



**MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING & URBAN  
DEVELOPMENT**

**STATE DEPARTMENT FOR INFRASTRUCTURE**

**ROADS10,000 PROGRAMME**

**THE DEVELOPMENT OF ROADS SUPPORTING PRIMARY GROWTH SECTORS  
THROUGH CONTRACTOR FACILITATED FINANCING MECHANISM**

**Tender Number: KeNHA/1291/2016**

**Lot No.6**

**ADDENDUM / CLARIFICATION NO. 2 TO THE BIDDING DOCUMENTS**

**29<sup>TH</sup> SEPTEMBER, 2017**

**HEAD PPP SECTION  
KENYA NATIONAL HIGHWAYS AUTHORITY  
P.O. Box 49712  
NAIROBI**

**THE DIRECTOR GENERAL  
KENYA NATIONAL HIGHWAYS AUTHORITY  
P. O. Box 49712  
NAIROBI**

**Date:** 29<sup>th</sup> September, 2017

**Tender No:** KeNHA/1291/2016

**Project:** The Development of Roads Supporting Primary Growth Sectors through Contractor Facilitated Financing Mechanism. Annuity Lot 6

**To:** All Pre-Qualified Bidders

**Addendum / Clarification No: 2**

Pursuant to Clause 1.11 of the RFP dated 18<sup>th</sup> May 2017, all Pre-Qualified Bidders are advised of:

- (i) The responses of KeNHA to the queries raised on the Part I of the Bidding Documents i.e. the RFP; and
- (ii) Other changes made to the RFP.

All other terms and conditions of the RFP shall remain unchanged. All Pre-Qualified Bidders shall take note of the same.

For: Director General  
Kenya National Highways Authority

## 1. RESPONSE TO QUERIES ON THE RFP

	Issue	Query/Clarification	Response
<b>SNo.</b>	<b>Issues Relating to RFP and Tendering Process</b>		
1.	Schedule of Bidding Process	<p>Since the data room containing the technical documents has not been made available to the bidders, the bidder suggests:</p> <ul style="list-style-type: none"> <li>i. Extension of the deadline for bid submission to 4 months after the publication of all the technical schedules and drawings; and</li> <li>ii. Extension of the deadline to ask questions regarding the project up to 3 months after the publication of all the technical schedules and drawings.</li> </ul>	<p>Kindly refer to Addendum No. 1 published on our website on the 18<sup>th</sup> May 2017 which revised the bidding scheduled. The last day for receiving queries was revised to 22<sup>nd</sup> September, 2017 while the submission date was revised to 12<sup>th</sup> October, 2017.</p>
2.	Schedule of Bidding Process	<p>The bidder requests inclusion of one or two competitive dialogue session as a complementary process to the written queries.</p>	<p>Competitive dialogue is not considered as part of the structure for this project, and cannot be implemented at this stage.</p>
3.	Change of Consortium Composition	<p>The Bidder would like confirmation that to the extent that all the other conditions regarding change of consortium composition (under section 1.7 of the RfP) are met, the Lead Member can be substituted by an</p>	<p>No. The suggested substitution of the Lead Member may not take place.</p>

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		Affiliate.	The RfP is clear that Change in Consortium Composition is subject to the requirement that the Lead Member continues to be the Lead Member of the Consortium. Refer to Clause 1.7 sub-section (b) of the RfP. Therefore, the lead member cannot be replaced by an affiliate.
4.	Drawings	Bidder requests confirmation of when the Drawings will be made available.	The designs had been uploaded on the website for information purposes. Otherwise bidders are expected to develop their own designs
5.	Return of Bid Security	Bidder would like specification of the period within which the bid security will be returned.	The Data Sheet has been amended and the Bid Security of unsuccessful bidders aside from the second lowest bidder will be returned within <b>14 Days</b> from the date of notification of award to the successful bidder.
6.	Return of Financial Proposals	Bidder would like specification of when the Financial Proposals of unqualified Bidders will be returned.	Clause 1.32.7 has been amended as follows:  “Financial Proposals of those bidders whose Qualification Proposals meet the threshold technical and financial capability requirements as set out in Annex 5&7 shall be opened and evaluated in Stage III of the Evaluation Process. The Client shall notify Bidders whose Proposals were considered non-responsive or did not meet the minimum qualifying technical and financial score within 14 days upon

	Issue	Query/Clarification	Response
			issuance of letter of award to the successful bidder and that their unopened Financial Proposals shall be enclosed in such notices.”
7.	Content of Qualification Proposal	Bidder requests that the RfP is amended to exclude Annex 5 from Part 2 of the Proposals (the Qualification Proposal) and have Annex 5 included in part 3 of the Proposal.	It is envisaged that the deliverability and robustness of all financial model will be evaluated at stage 2 in line with your technical proposals and therefore we may not change the structure of our evaluation at this time. However, your financial models will be treated with outmost confidentiality and <b>SHOULD NOT</b> include the <b>ANNUITY NUMBER</b> .
8.	Tie between Lowest Bidders	The Bidder requests that the Contracting Authority clarifies which measures (other than inviting fresh proposals) it may take in the event of a tied result rather than indicating that it may ‘take any such measures as may be deemed fit, including annulment of the bidding process’.	The Contracting Authority will exercise discretion on the steps it will take where there shall be a tie. Therefore Clause 1.33.3 remains unchanged
9.	Recourse on Disqualification of the Successful Bidder	The Bidder would like to have Clause 1.35.3 amended to indicate that in the event that the Successful Bidder is disqualified due to material misrepresentation or failure to respond to a request for information, the second ranked bidder should be awarded the concession on the basis of Section 52 of the PPP Act. Currently, the RfP provides that the	Section 52 of the PPP Act permits the Contracting Authority to enter negotiations with the second ranked bidder where negotiations carried out with the successful bidder are unsuccessful.  In view of this, Clause 1.14.3 has been amended to

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		<p>Contracting Authority may take any measure deemed fit, including annulment of the bidding process.</p>	<p>read as follows:</p> <p>“The Bid Security of the unsuccessful bidders will be returned within the period specified in the Data Sheet from the date of notification of award to the Successful Bidder, with exception of the bid security of the second lowest Bidder (“Second Ranked Bidder”) as determined on the opening of the Financial Proposal whose Bid Security shall be returned by the Authority on the expiry of the Proposal Validity Period or the execution of the Concession Agreement, whichever is earlier – provided that following expiry of the Proposal Validity Period the Second Ranked Bidder may be requested to extend the validity of its bid pending negotiations with the successful bidder and execution of the Concession Agreement.”</p> <p>Clause 1.36.2 has been amended and Clause 1.36.3 introduced as follows:</p> <p>Clause 1.36.2</p> <p>“In case, the Concession Agreement is not executed within the time specified in the <b>Data Sheet</b>, the Authority on receiving a request from the Successful Bidder may at its absolute discretion, permit extension of the stated period for execution of the Concession Agreement. If the Concession Agreement is not executed within the extended</p>

	Issue	Query/Clarification	Response
			<p>period, the Authority shall enter negotiations with the Second Ranked Bidder. In such a case the entire bid security submitted by the Successful Bidder shall be forfeited.”</p> <p>Clause 1.36.3</p> <p>“If negotiations between the Second Ranked Bidder and the Authority are unsuccessful, the Authority reserves the right to annul the bidding process and may invite fresh bids for the Project. In such a case the entire bid security submitted by the Second Ranked Bidder shall be forfeited.”</p>
10.	Performance Security	The Bidder would like confirmation on the amount of the Performance Security. The Bidder stated that the Data Sheet indicates that it will be 5% of the <u>Contract Price</u> while the PA indicates that it is 5% of the <u>Total Project Cost</u> .	<p>The two terms are synonymous.</p> <p>The Performance Security will be 5% of the Total Project Cost which is defined in the PA.</p> <p>The data sheet does not conflict with the PA because it indicates that the security will be 5% of the <u>Contract Cost</u> which is the same as the Total Project Cost.</p>
11.	Annex 7	Annex 7 is not available.	Annex 7A and 7B have been uploaded on the website

	Issue	Query/Clarification	Response
	<b>Issues Relating to Project Agreement</b>		
12.	Definition of “Accounting Year”  (Clause 1.1)	Bidder indicated that the definition of ‘Accounting Year’ was incomplete.	The definition has been amended to read:  <i>“Accounting Year means the financial year commencing from the first day of July of any calendar year and ending on the thirtieth day of June of the next calendar year;”</i>
13.	Definition of “Total Project Cost”  (Clause 1.1)	The “Total Project Cost”  is defined as being the capital cost of the project. Bidder requested to know whether ‘capital cost’ refers to cost of EPC contract alone or whether it includes cost of finance, O&M costs and other related costs.	The ‘capital cost’ refers to the cost of the EPC contract alone.
14.	Employment of Foreign Nationals  (Clause 5.4)	The Bidder would like the provision to be amended to include reasonable assistance by the Authority in the event of a request by the Service Provider.	Clause remains unchanged.  Employment of foreign nationals is regulated by Kenyan immigration laws and undertaken by the Kenyan Immigration Department. The Contracting Authority is a separate entity from the Immigration



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			<p>Department and cannot influence its decisions.</p> <p>Whereas the Contracting Authority may be able to render reasonable assistance, we cannot have a clause under the PA requiring or obligating it to provide assistance.</p>
15.	<p>Tests</p> <p>(Clause 19.3)</p>	<p>The Bidder requested clarification on the tests to be undertaken by the SP on the instruction of the IE as the tests are not included in the Output Specifications as indicated in Clause 19.3</p>	<p>Clause 19.3 has been amended to read as follows:</p> <p>“For determining that the Project Network conforms to the Output Specifications, the Independent Expert shall require the Service Provider to carry out, or cause to be carried out, any such tests as may be required to confirm that the Project Network conforms to the Output Specifications – including such test as are in accordance with Good Industry Practice. The Service Provider shall, with due diligence, carry out or cause to be carried out all such tests in accordance with the instructions of the Independent Expert and furnish the results of such tests forthwith to the Independent Expert. One half of the costs incurred on such tests, and to the extent certified by the Independent Expert as reasonable, shall be reimbursed by the Contracting Authority to the Service Provider.”</p>

	<b>Issue</b>	<b>Query/Clarification</b>	<b>Response</b>
16.	Termination of the IE at the Instance of the SP  (Clause 20.4)	The Bidder would like the PA to be amended to have any dispute regarding termination of the IE referred to the Fast Track dispute resolution procedure as an option in order to ensure expeditious resolution of the matter.	Clause 20.4.2 and 20.6 envisages a fast-tracked dispute resolution mechanism
17.	Termination due to Failure to Achieve Financial Close  (Clause 21.2.2)	The Clause provides that where financial close is not reached solely account of CA default, the bid security will be returned alongside any damages payable under Clause 4.2. The Bidder would like an indication of the damages payable.	The reference to damages under Clause 4.2 is erroneous as no damages are payable by the Contracting Authority in any circumstances.  Clause 21.2.2 has been amended to read as follows:  “Upon Termination under Clause 21.2.1 other than a failure by the Contracting Authority to satisfy the Conditions Precedent set out in Clause 4.1.5, the Contracting Authority shall be entitled to encash the Bid Security and appropriate the proceeds thereof as Damages; provided, however, that if Financial Close has not occurred solely as a result of the Contracting Authority being in default of any of its obligations under Clause 4.2, it shall, upon Termination, return the Bid Security.

	Issue	Query/Clarification	Response
			For the avoidance of doubt, it is expressly agreed that if the Bid Security shall have been substituted by the Performance Security, the Contracting Authority shall be entitled to encash therefrom an amount equal to the Bid Security.”
<b>Non-Technical Issues Relating to the Schedules</b>			
18.	Occurrence of Project Milestone IX  (Schedule G and Schedule M)	The Bidder noted that Schedule G provides that Project Milestone IX shall occur on the date falling on the 730 <sup>th</sup> day from the Effective Date while Schedule M states that it shall fall on the 735 <sup>th</sup> day after commencement which is not defined.  The Bidder requests clarification on the above issue.	“The references to ‘commencement’ in Schedule M has been amended to read ‘Effective Date’ instead.  The last project milestone during construction (PM-IX) has also been amended to read “730 Days from the Effective Date,”
19.	Late Payment to the IE  (Para 4.6, Schedule K)	Schedule K provides that any late payment to the IE should be inclusive of interest at a rate that is agreed as being fair and reasonable rate for the purposes of the Late Payment of Commercial Debts (Interest) Act 1998. The Bidder commented that the Late Payment of Commercial Debts (Interest) Act 1998 is a	Clause 4.6 has been amended to read as follows: “If either Party fails to pay the Independent Expert any sum payable under this Agreement by the Due Date for Payment, the relevant Party shall pay the Independent Expert simple interest on that sum from the Due Date for Payment until the actual date of payment at the prescribed rate of 1% above the

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		UK Act which is not applicable under Kenyan law.	interest rate specified by the Central Bank of Kenya (“CBK”) from time to time in pursuance of section 36 of the Central Bank of Kenya Act Cap 491 or any replacement of such CBK rate for the time being in effect.”
20.	Project Scope	Following the pre-bid meeting in your board room on June 6 of 2017, we were told that the change of scope will be noticed officially and some of the study and report which you have will be posted on your website. Kindly confirm when we can get them?	The following road sections have been expunged from the project Lot as they have been incorporated in other ongoing programmes: <ul style="list-style-type: none"> <li>• Kakamega – Ingotse – Namukoye – Nzoia River – Musikoma Road C777</li> <li>• Korosiondet – Lwakhaka (3Km) being a section of Kimaeti – Malakisi – Lwakhaka Road C807</li> </ul>
21.	Proposal Validity	With reference to the data sheet 1.15, “ <i>Proposal Validity Period ....120... Days from Proposal Due Date,</i> ” however , according to Annex 1A Cover Letter , the Proposal shall be valid for a period of two hundred and eighty (280) days from the proposal due date  Kindly confirm how much is the Proposal Validity Period?	The proposal validity shall remain as prescribed in Annex 1A i.e. 280 Days.  The Data Sheet has also been amended accordingly.
22.	Annex 7	For the Annex 7A: Method statements and 7B: Output Specifications (Bound Separately )	Annex 7A and 7B have been uploaded to our website

	Issue	Query/Clarification	Response
		You are expected to provide them at your earliest	
23.	Financial Model	For the Annex 5B Financial Model of the project , which will contain the bid price and some other financial figures m should we enclose it in the Qualification Proposal or in the Financial Proposal	It is envisaged that the deliverability and robustness of all financial model will be evaluated at stage 2 in line with your technical proposals and therefore we may not change the structure of our evaluation at this time. However, your financial models will be treated with outmost confidentiality and <b>SHOULD NOT</b> include the <b>ANNUITY NUMBER</b> .
24.	Schedules to Project Agreement	According to your RFP documents, all the lanes should be 6.5 m wide and double dressed surface (Schedules to Project Agreement – B- Appendix BI). However, following the design documents uploaded on your website recently, some sections are 7m wide Clarify which design standard we should refer to.	The design reports shared are for information only. Bidders are expected to come up with their own designs that meet the prescribed output specifications and performance standards
25.	Schedules to Project Agreement	The requirements or design standard is Class c or above. However, following the design documents uploaded on your website recently, it is AC surface or AC plus DBM surface. Clarify which design standard we should refer to.	The design reports shared are for information only. Bidders are expected to come up with their own designs that meet the prescribed output specifications and performance standards