



REPUBLIC OF KENYA
THE PUBLIC PRIVATE PARTNERSHIPS
PETITION COMMITTEE

PETITION No. 3 of 2015

BOLLORÉ

TOYOTA TSUSHO CORPORATION

KAMIGUMI COMPANY LIMITED

MITSUI ENGINEERING & SHIPBUILDING COMPANY

MOMBASA MAIZE MILLERS LIMITED.....PETITIONERS

(acting as a Consortium)

-AND-

KENYA PORTS AUTHORITY.....RESPONDENT

BEFORE:

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

DECISION

Introduction

1. This is the Petition of a consortium **Bolloré – Tsusho Consortium** (hereinafter "**the Petitioner**"), comprising of Bolloré, Toyota Tsusho Corporation, Kamigumi Company Limited, Mitsui Engineering & Shipbuilding Company and Mombasa Maize Millers Limited filed with the Petition Committee on the 28th day of July 2015.
2. It is not in dispute that on 9th April 2015, Kenya Ports Authority, the Respondent herein, 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 "**the Tender**")
3. In response to this invitation, the Petitioner submitted its technical and financial bids.
4. It is also not in dispute that by a notification letter dated 16th July 2015, the Respondent informed the Petitioner that its bid failed at Stage II i.e. the Technical Evaluation and that its Bid Security together with its unopened financial offer would be returned to them after Monday 3rd August 2015 when the financial bids for the successful bidders would be opened.



5. It is also not in dispute that the Petitioner being aggrieved with the Respondent's decision to disqualify it at Stage II (Technical Evaluation) lodged this Petition, which the Petition Committee is now being asked to decide.
6. On 28th August 2015, **APM Terminals**, (hereinafter referred to as "**APM**") the Petitioner in **Petition No. 2 of 2015** 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 said Petitioner. At the time, this Petition was mentioned simultaneously with Petition No. 2 of 2015 and No. 4 of 2015.
7. In its Ruling delivered on 31st August 2015, the Petition Committee dismissed APM's request to compel/direct the Respondent to produce the Evaluation Report and/or analysis of how the evaluation was carried out.
8. APM, 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.
9. 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 contained in the Ruling dated 31st August 2015. The High Court however left it to the Petition Committee to determine the extent of disclosure in view of the confidential nature of the procurement process.

10. On 17th November 2015, the Petition Committee directed the Respondent to, among other things, file and provide a summary of the Technical Evaluation criteria and a summary of Technical Evaluation results to the Petitioner.

The Petitioner's Case

11. In this instant Petition, the Petitioner complains that the Respondent disqualified its bid at Stage II (Technical Evaluation) under Section 51 of **the Public Private Partnerships Act, 2013** (hereinafter referred to as "**the Act**") for "non – compliance" despite the fact that the Petitioner avers that it fully complied with the requirements in the **Request for Proposals**, (hereinafter referred as "**RFP**") and further complied with all rules and statutory provisions relating to submission of bids.
12. The Petitioner, through an affidavit by **Jason Reynard**, further complained that the Respondent did not cite any areas of non-compliance by the Petitioner when rejecting the Petitioner's bid under Section 51 and Rule 42(2) of the **Public Private Partnerships Regulations, 2014** (hereinafter referred to as "**the Regulations**") and it is evident on the contrary that the

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Petitioner's Bid was in fact subjected to substantive Technical evaluation.

13. The Petitioner complained that the Respondent failed to submit the Evaluation Report (if any) and/or decisions of its **Proposal Evaluation Team** (hereinafter referred to as "**PET**") to the **Public Private Partnerships Committee** (hereinafter referred to as "**the Committee**") for review and approval or rejection before communicating the same to the Petitioner. It is the Petitioner's case that the decision of the Respondent was contrary to both Section 49 (2) of the Act and the provisions of Rule 48 of the Regulations.
14. The Petitioner further contended that the Proposal Evaluation Team had no authority to render any final decisions on the evaluations without first subjecting its recommendations to validation by the Committee.
15. The Petitioner contended that the Respondent created a new arbitrary prerequisite during the evaluation of the Technical Proposal of the Petitioner that the organisational structure of the Lead Bidder in the Consortium was required to be depicted or presented by way of an organogram. The Tender Document did not dictate any specific format for the presentation of the organisational structure and the Respondent effectively left the format of presentation to the Bidders' discretion.

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16. The Petitioner stated that it provided all the information regarding the Lead Bidder's organisational structure as indicated in the Petitioner's Technical Bid (at pages 76 to 91) without presenting it in organogram format as this was not a prerequisite.
17. The Petitioner further contended that the new non-existent criteria was used to illegally mark down and eliminate the Petitioner from the bidding process prematurely and arbitrarily and that the actions of the PET are contrary to Section 43(2) and Section 47 of the Act and Article 227 of the Constitution, in that deviation from set evaluation criteria is specifically prohibited by law.
18. The Petitioner further alleged that the various instructions to the Bidders were in direct contradiction to the evaluation criteria applied by the PET. To explain this allegation, the Petitioner states that under the original criteria on productivity (Form Tech-2B under "*Performance Indicators.*"), bidders were required to show that they had achieved a minimum of more than 25 moves per hour in any port being the gross per crane productivity benchmark.
19. The Petitioner contended that the above requirement was first amended at pages 4 and 5 of Addendum 4 dated 26th May 2015 as the Addendum clearly stated that the minimum performance indicators would not be applicable and instead they would be graded on a "graduating scale". The



Petitioner contends that particulars or parameters of this scale were not stated in this Addendum.

20. It is the Petitioner's case that under paragraph 3 at page 3 of Addendum 8, the Respondent confirmed to bidders that the minimum performance indicators stipulated in Form TECH-2B been deleted in their entirety and further that the scoring of the performance indicators would be on a graduated scale but once again the particulars or parameters of this scale were not stated in this Addendum.
21. The Petitioner contended that the "Instructions to Bidders" in the RfP provided the criteria for evaluating bidder's experience as follows:-

"Marks will be awarded according to the Performance Indicators listed in Form TECH -2 B, for each of the individual terminals in different ports."

22. Clause1 (b) (i) of Table 1 to the Technical Evaluation Criteria and the Technical Evaluation results provided by the Respondent discloses that the Performance Indicators on which the bidders were evaluated were Gross Crane Productivity, Gross Ship Productivity and Annual Throughput. The said Report indicated the marking scheme applied by the Respondent to each of these three Performance Indicators.



23. The Petitioner complained that no marks were awarded for any other Performance Indicators as required in the bid documents, e.g. the requirement that at least one terminal be from a developing country and/or any of the other Performance Indicators. By deciding what aspects of the Technical Proposal earned marks (and if so how many) and what aspects would not earn any credit after the Tender was opened, the entire technical evaluation process was open to abuse and subjectivity.

24. The RFP in the "Instructions to Bidders." provided that "Marks will be awarded according to the Performance Indicators listed in Form TECH -2 B, for each of the individual terminals in different ports." However, despite the clearly defined method of scoring, the Respondent first calculated the averages of a selection of the Performance Indicators for the three terminals as submitted and thereafter used the averages as the basis for evaluation contrary to the provisions of the Technical Evaluation Criteria. Thus, the Respondent not only failed to apply the criteria set forth in the bid documents, it also failed to apply the criteria that it introduced vide various addenda.

25. The Petitioner submitted that, in complete disregard of the provisions of Addendum 8, the Respondent rigorously applied the discarded criteria regarding productivity and proceeded to score and penalise the Petitioner on the basis of "productivity criteria" that were not applicable or pertinent at the point of evaluation.



26. The Petitioner further asserted that the Respondent sought to "compute" productivity by seeking to average the gross per crane productivity of the three ports provided by the Petitioner and on that basis claimed that the Petitioner had demonstrated "overall productivity per crane" of 23.9 moves.
27. The Petitioner stated that the Notification Letter dated 16th July 2015 implied that the Petitioner's bid lost marks because the Petitioner had failed to achieve an average performance target that was unspecified. The Petitioner further contended that this new computation methodology using averages did not exist in the RfP or the addenda and yet it was applied in the technical evaluation to disqualify the Petitioner.
28. The Petitioner further stated that, while Addendum No. 4 removed the minimum performance indicators, Addendum No. 7 at pages 1 and 2 further clarified that failure to meet certain minimum benchmarks would not lead to rejection of bids.
29. The Petitioner further argued that, had the Petitioner been guided appropriately, transparently and clearly on all the scoring methodology applicable, they would have structured their proposal to compete on the basis of these criteria.



30. The Petitioner further asserted that the failure by the RFP to provide clear criteria for assessment of Technical Bids and its failure to provide a clear and objective scoring system was contrary to the provisions of Rule 35 (3) of the Regulations and this led to uncertainty, lack of transparency and arbitrariness in the scoring of the Petitioner's Bid. To illustrate this point, the Petitioner noted that Addendum 7 indicated that certain performance criteria would be decided at the evaluation stage.
31. The Petitioner submitted that failure by the respondent to submit the recommendations it received from the PET to the Committee for review and approval or rejection was contrary to both Section 49 (2) of the Act and the provisions of the Regulations, particularly, Rule 48.
32. The Petitioner contended that by refusing to transparently provide all of the technical criteria during the bidding process and disregarding the criteria set forth in the bid documents, the Respondent created and applied a marking scheme that was skewed, arbitrary, and contrary to the law resulting in an unfair and highly subjective tender process.
33. The Petitioner submitted that, after the removal of the minimum Performance Indicators, the Respondent arbitrarily set up a graduating scale that set a threshold for the awarding of marks from a minimum point as follows: -

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(i) Gross Crane Productivity - 20 – 24 moves per crane

(ii) Gross Ship Productivity - 60 – 74 moves per ship

34. The Petitioner further submitted that the effect of the graduating scale was that: -

i) The marks allocated for "Gross Crane Productivity" started from 20 moves/hour per crane upwards and no points were allocated to any Bidder with less than 20 moves per Crane per hour in any port and. This was never disclosed in the RfP or the Addenda and directly contributed to elimination of certain bidders. It effectively made a pass/fail criterion out of this indicator and could not be referred to as an objective graduating scale.

ii) The marks allocated for "Gross Ship Productivity" started at 60 moves/hour per ship and no points were allocated to any Bidder with less than 60 moves per Ship per hour in any port. This effectively meant that the terminals with moves ranging between 40 to 59 moves per hour "failed" to meet this arbitrary pass mark and the Petitioner achieved nil marks in this manner in two terminals directly leading to its elimination.

35. The Petitioner concluded its case by submitting that the decision communicated to the Petitioner through Letter of

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Notification dated 16th July 2015 was therefore premature and illegal and ought to be annulled entirely.

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

1. **The decision of the Respondent dated 16th July 2015 be annulled in its entirety; and**
2. **The Evaluation Report that informed the decision of the Respondent dated 16th July 2015 be annulled in its entirety and the Respondent be directed to reconstitute a Proposal Evaluation Team to re-evaluate and score the Petitioner's bid and other bidders strictly within the parameters of the RfP and the Public Private Partnerships, Act 2013 and the Public Private Partnerships Regulations, 2014 and subsequently to submit its new Evaluation Report and recommendations to the Public Private Partnerships Committee for review and validation as required by law before any decision is announced by the Respondent.**

Alternative to prayer (b): -

3. **The Evaluation Report that informed the decision of the Respondent dated 16th July 2015 be annulled to the extent that it purported to penalise the Petitioner on grounds not provided for in the Tender Documents and not provided for in law and the Respondent be directed to submit the Petitioner's bid for review and scoring by the Public Private Partnerships**



Committee to enable the PPP Committee mark the said proposal and render a final decision on merit on the Technical Evaluation of the Petitioner.

4. That in the alternative to all the above, the Petition Committee do declare that the RfP issued by the Respondent was not compliant with the Public Private Partnerships Act, 2013 for failure to adhere to and make clear provision for the mandatory technical evaluation and other processes provided for in law and that the RfP therefore ought to be annulled in its entirety and the Respondent ordered to amend and re-issue the same in full compliance with the law and commence this PPP procurement process afresh from RfP stage.
5. The Petition Committee do make any further orders that it deems just and expedient to achieve the ends of justice as mandated by law.

Respondent's Case

37. In response to the Petition, the Respondent filed two affidavits and subsequently filed written submissions in support of its case.
38. The Respondent replied through the affidavit dated 4th August 2015 of **Justus Omae Nyarandi**, the Chairman of PET



constituted pursuant to the provisions of Section 47 of the Act.

39. He deponed that the Respondent conducted the evaluation of the technical bids and all processes in respect of the Tender in accordance with the dictates of the Constitution of Kenya, the Act, the Regulations and the RfP prescriptions as read together with the Addendums issued. He further avers that the evaluation process was transparent, fair and equitable.
40. Mr. Nyarandi averred that the Respondent is not required to submit the outcome of the technical evaluation process to the Committee for review or approval before it concludes the financial evaluation.
41. He deponed that Section 49(2) of the Act requires the Respondent to prepare an evaluation report and submit it to the Committee for approval after conclusion of proposals evaluation processes. He further stated that the "proposal evaluation process" requires the evaluation of both the technical and financial offers and not the technical offer alone. He further asserted that the financial proposals have not been opened and therefore an evaluation report prepared at this stage would be incomplete and premature.
42. Mr. Nyarandi deponed that the RfP and particularly the Instructions to Bidders, Data Sheet in general and paragraph Reference No. 5.2 thereof specifically provided criteria to be



applied in the evaluation of the proposals. He further averred that, in the event the Petitioner was of the view that the evaluation criteria was omitted from the RfP and addenda thereto, it ought to have challenged this at the outset, instead of going through the process and then raising this issue at this stage.

43. He further stated that the Petitioner's proposal bid failed to attain the minimum pass mark in the criterion on Bidder's Organization Structure and Experience and therefore did not qualify for the stage of Financial Opening and Evaluation.
44. Mr. Nyarandi further averred that the reasons of the failure of the Petitioner's bid are clearly set out in the Letter of Notification issued by the Respondent dated 16th July 2015. He further averred that the particulars provided are justified under the Act, the Regulations and the RfP.
45. It is the Respondent's case that the evaluation criteria set out in the RfP was objective as required in the Act, Regulations and the Constitution of Kenya. According to the Respondent, the evaluation of the bids was done in accordance with the evaluation criteria set out in the RfP. Mr. Nyarandi also averred at paragraph 7 of his Supporting Affidavit that the Petitioner indeed admitted that the Tender documents contained *"the evaluation and scoring parameters, the criteria to be met by bidders, the information and documentation expected from the Bidders,*



some of the required formats of presentation and the draft Project Agreement...".

46. The Respondent further averred that the Instructions to Bidders, Stage II (1) (a) of the Tender Documents, required bidders to provide their organisational structure as provided by TECH- 2 A of the Tender Documents. The specific requirement was that *"Bidders shall provide information based on the following; "Organisational structure, including shareholding percentages.."* The maximum mark allocated to this sub section of the proposal was *four (4) marks*. The Petitioners scored *three and a half (3.5) marks*.
47. Mr. Nyarandi deponed that the Petitioner's proposal, makes it clear that the Petitioner did not give sufficient particulars of their organisational structure. He further noted that the Petitioner failed to (a) state the designation of the operating head of Bolloré as an organisation, (b) indicate the reporting lines for the various key personnel who work under him/her and (c) clearly describe the various divisions in their corporate structure. Mr Nyarandi averred that it is for this reason that the Petitioner was informed in the Notification Letter in this respect that, *"[y]our bid lost marks for not providing sufficient information on the organisation structure. It was expected that the Lead Partner's organisational structure/organogram depicting various departments divisions will be given."* He explained that the reference to "organogram" in the notification letter was only used to lay emphasis to what was expected of the Petitioner.

48. Mr. Nyarandi averred that Addendum No. 4 issued by the Respondent on 26th May 2015 amended Form TECH-2B on Bidder's Experience to the effect that *"The bidders shall be evaluated on the basis of the following performance indicators based on graduating scale:"*
49. The Respondent further stated that the minimum performance indicators initially provided under paragraphs (b) to (f) were deleted. The bidders were further informed that *"Bidders are required to demonstrate what they have achieved in the various terminals and what strategy they will deploy at CT2 and how they will apply their past experience to achieve the KPA target performance indicators as indicated in Annex A(b) viii. Bidders are also required to provide certified evidence for the above information."*
50. Mr. Nyarandi submitted that the effect of this amendment was to remove the initial pass/fail criteria that would apply in the event that the bidder did not meet the minimum performance indicators set in the original RfP. The bidders were informed that the Respondent would apply a graduating scale in the allocation of marks but it is critical to note that Addendum No. 4 reiterated *"the KPA target performance indicators"* remained a focal point in the assessment. The Respondent's target performance indicators were included in the Draft Project Agreement to be signed with the first ranked bidder. These Performance Indicators are;



- a) Annual throughput of at least 400,000 TEUs per terminal in three different ports (or combine average of 1,200,000 TEUs);
- b) Net per crane productivity: higher than 30 moves/hour/crane;
- c) Gross per crane productivity: higher than 25 moves/hour/crane;
- d) Net per ship productivity: higher than 90 moves/hour/ship;
- e) Gross per ship productivity: higher than 75 moves/hour/ship; and
- f) Import dwell time in the yard: shorter than 6 days.

51. Mr. Nyarandi further stated that whilst a bidder would not be disqualified for not meeting or have proximate past experience to the performance indicators (b) – (f) above, the marks scored would be scored down on a graduating scale.
52. The Respondent submitted that following enquiry by bidders about the maximum marks to be awarded under Performance Indicators' Criteria (TECH-2B), the Respondent responded that *"Maximum allocated point is 16 marks. Higher performance will have higher scores on graduating scale."*
53. Mr. Nyarandi further deponed that, had the Respondent applied the criteria stipulating minimum performance indicators, the Petitioner's bid would have failed and be subject to summary rejection. He further submits that the



Petitioner's bid was evaluated and scored on a graduating scale and achieved a mark of 10.6 out of a possible 16 given that the performance they provided did not exemplify high performance to entitle them to the maximum score.

54. In addition, Mr. Nyarandi stated that the Petitioner only provided experience of two (2) terminals which are operated by the Petitioner's as a major shareholder. For the third terminal operated by Kamigumi Company Limited ("Kamigumi"), which is an associate of the Petitioner, Kamigumi only owns 40.09% share while majority share of 59.91% is owned by Hanjin Shipping. This would have been non-compliant in accordance with the initial provisions of TECH-2 B.
55. The Respondent further deponed that the productivities (gross per crane and gross per ship) of the Kamigumi's terminal are the highest among the said three terminals, and the evaluated score would be lower if Kamigumi's Terminal was excluded.
56. In response to the Petitioner's contention that the PET now sought to "compute" productivity by seeking to average the gross per crane productivity of the three ports provided by the Petitioner, Mr. Nyarandi averred that Form TECH-2B required bidders to provide stated performance indicators for three (3) terminals and the numbers provided by the bidders would only make sense on assessment if they were



considered both individually and collectively on average as these were numbers provided by a consortium.

57. In response to the Petitioner's claim that its bid lost marks because Petitioner had failed to achieve an average performance target that did not exist in the RFP or addenda, Mr. Nyarandi stated that the Petitioner's lost marks for failing to demonstrate past experience performance indicators with high numbers viewed individually or collectively.
58. It is the Respondent's case that computation using averages was the most appropriate method to assess and evaluate the Petitioner's bid. For bidders who bid as a consortium, as per section 46 of the Act, their participation and qualification in the tender is contingent to the strength and performance of each individual party of the consortium.

The Respondent further submitted that use of averages does not change the result that would have been obtained in any event as each terminal was evaluated separately on the basis of information provided by the bidder. The Respondent further submitted that the result that would have been obtained by looking at each terminal individually is represented in the average number.

59. In response to the Petitioner's contention that only three categories out of seven performance indicators (a) to (g) were evaluated, the Respondent submitted that it selected three highest relevant categories (1) Annual throughput, (2)

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Gross per crane and (3) Gross per ship out of (actually) eight (a-h) categories for evaluation.

60. It is the Respondent's case that other categories have either direct linkages with the selected three categories or no relation with productivity. The Respondent argued that "Net per crane", "Net per ship" and "Import dwell time" have direct/strong linkages with "Gross per crane", "Gross per ship", and "Annual throughput", respectively and the Respondent therefore tried to avoid duplications in evaluation by only considering the latter three performance criteria.
61. The Respondent submitted that "Percentage volumes delivered by rail" and "Percentage volumes delivered by road" were requested only for reference. To illustrate this point, the Respondent referred the Petition Committee to Addendum No. 7 Queries Set No. 4. Query No. 20, which stated that *"These experiences (percentage volumes for rail/road) are for reference only. No evaluation will be made for these categories of the percentages"*.
62. The Petitioner referred the Petition Committee to the case of **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others v Cabinet Secretary For Transport & Infrastructure & 5 others (Nairobi HC J.R No. 2 Of 2014)** where it was held that if subsidiary legislation that is inconsistent with a section of the Act or whose effect is to vary the same would not only be unreasonable but also ultra vires.



Issues to be Determined

63. The Petition 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 deliberated below.
64. **Issue No. 1**
Was the Respondent required by law to seek and obtain the Committee's approval of the results of the technical evaluation prior to communicating the results to bidders?
65. The Petitioner argued that under Section 7 of the Act, the Committee is required to oversee the monitoring and evaluation by a Respondent of a Public Private Partnership. The Petitioner has therefore maintained that this role of the Committee is anchored in the evaluation of Technical Proposals.
66. The Petitioner has further contended that the provisions of Regulation 48(1) clearly refer to the period within which the evaluation of the evaluation of Technical Proposals should be completed. Therefore, the Petitioner concluded that the Evaluation Report, referred to in Regulation 48 (2), is the Technical Evaluation Report that is required to be submitted to the Committee for approval or rejection pursuant to Regulation 48(5). Based on this interpretation, the Petitioner has contended that the Respondent must obtain prior approval of the Committee before it could communicate



the results of the evaluation of Technical Proposals to bidders.

67. On the other hand, while accepting that Regulation 48(1) deals with the process of technical evaluation, the Respondent has argued that there exists a drafting error in Regulation 48(3) by referring to paragraph (1) instead of paragraph (2).
68. The Petition Committee does not agree with either the Petitioner or the Respondent on the interpretation of Regulation 48(1).
69. Further, the Petition Committee does not agree with the Petitioner with respect to approval of the Committee of the Technical Evaluation Report.
70. A careful examination of the provisions of the Act and those of the Regulations, in particular Sections 44, 47, 48 and 49 and Regulations 46 and 48, leads to a contrary conclusion.
71. Section 44(2) of the Act prescribes a two-stage evaluation process, starting with the evaluation of the technical proposals followed by the evaluation of the financial proposals. Section 47 sets out the procedure to constitute a PET and the evaluation procedure to be followed. Section 47(2) makes provision for the technical evaluation by the PET to be approved by the Contracting Authority before Financial Proposals can be opened.



72. Section 48 sets out the financial proposals evaluation procedure. Section 48(1) provides that the PET shall invite the bidders who have been prequalified on the basis of their technical proposals to attend the opening financial proposals. This procedure is also found in Regulation 46(2).
73. Following completion of the evaluation of technical and financial proposals, Section 49(1) requires the PET to prepare an evaluation report, which includes recommendation of ranking of bids, for submission to the Contracting Authority.
74. Section 49(2) requires the Contracting Authority to submit the evaluation report to the Committee for approval. It is clear that the Act only provides for one evaluation report to be submitted to the Committee after conclusion of both the technical and financial evaluation.
75. Contrary to the contention of the Petitioner and admission by the Respondent, Regulation 48 is not at variance with the provisions of the Act. Regulations being subsidiary to the Act, their provisions must be read and be construed in consonance with the provisions of the Act.
76. As provided for under Section 44(3), the Cabinet Secretary made rules, which specify, among other provisions, the timing of various activities of the procurement process. The timelines for the various procurement activities, following the submission of technical and financial proposals, are found in

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Regulation 48. The import of Regulation 48 therefore is to set out the timing of these activities, which is as follows: -

- (a) **Completion of the evaluation of technical and financial proposal: within seven (7) days of the opening of technical bids;**
- (b) **Preparation and submission of evaluation report: within five (5) days of the completion of the evaluation;**
- (c) **Submission of the evaluation report by the Contracting Authority to the Committee: within 7 days of receipt of the report from the PET;**
- (d) **Approval/rejection of the evaluation report by the Committee: within 21 days of receipt of the evaluation report.**

77. Regulation 48 is therefore consistent with the provisions of the Act in every respect.

78. In view of the foregoing, the Petition Committee finds that the Respondent acted within the law.

79. **Issue No. 2**

Did the Respondent use evaluation criteria for Bidder's Organisation category other than those set out in Form TECH – 2A?

80. The Petitioner has contended that during the evaluation of technical proposals, the Respondent introduced submission of an organogram as an evaluation criteria contrary to the requirements set out in Form TECH-2A. The Petitioner further argued that the requirements in this form was to provide a

brief description of the background and organisation of the consortium, which it maintained it did. The Petitioner further stated that the introduction of a requirement for submission of an organogram resulted in it losing marks and contributed to its disqualification.

81. In its response, the Respondent stated that it did not introduce a requirement, which was not stipulated in Form TECH-2A. The mention of an organogram, in its notification letter to the Petitioner, which stated "*...your bid lost marks for not providing sufficient information on the organisation structure. It was expected that the Lead Partner's organisational structure/organogram depicting various departments/divisions will be given...*" was only by way of explanation.
82. The Respondent further asserted that no marks were specifically allocated to the submission of an organogram. The Respondent added that the marking scheme, as presented in the summary of the evaluation criteria supplied to the Petitioner, following the order of the Petition Committee, allowed 1.0 mark for Organisational Structure, including shareholding percentage. The Respondent stated that it only awarded 0.5 marks to the Petitioner under this criterion because the information supplied was insufficient.
83. The Respondent added that the Petitioner would have been awarded full marks had it presented the organisational



structure of the Lead Member with sufficient details whether in prose or in tabular format.

84. Evidence placed before the Petition Committee lends credence to the Respondent's assertion. The RfP requirements for Organisation Structure are found in Form TECH-2A. These include the following seven evaluation criteria relating to the Lead partner: -

1. **Organisation structure, including shareholding percentage,**
2. **International presence (at least 5 number of terminals globally with major shareholding)**
3. **Global network/partnership**
4. **Staff complement**
5. **Mission, Vision and Core Values**
6. **Quality Assurance Policies**
7. **Certifications by International Bodies.**

85. The marking scheme used to evaluate this category allocated 0.5 marks to each of these criterion, except for criterion 1. above, which was allotted 1.0 mark. As can be seen from the above list, no marks were specifically allocated to the submission of an organogram.

86. Further, the Petitioner has not provided any evidence to support its contention that the loss of 0.5 was occasioned by its non-submission of an organogram.

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87. The Petition Committee therefore finds that the Respondent did not vary the evaluation criteria for the Bidder's organisation category, as set out in Form TECH-2A.

88. **Issue No. 3**

Did the Respondent provide sufficient disclosure regarding the evaluation criteria for the Bidder's experience category as required by law?

89. The Petitioner has maintained that its inability to attain the pass mark for Bidder's experience category was partly as a consequence of the failure by the Respondent to disclose a detailed marking scheme for the evaluation of the criteria for Bidder's experience category set out in Form TECH-2B of the RfP and Addenda 4, 6, 7 and 8 thereto.

90. The Petitioner has further contended that had a detailed marking scheme been disclosed, it would not have submitted data for two low productivity container terminals in Africa but would have instead provided data for its more efficient container terminal operations in developed markets.

91. The Respondent has underscored that it disclosed sufficient information to all bidders, which information made it abundantly clear that higher productivity levels would result in higher marks being awarded for the Bidder's experience category. In this regard the Respondent cited Addendum



No. 8, wherein bidders were informed that "higher performance will have higher scores on a graduating scale".

92. Having examined the evaluation criteria disclosed by the Respondent, the Petition Committee is satisfied that sufficient disclosure was made to ensure a level playing field. This conclusion is based on the following: -

- i. Bidders were informed, vide Annex A (b) (viii) of the RfP and Annex 5 of the Draft Project Agreement, of the Respondent's target performance indicators for each of the six (6) performance indicators set out in Form TECH-2B;
- ii. Item 3 of Addendum No. 7 gave a clear response that actual performance indicators lower than the target performance indicators will result in loss of marks; and
- iii. Furthermore, bidders were informed in Addendum No. 8 that a graduating scale would be used, with the higher performance attaining higher marks. The only condition was that one of the ports had to be from a developing country.

93. The above information was sufficient to have enabled the Petitioner to provide data for three terminals, which would have maximised the throughput and operational efficiency data supplied in Form TECH-2B submitted in the Technical Proposal.



94. In conclusion, the Petition Committee therefore finds that the Respondent complied with the requirements of Section 43(2)(2) of the Act, which placed an obligation on it to provide the criteria and method to be used in evaluating a bid.

95. **Issue No. 4**

Did the Respondent evaluate Bidder's Experience category strictly in accordance with the requirements set out in the RFP, as required by the law?

96. The Petitioner has argued that, in contravention of the provisions of the Act and the Regulations, the Respondent evaluated its experience using criteria other than that set out in Form TECH-2B and its subsequent amendments/clarification in Addenda No 4, 7 and 8. The Petitioner has contended that this unlawful action by the Respondent partly contributed to its failure to qualify to proceed to the financial opening phase. In this regard, the Petitioner has cited, among others, (i) the reduction of the evaluation criteria from the six (6) listed on Form TECH-2B to three (3), and (ii) averaging actual performance data, provided for the required three ports, contrary to the procedure set out in in Addendum No 4, which required marks to be awarded according to the performance indicators of each of the individual terminals in different ports.



97. Initially the Respondent, vide the replying affidavit sworn by the Chairman of the PET dated 4th August 2015, indicated that the evaluation criteria for Bidder's experience set out in Form TECH-2B, and as subsequently amended in various Addenda, was used to evaluate the Petitioner's experience. However, following the release of the summary of the Technical Evaluation Report to the Petitioner, a further affidavit sworn by the Secretary to the PET indicated to the contrary as explained below.
98. Addendum No. 4 amended Form TECH-2B, under Item (I) to delete the minimum values for five (5) out of the six (6) criteria; i.e. Performance Indicators (b) – (f). This effectively removed the pass/fail evaluation basis for these Performance Indicators thus allowing the Respondent to evaluate Bidder's experience on a graduating scale basis. However, under Item (K), Addendum No. 4 introduced three other criteria: (i) No. of terminal (bidders were required to provide 3, with a least one from developing countries), (ii) Evidence to support the past experience achieved, and (iii) that marks would be awarded according to the performance indicators listed on Form TECH-2B, for each of the individual terminals in different ports.
99. Addendum No. 6, under Items 1 (iv) and (v), minimum requirements and pass/fail criterion were reintroduced. However, Addendum No. 7, under Item No 3 reverted back to the provisions under Addendum 4.
100. Addendum No. 8 recorded the following under Item 3: -







Statement:

"The bidders shall be evaluated on the basis of the following performance indicators based on a graduating scale:

- (a) Annual throughput of at least 400,000 TEUs per terminal in three different ports (or combined average of 1,200,000 TEUs);
- (b) Net per crane productivity;
- (c) Gross per crane productivity;
- (d) Net per ship productivity;
- (e) Gross per ship productivity; and
- (f) Import dwell time in the yard."

Clarification required:

"1) Please confirm that the "combined average of 1,200,000 TEUs" should read "combined throughput of 1,200,000 TEUs for three different ports"

2) Please confirm that the minimum performance indicators for b) to f) have been removed.

3) What are the maximum marks awarded for this segment of evaluation?

4) How will marks be awarded on a graduating scale for performance indicators a) to f) and what is the basis for the awarding of maximum marks for each performance indicator category



KPA Responses:

1) KPA confirms "combined throughput of 1,200,000 TEUs for three different ports."

2) KPA confirms that the minimum performance indicators for (b) to (f) in Form TECH-2 have been removed as per Addendum 4.

3) & 4) Maximum allocated point is 16 marks. Higher performance will have higher score on graduating scale.

101. This Committee therefore finds that based on the RfP and the various addenda thereto, the evaluation criteria ought to have been as follows:

(a) The basis for the evaluation was the six performance indicators (a) to (f), as set out in Form TECH-2B.

(b) A total of sixteen (16) marks were to be awarded for the six performance indicators.

(c) For performance indicator (a), evaluation was to be on a pass/ fail basis based on either a minimum of 400,000 TEUs per terminal or a combined throughput of 1,200,000 TEUs for three different ports.

(d) For performance indicators (b) to (f), marks were to be awarded for each of the individual terminals in different ports on a graduating basis. Higher performance was to score higher marks.



(e) Full marks should be awarded if previous performance meets the target minimum performance indicators set out in Annex A(b) viii of the ITB.

102. However, the Petition Committee notes from the Technical Evaluation Report, that during the evaluation process the Respondent made the following adjustments to the above evaluation criteria: -

- (i) The Respondent used three (3) instead of the six (6) performance indicators listed on Form TECH-2B;**
- (ii) The Respondent allocated 3 marks to the provision of documentary evidence, yet this criterion had been eliminated by Addendum No 8; and**
- (iii) Contrary to the provisions of TECH-2B, as amended by Addendum No. 4, the Respondent adopted a procedure of aggregating past performance for different terminal and averaging them for the purposes of allocating marks.**

103. The Committee therefore finds that the Respondent failed to comply with the law with respect to Regulation 47 (1), which placed an obligation on the PET to apply the criteria specified in the tender documents when evaluating technical offers.



Orders

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

1. The Respondent's decision, contained in its letter ref. PSM/CTC/1/01(125) VOL 1 (81) dated 16th July 2015 addressed the Petitioner, is hereby set aside.
2. The Respondent is hereby directed to re-evaluate the Technical Proposal of all bids that satisfy the requirements of Stage 1 evaluation.
3. The basis of the re-evaluation shall be the six performance indicators (a) to (f) set out in Form TECH-2B as follows:
 - (a) Annual throughput of at least 400,000 TEUs per terminal in three different ports (or a combined throughput of 1,200,000 TEUs for three different ports);
 - (b) Net per crane productivity: higher than 30 moves/hour/crane;
 - (c) Gross per crane productivity: higher than 25 moves/hour/crane;
 - (d) Net per ship productivity: higher than 90 moves/hour/ship;
 - (e) Gross per ship productivity: higher than 75 moves/hour/ship; and

- (f) Import dwell time in the yard: shorter than 6 days.
4. A total of sixteen (16) marks shall be awarded for the six performance indicators in 3. above.
 5. For performance indicator (a) evaluation shall be on a pass/fail basis based on either a minimum of an annual throughput of 400,000 TEUs per terminal or a combined throughput of 1,200,000 TEUs for three different ports.
 6. For each Performance Indicator, maximum marks shall be awarded if previous performance meets the target minimum performance indicators set out in Annex A (b) viii of the ITB.
 7. For performance indicators (b) to (f), marks should be awarded for each of the individual terminals in different ports on a graduating basis.
 8. As required by Section 43(2) and Regulation 35(3), the Respondent shall by 30th December 2015, inform all bidders of the above evaluation criteria, including the marks allotted to each Performance Indicator.
 9. There shall be no orders as to costs.

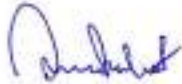


DATED and DELIVERED at NAIROBI this 5th day of December 2015



PAUL KAREKEZI

Member



ISAAC BONDET

Member



KIHARA MURUTHI

Chairperson

Delivered in the presence of: -

- Mr. Andrew Mukite Mwangi & Rachael Ndem for the Petitioner
- M^{rs} Patricia Jeki H/B Mr. Geoffrey Imende for the Respondent.