



REPUBLIC OF KENYA
THE PUBLIC PRIVATE PARTNERSHIPS
PETITION COMMITTEE

PETITION No. 4 of 2015

INTERNATIONAL CONTAINER TERMINAL
SERVICES, INC. (ICTSI).....PETITIONER

-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. This is the Petition of **International Container Terminal Services, INC. (ICTSI)** (hereinafter "**the Petitioner**"), filed with the Petition Committee on the 29th day of July 2015.
2. The Respondent filed its replying affidavit and written submissions in response to the Petition.
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 Phase 1 of the Second Container Terminal Port at Mombasa, Kenya** (hereinafter "**the Tender**")
4. In response to this invitation, the Petitioner submitted its technical and financial bids.
5. It is not in dispute that by a notification letter dated 16th July 2015, the Respondent informed the Petitioner that its bid failed at Stage II; Technical Evaluation in the following areas:
 - a) **Your bid lost marks for not providing sufficient information on the organization structure. Only shareholding of the company was given;**



- b) Your bid lost marks on productivity performance indicators. For instance, in Philippines Manila Port, you achieved a gross per crane productivity of 24.3 moves, Guayaquil Ecuador, 19.4 moves and in Baltic Terminal in Poland, 25.0 moves, thus achieving an average of 22.9 moves overall productivity per crane.

Overall your score was as follows:-

No.	Criteria	Pass Mark	Score
1.	Bidder's Organization Structure and Experience	16	14.5
2	Financial Capability (as provided in Form TECH-2 C)	20	24

Your bid therefore failed to attain the minimum pass mark in the criterion on Bidder's Organization Structure and Experience and therefore did not qualify for the next stage of the Financial Opening and Evaluation.

6. The Petitioner being aggrieved with the Respondent's decision to disqualify it at Stage II lodged this Petition, which the Petition Committee is now being asked to decide.
7. In response to the Petition, the Respondent filed replying affidavit and written submissions in support of its case. The instant Petition has been decided on the basis of the pleadings, documentary evidence and oral arguments by the Counsels for the parties during the hearing of this Petition on 2nd December 2015.

8. On 31st August 2015, when this Petition came up for mention, the Petitioner applied to be supplied with the Technical Evaluation Report by the Respondent. After the application was disallowed by the Petition Committee, the Petitioner moved the High Court vide **Judicial Review Case No. 325 of 2015** and obtained leave to commence judicial review proceedings against the Petition Committee and the Respondent. Subsequently, the Petitioner filed a Notice of Motion dated 5th October, 2015, seeking, among others, an order of *Certiorari* to quash the decision of the Petition Committee contained in the Ruling dated 31st August 2015.
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.
10. Pursuant thereto, the Petition Committee on 17th November 2015, directed the Respondent to, *inter alia*, 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 Petition, the Petitioner complains that the Respondent disqualified its bid at Stage II despite the fact that the Petitioner fully complied with the requirements in the Tender Document.

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12. The Petitioner complained that despite availing all information and/or documentation as expressly requested for in the Tender Document, the Respondent arbitrarily and without justifiable cause held the said information and/or documentation was deficient. It is the Petitioner's complaint that despite providing the information on the Organisation Structure as required by the Tender Document, the Notification Letter indicated that the Petitioner's bid lost marks for not providing sufficient information on the organization structure.
13. The Petitioner stated that the instructions to the bidders as contained in the Tender Documents did not prescribe a specific format and/or manner in which a bidder should present its organisational structure. The Petitioner further argued that Form TECH – 2A of the Tender Document specifically provided for a brief description of the background and organisation of the bidder.
14. It is the Petitioner's case that it provided the make-up and structure of its board and key executives in its Technical Proposal and in so doing has demonstrated a functional departmentalisation, comprising: Chairman and President, Executive Vice President; Vice president for Business Development, Vice President for global information and technology; Vice president Greater China; and Vice President, Africa.
15. In view of the aforesaid, the Counsel for the Petitioner submitted that the Petitioner provided information on the

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structure of the board and key executives plus shareholding structure and therefore it was wrong and unfair for the Respondent to disqualify its bid.

16. The Petitioner also stated that it should have garnered the maximum marks/points allocated for this section, to wit: 4 marks in respect of the sub criteria on Organisation Structure but it was given 3.5 marks.
17. The Petitioner's informed this Petition Committee that its Technical Proposal was subjected to evaluation based on criteria which was arbitrary and/or ambiguous. The aforesaid ambiguity was interpreted as against the Petitioner to its detriment.
18. Further, it is the Petitioner's case that the Technical Proposal was subjected to evaluation based on criteria which had been expressly excluded in the Tender Document.
19. As per the Notification Letter, one of the reasons given by the Respondent for disqualifying the Petitioner's bid at Stage II was that the bid did not meet the productive performance indicators as demanded in the Tender Document.
20. The Petitioner contends that in disqualifying the Technical Proposal as above mentioned the Respondent erred in basing its evaluation of the Petitioner's experience on criteria which had expressly been excluded in the Tender Document.

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21. The Petitioner further contends that it has reviewed the summary of Technical Evaluation results and it clearly shows that the evaluation team has employed minimum requirements in evaluating the performance indicators contrary to Addendum No. 4. To illustrate this point, the Petitioner submitted that page no. 1 of 7 of the Evaluation Report, paragraph (b) (i) indicates the following:-

- a) The performance indicator, gross crane productivity is assigned a minimum of 30 moves per crane for full points to be awarded; and**
- b) The performance indicator, gross ship productivity is assigned a minimum of 90 moves per ship for full points to be awarded**

22. The Petitioner submitted that the original Tender Document (Form TECH – 2B, at page 29) required the bidders to demonstrate, for the past 3 years, achievement of minimum performance indicators in respect of six (6) fields, to wit: Annual throughput, Net per crane productivity, Gross per crane productivity, Net per ship productivity, Gross per ship productivity and Import dwell time in the yard.

23. It is the Petitioner's case that pursuant to Addendum No. 4 to the Tender Document, the performance indicators in relation to Net per crane productivity, Gross per crane productivity, Net per ship productivity, Gross per ship productivity and Import dwell time in the yard were deleted. The Petitioner further argued that on the basis of the

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amended version of the Tender Document, the only set minimum performance indicator was the annual throughput of at least 400,000 TEUs per terminal in three (3) different ports or combined average of 1,200,000 TEUs.

24. It was the Petitioner's view that the Respondent confirmed to the bidders through Addendum No. 8 that the minimum performance indicator to be fulfilled is annual throughput of at least 400,000 TEUs per terminal in three different ports (or annual combined throughput of 1,200,000 TEUs in all the three ports.)
25. Counsel for the Petitioner submitted that pursuant to Addenda 4 and 8, the only minimum performance indicator required was annual throughput. His client exceeded the minimum performance indicators in all three terminals/ports for all the relevant periods.
26. The Petitioner was of the view that it demonstrated that it had achieved the minimum annual throughput of 400,000 TEU's in all three port terminals and further provided certified evidence of the same, and therefore the Respondent should have immediately determined that the Petitioner had in so doing achieved the Pass Mark that was set for the experience criteria, being 80% of the set 16 marks.
27. It is the Petitioner's case that there was no minimum performance requirement for the productivity performance indicators (having been deleted vide Addendum No. 4) and therefore they should have been evaluated to provide



higher scores on a graduating scale, as set out in Addendum No. 8 under the Respondent's responses to Query No. 3. The Petitioner argued that once they had achieved the pass mark on minimum annual throughput, then any marks above the pass mark would be awarded on the basis of the demonstrated productivity performance indicators, with higher productivity indicators being awarded higher marks.

28. The Petitioner argued that by stating in the Notification Letter that they lost marks on productivity indicators, the Respondent clearly demonstrates that a minimum threshold was applied in such evaluation, which would either be those minimums performance indicators that were removed from the Tender Document through Addendum No. 4 or other criteria that was not communicated in the bid documents.
29. It was also said that the Respondent breached the following provisions of the law by evaluating the Petitioner's bid on the basis of minimum productivity indicators which were deleted by Addendum No. 4:-

a) Section 43 (2) of the Public Private Partnerships Act 2013 (hereinafter referred to as "the Act") which requires the Respondent to prepare invitation to bid and tender document which include, among other things, the criteria and method to be used in evaluating a bid;

b) Regulation 35 (3) (k) of the Public Private Partnerships Regulations 2014 (hereinafter referred to as "the Regulations") which require the tender documents to

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provide the criteria for assessing technical bids and the thresholds each bid should meet.

c) Regulation 47 of the Regulations which requires that the evaluation team shall apply the criteria specified in the tender documents when evaluating technical offers

30. The Petitioner argues that it met all the thresholds set out in the bid documents with respect to the performance indicators and on that basis cannot be disqualified on new criteria introduced at evaluation stage.
31. The Petitioner informed the Petition Committee that Addendum No. 4 clearly set out six performance indicators. Despite the foregoing, the summary of Technical Evaluation results clearly demonstrated that the Evaluation Team only considered three criteria, namely, Gross per crane productivity, Gross per ship productivity and Annual throughput, and completely ignored Net per crane productivity, Net per ship productivity and Import dwell time.
32. The Petitioner referred this Committee to a number of Decisions before the **Public Procurement Administrative Review Board** and the High Court of Kenya. In the said cases, the issue of ambiguous tender documents and introduction of new criteria had been held to warrant the dismissal of the decision of a procuring entity.
33. To buttress the above position the Petitioner referred to the following authorities:



- a) Richardson Company Limited –v– The Registrar High Court of Kenya Review No. 43 of 2008
- b) Guardforce Group Limited –v– Chemelil Sugar Company Limited Review No. 15 of 2014
- c) Metro Consultants & Guardian Limited –v– Chemelil Sugar Company Limited Review No. 2 of 2008
- d) Midrocwater Drilling Company Limited –v– National Water Conservation & Pipeline Corporation Review No. 36 of 2008
- e) Muttu Salmann & Associates & Symbion International –v– Catering & Tourism Development Levy Trustees Consolidated Review Nos. 50 & 51 of 2007
- f) MFI Office Solutions Limited –v– Kenya Ports Authority Review No. 32 of 2007

34. The Petition Committee was also requested to adopt the position taken in the case of **Misc. Civil Application No. 362 of 2010 Republic vs. Public Procurement Administrative Review Board & 2 Others ex-parte HYOSUNG EBARA Company Limited [2011] eKLR**, where the High Court held thus:

"No other criteria apart from the ones set out in the tender documents should have been relied upon in carrying out the evaluation. The spirit of confidentiality as stated under Section 44 of the Act and strict adherence to the evaluation criteria of tenders in the tendering process as required in Section 66 of the Act must be guarded jealously if the objectives of the Public Procurement and Disposal Act are to be realized."



35. In conclusion, the Petitioner submitted that the Evaluation team has applied the criteria selectively, such selection being done arbitrarily and to the detriment of the Petitioner. In any event, it was submitted that the arbitrary selection of which criteria to apply and which criteria to ignore is inimical to the laid principles and laws of procurement.
36. In view of the above allegations, the Petitioner has sought several orders: -
- a. **That the decision of the Respondent rendered on 16/07/2015 disqualifying the Technical Proposal of the Petitioner be set aside;**
 - b. **That pending the hearing and determination of this instant petition conservatory orders be issued.**
 - c. **A declaration that the Petitioner's Technical Proposal is responsive in all respects and as relates to the tender in issue;**
 - d. **That the Respondent be condemned to pay the costs of this Petition; and**
 - e. **Any other relief this Honourable Committee may deem just and fit to grant**

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Respondent's Case

37. The Respondent opposed the Petition through a replying affidavit sworn on 7th August, 2015 by **Justus Omae Nyarandi**, the Chairman of the Respondent's **Proposal Evaluation Team** (hereinafter referred to as "**the PET**") constituted pursuant to the provisions of Section 47 of the Act. The affidavit gives extensive details about the procurement in question. The Petition Committee will, however, only highlight those portions of the affidavit relevant to the issues before the Petition Committee.
38. The Respondent gave evidence that it conducted the evaluation of the proposals in accordance with the provisions of the Constitution of Kenya, the Act, the Regulations and the Tender as amended by the Addenda issued by the Respondent. It was their view that the evaluation process was transparent, fair and equitable.
39. The Respondent further affirmed that the reasons for the failure of the Petitioner's bid are clearly set out in the Letter of Notification issued by the Respondent dated 16th July 2015. The reasons are listed as follows:

Bidder's Organization Structure and Experience

- a. **Your bid lost marks for not providing sufficient information on the organization structure. Only shareholding of the company was given.**



b. Your bid lost marks on productivity performance indicators. For instance, in Philippines Manila Port, you achieved a gross per crane productivity of 24.3 moves, Guayaquil Ecuador, 19.4 moves and in Baltic Terminal Poland, 25.0 moves, thus achieving an average of 22.9 moves overall productivity per crane."

40. In response to the Petitioner's complaint that it provided all the required information on Organisational Structure, the Respondent stressed that the Petitioner's bid lost marks for not providing sufficient information on the organization structure. The Respondent maintained that only the shareholding of the company was given.

41. In the Respondent's view, the Instructions to Bidders, Stage II (1) (a) of the Tender, required the bidders to provide their organizational structure as provided by TECH- 2 A of the Tender. The specific requirement was that:-

**"Bidders shall provide information based on the following;
(1) Organizational structure, including shareholding percentages....."**

42. This Petition Committee was referred to Addendum No. 4 issued on 26th May 2015 which set out the evaluation criteria and made it clear that the information to be provided by the bidders, in respect of the Bidder's Organization as stipulated in Form TECH – 2A, was that of the Lead Partner. The maximum allocated marks for providing all the information sought was four (4) marks. The Petitioner scored 3.5 marks out of 4 marks.



43. The Respondent submitted that a reading of the Petitioner's proposal attached to the Petition (Exhibit "ICTSI4" at pages 6 to 46 of the Technical Proposal), makes it clear that the Petitioner did not give sufficient particulars of their organizational structure as required by TECH- 2 A of the Tender Document because of the following reasons/issues:-

1. **It is not clear what the designation of the Petitioner's operating head is.**
2. **What are the reporting lines for the various key personnel who work under him and the various divisions in their corporate structure?**
3. **What are their designations and what are they in charge of?**

44. The Respondent further submitted that failure to provide this information cost the Petitioner 0.5 marks.

45. It is the Respondent's case that, by claiming that it should have been awarded the maximum marks under the section on Organisational Structure, the Petitioner seeks to constitute either itself or the Petition Committee into a Proposal Evaluation Team. The Counsel for the Respondent submitted a similar issue was raised in the case of **Consortium of Mitsubishi Heavy Industries Ltd & Mitsubishi Corporation versus Kenya Electricity Generating Company Limited Review 25 of 2011** where Administrative Review Board held that the hearing before it should not be converted into a technical



evaluation of the bids which is a function of the Evaluation Committee of a Procuring Entity.

46. In response to the alleged failure to properly or fairly evaluate the Petitioner's bid in accordance to the criteria set out in the Tender Document, the Respondent stated that the Tender and particularly the Instructions to Bidders, Data Sheet specifically provided the detailed and objective criteria to be applied in the evaluation of the bid proposals and the Petitioner's proposal was evaluated in accordance to the criteria set out in the Tender Document as amended by the Addenda. It is the Respondent's position that, in the event that the Petitioner was clear that there was no evaluation criteria provided in the Tender, they ought to have challenged this at the outset, instead of going through the process and then raising this issue at this stage.
47. In response to the allegation that the Respondent evaluated the Petitioner's proposal on criteria which had been expressly excluded or deleted by Addenda 4 to the Tender Document, it is the Respondent's position that the evaluation criteria applied by the Respondent was always in accordance with the Act, Regulations and Tender as amended by the Addenda issued by the Respondent.
48. According to the Respondent, 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 would be evaluated on the basis of the performance indicators



based on a graduating scale thus deleting the minimum performance requirements set out in paragraphs (b) and (f).

49. The Respondent averred that bidders were further informed that they were required to demonstrate what they had achieved in the various terminals and what strategy they would deploy at CT2 (2nd Container Terminal) and how they would apply their past experience to achieve the Respondent's target performance indicators. Bidders were also required to provide certified evidence of the above information.

50. It was submitted that the effect of this amendment was to remove the initial pass/fail criterion that would apply in the event that the bidder did not meet the minimum performance indicators set in the original Tender. The bidders were informed that the Respondent would apply a graduating scale in the allocation of marks but it is critical to note that the Addendum No. 4 reiterated the Respondents target performance indicators remained a focal point in the assessment. The Respondents target performance indicators were included in the Draft Project Agreement to be signed with the first ranked bidder.

51. It is the Respondent's position that whilst a bidder would not be disqualified for not meeting or have proximate past experience to the performance indicators (b) – (f) in the Tender Document, the marks scored would be scored down on a graduating scale.



52. Mr. Nyarandi deponed that following enquiry by bidders on the maximum marks to be awarded under Performance Indicators' Criteria (TECH-2B), and how marks would be awarded on a graduating scale for the performance indicators (a) to (f) and what would be the basis for awarding of maximum marks for each performance indicator category, the Respondent replied that maximum allocated points is 16 marks. Higher performance would have higher scores on a graduating scale.
53. It was his view that the performance indicators at paragraphs (b) to (f) in Form TECH-2B were not deleted. Only minimum performance indicators were deleted.
54. Mr. Nyarandi swore in his affidavit that the approach to the evaluation was to the Petitioner's advantage as they were evaluated on this criterion and scored accordingly 11 marks out of a maximum possible score of 16 when otherwise they would not have met the previously stated minimum performance indicators and therefore would not have been scored at all. According to him the proposal would have been deemed non responsive and summarily rejected at that stage without being scored. This is because, the performance indicators of the gross moves/hour/crane (ship) by the Petitioner was an average of 22.9/61.6 moves.
55. In its evidence the Respondent pointed out that the Performance Indicators 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 party/consortium.

56. In response to the Petitioner's contention that it demonstrated that it had achieved the minimum annual throughput of 400,000 TEU's in all three port terminals and further provided certified evidence of the same, and therefore the Respondent should have determined that the Petitioner had achieved the Pass Mark that was set for the experience criteria, being 80% of the set 16 marks, Mr. Nyarandi averred in paragraph 31 of his affidavit that the Petitioner lost marks for failing to demonstrate past experience performance indicators with high numbers viewed individually or collectively. The Petitioner's bid was evaluated and scored accordingly.

57. Mr. Nyarandi further deponed that the evaluation is based on the fact that the Petitioner had been informed that the maximum allocated point were 16 marks. Higher performance will have higher scores on graduating scale.

58. He further averred that, though the starting point for all bidders may have been to be allocated full marks, their performance indicators would lead them to lose marks in a graduating scale based on the target performance indicators that the bidders had been informed would be required of the first ranked bidder.

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59. It is the Respondent's case that their target performance indicators are referred to in Addendum No. 4, in the Outline of the Concession; Annex A (b) viii of the Tender and the Draft Project Agreement.
60. In response to the Petitioner's assertion that only three categories out of seven performance indicators (a-g) were evaluated, the Counsel for the Respondent submitted that the Respondent selected three highest relevant categories (1) Annual throughput; (2) Gross per crane; and (3) Gross per ship out of eight categories indicated in Addendum 4 for evaluation.
61. The Counsel for the Respondent further submitted that other categories have either direct linkages with the selected three categories or no relation with productivity. "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.
62. The Counsel for the Respondent further submitted that the Respondent tried to avoid duplications in evaluation. He further submitted that Percentage volumes delivered by rail and Percentage volumes delivered by road were requested only for reference. He referred the Petition Committee to the Respondent's clarification in Addendum No. 7 Queries Set No. 4, Query No. 20, indicating that these experiences (percentage volumes for rail/road) were for reference only.

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No evaluation was made for these categories of the percentages.

Issues to be Determined

63. 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 emerged therefrom.

64. **Issues No. 1**

Did the Respondent evaluate the Bidder's Organisation information using the criteria and method set out in the Request for Proposals (hereinafter referred to as "RfP")?

65. The requirements for Bidder's Organisations structure is to be found in Form TECH-2A. This category had initially been allocated five (5) marks in the evaluation of technical proposals but was later reduced to four (4) marks in Addendum No. 4 dated 26th May 2015.

66. The evaluation criteria for Bidder's Organisation set out in Form TECH-2A involved performance indicators (1) to (8).

67. The marking scheme used to evaluate this category allocated 0.5 marks to each of these performance indicators, except for performance indicator (1), which was allotted 1.0 mark and performance indicator (8) relating to local partners that was removed in Addendum No. 4.

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68. The Respondent awarded 3.5 marks out of 4 to the Petitioner in this category because in its opinion, the Petitioner did not provide sufficient information relating to Organisation structure.

69. The Petitioner argued that it should not have lost 0.5 marks under the Organisation Structure performance indicator and should have been awarded all the four (4) marks for this category for the following reasons:-

(a)The RfP was not specific with regard to the requirements for organisation structure – it was left to bidders to decide the extent of information to be supplied;

(b)The RfP in Form TECH-2A, as amended by Addendum No. 4, specifically required bidders to provide a brief description of the background and organisation of the Lead Partner, which it did; and

(c)The Respondent requested bidders in Addendum No 7 to limit the number of pages of Form TECH-2A to 30 pages, which it duly complied with.

70. The Respondent asserted that it provided adequate information relating to the criteria and method to be used in evaluating the technical proposals, in compliance with the provisions of Section 43(2) (e) of the Act.

71. This Committee notes that although the description of all the performance indicators under Bidder's Organisation are brief in nature, the Petitioner appears to have understood

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requirements of all the performance indicators, except for the performance indicator for organisation structure. In light of this, the Petition Committee questions the merit of the Petitioner's argument.

72. The Respondent, as stated by the Petitioner, has a duty under Section 29(2) of the Act to be guided by the principles of transparency, free and fair competition and equal opportunity. Pursuant to Section 29(2), the Act has placed an obligation on the Respondent under Section 43(2) (e) to include in the tender documents information relating to the criteria and method to be used in evaluating bids. Further, Regulation 47(1) places an obligation on the Respondent to apply the criteria specified in the tender documents when evaluating technical proposals. The Petitioner has not demonstrated that the Respondent failed to comply with these requirements.

73. In the light of the above, the Petition Committee is of the view that the Petitioner's arguments have no merit.

74. **Issue No. 2**

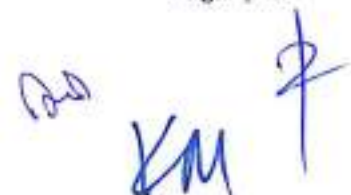
Did the Respondent evaluate the Bidder's Experience information using the criteria set out in the RfP?

75. The Petitioner stated it failed to qualify to proceed to the financial opening stage because the Respondent (a) arbitrarily applied minimum requirements that were not



included in the RfP, (b) failed to take into account all the six criteria for the evaluation of Bidder's Experience as set out in Form TECH-1B, and (c) applied a graduating scale to performance indicators whose minimum values had been removed from the RfP.

76. Initially, the RfP called for the evaluation of a bidder's experience to be on a pass/fail basis. For this reason, the RfP prescribed minimum values for each of the performance indicators set out in Form TECH-1B.
77. In addition, Clause 5.2 of the ITB Data Sheet allotted maximum scores and passing scores to each of the each of the four (4) main headings of Technical Proposal Evaluation criteria.
78. Thus, in respect of the Bidder's Organisation Structure and Experience, the original RfP contemplated a two hurdle evaluation process. Firstly, the bidder had to meet the minimum threshold under each of the six (6) criterion followed by achieving at least the pass mark in order to fulfil the requirements under Bidder's Organisation Structure and Experience.
79. Addendum No. 4 amended Form TECH-2B, under Item (I) to delete the minimum values for five (5) out of the six (6); i.e. Performance Indicators (b) to (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. Additionally, Addendum No.4 removed the criterion relating to the participation of Kenya nationals among proposed Key Experts and revised maximum scores allotted and the passing marks of the remaining four (4) technical evaluation criteria.

80. Item (K), in Addendum No. 4 introduced three other criteria: (i) Number of terminal (bidders were required to provide 3, with at least one from developing countries), (ii) Evidence to support the past experience achieved, and (iii) marks would be awarded according to the performance indicators listed in Form TECH-2B, for each of the individual terminals in different ports.
81. In Addendum No. 6, under Items 1 (iv) and (v), minimum requirements as well as pass/fail criterion were reintroduced. However, Addendum No. 7, under Item No 3 reverted back to the provisions under Addendum 4.
82. Additionally, Addendum No 7 under Item 3 (iv), the Bidders asked if the failure to meet some performance indicators would result in loss of marks and the response by the Respondent was in the affirmative.
83. Addendum No. 8 in item number 3 the queries were as follows:-



Statement

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

- i. "Please confirm that the "combined average of 1,200,000 TEUs" should read "combined throughput of 1,200,000 TEUs for three different ports"
- ii. Please confirm that the minimum performance indicators for b) to f) have been removed.
- iii. What are the maximum marks awarded for this segment of evaluation?
- iv. 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?"

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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-2B have been removed as per Addendum 4.
 - 3) & 4) Maximum allocated point is 16 marks. Higher performance will have higher score on graduating scale.
84. Addendum No. 8 therefore had the effect of removing two of the criteria introduced under Addendum No.4; namely (i) Number of terminal (bidders were required to provide three, with at least one from developing countries), and (ii) Evidence to support the past experience achieved.
85. Addendum No. 8 further clarified the full 16 marks were to be allotted to the six (6) criteria listed above. This is also consistent with Mr. Nyarandi's sworn affidavit.
86. It is evident from the queries raised by bidders in Addenda 7 and 8 that there was lack of clarity with respect to awarding marks on a graduating scale for performance indicators (b) to (f). By the Respondent failing to give a specific response to bidder's query under Item 3 (4) of Addendum No. 8, reading this response together with the Respondent's reply under Item 3 (iv) of Addendum No. 7 leads to the conclusion that it was reasonable for bidders to assume that full marks

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would be awarded if previous performance met the target minimum performance indicators set out in Annex A (b) viii of the ITB and Part II of Annex 5 of the Draft Project Agreement.

87. This Committee finds that based on the RFP and the various addenda thereto, the evaluation criteria ought to have been as follows:-

(a)The six performance indicators (a) to (f), as set out in Form TECH-2B, were to be used for the evaluation of bidder's experience;

(b)A total of sixteen (16) marks were to be awarded for performance indicators (a) to (f);

(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 – full marks were to be allotted upon achieving this threshold; and

(d)For performance indicators (b) to (f), marks were to be awarded for each of the individual terminals in different ports on a graduating scale. Higher performance was to score higher marks on a graduating basis with previous performances which met the minimum target performance indicators set out in Annex A (b) viii of the ITB being awarded maximum marks.



88. 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.
89. However, following the release of the summary of the Technical Evaluation Report to the Petitioner, as ordered by this Committee on 17th November 2015, the Respondent's further written submissions dated 30th November 2015 indicated to the contrary. This further written submission shows that the procedure adopted to evaluate the Petitioner's experience involved only three out of the six Performance Indicators, and the performance of the three terminals proposed were aggregated and averages used for the purpose of allocating marks.
90. Additionally, marks were awarded for the provision of documentary evidence to support the performance figures submitted for the container terminals at the three ports, yet this criterion had been eliminated by Addendum No 8.
91. In view of the foregoing, the Petition Committee finds that the Respondent did not evaluate the Bidder's Experience information using the criteria set out in the RfP, which is contrary to the provisions of Regulation 47 (1) of the Regulations.

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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;**

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"KM" in large blue letters.
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(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.

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DATED and DELIVERED at NAIROBI this 15th day of December 2015



PAUL KAREKEZI
Member



ISAAC BONDET
Member



KIHARA MURUTHI
Chairperson

Delivered in the presence of: -

- Ms Patricia Leloi h/o Geoffrey Imende for the Respondent
- George Muchiri, Samson McOduol & Julius Wako for the Petitioner