



REPUBLIC OF KENYA
PUBLIC PRIVATE PARTNERSHIPS
PETITION COMMITTEE

PETITION No. 2 of 2015

APM TERMINALS B.VPETITIONER

-AND-

KENYA PORTS AUTHORITY..... RESPONDENT

BEFORE:

- | | | |
|-------------------|---|-------------|
| 1. KIHARA MURUTHI | - | CHAIRPERSON |
| 2. PAUL KAREKEZI | - | MEMBER |
| 3. ISAAC BONDET | - | MEMBER |

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DECISION

Introduction

1. APM Terminals B.V (hereinafter "**the Petitioner**") filed with the Petition Committee on the 28th day of July 2015 a Notice of Motion of even date under Certificate of Urgency. The Motion was supported by an affidavit of **John Williams**. Later on the 25th day of November 2015 the Petitioner filed an Amended Petition dated 24th November 2015 supported by of **Robert Gichure Kerama**. Both deponents stated that they were the Petitioners Managing Director for the Great Lakes Region. This Notice of Motion is what the Petition Committee has treated as the Petition. Later it was amended pursuant to the Orders of the Petition Committee made on the 17th day of November 2015.
2. The Respondent filed a Replying Affidavit sworn by **Justus Omae Nyarandi** dated 4th August 2015. Mr. Nyarandi deponed that he is the Chairman of the Respondent's Proposal Evaluation Team (hereinafter referred to as "**the PET**") constituted in accordance with Section 47 of the **Public Private Partnerships Act, 2013** (hereinafter referred to as "**the Act**"). Pursuant to the directions issued by the Petition Committee on 17th November 2015, the Respondent filed a Further Affidavit dated 30th November 2015. This latter affidavit was sworn by **Yobesh Oyaro**, the Respondent's Head of Procurement and Supplies.

3. It is not in dispute that on 9th April 2015, the Respondent invited the Petitioner and eleven (11) other entities to submit bids by way of proposals in respect of **Tender No. KPA/125/2014-15/CS-Selection of Concessionaire for Phase 1 of the Second Container Terminal Port of Mombasa, Kenya.** (hereinafter referred to as "**the Tender**")
4. In response to this invitation, the Petitioner submitted its technical and financial bids.
5. The Request for Proposals (hereinafter referred to as "**the RfP**") required bidders to submit a bid security (bond), in the amount of USD 200,000, valid for sixty (60) days after the end of the proposals validity period.
6. It is not in dispute that the Respondent sent the Petitioner a notification letter dated 16th July 2015 stating that the Petitioner failed at preliminary evaluation stage of technical bid (Stage I) because the Bid Security issued by Barclays Bank Kenya Limited, dated 19th June 2015 in favour of the Respondent, was valid until 31st January 2016 and therefore did not meet the RfP requirements.
7. It is also not in dispute that the Petitioner being aggrieved with the Respondent's decision to disqualify it at preliminary evaluation stage lodged this Petition, which the Petition Committee is now being asked to decide.

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8. This Petition has been decided on the basis of the pleadings, affidavits, documentary evidence, oral arguments by the counsels for the parties during the hearing of this Petition on 2nd December 2015, written submissions and relevant law.
9. On 28th August 2015, the Petitioner filed with the Petition Committee a Notice to Produce Documents seeking orders to compel the Respondent to disclose and produce the Evaluation Report and/or analysis of how evaluation was carried out in arriving at the decision of 16th July 2015 disqualifying the Petitioner.
10. In its Ruling delivered on 31st August 2015, the Petition Committee dismissed the Petitioner's request to compel/direct the Respondent to produce the Evaluation Report and/or analysis of how the evaluation was carried out.
11. The Petitioner being aggrieved by the Ruling of the Petition Committee approached the High Court of Kenya by filing **Misc. Application No. 298 of 2015** and obtained leave to commence judicial review proceedings against the Petition Committee and the Respondent. Subsequently, the Petitioner filed the Notice of Motion dated 15th September 2015 seeking, among others, an order of *Certiorari* to bring into the High Court, for the purpose of being quashed, the decision of the Petition Committee.
12. The High Court delivered its ruling on the 5th day of November 2015, in which the High Court quashed the decision of the

Petition Committee. However, the High Court left it to the discretion of Petition Committee to determine the scope of disclosure in view of the confidential nature of the procurement process.

13. The Petition Committee vide its orders dated 17th November 2015 directed the Respondent to file and provide forthwith a summary of the Preliminary Evaluation results (Stage 1) to the Petitioner which order was complied with.

The Petitioner's Case

14. The dispute in this Petition revolves around the Respondent's decision to reject the Petitioner's bid at the preliminary evaluation stage, allegedly for submitting a bid security that did not comply with the requirements set out in the RfP.
15. In the instant Petition, the Petitioner argued that the proposal validity period was 180 days from the deadline for submission of proposal, initially given as 5th June 2015. Accordingly, the tender security had to be valid for at least 240 days with effect from 5th June 2015. Thus, bidders had to give a tender security expiring on or after 31st January 2016.
16. In Addendum No. 4, the Respondent extended the deadline for submission of proposal to the 26th June 2015, pursuant to Clause 2.3 the Instruction to Bidders (ITB) of the RfP. Thus, as per the requirements of Clause 1.12 of the Data Sheet of the

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ITB, the tender security validity should be extended to the 21st February 2015.

17. However, the Petitioner alleges that the Respondent issued an Addendum No. 6 dated 28th May 2015 confirming that bidders could submit a tender security expiring on 31st January 2016.

18. The Petitioner further argued that based on Addendum No. 6 of 28th May 2015, the Respondent is estopped from denying the validity of a tender security expiring on 31st January 2015 or invoking Regulation 41 (2) of the **Public Private Partnerships Regulations, 2014** (hereinafter referred to as "**the Regulations**") as a basis for rejecting the Petitioner's bid. In support of this claim, the Petitioner relied on Section 120 of the Evidence Act, Chapter 80 of the Laws of Kenya and also a decision of the Court of Appeal in **Gatune v The Headmaster, Nairobi Technical High School & Another [1988] KLR 561**). The Petitioner argued that the import of this authority is that:-

a) the doctrine of estoppel applies to statutory provisions; and

b) In particular, Addendum No. 6 of 28th May 2015 estops the Respondent from invoking Regulation 41 (2) of the Regulations as a basis for purporting to reject the Applicant's bid or bid bond.

19. The Petitioner also cited the decision of the High Court of Justice (and the Court of Appeal) of England and Wales

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(Queens Bench Division) in **Mears Limited v Shoreline Housing Partnership Limited [2015] EWHC 1396 (TCC)** in support of this position. The Petitioner argued that the import of this authority is that:

- a) **The doctrine of estoppel has evolved to such an extent that it can now be said to have been shorn of the limitations previously thought to curtail its scope of application, and that it extends to matters of both fact and law; and**
- b) **When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law—whether due to misrepresentation or mistake, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.**

20. It is the Petitioner's contention that any ambiguity, gap or misleading information contained in the tender documents or the Addenda thereto should, under the prevailing law, be construed against the party responsible for their authorship (i.e. the Respondent). In support of this position, the Petitioner relied on the **Black's Law Dictionary, 9th Edition**, at p. 377; and the decision of the Court of Appeal for England and Wales in **Lexi Holdings Plc v Garth Scott Stainforth [2006] EWCA Civ 988**. The Petitioner also relied on the **Judicial Review App. No. 106 of 2014 Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication Pvt Limited [2014] eKLR**

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(at para 155) in support of this view. In the latter case, the High Court of Kenya held that: -

".....in order to achieve a transparent system of procurement as required under Article 227 of the Constitution, it is important that procuring entities should set out to achieve a certain measure of precision in their language in the tender documents and not leave important matters for speculation and conjecture"

21. In the instant Petition, the Petitioner alleged that its tender security complied with the requirements of the RfP as amended by Addendum No. 6 of 28th May 2015.
22. The Petitioner argues that the Respondent's decision to disqualify the Petitioner at preliminary evaluation stage breached Sections 29 (2), 47 (3) and 51 of the Act, all of which behove the Respondent to evaluate the Tender (i) in accordance with the criteria and procedures set out in the Tender Document; and (ii) in a manner that is lawful, reasonable, procedurally fair, equitable, transparent, competitive and cost-effective.
23. The Petitioner further argued that, in line with the requirements of Section 29(2), should its tender security be found to be non-compliant, then the Respondent ought to have should treated the non-compliance as a minor deviation and waive it in accordance with items (E) and (G) of Addendum No. 4, as has been the case with other bidders.

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24. In his affidavit dated 24th November 2015, Mr. Kerama, has averred in the Amended Petition that the Respondent's decision to disqualify the Respondent was also orchestrated, triggered, influenced and/or inspired by a letter written to the Respondent by a competing bidder regarding the responsiveness of the Petitioner's tender. The letter was annexed to the Replying Affidavit of the Respondent to the Judicial Review case No. 298 of 2015.
25. Mr. Kerama further deponed that the law abhors the prospect of a bidder writing to a contracting authority to express an opinion on the responsiveness of another bidder's tender and that the Respondent's entertainment of opinions from other bidders on the responsiveness of the Petitioner's tender, and its subsequent disqualification of the Petitioner based on such opinions, vindicates the Petitioner's contention that the evaluation process was not conducted in accordance with the law.
26. He further deponed that the Summary of the Preliminary Evaluation Report supplied to the Petitioner pursuant to the Orders of the Petition Committee made on 17th November 2015 leads to the strong, distinct and inescapable conclusion that the evaluation process was whimsical, inconsistent and discriminatory. To explain this assertion, he stated that the Respondent: -



- a) excused Cosco Pacific Ltd and Paramount Bank Consortium's non-compliance with the mandatory requirement of providing an Integrity Declaration Form;
- b) excused Hutchinson Ports Investments S.A.R.L. and Mitsui & Co. Ltd's non-compliance with the mandatory requirement of serializing the appendices to its bid;
- c) excused China Merchants Holdings (International) Co. Ltd's non-compliance with the mandatory requirement of ensuring consistent pagination between the original and copy versions of its bid;
- d) excused International Container Terminal Services Inc. and Siginon Group's non-compliance with the mandatory requirements of consistent pagination and submission of original and copy versions of their bid; and
- e) excused Carrix Inc. and Interpel Investments Ltd's non-compliance with the mandatory requirements of consistent pagination and submission of Qualification Information Statement for the Lead Partner.

27. The Applicant relied on the decision of the Court of Appeal of Kenya in **Gatune v The Headmaster, Nairobi Technical High School & Another [1988] KLR 561**). The import of this authority is that:

- i. the doctrine of estoppel applies to statutory provisions; and
- ii. in particular, Addendum No. 6 of 28th May 2015 estops the Contracting Authority from invoking Regulation 41 (2) of the Public Private Partnerships



Regulations, 2014 as a basis for purporting to reject the Applicant's bid or bid bond;

28. The Petitioner concluded its case by arguing that the Respondent's decision to disqualify it at preliminary stage on the basis of a non-compliant tender security was unfair, whimsical, discriminatory, unreasonable, disproportionate and contrary to the letter and spirit of, *inter alia*:-

- a) Articles 47 and 227 (1) of the Constitution;**
- b) Sections 29 (2); 47 (3) and 51 of the Act; and**
- c) Regulation 40 (5) of the Regulations, 2014.**

29. In view of the above allegations, the Petitioner has sought several orders: -

- (a) That the Respondent's decision contained in its letter dated 16th July 2015 be set aside and/or annulled;**
- (b) The Respondent be directed to treat the Petitioner's bid as responsive and evaluate the same in accordance with the procedures and criteria set out in the tender documents;**
- (c) Alternatively, and without prejudice to prayers 2 (a) and (b) above, the Respondent be ordered to conduct a fresh tender evaluation, commencing with Stage 1 Preliminary Evaluation.**

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- (d) In the further alternative and without prejudice to the foregoing, Tender No. KPA/125/2014-15/CS, Selection of the Concessionaire for Phase I of the Second Container Terminal Port of Mombasa, Kenya be nullified and the Respondent be directed to re-advertise the same.
 - (e) The Respondent be ordered to pay the Petitioner the costs of and incidental to the proceeding; and
 - (f) Such other, further, supplemental, incidental and/or alternative orders as the Honourable Committee may deem just and expedient.
30. In response to the Petition, the Respondent filed its respective affidavits and subsequently, written submissions in support of its case.

Respondent's Case

31. The Respondent replied through the affidavit of **Justus Omae Nyarandi**, the Chairman of the Respondent's Proposal Evaluation Team constituted pursuant to the provisions of Section 47 of the Public Private Partnerships Act, 2013. Justus Omae Nyarandi deponed as hereinafter appearing.
32. He deponed that the RfP provided that the proposals must remain valid for 180 days after the date of submission. He further stated that the Paragraph 1.12 of the Data Sheet of the ITB provided that the amount of bid security (bond) is USD



200,000 and must remain valid for 60 days after the end of the proposal validity period.

33. Justus Omae Nyarandi averred that the provision in the RfP regarding bid security was in compliance with Regulation 41(2) which provides that the validity period of a bid security shall be at least sixty (60) days from the date the bid validity period ends.
34. He further averred that the proposals were to be valid for 180 (one hundred and eighty) days from the deadline for their submission, initially given as 5th June 2015 before 10:00 a.m. The bid security (bond) was therefore required to remain valid for a period of sixty (60) days after the validity period of the bid proposals, i.e. a period of 240 (two hundred and forty) days from 5th June 2015.
35. He further averred that the Respondent issued Addendum No. 3 on 8th May 2015 to address questions and requests for clarifications sought by the bidders: The question for clarification was that: -

"Can we mention a specific date on the bid security instead of stating that the bid security will expire 60 days after the period of tender validity. In any case, if the tender validity is extended, we are willing to amend the bid security maturity date to fulfil the bidding requirements."



And the response was: -

"Yes, you may mention a specific expiry date on the bid security, should the tender validity period be extended, the bid security also be extended. Refer to revised tender security format."

36. He further stated that though the bidders were at liberty to insert the exact expiry date of the bid security (bond) computed based on the parameters in the RfP, they were obliged to amend that date if the proposal bid validity was extended. He further averred that the two are intrinsically connected because the bid security (bond) expiry date is reckoned from the date of the validity period of the proposal bids.
37. Mr. Nyarandi further deponed that on 26th May 2015, the Respondent issued Addendum No. 4 whereby it extended the new deadline for submission of proposal bids to 10:00 a.m. East African Time on Friday 26th June 2015. He averred that the effect of this extension of deadline for submission of bid proposals was that the bid Security was required to be valid up to and including 21st February 2016.
38. Mr Nyarandi further averred that validity period of a bid security is a mandatory requirement in the RfP and the Respondent has no discretion in the matter. He also stated that the matter is provided for in the law and is not a minor deviation that can be waived. He further averred that



Addendum No. 6 was limited to affirming that the format of the bid security could be amended to delete the wording which would be inapplicable if a bidder chose to insert an exact date of the expiry of bid security.

39. He further averred that the Respondent was never asked and therefore did not shorten the validity/expiry period of the bid security. He further noted that the even if such a request were to be made, the Respondent has no power to shorten the period of the validity of the bid security as this is statutorily provided for.

Issues to be Determined

40. This Committee has carefully considered the pleadings, the submissions of the parties, case law and documents placed before it and has isolated several issues which have been discussed below.

41. **Issue No. 1**

Was the Bid Security submitted by the Petitioner compliant?

42. Clause 1.13 of Section 2 the ITB, directs bidders to the Data Sheet of the ITB as regards the requirements of the Bid Security. Paragraph 1.12 of the Data Sheet provides as follows: -

"Proposals must remain valid for 180 days after the date of submission. Amount of Bid Security (Bond) is USD 200,000 and must remain valid for 60 days after the end of the proposal



validity period. The Bid Security shall be in the form of an irrevocable bank guarantee issued from a bank licensed in Kenya, in the format provided in this tender document."

43. The original submission date of proposal was 5th June 2015 but was extended to 26th June 2015 under Addendum No. 4 dated 26th May 2015. In view of the revised submission date, the proposals validity period will end on 23rd December 2015. Consequently, expiry date of the validity period of the Bid Security is 21st February 2016.
44. The bid security submitted by the Petitioner does not conform to the above requirements as it will expire on 31st January 2016 instead of the 21st February 2016.
45. In its defence, the Petitioner argued that it complied with the requirements of the RfP, as amended by Addendum No 6 issued on 28th May 2015. Under Queries Set No. IV, Item 65 of this Addendum, the Respondent replied in the affirmative to a query, which contained the following statement: -

"With reference to the amended format of the bid security, if we now chose to insert the specific expiry date in the bid security, can we delete the wording 'sixty (60) days after the period of tender validity', i.e. in the amend format?"

"This Bid guarantee will remain in force up to and including ~~sixty (60) days after the period of tender validity, i.e. 31st~~ January 2016 at 3.00pm and any other demand....."

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46. The Petitioner further maintained that the Respondent having acceded to the above wording, it is estopped from disqualifying the Petitioner on account of having submitted a bid security whose validity period is shorter than prescribed.
47. The Petitioner's argument is not considered plausible by this Committee for the following reasons: -
- a) The period of validity of the Bid Security is defined in Clause 1.12 of the ITB Data Sheet. Had the Respondent intended to amend this Clause, it would have been expressly stated. The reply of the Respondent could only have related to the deletion of the words "sixty (60) days after the period of tender validity", not to the amendment of the provisions of Clause 1.12 of the ITB Data Sheet. In any event, the Respondent could not have amended the validity period of the bid security in view of the provisions of the Regulation 41(2) that make it mandatory for the period of validity of a bid security to be at least sixty days from the date of the expiry of the bid validity period.
- b) Further, in Addendum No. 3 of 8th May 2015, under Query Set No. 2, item 25, the following was recorded:

Question:-

"Can we mention a specific expiry date on the bid security instead of stating that the bid security will expire 60 days after the period of tender validity. In any case, if the tender

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validity is extended, we are willing to amend the bid security maturity date to fulfil the bidding conditions."

Response:-

"Yes, you may mention a specific expiry date on the bid security. Should the tender validity be extended, the bid security [should] also be extended. Refer to revised tender security format provided."

Clearly the need to extend the expiry date of the tender security, in the event the expiry date of the tender validity was amended, was reconfirmed to bidders a few weeks before the submission of bids.

- c) The bid security submitted by the Petitioner recorded that the Petitioner submitted its tender dated 26th June 2015, which is the revised deadline for submission of proposals, and included the following statement: -

"This bid guarantee will remain in force up to and including sixty (60) days after the period of tender validity, i.e. 31st January, 2016 at 3:00 pm (expiry date and time) and any demand in respect thereof....."

This statement is at variance with the statement made in Addendum No. 6 as it retained the wording "*sixty (60) days after the period of tender validity*". Further, it contains a contradiction – the date 60 days after the tender validity is 21st February 2016 and not 31st January 2016. The 31st January

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2016 date corresponds to the original submission date of proposals; i.e. 5th June 2015.

d) Notwithstanding the query and response given under item 65 of Addendum No.6, it was only the Petitioner out of the 12 shortlisted bidders who failed to provide a bid security whose validity period took account of the revised submission date of proposals. It cannot therefore be said that the query and response under item 65 of Addendum No.6 could have reasonably influenced the failure by the Petitioner to submit a compliant bid security.

48. For the aforesaid reasons, the Petition Committee finds that the bid security provided by the Petitioner was not valid.

49. **Issue No. 2**

Is the failure to provide a valid bid security by the Petitioner an excusable minor deviation?

50. The Petitioner has pleaded that even if the Petition Committee were to find that its bid security was non-compliant, it urged the Petition Committee to find that it was an excusable minor deviation.

51. As stated earlier, the law makes it mandatory for a bid security to be valid for a period of sixty days beyond the bid validity period. Thus the non-compliance is fundamental. The issue of non-compliance of a bid security was deliberated at length in the case of **Silex Restorations Ltd. v. Strata Plan VR 2096 (2004)** in

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2004 by the British Columbia Court of Appeal. It was held that a 60-day bid bond when a 90-day bid bond was stipulated was a material non-compliance. It was also held that the subsequent request by the owner for the contractor to extend its bid bond was not a waiver of that non-compliance. The court decided the contractor had gained financial advantage by providing only a 60-day bond and had also exposed the owner to claims by compliant bidders.

52. Clause 5.2 of the ITB Data Sheet lists documents which are mandatory. This Clause stipulated that these mandatory requirements will be evaluated on a pass-fail basis and that bids found non-responsive to any mandatory requirements would be rejected and disqualified from further consideration.

53. However, Addendum No.4 issued on 26th May 2015 under items (E) and (G) amended the provisions of Clause 5.2 of the ITB Data Sheet. Item (E) deleted the wording, after item No.4, which states "*Failure to meet the above requirements shall lead to automatic disqualification*". By deleting this provision, the requirements set out in items 1 to 4 of Clause 5.2 of the ITB Data Sheet ceased to be mandatory. Item (G) included a statement to the effect that the Respondent shall have the right to waive minor deviations that will not materially affect the bid. However, a definition of a "minor deviation" was neither defined in the RFP nor in the addenda. This therefore raises the question as to how the Respondent could objectively determine "minor deviations". In any event, if the Respondent wished to allow acceptance of deviations during the evaluation of "mandatory



requirements", these requirements would effectively cease to be mandatory. In the interest of transparency and fairness, the Respondent ought to have clarified how these "minor deviations" would be objectively determined.

54. Best international procurement practice with regard to Evaluation and Post Qualification Criteria – (Following Prequalification) is to set out mandatory requirements which are evaluated on a pass-fail basis. The objective of this process is to confirm that the Bidder continues to meet the criteria used at the time of prequalification. This is achieved by requiring the bidder to update information which was previously considered during prequalification and its reassessment. Mandatory requirements would normally include eligibility, litigation history and financial position but would exclude minor issues such as pagination, table of contents and the like to avoid disqualification of a competent bidder on the basis of immaterial deviations.

55. For example, the UNCITRAL Model Law on Public Procurement deals with the examination and evaluation of tenders in Article 43, and provides in pertinent part as follows:

1. (a) Subject to subparagraph (b) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article 10 of this Law.

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart

from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

2. The procuring entity shall reject a tender:

(c) If the tender is not responsive.

56. Similarly, the World Bank Standard Bidding Documents are a good example. These documents have been prepared by the World Bank for use by borrowers and their implementing agencies in the procurement of goods, works and consulting services and they are commonly used and adopted by many countries. The April 2015 Edition of the World Bank Standard Bidding Documents make the following statement in relation to qualification of bidders:-

"The Bank requires bidders to be qualified by meeting predefined, precise minimum requirements. The method entails setting pass-fail criteria, which, if not met by the bidder, results in disqualification. It will therefore be necessary to ensure that a bidder's risk of having its bid rejected on grounds of qualification is remote if due diligence is exercised by the bidder during bid preparation. For that purpose, clear-cut, fail-pass qualification criteria need to be specified in order to enable bidders to make an informed decision whether to pursue a specific contract and, if so, either as a single entity or in joint venture. The criteria adopted must

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relate to characteristics that are essential to ensure satisfactory execution of the contract, and must be stated in unambiguous terms." [emphasis added]

57. Equally, in United States procurement law, there are statutory provisions which stipulate that an award must be made to the bidder whose bid conforms to the solicitation. Subpart 14.301 of the Federal Acquisition Regulations further deal with the "responsiveness of bids", and state that: -

".....to be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system. "

58. Under United States procurement law, therefore, non-responsiveness is also defined in terms of the materiality of the nonconformity. A bid that contains "minor informalities" is not considered non-responsive. A minor informality or irregularity, in turn, is defined in Subpart 14.405 as: -

".....one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The

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contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government."

59. The international best practice discussed above is reflected under Section 29(2) of the Act, which requires a contracting authority to be guided by the principles of transparency, free and fair competition and equal opportunity.
60. In order to conform to the provisions of Section 29(2), submission of all the documents listed in Clause 5.2 of the ITB Data Sheet must remain mandatory. However, minor deviations should be excusable/waived provided if accepted, they would not: -
- a) affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or
 - b) limit in any substantial way, inconsistent with the Bidding Document, the Employer's rights or the Bidder's obligations under the proposed Contract; or
 - c) if rectified, would unfairly affect the competitive position of other bidders presenting substantially responsive bids.
61. The Petition Committee agrees with the Respondent that items 1 to 3 listed in Clause 5.2 of the ITB Data Sheet fall squarely within the category of minor deviations. However, ordinarily, item 4, which requires that signing of bid documents by a duly authorised person should be evidenced by a Power of Attorney, ought to be mandatory. However, in view of the amendment of

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the RfP under item (E) of the Addendum No. 4, this requirement ceased to be mandatory.

62. It is the view of the Petition Committee that the intention of the RfP, as amended by Addendum No. 4 was for all the others requirements under Clause 5.2 of the ITB Data Sheet to remain mandatory and the Respondent cannot exercise discretion or waive in any way the said requirements after submission of proposals. For avoidance of doubt, the components included in Envelope A are mandatory. The Respondent has not complied with this provision consistently.
63. It is therefore the Committee's view that the failure by the Petitioner to submit a tender security, with the prescribed validity period is not an excusable minor deviation as it is one of the components required to be included in Envelope A.
64. However, having reviewed the Technical Evaluation Report submitted by the Respondent, the Petition Committee further finds that the Respondent did not objectively apply the provisions under Clause 5.2 of the ITB Data Sheet in the evaluation of bids.
65. **Issue No. 3**
Was the Respondent's decision to disqualify the Petitioner in any way influenced by a bidder?
66. Whilst the Respondent has confirmed receipt of a letter from a bidder pointing out non-compliance of the Petitioner's bid



security, which information was availed to bidders during the public opening of Technical Proposals, the Petitioner has not adduced any evidence to support its contention that the Respondent was influenced by the said letter.

67. In any event, given our findings under issues 1 and 2 above, the allegation that the Respondent could have been influenced by the intervention of a bidder does not merit our further consideration.

Orders

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

- (a) The Prayer that the Respondent be ordered to conduct a fresh tender evaluation, commencing with Stage 1 Preliminary Evaluation is hereby denied. The Respondent is however ordered to review Stage 1 (Preliminary Evaluation) submissions by all bidders, strictly in accordance with the requirements of Clause 5.2 of the Data Sheet of the ITB with items 1-4 being minor requirements and the components included in Envelope A remaining mandatory.**
- (b) The Request to direct the Respondent to treat the Petitioner's bid as responsive and re-evaluate the same is hereby declined.**

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- (c) The Prayer that Tender No. KPA/125/2014-15/CS, Selection of the Concessionaire for Phase I of the Second Container Terminal Port of Mombasa, Kenya be nullified and the Respondent be directed to re-advertise the same is hereby denied.
- (d) The Respondent shall by 30th December 2015, inform all bidders of the re-evaluation of Stage I (Preliminary Evaluation) as ordered in (a) above.
- (e) There shall be no order as to costs.

DATED at NAIROBI this *15th* day of *December* 2015



PAUL KAREKEZI
Member



ISAAC BONDET
Member



KIHARA MURUTHI
Chairperson

Delivered in the presence of: -

Mr. Muthoni Thiankely for the Petitioner
Ms. Patricia Jeteri W/p for Geoffrey
Imende for the Respondent.

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