



REPUBLIC OF KENYA
IN THE PPP PETITION COMMITTEE AT NAIROBI
PETITION NO. 1 OF 2019

BETWEEN

**MOTA-ENGIL ENGENHARIA E CONSTRUCAO AFRICA, S.A.,
ORASCOM CONSTRUCTION,
EGIS PROJECTS S.A, and
AFRICAN INFRASTRUCTURE INVESTMENT FUND 3 PARTNERSHIP
CONSORTIUM.....PETITIONERS**

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

BEFORE:

- | | | |
|-------------------------------------|----------|--------------------|
| 1. JAMES M. KIHARA | - | CHAIRPERSON |
| 2. LEDISHAH JEBICHII KIPSEII | - | MEMBER |
| 3. BEATRICE NYABIRA | - | MEMBER |
| 4. MAURICE DE SOUZA | - | MEMBER |
| 5. PAUL KAREKEZI | - | MEMBER |

DECISION

1. This Petition dated 8th March 2019 has been filed by the Petitioners seeking a review of the decision of the Kenya National Highways Authority of 27th February 2019 in the matter of Tender Number: KeNHA/PPP/1689/2017.
2. The Petitioners are a consortium made up of African Infrastructure Investment Fund 3 Partnership, Egis Projects S.A, Mota-Engil Engenharia E Construcao Africa, S.A and Orascom Construction ("the Consortium of ALLM, Egis, Mota-Engil and Orascom") and is represented by the firm of LJA Associates LLP Advocates.
3. The Respondent is a body established under Section 3 of the Kenya Roads Act No. 2 of 2007 with the mandate of management, development, rehabilitation and maintenance of national roads.
4. The Petition is broadly based on the grounds of alleged non-compliance and material non-disclosure. It is supported by the affidavit of Mr. John Kaigua Kimotho.
5. The Respondent filed its replying affidavit sworn on 14th March 2019 by one Eng. George Kiiru, the Deputy Director, Public-Private Partnerships Department of the Respondent.
6. In exercise of its statutory mandate the Respondent commenced the Tender process to undertake widening, improvement and operation and maintenance of various sections of highway between Nairobi and Mau Summit through a Public Private Partnership arrangement on a Design, Build, Finance, Operate, Maintain and Transfer basis (hereinafter "Tender or Bid").

7. It is the Petitioners' case that the Respondent did not comply with the provisions of the law and that the Respondent wilfully disregarded the processes outlined in the Request for Proposals ("RfP") and entrenched in the Constitution of Kenya 2010, the Public Private Partnership Act 2013 ("PPP Act"), the Public Private Partnership Regulations, 2014 ("PPP Regulations") and the Fair Administrative Action Act, 2015 ("FAA Act").
8. Further, the Petitioners alleged that the Respondent engaged itself in a non-transparent bidding process to the detriment of the Petitioners in breach of Sections 2, 4, 6 and 7 of the FAA Act. This conduct, it is alleged, impeded fair competition in the bidding process and compromised the integrity, transparency, accountability and confidence in the bidding process contrary to the PPP Act and PPP Regulations to the prejudice of the Petitioners.
9. According to the Petitioners, the Respondent failed to disclose material information as to why the former were selected as the Reserve Bidder and not the Preferred Bidder. It is their case that the Respondent did not confirm the Preferred Bidder's accurately evaluated Net Present Value (NPV) as compared to that of the Petitioners, and neither did it disclose the quarterly charges quoted by both the Petitioners and the Preferred Bidder and therefore, the conduct of the Respondent impeaches the integrity, fairness and transparency of the procurement process in breach of Sections 6 and 7 of the FAA Act, the fundamental rights envisaged under Article 227 of the Constitution and all basic tenets of fair procurement process.
10. The Petitioners complain that as a consequence of the Respondent's decision, they are required to summarily and unconditionally accept being assessed as the Reserve Bidder within 21 days of the Notification

Letter, without being accorded any information on the process of evaluation, despite the Petitioners' request for the same and therefore being coerced into accepting the bidding outcomes. The Petitioners allege that they had a legitimate expectation that the proposed Quarterly Charges by all bidders would be disclosed, but this was not the case.

11. By acting in breach of Article 227 of the Constitution which requires that all procurement by any state organ or public entity must be conducted in a manner that is fair, equitable, transparent, competitive and cost effective, the Respondent, according to the Petitioners, has deviated from the clearly stipulated statutory process without valid or lawful cause and therefore the process has been shrouded in mystery, making it susceptible to manipulation.
12. The Petitioners aver that the conduct of the Respondent has impeded the Petitioning Consortium's efforts to freely and fully exercise their rights to execute a proper and comprehensive review of the bidding process and its outcomes which review will undoubtedly shed more light on the manifest irregularities outlined above should the Respondent be legally compelled by this Committee to provide the said Tender records or further information.
13. In view of the above, the Petitioners have sought Orders from this Committee, that:
 - (a) *the decision of the Respondent dated 27th February 2019 be declared irregular, unfair, unprocedural and unlawful;*
 - (b) *the decision of the Respondent dated 27th February 2019 be annulled in its entirety;*
 - (c) *the Evaluation Report that informed the decision of the Respondent dated 27th February 2019 be reviewed in its entirety and the Respondent be directed to conduct the evaluation in strict accordance with the law;*

- (d) *in the alternative, the Respondent be directed to declare the Petitioning Consortium as the Preferred Bidder; and*
- (e) *the Petition Committee do make any further orders that it deems just and expedient to achieve the ends of justice as mandated by law.*
14. On the other hand, the Respondent averred that both bidders met the technical evaluation requirements and were subsequently invited to the opening of their financial proposals. It has been disclosed that the Petitioners' financial proposal has an NPV of KShs 194,975,130,000/- whilst that of the Preferred Bidder has an NPV of KShs 159,499,760,000/-. The financial proposals were subjected to detailed evaluation in accordance with Clause 8.3 of the Tender document and in full compliance with the requirements of section 48 of the PPP Act.
15. Following conclusion of the Tender evaluation process the Respondent prepared an evaluation report pursuant to Section 49(1) of the PPP Act which report was duly approved by the PPP Committee in accordance with Section 49(2) of the PPP Act. Upon approval of the evaluation report, the Respondent duly notified the bidders of the outcome of the evaluation process vide letters of notification dated 27th February 2019.
16. The Respondent has pleaded that the Petition which was lodged and served on the Respondent on 11th March 2019 is incompetent and a nullity and ought to be struck out for the reason that the John Kaigua Kimotho who lodged the Petition is not the authorised representative of the Petitioners, and argued that the Petition ought to have been signed by the Authorised Representative as indicated in the Tender.
17. With regard to the Petitioners' complaint about non-compliance, the Respondent averred that except for the instance where the information requested in the letter dated 5th March 2019 was not

provided, the Petitioners do not fault the Respondent's conduct in the procurement process and have duly acknowledged this at paragraph 2.5 of their Petition that the subject Tender process was conducted transparently.

18. The Respondent has stated that the procurement process was done in accordance with the law and procedure provided in the RfP. Further, in response to the Petitioners' allegation that the Respondent is in breach of the FAA Act, the Respondent averred that under Section 4(6) of the FAA Act it is duly mandated to follow the procedure set out in the applicable law, namely, the PPP Act and the PPP Regulations in carrying out the procurement process.
19. With regard to confidentiality, the Respondent's case is that it has an obligation to preserve the confidentiality of the Tender evaluation process. In support of this averment the Respondent relies on Regulation 40(5) of the PPP Regulations as well as Clause 9.1 and the Conduct of Procurement Undertaking of the RfP.
20. Together with the Replying Affidavit, the Respondent also filed a preliminary objection dated 18th March 2019 on whether: (i) this Committee has jurisdiction to entertain this Petition; and (ii) John Kaigua Kimotho has *locus standi* to institute this Petition on behalf of the Petitioners.
21. In view of the foregoing, the Respondent avers that the Petitioners are not entitled to the prayers sought in the Petition, which has been filed solely to delay the procurement process in the subject Tender.

22. This Committee has carefully considered the pleadings, the submissions and authorities of the parties, as well as documents placed before it and has isolated the following issues for determination.

Issue No. 1 - Whether this Committee has jurisdiction to entertain this Petition in light of the Access to Information Act and Article 35 of the Constitution.

23. The Respondent in its Preliminary Objection is of the view that this Committee lacks jurisdiction to entertain this Complaint. Jurisdiction is everything and we have to address this issue from the onset.
24. The gist of the objection by the Respondent as can be discerned from the Respondent's case and specifically the Preliminary Objection dated and filed on 18th March 2019, is that the provisions of Article 35 of the Constitution are only available to citizens who are natural persons but not the Petitioners, who are juristic persons. It was also stated that the Petition is pre-mature since the ATI Act confers an oversight and enforcement role as regards the right to information on the Commission of Administrative Justice (CAJ).
25. The complaint by the Petitioners is in the nature of the right to information and also the right to fair administrative action. Reference has been made to both statutes. We shall therefore look at the provisions of both statutes.
26. The relevant sections of the FAA Act are as follows: -

Section 6 (1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her

application for an appeal or review in accordance with Section 5.

Section 6 (5) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure.

Section 7 (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to (a) a court in accordance with Section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

27. The Petitioners' complaint or request for review, in a nutshell, is about non-compliance, non-disclosure and breach of Article 227 of the Constitution. These matters are in the nature of administrative action taken by the Respondent. Section 7 above directs a party who feels that he has been unfairly treated to lodge his complaint in the High Court or a Tribunal. The Petitioners have filed this Petition with this Committee seeking redress and this was indeed the correct procedure. Section 7 of the FAA Act has clothed this Committee with the requisite jurisdiction to entertain this complaint and this forum is without doubt the right place to lodge the complaint. Section 6(5) gives discretion to the Respondent to decline to furnish information if it is reasonable and justifiable in the circumstances.
28. The other law that the parties made reference to is Article 35 of the Constitution and Section 4(1) of the ATI Act which is a replica of the provision in the Constitution.

Section 4 (1) Subject to this Act and any other written law, every citizen has the right of access to information held by-

(a) the State; and

(b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

29. The Respondent in its responses and submissions contended, first, that the Petitioners are not citizens being juristic persons and therefore cannot access information under Article 35(1) (a) of the Constitution contending that this right is limited to citizens only. This issue has been deliberated by the High Court in the case of **Nairobi HCCC. No. 278 OF 2011 Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others [2013] eKLR** and **Nairobi Petition 43 of 2012 Famy Care Limited v Public Procurement Administrative Review board & another & 4 others [2013] eKLR**.
30. The issue of the right under Article 35 being available to juristic persons has recently been addressed by Justice Mwita in **Nairobi Petition No 468 of 2017 Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR**. The court held that *"It is noteworthy, however, that both decisions by Mumbi Ngugi J and Majanja J in the above cases came before the enactment of the Access to Information Act, in 2016. Section 2 of the Act defines a citizen as "any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens." From the above definition, a juristic person whose director(s) is a citizen, is considered a citizen for purpose of exercising the right to access to information under Article 35(1)(a) of the Constitution as read with section 4 of Access to information the Act."*

31. The import of this latter decision by Justice Mwita, which this Committee embraces, does not assist the Respondent in that Article 35 of the Constitution can be a right that accrues to a private entity. However, it should be noted that the entity referred to in the ATI Act ought to be in the control of Kenyan citizens. It is not in dispute that the consortium comprising the Petitioners is made up of entities which are controlled by non-Kenyan citizens. This by extension means that the Petitioners cannot claim a right under Article 35.
32. In any event both the ATI Act and the FAA Act require the public entity to provide the information within 21 days and 30 days respectively. The PPP Act Section 67 gives a private party a maximum of 15 days within which to lodge a complaint. Should the Petitioners seek information or reasons for administrative action under the ATI and the FAA Acts, then the Petitioners would be clearly statutorily time barred under the PPP Act.
33. In view of the aforesaid, this Committee holds that it has jurisdiction to entertain this Petition but also finds that Article 35 of the Constitution is not available to the Petitioners.

Issue No. 2 - Whether John Kaigua Kimotho has *locus standi* to institute this Petition on behalf of the Petitioners.

34. The Respondent in his Preliminary Objection states that the Petition is lodged by a stranger to the Tender process and by extension the signatory to the Petition (**John Kaigua Kimotho**) does not have the capacity or authority to act on behalf of the Petitioners.
35. John Kaigua Kimotho has described himself as an investment professional employed by the Investment Manager of Africa

Infrastructure Investment Fund 3 Partnership, which is one of the Petitioning Consortium partners. His authority to file the Petition, he avers, stems from a Power of Attorney (PoA) attached to the Petition. On the other hand, exhibited in the Petition bundle is a PoA granted to **Joao Vasco Alves dos Reis**.

36. Faced with these two Powers of Attorney, the Respondent submitted that Mr. Reis is the lawful attorney and Mr. Kimotho cannot be granted any authority to act as attorney. It is this Mr. Reis, who according to the said Respondent, ought to have executed the Petition documents.
37. To enable this Committee deal with this issue it is prudent to look closely at the wording of the two documents. The PoA donated to Mr. Reis states that he is:

"to do all such acts, deeds and things as are necessary or required in connection with or incidental to submission of the bid for the Nairobi-Nakuru-Mau Summit being developed by KeNHA including but not limited to signing and submission of all applications, bid, undertakings and other documents and writings, participate in pre-bid meeting, CD meetings and any other meetings or conferences as organised by KeNHA in respect of the Bidding Process, to hold discussions and to negotiate the terms and conditions of the Bid with KeNHA, to provide information/responses/clarifications to KeNHA, representing us in all matters before KeNHA, signing and execution of all contracts including the Final Project Agreement and undertakings consequent to acceptance of our Bid, and generally dealing with KeNHA in all matters and performing all such activities and executing all such documents in connection with or relating to or arising out of the Bid for the said Project

and/or upon award thereof to us and/or fill entering into of the Final Project Agreement with KeNHA."

38. The PoA given to Mr. Kimotho is limited to 6 months from the date of signature or the finalisation of this Petition in relation to the decision of the Contracting Authority of 27th February 2019. The PoA grants authority to the Donee to:

" accept service of any legal process; appear and represent the consortium in any Kenyan court or tribunal and before all judicial or other offices in the Republic of Kenya whomsoever as the agent shall consider advisable; institute action in the consortium's name, to make any demand or claim and to commence and conduct any petition, review, action or other proceedings in any court or tribunal in the Republic of Kenya in relation to the decision of the Kenya National Highways Authority (KeNHA) (Contracting Authority) of 27th February 2019 in the matter of Tender number: KeNHA/PPP/1689/2017 and to prosecute, discontinue, compromise, terminate or abandon such petition, review, action or proceedings as the agents shall see fit."

39. It is clear that each of these PoAs are designed for a specific purpose. The PoA granted to Mr. Reis is clearly limited to authority required to participate in the Tender process. The one donated to Mr. Kimotho is very specific to filing this Petition. The Tender process is still on-going as at the date of this Decision. The question is whether Mr. Reis is the appropriate person to lodge the petition in place of Mr. Kimotho? Our answer is in the negative. The PoA donated to Mr. Reiss is clearly for management of the procurement process whilst the one granted to Mr. Kimotho is for the sole purpose of agitating court action. Mr.

Kimotho need not have been a participant in the Tender process for him to initiate this Petition. In any event, he has deponed in paragraph 1 of his supporting affidavit that he participated in the Petitioning Consortium's Bid from inception. This fact is not disputed.

40. We also hold that, since the two PoAs are completely independent of each other, then the form and substance of Mr. Kimotho's PoA need not comply with the form and substance stipulated in the RfP document.
41. The other complaints regarding the PoA given to Mr. Kimotho are related to want of form. This Committee is cognisant of Article 159 (d) of the Constitution which states that justice shall be administered without undue regard to procedural technicalities.
42. Be that as it may, the PoA granted to Mr Kimotho is clearly not notarised despite the donors being situated outside Kenya. Additionally, of the four donors only one has inserted the venue and date of signature. The four donors are donating on behalf the entities forming the consortium. There are no accompanying board resolutions.
43. These omissions are not mere procedural technicalities and go to the root of the validity of the PoA. We find these omissions to be fatal to the Petition and totally incurable. Without a valid PoA the Petition cannot stand.
44. In view of the above, this Committee does not agree with the Respondent that Mr. Kimotho is a stranger and not competent to lodge this Petition. However, the Preliminary Objection is sustained on the ground that the PoA granted to Mr. Kimotho is defective. This

notwithstanding, the Committee has also considered the other issues arising from this Petition.

Issue No. 3 – Whether the Petitioners are entitled to disclosure of the information sought.

45. Based on their Petition, written and oral submissions, the Petitioners' complaints centre around the Respondent's alleged non-compliance and material non-disclosure. These allegations are based on lack of reasons in the Respondent's letter of 27th February 2019 for the Petitioners being ranked the Reserve Bidder and the Respondent's failure to respond to the request made by the Petitioners in their letter dated 5th March 2019.
46. The information sought in the Petitioners' letter dated 5th March 2019 included: (i) an outline evaluation of the two bids; (ii) confirmation that the evaluation process was strictly in compliance with the requirements of the RfP and the law and was endorsed by the Attorney General; (iii) clarity on the information on the estimated value of the project allegedly provided by the Respondent as published in a local daily; and (iv) provision of a copy of the notice issued to the Preferred Bidder.
47. Subsequently, the Petitioners sought to be provided with further documents comprising the following, by way of an oral application before this Committee: (i) *evaluation report and its conclusion*; (ii) *Transaction Advisor's report*; (iii) *the PPP Unit Report*; (iv) *the PPP Committee's decision*; (v) *the award letter to the Preferred Bidder*; (vi) *details of any post-bid clarifications sought by the Respondent and replies received*; and (vii) *any relevant third-party reports on the bids*

relating to compliance and responsiveness that were considered if not already captured.

48. At this juncture we note that despite the Petitioners' requests at paragraphs 46 and 47 above, the same do not form part of the Petitioners' prayers in this Petition.
49. It is trite law that parties are bound by their pleadings and prayers and the Committee can only consider what has been prayed for. The Petitioners having not prayed for an order for disclosure, the Committee cannot grant it.
50. The Committee is of the view that the nature of the documents sought at this stage of the procurement process fall under the limitations set out in Sub-Sections 6(1)(e) and 6(1)(g) of ATI Act. However, consideration could be given to the Petitioners' request under the provisions of Section 56 of the PPP Act following completion of negotiations.
51. In addition, the Committee is persuaded by the Respondent's arguments that the Petitioners are bound by their Conduct of Procurement Undertaking wherein the Petitioners undertook to be bound by the confidentiality clause of the RfP (Sub-Clause 9.1), which prohibits the Respondent from disclosing any information submitted to it as part of the Bid process by a pre-qualified bidder prior to Financial Close.
52. Public-Private Partnership procurements are governed by the PPP Act, PPP Regulations and the RfP. These three do not place an obligation on the Respondent to communicate with the Reserve Bidder at this stage of the Bid process, except where the Respondent may require the

Reserve Bidder to extend the validity of its bid or bid security pursuant to section 52(1) (b) of the PPP Act and Clause 6.2.2 of the RfP.

53. The Respondent is only required to communicate the outcome of the procurement process to the bidders under Section 56(3) of the PPP Act. This obligation comes into effect after conclusion of negotiations with either the Preferred Bidder or the New Preferred Bidder.

Issue No. 4 – Whether the Petitioners are entitled to the prayers in their Petition.

54. The Petitioners have sought several substantive prayers, namely, that the Respondent's decision communicated vide its letter dated 27th February 2019 be annulled for being irregular, unfair, unprocedural and unlawful. The Petitioners have also sought the review of the evaluation, and in the alternative that they be declared the Preferred Bidder.
55. The Petition is largely hinged on grounds of non-disclosure, the trigger being failure by the Respondent to reply to the Petitioners' letter dated 5th March 2019. This letter sought information regarding various aspects of the procurement process, and was later augmented by Counsel for the Petitioners before this Committee.
56. It is clear to this Committee that the Petitioners were seeking material to be able to support their Petition. Paragraph 2.8 of the Petition also leads to this conclusion.
57. Though the Petitioners appear to be seeking information regarding the procurement process, they have not prayed for the same in this Petition.

58. The Petitioners have also not demonstrated to this Committee the law, procedure or provisions of the RfP that were breached by the Respondent.
59. In view of the foregoing, the Committee finds that the Petitioners have not proved any of the prayers sought and the same are therefore denied *in toto*.

Issue No. 5 - Who is to bear the costs of this Petition?

60. In view of the public interest nature of this Petition, each party shall bear its own costs.

Orders

In consideration of the issues determined above, this Committee makes the following Final Orders:

Preliminary Objections


- (a) This Committee holds that it has jurisdiction to entertain this Petition.
- (b) The Petitioners are not entitled of the benefit of Article 35 of the Constitution and Section 4 of the ATI Act.
- (c) The Power of Attorney annexed to the Petition is fatally defective and the Petition is hereby struck off.

Prayers

- (d) The prayer that the decision of the Contracting Authority dated 27th February 2019 be declared irregular, unfair, unprocedural and unlawful is hereby denied.

- (e) The prayer that the decision of the Respondent dated 27th February 2019 be annulled in its entirety is hereby denied.
- (f) The prayer that the Evaluation Report that informed the decision of the Respondent dated 27th February 2019 be reviewed in its entirety and the Respondent be directed to conduct the evaluation in strict accordance with the law is hereby denied.
- (g) The prayer that the Respondent be directed to declare the Petitioning Consortium as the Preferred Bidder is hereby denied.
- (h) Each party to bear its own costs.

DATED at NAIROBI this *8th* day of April 2019.



JAMES M. KIHARA
Chairman



LEDISHAH JEBICHII KIPSEI
Member

Beatrice

BEATRICE NYABIRA
Member

Maurice de Souza

MAURICE DE SOUZA
Member

Paul Karekezi

PAUL KAREKEZI
Member

Read in the presence of :

1) Andrew M. Musangi } For the Petitioners
2) Rachel W. Nderi }

1) Prof Albert. Mwanua } For the Respondents
2) Justice Omollo }