not just the issue of price, but should also consider the issue of quality and service while carrying out an evaluation and the award of a tender.

While commenting on the issue of the appropriate remedy if the Board found that there was a problem in the tender document, Counsel for the successful bidder conceded that if that was the case, the Board had the power to order for a re-tender but stated that in the circumstances of this procurement, there was no clash between Provisions of the tender document and more particularly the Provisions of Clause 3.27 with any of the Provisions of the Act.

Turning to the issue of Jurisdiction as set out in the notice of additional submissions on jurisdiction dated 22<sup>nd</sup> Jun 2015, Counsel for the successful bidder submitted that the bid by the Applicant was presented by the Applicant and Sinopec in a joint venture. He further submitted that under the Provisions of Section 3 and Section 93 of the Act, the Applicant could not lawfully file this application alone and that the same ought to have been filed by the joint venture of M/s Civicon Ltd and Synopec because it this joint venture that was the bidder for the purposes of this tender.

Mr. Ogeto while relying on the decisions cited in the notice of additional submissions and the additional list of authorities stated that the issue of whether a party was a candidate or not was an issue of jurisdiction which could be raised at any time and that the legal doctrine of estoppel could not apply where the issue for consideration was one of jurisdiction.

On the definition of who a candidate was under the Provisions of the Act, counsel for the successful bidder relied on the Board's decisions in the cases of *Hagar Construction Co. Ltd =vs= The Tender Committee Wajir South District*, *Gibb Africa Ltd/Canarall Consultants Inc =vs= Kenya Railways Corporation* and the case of *Inter-Security Services Ltd =vs= The Kenya Electricity Generating Company Limited*.

Counsel for the successful bidder therefore urged the Board to find that there was no proper party present before it and that since there was no

proper party before the Board, the Board therefore lacked the jurisdiction to entertain the purported proceedings.

In a brief response to the submissions made by both counsel for the procuring entity and by Counsel for the successful bidder, Mr. Nyaanga stated that what the two parties had stated, namely; that the Applicant was not a candidate ought to have either been raised when this matter first came up for hearing before the Board or in the High Court. Counsel for the Applicant submitted that the question of whether a bidder in a joint venture agreement was a candidate or a proper party to any proceedings is not an issue of jurisdiction which can deprive the Board of the jurisdiction conferred upon it under the Act. He reiterated his earlier submissions that having failed to raise the issue initially, counsel for the Applicant had acquiesced and could not now turn back very late in the day and seek to raise the issue after the matter had been remitted back by the High Court for reconsideration.

While responding to the submissions by Counsel for the procuring entity's that Section 66(3)(b) of the Act enjoins a procuring entity to take into account the issue of price, quality and service, counsel for the Applicant stated that the procuring entity had done so in the tender document and that is why it had placed a cut off mark of 75% before any bidder could proceed for financial evaluation. He submitted that the Applicant passed this threshold and that is why it was invited for financial evaluation. He

therefore stated that the submission by Counsel for the Procuring Entity that the Applicant could not be able to effectively carryout the subject project was not correct. Mr. Nyaanga concluded his submissions by re-stating that the provisions of Sections 50 to 71 of the Act must apply in an open tender and cannot be excluded. He therefore urged the Board to reach the same decision as it had reached in it's 1<sup>st</sup> decision and award the tender to the Applicant.

Only one other interested party namely M/s 4D Engineering S.R.L (Italy) Mayira Limited (Kenya) appeared in the proceedings before the Board through it's Director Mr. Pancras Oyatsi. When the Board invited Mr. Oyatsi to make representations on the issues involved, he stated that he did not wish to participate in the proceedings and that he did not therefore have any comments to make in support or opposition to the submissions made by any of the parties.

### **THE BOARD'S FINDINGS ON THE ISSUE OF JURISDICTION**

The Board has heard and considered the submissions made before it by the Advocates who represented the parties in this Request for Review. The Board has also considered all the documents that were placed before it and the original tender documents and finds that although the parties to the review spent a considerable amount of time on this matter, the re-hearing of the matter was necessitated by the Judgement given by the High Court in Judicial Review application No. 137 of 2015. The Board has read through the entire Judgement delivered by the Honourable Judge on 10<sup>th</sup> July 2015

where the Judge pointed out several errors on the part of the Board and on the basis of which he re-mitted the matter back to the Board for reconsideration. The Board has considered the issues raised by the Judge but before dealing with the said issues, the Board will first consider whether it has the jurisdiction to re-hear this matter on the basis of the successful bidders contention that the Applicant was not a candidate for the purposes of filing this Request for Review under the Provisions of Sections 3 and 93 of the Public Procurement and Disposal Act 2005.

As the Board has already observed, this objection was introduced into the proceedings on 22<sup>nd</sup> July 2015 and was not raised when this matter first came up for hearing before the Board for the first time. This issue was also not raised in the proceedings before the High Court. The Board wishes to observe that from the decision that was delivered by it on 21<sup>st</sup> April, 2015 during the first hearing of the Request for Review, the only issue of jurisdiction that was raised by the Procuring Entity was that the Applicant's request for review had been filed out of time and that the Board did not therefore have jurisdiction to hear and determine the matter. The Board heard the arguments on this jurisdictional issue and dismissed it.

It is clear from the Judgement delivered by the Judge that none of the parties and more particularly the successful bidder and or the Procuring Entity took issue with both the Board's and the High Court's jurisdiction to hear the dispute before any of the two forums on the ground that the

Applicant was not a candidate in the subject tender. It is on this basis that the Court proceeded to grant the successful bidder relief against the same Applicant which was named as the 1<sup>st</sup> Interested Party in the proceedings before the High Court.

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The Board wishes to observe that an issue of jurisdiction is one of the foremost grounds on the basis of which a party can challenge the decision of a tribunal in judicial review proceedings before the High Court but both the successful bidder and the procuring entity did not challenge the Board's decision in the High Court on the basis that the Applicant before it was not a candidate within the meaning of the Provisions of Sections 3 and 93 of the Public Procurement and Disposal Act 2005.

The result of that failure was that the High Court did not remit the Board's decision for reconsideration to enable it review and make a decision on whether the Applicant was a candidate for the purposes of the proceedings before the Board.

The Board has also considered the foundation upon which the argument that the Applicant was not a candidate was made and this was namely because the Applicant had submitted its bid for this tender in joint venture with M/s Sinopec who had not participated in the proceedings both before this Board and the High Court.

It was however common ground among all the parties to this request for review that there existed a joint venture agreement between Civicon Ltd and Sinopec in which Civicon Ltd was the lead bidder. It is evident from all the available evidence that the Procuring opted to deal directly with the Applicant on the very critical aspects of service of notifications. A notification is what under the Provisions of Section 93 of the Act and Regulation 73 of the Public Procurement and Disposal Regulations 2006 triggers the process of lodging a request for review before the Board. The Board wonders how Sinopec which had not been served with a notification could have filed or joined a request for review without a notification from the procuring entity.

The Board additionally finds as was also conceded by Mr. Ogeto, that this was a unique case and that even he himself did not have any authority to support the position that any member of joint venture and who had participated in a tender process as a member of a joint venture cannot challenge the outcome of the process just because the joint venture partner was not joined into the proceedings.

The Board therefore finds on the basis of all the above findings that the objection taken by the successful bidder on this ground fails and will consequently proceed and address the issues that were remitted to it by the High Court for consideration.

## THE BOARD'S FINDINGS ON THE ISSUES REMITTED TO IT FOR CONSIDERATION

~~As the Board has already stated in this decision, the Board has read~~ through the decision given by the High Court and finds on the basis of the court's findings at paragraphs 97, 98 and 106 that the court found that the Board acted in error by failing to take into account the provisions of Section 66(2) of the Provisions of the Public Procurement and Disposal Act 2005 and the criteria for award set out under clause 3.27.2 of the tender document.

The Judge made two further significant findings in his decision which appear at paragraphs 99 and 109 of his decision where the Judge held that if the review Board had found that the criteria set out in the tender document was faulty, then the proper remedy would have been for the Board to order for a retender. The Judge also agreed with the Board that owing to the nature of the project in question, it was important that the subject procurement be concluded expeditiously.

As already stated above, the crucial parts of the court's decision that will ultimately inform the outcome of this matter appear at paragraphs 97, 98, 106 and 109 of the Court's judgment and owing to the importance of the said findings, the Board has found it necessary to reproduce them verbatim.



98: I have intentionally reproduced the decision of the review Board in Order to show that it completely failed to take into consideration S.66(2) of the PPDA. Not only did it fail to do so but it also ignored clause 3.27 of the tender document which specifically stated that:-

3.27 Award

The award of the tender shall be qualify and cost base selection as follows;

- (i) The technical score shall carry a weight of 0.7.
- (ii) The financial score shall be subjected to a weight of 0.3.
- (iii) The financial score shall be computed as follows; the lowest bid price  $x$  shall be computed as follows; the lowest bid price,  $X$  shall attract 100% score in the financial evaluation. Any other bid price, shall attract a financial score = (lowest bid price,  $x$  (bid price)  $\times$  100%).
- (iv) The bidder's final score shall be the summation of the weighted technical and the financial scores.

3.27.2 Subject to clause 3.27.3 KPC will award the contract to the tenderer whose tender is determined to be substantially responsive to the tender documents and who has the highest evaluated combined weighted score

subject to possessing the capability and resources to effectively carry out the contract works.

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3.27.3 KPC reserves the right to accept or reject any tender and to annul the tendering process and reject all tenders, at any time prior to award of contract, without thereby incurring any liability to the affected tenders.

3.27.4 The successful tender shall be the tender with the highest Evaluated combined weighted score."

106: The PP&DA and the Regulations bequeath the onus of amending a Tender document on a procuring entity. When the review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses it's statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of it's parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it is exercised for legitimate purposes. In the instant case, the Review Board exceeded it's authority by purporting to read it's own words in the tender document. If the tender document was defective, then the only order that

was available to the Board was to direct the P.E to commence the tender process afresh."

108: The exparte Applicant also prayed for an order of mandamus directed at the P.E to enter into a contract with the consortium in respect to tender in question. In this prayer, I find that the court would be usurping the powers of the Review Board were it to do so. I therefore decline to grant the prayer."

109: *However, I agree with the Review Board that there is need to finalize this procurement without further delay. Re-tendering will take time and will end up delaying the project which is important to the economy of this country. In the circumstances, i will remit the matter to the Review Board so that it can review it's decision in the light of the findings of this Court and make any orders it deems appropriate. In doing so it is important to give an opportunity to the parties involved to highlight their cases in light of this decision. The review Board shall proceed with the new mater within the time frame set for the disposal of a request for review."*

The Board has reproduced the above extracts from the Judgement of the learned Judge to demonstrate that the Judge made specific findings which in his view centred around the criteria for the award of the tender and more particularly the Provisions of Clause 3.27 of the tender document.

The second instructive finding by the Judge and which will determine the final nature of the orders that the Board should make in the circumstances of this case is the court's finding in paragraph 109 namely that there is need ~~to finalize this procurement without further delay and that retendering~~ may take time and will end up delaying the project which is important to the economy of this country.

It is however necessary at this point to set out the place of the High Court's decision and findings vis-avi the position of the Board as an inferior body to the High Court.

Under the legal doctrine of *stare decisis* any tribunal is bound by the decisions of the High Court, which is in turn bound by the decisions of the Court of Appeal in the same way that the later is bound by the decisions of the Supreme Court.

The binding nature of the decisions of the High Court or anyother court which is higher in the legal highreachy to a tribunal and anyother bodies that are subordinate to it has been the subject matter of along line of decisions both of the High Court and the Court of Appeal as demonstrated by the following decisions among others.

In the case of **Mwai Kibaki -vs- Daniel Toroitich Arap Moi & Two Others Civil Appeal NO. 172 of 1999** the Court of Appeal stated as follows:-

- a) *That the High Court has no power to overrule the Court of Appeal.*
- b) *The High Court has no jurisdiction to flout the first principles of precedent and stare decisis and*
- c) *That the High Court; while it has the right and indeed the duty to critically examine the decisions of this court it must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as the obiter dictum if applicable"*

The foregoing demonstrates the strictness of the principles of precedent and *stare decisis*.

The Honourable Justice Mohammed Ibrahim restated this position in the High Court case of **Beth Wanjiru Mulinge -vs- James Mutonga Mulinge** (Mombase HCC No. 542 of 2000 in the following words:-

*"Applications of written or statutory Provisions that are mandatory cannot be the subject of discretion. The Court must apply written or statutory law as its core function and duty. Secondly, a court of law is bound by the doctrine of precedent and stare decisis. In the Kenyan context the Magistrate's Courts are bound to follow and apply the decisions of the High Court. On it's part the High Court is bound and must follow and apply the decisions of the court of appeal. There is no two ways about this. This is not a matter of discretion. The only exception is where the inferior court to the other is able to distinguish the facts when applying the law".*

All the above decisions which are binding on the Board show that the Board has no option but to abide by the findings of the High Court in Judicial Review application No.137 of 2015 whose salient holdings the Board has already set out above.

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One of the findings that the High Court made in its Judgement was the finding that the Board did not take into account the Provisions of the tender document on the award criteria.

The Board has examined the award criteria set out in the tender document and which appears at the printed pages 34 and 35 of the tender document against the Provisions of Section 66(2) of the Act and notwithstanding the view earlier taken by the Board when this Request for Review first came up before it and in view of the decision of the High Court and which is binding on the Board under the doctrine of *stare decisis* the Board has considered the criteria of award set out in the tender document and which is spelt out under clauses 3.27.2 and 3.27.4 which stipulate as follows:-

3.27.2 Subject to clause 3.27.3 KPC will award the contract to the tenderer whose tender is determined to be substantially responsive to the tender documents and who has the highest evaluated combined weighted score subject to possessing the capability and the resources to effectively carry out the contract works.

3.27.4 The successful tender shall be the tender with the highest  
Evaluated combined weighted score."

It was not in dispute when this matter came up for hearing both in the High Court and at the re-hearing before the Board that the method used by the procuring was that of an open tender which is governed by the provisions of Sections 50 to 71 of the Public Procurement and Disposal Act 2005.

Under the Provisions of Section 52 of the said Act as read together with the Provisions of Section 34 of the Act, every Procuring Entity is required to prepare tender documents in accordance with the Provisions of Section 52 and 34 of the Act and the Regulations made thereunder.

Section 52 of the Act requires that the tender document must provide for the procedures and the criteria to be used in the evaluation and comparison of tenders while Section 66(2) of the Act provides as follows:-

66(2) The evaluation and comparison shall be done using the  
procedures and criteria set out in the tender documents and no  
other criteria shall be used.

In view of the above Provisions of the tender document and the Act, the Provisions of Section 66(2) of the Act and the High Court findings on the award criteria and the Court's further finding that retendering may not be

the appropriate remedy for the Board to order in the circumstances of this review, the Board is left with no other option but to find that the party which was qualified for the award of the tender as per the tender documents was the bidder who attained the highest weighted score upon taking into account the combined weighted score for both technical and the financial evaluation as provided for in the tender document.

The Board has looked at the minutes of the tender evaluation committee and the tender committee and has established that the winning bidder was therefore the successful bidder in this Request for Review **M/s JGH Marine A/S Western Marine Service Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Price Enterprises** which attained a financial score of 86.66% and a technical score of 98.50% thereby attaining a combined weighted total score of 94.95%.

### **FINAL ORDERS**

In view of the Board's findings and in line with the High Court's findings and directions in Judicial Review Application number 137 of 2015, the Applicant's request for review therefore fails and in the exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Public Procurement and Disposal Act 2005, the Board makes the following orders on the re-mitted Request for Review.



*(a) For the reasons given by the Board in this decision, the Applicant's Request for Review dated 24<sup>th</sup> March 2015 and which was filed with the Board on 24<sup>th</sup> March 2015 hereby fails and is dismissed.*

*(b) The award of the tender for the construction of an aviation fuel depot at the Jomo Kenyatta International Airport, Nairobi (Green field) (Contract number SU/QT/786/N/14 to the successful bidder is hereby upheld.*

*(c) Owing to the time taken and in view of the fact that the award the subject matter of this tender was made on 18<sup>th</sup> March 2015 which is a period of more than Fourteen (14) days from the date of the award, the Board directs that the Procuring Entity shall conclude the subject Procurement including the signing of a contract in terms of Section 68 of the Act forthwith.*

*(d) In view of the fact that the Applicant was successful in resisting the Preliminary objection raised by the Applicant and was therefore partly successful in this application the Board Orders that each party shall bear it's own costs of this request for review.*

Dated at Nairobi on this 27<sup>th</sup> day of July, 2015.

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CHAIRMAN  
PPARB

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SECRETARY  
PPARB

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