



REPUBLIC OF KENYA
IN THE PPP PETITION COMMITTEE AT NAIROBI
PETITION NO. 1 OF 2017

STRABAG AG, KOLIN INSAAT TURIZM SANAYI VE TICARET A.S. AND GROUP
FIVE CONSTRUCTION LIMITED.....PETITIONER

VERSUS


KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

BEFORE:

- | | | |
|--------------------------|---|-------------|
| 1. JAMES M. KIHARA | - | CHAIRPERSON |
| 2. JACKLINE C. KIMETO | - | MEMBER |
| 3. CHARITY MUYA-NGARUIYA | - | MEMBER |
| 4. PAUL KAREKEZI | - | MEMBER |

DECISION

Introduction

1. This is the Petition of **Strabag AG, Kolin Insaat Turizm Sanayi Ve Ticaret A.S. and Group Five Construction Limited** (hereinafter referred to as the "the Petitioner") filed with the **Petition Committee** (hereinafter referred to as "the Committee") on the 24th of April 2017. The Respondent is the **Kenya National Highways Authority**. The Petitioner also filed its written submissions and was represented by Counsel.
2. The Respondent in response filed a replying affidavit, dated 4th May 2017, written submissions, dated 8th May 2017, ^{and} was represented by Counsel. 
3. It is not in dispute that on or about November 2016, the Respondent advertised a Request for Qualification (hereinafter referred to as "**the RfQ**") inviting applications to pre-qualify to bid for design, finance, construct, operate, maintain and transfer the Nairobi-Nakuru-Mau Summit Highway under Public Private Partnership arrangement (hereinafter referred to as "**the Project**").
4. Section 3(j)(ii) of the RfQ provided for the payment of a Participation Fee in the following terms:

"Participation Fee shall be paid by a Prospective Bidder to KeNHA no later than seven (7) days before the RFQ Submission Date. The proof of such payment of Participation Fee to KeNHA shall be submitted by the Prospective Bidder along with its Qualification Documents. For the avoidance of doubt, the Qualification Documents submitted by a Prospective Bidder who has not paid the Participation Fee or whose submission does not

contain proof of payment will be rejected and the Prospective Bidder will be disqualified from the Bidding Process. Participation Fee may be paid in the form of a banker's cheque or through online transfer to the bank account of KeNHA, the details of which are provided below:...."

5. The Petitioner submitted its Qualification Documents as a Consortium (under the name SK5+ CONSORTIUM) in response to the Respondent's RfQ dated November, 2016 and subsequently amended and dated 22nd December, 2016 including further addenda amending certain provisions of the RfQ, including *inter alia* the criteria for qualification of bidders.
6. It is not in dispute that by a letter addressed to the Petitioner dated 11th April, 2017 and received on 13th April 2017, the Respondent rejected the Petitioner's RfQ submission on the basis that it made payment of the Participation Fee on 14th February, 2017 rather than on or before 10th February 2017.
7. The Petitioner being aggrieved with the Respondent's decision to disqualify it lodged this Petition, which the ~~the~~ Petition Committee is now being asked to decide. K

The Petitioner's Case

8. The dispute in this Petition revolves around the Respondent's decision to disqualify the Petitioner's Request for Qualification, for paying the Participation Fee on 14th February, 2017 and not by 10th February, 2017 as required by Section 3 (j) (ii) of the RfQ.
9. The Petitioner supported the Petition with the affidavit of **JAMES WEISS**, an authorised representative of the Petitioner.

10. It is the Petitioner's case that the aforesaid provisions of the RfQ regarding the payment of the Participation Fee were vague and ambiguous particularly the specific mode of payment of the Participation Fee in that: -

a) *It left doubt about whether, if the payment was made through a banker's cheque, the said cheque had to be physically delivered to the offices of the Respondent on a date not later than seven days before the RfQ submission date;*

b) *It left doubt as to whether, if the banker's cheque was physically delivered to the contracting authority's offices on a date not later than seven days before the submission date, it had to be accompanied by the Qualification Documents on the date of delivery or delivered in advance and separately from the Qualification Documents; and*

c) *It left doubt as to whether a bank transfer made but not received by the submission date constituted payment in terms of clause 3(j) (ii).*

11. The Petitioner avers that it purchased a banker's cheque on 13th December, 2016 for purposes of payment of the Participation Fee. However the Petitioner states that the Respondent on various occasions changed the submission deadline from 9th January 2017 to 7th February 2017 and later on to 27th January 2017^X issued an addendum again changing the submission date to 17th February 2017.

12. The Petitioner alleges that the frequent changes to the submission date caused confusion which resulted in the Petitioner not knowing by when

exactly and how the said Banker's cheque needed to be paid to the Respondent.

13. The Petitioner further alleges that ^{the} addendum of 27th January 2017 ^X stipulated that any clarifications on the RfQ had to be sought at least 14 business days before the submission date and therefore when the Petitioner, who ^{is} ~~are~~ based abroad, came to the realization that a ^X physical delivery of the banker's cheque to the Respondent by 10th February 2017 was not possible unless accompanied by the Qualification Documents, the Petitioner; who no longer had the possibility of seeking clarifications, immediately made alternative arrangements to pay the Participation Fee by way of an internal bank transfer.
14. The Petitioner stated that it paid the Participation Fee by bank transfer to the Respondent's bank account at Equity Bank which payment was made on 14th February 2017 and credited to the Respondent's bank account on the same date. The Petitioner further alleges that the Respondent, in its communication to the Petitioner dated 11th April 2017, acknowledged the fact that the Petitioner had paid the Participation Fee on 14th February 2017.
15. According to the Petitioner, it duly complied with the Respondent's requirements for payment of the Participation Fee and duly provided proof of such payment along with their Qualification Documents submitted to the Respondent by the deadline for submission of Qualification Documents.
16. The Petitioner further alleges that section 9.2 of the RfQ stipulated the grounds for disqualification of a Prospective bidder and none of those grounds were applicable to the Petitioner.

17. The Petitioner asserts that the circumstances for rejecting a bidder's Qualification Documents under Clause 3(j)(ii) of the RfQ document were expressly stated to be circumstances where a bidder has not paid the Participation Fee or whose submission does not contain proof of payment.
18. **Mr. James Weiss** has deponed that he attended the RfQ opening ceremony on 17th February 2017 whereupon the Petitioner Qualifications Documents were opened and found to be complete and as such the Respondent is now estopped from purporting to reject its Qualification Documents on the alleged ground of incompleteness under clause 6.2.2. as its documents were complete.
19. The Petitioner argues that whereas the fact of payment of the Participation Fee is material, the actual date on which it was made as long as it fell before the RfQ submission date, cannot be considered a material factor leading to disqualification of an otherwise technically and financially competent prospective bidder under clause 3(j)(ii) of the RfQ or any other clause therein.
20. **Mr. James Weiss** has deponed that the Respondent has contravened the express provisions of section 40(2) of the PPP Act by purporting to disqualify the Petitioner on a ground which is not contemplated under the said section.
21. The Petitioner told this Committee that neither the PPP Act nor the Regulations thereunder make provisions for charging a non-refundable Participation Fee for bidders submitting their Qualification Documents in a PPP tender.
22. The Petitioner further argues that the requirement for payment of the Participation Fee by a given date and its use as a basis for disqualifying a participant is unlawful, unreasonable, oppressive, inequitable,

restrictive and a breach of Article 227 of the Constitution of Kenya 2010 for the reasons, *inter alia*, to the extent that its effect is to restrict competition on grounds other than technical and financial capacity to implement the project.

23. The Petitioner was of the view that the Respondent did not suffer any prejudice as a result of the payment of Participation Fee by the Petitioner by bank transfer on 14th February, 2017 and not by 10th February, 2017 as the money was credited to the Respondent's bank account at Equity Bank on the same 14th February 2017 before the RfQ submission date.
24. The Petitioner submitted that Section 40(2)a of the PPP Act provides the basis upon which a bidder may be disqualified for incompleteness of its Qualification Documents. The Petitioner further submitted that this position was held by Musinga, J (as he then was) in the case of **Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Hyosung Ebara Company Limited [2011] eKLR** in reference to section 31(5) of the Public Procurement and Disposal Act (now repealed) which is similar to section 40(2)a of the PPP Act:-

While I agree that this was an important aspect that ought to have been brought to the attention of the procuring entity, the 1st respondent failed to appreciate that Section 31(5) of the Act which empowers the procuring entity to disqualify a person for submitting false, inaccurate or incomplete information about his qualifications only applies where both the technical and the financial evaluations have been completed and the procuring entity is at the final stage of awarding the tender to the successful bidder. [Emphasis added]

25. In view of the above allegations, the Petitioner have sought the following orders:

- a) The bidding process in Tender No. KeNHA/1397/2016 for the DESIGN, FINANCE, CONSTRUCT, OPERATE, MAINTAIN AND TRANSFER OF THE NAIROBI – NAKURU – MAU SUMMIT HIGHWAY be suspended pending the hearing and determination of this Petition in accordance with Regulation 60(2) of the PPP Regulations, 2014 and paragraph 9(2) of the PPP Petition Committee Guidelines, 2014.
- b) The Respondent's decision contained in the letter of notification dated 11th April, 2017 purporting to disqualify the Petitioner from the pre-qualification process be and is hereby annulled and set aside.
- c) The purported pre-qualification shortlist for the said Tender No. KeNHA/1397/2016 published by the Respondent on the websites www.kenha.co.ke, www.treasury.go.ke and www.devbusiness.com or any other medium on/or about April, 2017 and which purports to exclude the Petitioner' consortium therein be and is hereby annulled and set aside.
- d) The Respondent be and is hereby directed to admit the Petitioner' Qualification Documents, evaluate it on its merits and shortlist the Petitioner alongside other shortlisted bidders for Tender No. KeNHA/1397/2016 for the DESIGN, FINANCE, CONSTRUCT, OPERATE, MAINTAIN AND TRANSFER OF THE NAIROBI – NAKURU – MAU SUMMIT HIGHWAY.
- e) A declaration be and is hereby issued that Clause 3(j)(ii) of the Request for Qualification for tender No. KeNHA/1397/2016 for the DESIGN, FINANCE, CONSTRUCT, OPERATE, MAINTAIN AND TRANSFER OF THE NAIROBI – NAKURU – MAU SUMMIT HIGHWAY does not provide a ground for disqualification or rejection of the Qualification

Documents of a prospective bidder who has paid the Participation Fee and/or provided proof thereof.

26. This committee on 2nd ^{of} may 2017 did consider prayer (a) and issued an order dispensing with the same. The Committee declined to order that the bidding process in Tender No. KeNHA/1397/2016 for the DESIGN, FINANCE, CONSTRUCT, OPERATE, MAINTAIN AND TRANSFER OF THE NAIROBI – NAKURU – MAU SUMMIT HIGHWAY be suspended pending the hearing and determination of this Petition. We are therefore not going to address ourselves to this request in this Decision.

Respondent's Case

27. The Respondent replied through the affidavit sworn by **Eng. George Kiiru**.
28. The Respondent avers that the tender process is a two-stage open competitive bidding process in accordance with the PPP Act and the PPP Regulations and the applicable provisions were incorporated in the tender document.
29. The Respondent states that Section 3 (j) (i), (ii) & (iii) of the RfQ explicitly specifies following steps to be followed by a Prospective Bidder as follows:
- a) *Participation Fee shall be paid by a Prospective Bidder to KeNHA no later than 7 (seven) days before the RFQ Submission Date;*
 - b) *The proof of such payment of Participation Fee to KeNHA shall be submitted by the Prospective Bidder along with its Qualification Documents; and*

c) Participation Fee may be paid in the form of a banker's cheque or through online transfer to the bank account of KeNHA.

30. It is the Respondent's contention that the Petitioner participated in the tender process and pursuant to provision 3 (j)(ii) elected to pay the participation fees through an online transfer into the Respondent's account on the 14th February 2017 and submitted their bids on 17th February 2017.
31. The Respondent asserts that ~~the Respondent~~ vide its communication dated 11th April, 2017 informed the Petitioner that their Request for Qualification has been disqualified due to late submission of the Participation Fee by the Petitioner i.e. on 14th February, 2017 rather than on 10th February, 2017 which clearly fell short of the requisite 7 day period.
32. In response to the contention of the Petitioner as provided in the Paragraph No. 7(iii) of the Petition, where they have asserted that there was room for doubt as to whether a bank transfer made but not received by the submission date constituted payment in terms of Section 3(j)(ii), the Respondent argues that it is totally irrelevant since the instructions for initiating the bank transfer were not even issued by the Petitioner within the period prescribed under the RFQ. The Respondent further argues that had instructions been issued by the Petitioner well in time i.e. prior to the time period stipulated in the RFQ, the same would have ~~got~~^{been} credited into the bank account of Respondent well by the last date of 10th February, 2017 i.e. 7(seven) days prior to RfQ Submission Date which was 17th February, 2017.
33. The Respondent states that the only proof of payment under consideration by the Respondent and which was submitted to the

Respondent was the bank funds transfer receipt dated 14th February 2017 which clearly fell short of the requisite 7 day period.

34. In response to paragraph 7 of the Petition, the Respondent avers that there is no vagueness, ambiguity neither is there a possibility of Section 3(j)(ii) of the RFQ being open to multiple interpretations as alleged. The language of the said provision clearly specifies the manner of submission of the "Participation Fee" of 100,000 Kenyan Shillings which was to be paid to the Respondent by the Petitioner being the "Prospective Bidder" in the terms of the RfQ in the form of a banker's cheque or through online transfer to the bank account of KeNHA.
35. The Respondent further avers that the contents of Paragraph No. 12 of the Petition are misleading because the Petitioner failed to comply with the requirement of the RfQ with regard to timely payment of Participation Fee which was required to be paid to Respondent 7 (seven) days prior to the RfQ Submission Date and as such all averments of the Petitioner with regard to having complied with all the requirements of the RfQ are false and incorrect.
36. The Respondent further states that Section 3(j)(ii) of the RfQ has to be read with the Section 9.2 of the RFQ for its correct interpretation. The expression "it fails to make payment of the Participation Fee in accordance with this RfQ" as used in the Section 9.2 also means that the Participation Fee should be paid within the time prescribed under the provisions of the RfQ i.e. at least 7 (seven) days prior to the RfQ Submission Date.
37. The Respondent further argues that a ^{non} conjoint reading of the Sections 9.2 and 3(j)(ii) of the RfQ, it is very clear that if all the steps regarding submission of the Participation Fee as specified in the Section 3(j)(ii) have not been followed by a Prospective Bidder wherein payment of

- the Participation Fee not later than 7(seven) days of the RfQ Submission Date is one of such mandatory requirements essentially to be complied, then such Prospective Bidder shall be deemed to have failed to make payment of Participation Fee and thus liable to be disqualified in accordance with Section 9.2.
38. The Respondent further states that the Petitioner made late payment of Participation Fee i.e. on 14th February, 2017 rather than 10th February, 2017, hence such late payment after the time period specified in the RfQ "does not constitute due payment of Participation Fee". The proof of payment in respect of such late payment, attached by the Petitioner in their Qualification Documents is of no consequence and does not cure the non-compliance by the Petitioner.
39. The Respondent urged the Petition Committee to take Judicial Notice that should the tendering process be suspended, it will impact negatively on the Respondent's implementation timelines, cost implications on delayed development and will undermine the strategic importance and benefit of the project to the country. Suspension on account of the grounds in the Petition will prejudice other bidders who complied as opposed to the Petitioner hence will avail an undue advantage to the Petitioner. Any such suspension will interfere with the designing, planning and execution of the project causing an unnecessary cost and burden on the taxpayers and the economy at large.
40. The Respondent further submitted that the orders sought by the Petitioner should not be granted in their entirety or at all, because if granted the functions, operations and independence of the Respondent will be prejudiced at the expense of the greater public interest considering that the Petitioner did not comply with the tender requirements as per the RfQ and was rightfully disqualified.

45. We therefore find that the Petitioner, by making a payment of the Participation Fee and providing proof thereof with its RfQ submission, met the requirements of Section 3(j)(ii).
46. The Respondent's letter dated 11th April 2017 disqualifying the Petitioner's RfQ submission, informed the Petitioner that it had failed to comply with Sections 6.2.2 and 3(j)(ii) of the RfQ.
47. Section 6.2.2 of the RfQ states that any incomplete submission of the Qualification Documents as at the date and time of opening of the Qualification Document shall be rejected. However, it is evident from the Respondent's Tender Opening Minutes at the date and time of opening, the Petitioner's RfQ submission was complete and was therefore not rejected. It is therefore not clear why the Respondent rejected the Petitioner's RfQ at a later date contrary to the requirements of Section 6.2.2 of the RfQ. ✓
48. With regard to Section 3(j)(ii) referred to in the Respondent's letter of 11th April 2017, the same has been addressed in the preceding paragraphs and our finding that by making a payment of the Participation Fee and providing proof thereof with its RfQ submission, met the requirements of Section 3(j)(ii).
49. The Respondent has stated that the requirement of the last bullet of Section 9.2 should be read in conjunction with the first sentence of Section 3(j)(ii) that requires that payment of the Participation Fee must be made not later than seven (7) days before the RfQ Submission Date so as to be compliant with the requirements of the RfQ. But in view of our finding above, a reading of the entire Section 3(j)(ii) only requires

the Petitioner to have made payment and provide proof of payment with its RfQ submission.

50. The Respondent relies on Section 1.3 (c) in its argument that as regards interpretation of the provisions of the RfQ, any interpretation shall rest solely with the Respondent. This is clearly against the Common Law rule that a court would construe contractual terms against the drafter.
51. The principles in Article 227 of the Constitution of Kenya, 2010 have been reflected in Section 29 of the Public Private Partnerships Act, 2013 which state that the Contracting Authority shall be guided by the principles of transparency, free and fair competition and equal opportunity.
52. Having found that the Petitioner complied with the requirements of Section 3(j)(ii) of the RfQ, it is our finding that disqualification of the Petitioner is contrary to the principles set out in Article 227 of the Constitution of Kenya, 2010 and Section 29 of the Public Private Partnerships Act, 2013.
53. In conclusion, the Petition Committee finds that the Respondent's decision contained in its letter ref. KeNHA/1397/2016 of 11 April 2017 was unlawful and not in compliance with the provisions of the RfQ. ✓
54. The Respondent avers that if this Committee grants the orders sought, the functions, operations and independence of the Respondent will be prejudiced at the expense of the greater public interest. However, the Respondent has failed to demonstrate this prejudice and we find not ✓
merit in this averment.

Issue No. 2

Who is to bear the costs of this Petition?

- 55.** In view of the public interest nature of this Petition, each party will bear its own costs.

Orders

In consideration of the issues determined above, this Committee makes the following orders: -

- a) **The prayer to suspend the bidding process in Tender No. KeNHA/1397/2016 for the DESIGN, FINANCE, CONSTRUCT, OPERATE, MAINTAIN AND TRANSFER OF THE NAIROBI – NAKURU – MAU SUMMIT HIGHWAY pending the hearing and determination of this Petition is hereby declined pursuant to this Committee Orders of 2nd May 2016.**
- b) **The Respondent's decision contained in the letter of notification dated 11th April, 2017 disqualifying the Petitioner from the pre-qualification process is hereby set aside.**
- c) **Prayer (d) is hereby declined as the petitioner's RfQ submission is yet to be evaluated.**
- d) **The Respondent is hereby directed to immediately evaluate the Petitioner's Qualification Documents**
- e) **Each party will pay its own costs.**

DATED at NAIROBI this

day of

2017

PAUL KAREKEZI
Member

CHARITY MUYA-NGARUIYA
Member

JACKLINE C. KIMETO
Member

JAMES MURUTHI KIHARA
Chairperson

Delivered in the presence of: -