

**DETERMINATION OF THE BID CHALLENGE BY THE LEVEL 1 AUTHORITY
ON A BID CHALLENGE SUBMITTED BY**

**TETRA TECH ES, INC.
(HEREAFTER "CHALLENGER")
FOR "CONSULTANCY SERVICES FOR CONSTRUCTION SUPERVISION FOR
TRANSMISSION LINES AND SUBSTATIONS ACTIVITIES FOR ELECTRICITY
TRANSMISSION PROJECT" REF: MCA-N/ETP/QCBS/006**

1.0 BACKGROUND

- 1.1 The Specific Procurement Notice for the "Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project" was published internationally (via online platforms, DgMarket, UNDB, MCA-Nepal Web Page and USA Embassy in Kathmandu) and locally, through an advertisement in the Kantipur National daily newspaper, dated 18th January 2023. By the extended deadline for submission of 30th March 2023, thirteen (13) Proposals were submitted. These proposals were subsequently opened publicly on the same day. The Technical Evaluation of the thirteen proposals submitted was carried out by a Technical Evaluation Panel (TEP).
- 1.2 The Technical Evaluation Report of the Proposals submitted was first cleared by MCA-Nepal Management and finally by the Millennium Challenge Corporation (MCC) on 20 June 2023, as required under the MCC Program Procurement Guidelines (PPG). Seven Consultants passed the Technical Evaluation stage, namely:
1. ELC Electroconsult S.p.A.
 2. Ginger SOFRECO in association with N.Arc Consulting and Udaya Consulting (P.) Ltd.
 3. Khatib and Alami Consulting Engineers Offshore S.A.L. (K&A) in association with PGESCO Engineering and Consulting Services (PGESCO) and Colenco Consulting Limited (CCL)
 4. Power Grid Corporation of India Ltd.
 5. Tetra Tech ES, Inc.
 6. Tractebel Engineering Pvt. Ltd in association with Tractebel Engineering GmbH and SMEC International Pty. Ltd and Total Management Services (TMS) Pvt. Ltd,
 7. WAPCOS Limited in association with Total Management Service (TMS) Private Limited
- 1.3 On 22 June 2023, notices of the outcome of the cleared Technical Evaluation Report (TER) were sent to all Bidders, including the Challenger. Through the same notification of results, bidders passing the required technical evaluation threshold were invited to the opening of



Financial Proposals to take place on 03 July 2023, 3.30 PM (Nepal Local Time).

- 1.4 On 22 June 2023, as per Rule 1.2 (b) of the BCS, the Challenger requested a Debriefing. As per same rule above, MCA-Nepal was required to provide a written explanation against the debriefing request within two (2) Business Days of receiving the request for Debrief.
- 1.5 On 26 June 2023, MCA-Nepal sent the Challenger the requested Debriefing indicating (i) the strengths and weaknesses identified in the Challenger's proposal and (ii) that the evaluation was conducted in compliance with the Request for Proposal (RFP) requirements.
- 1.6 Notwithstanding the above clarification provided, on 28 June 2023, Tetra Tech ES, Inc. submitted a protest/bid challenge against MCA-Nepal's decision and the findings of the TEP, stating that the evaluation of their technical proposal was arbitrary and erroneously conducted and that the TEP failed to score the Challenger's full organizational capabilities and experience as specified in RFP ITC sections under A(b), A(c), 5.7, 12.4, and the criteria in the Qualification Table at section 3.7. This assertion is based on the Challenger's argument that the TEP violated MCA-Nepal's Bid Challenge System Rule 1.2(a)(iii), as the Challenger's full organizational capabilities and experiences, as presented under the framework of an Association, were not considered. This oversight resulted in the arbitrary and incorrect classification of the Association members as sub-consultants, leading to a material underestimation of their technical score by up to ten points. The Challenger claims that the consequence of this violation poses a significant harm to the Challenger, through the forfeiture of potential opportunity costs and the loss of potential revenue due to the non-compliance with the evaluation criteria stated in the RFP. This issue is compounded by the irreparable harm the challenger will suffer if the procurement is not suspended, as this will result in lost economic costs and wasted proposal preparation efforts. In view of this, the Challenger seeks relief under BCS Rule 2.2, including the revision of the procurement proceedings to align with the evaluation criteria, the re-evaluation of their proposal, a new ranking of technical proposals, and the resumption of the procurement based on the revised technical rankings. The Challenger claims for relief is rooted in their qualification as consultants for the proposal, and the negligence of MCA-Nepal in adhering to its own RFP instructions and evaluation criteria, which will result in substantial losses for the Challenger and the Association. The Challenger seeks a fair evaluation and an equal opportunity to compete for the award.



- 1.7 On 30 June 2023, The Secretariat notified all bidders of the submitted Bid Challenge, and hence (i) the opening of Financial Proposals was postponed until the bid challenge issue is resolved and (ii) the remaining stages of the procurement process were suspended until a final decision with respect to the Protest/Challenge is issued or the Level 1 Authority lifts the suspension.
- 1.8 On 05 July 2023, Tractebel Engineering Pvt. Ltd in association with Tractebel Engineering GmbH and SMEC International Pty. Ltd and Total Management Services (TMS) Pvt. Ltd. (Tractebel) submitted a letter dated 04 July 2023 with subject “Tractebel Letter regarding the protest on evaluation of technical proposal” and later on 07 July 2023 Tractebel submitted Annexure B as per Para 1.6 of BCS to file a comment to join the Protest. Thus, Tractebel joined the protest by filing a comment as per Rule 1.6 of the BCS.

2.0 LEVEL 1 AUTHORITY REVIEW

- 2.1 In line with the Bid Challenge System Procedures, the MCA-Nepal Executive Director in his capacity as the “Level 1 Authority” initiated a thorough review of the protest/bid challenge to assess the points and claims raised by the Challenger and the comments filed by an “Interested Party” as described in 1.8 above.
- 2.2 The Level 1 Authority reviewed the entire procurement process, and specifically looked at the Technical Evaluation Process in respect of which the challenge arose in order to determine if due procurement processes were followed, as outlined in the MCC Program Procurement Guidelines and the Request for Proposal (RFP) Document.
- 2.3 The Level 1 Authority noted the following:
- a) The Protest was submitted within the timeline stated under Rule 1.4.1. (d)
 - b) The Protest was submitted as per Rule 1.4.
 - c) The Protest was submitted in the Annex A as per Rule 1.4.2
 - d) The Comments were filed by Tractebel Engineering Pvt. Ltd in association with Tractebel Engineering GmbH and SMEC International Pty. Ltd and Total Management Services (TMS) Pvt. Ltd (Tractebel), under Rule 1.6.
- 2.4 The Level 1 Authority also noted that the Challenger raised mainly two points as the basis of their challenge, which are as follows:
- 2.4.1 Technical Evaluation Panel (TEP) violated MCA-Nepal Bid Challenge System Rule 1.2 (a) (iii) and evaluation was flawed and contrary to the RFP requirements and added the following:**
- 2.4.1.1 The scores awarded by the technical evaluation panel were arbitrary and erroneous in failing to score the offeror’s full organizational capabilities and experience as specified in RFP sections A(b), A(c), 5.7, 12.4, and the



criteria in the Qualification Table at section 3.7.” In adherence to ITC A(b), the term "Associate" is defined as any entity that constitutes a part of the Association that forms the Consultant. It is expressly clarified that a Sub-Consultant does not qualify as an Associate.

2.4.1.2 The Challenger further added the following:

2.4.1.2.1 The Technical Evaluation panel overlooked the structure of our Association and arbitrarily and incorrectly determined that the Association members are sub-consultants and therefore, their project experience, presented as part of the TECH-4 – EXPERIENCE OF THE CONSULTANT was not considered.

2.4.1.2.2 Evaluation was flawed and contrary to the RFP requirements that specify the evaluation of offerors who form an Association rather than proposing a prime-subcontractor structure.

2.4.1.3 As a relief the Challenger has sought the following relief:

In addition to **suspension** of the procurement, the Association seeks the following relief available under BCS Rule 2.2: (1) require MCA-Nepal to **revise the procurement proceedings to conform to the evaluation criteria**; (2) **reevaluate the Tetra Tech Association offer to consider its full corporate capabilities and experience**; (3) **perform a new ranking of technical proposals**; and (4) **proceed with the procurement based on the revised technical ranking**.

3.0 CONSIDERATIONS OF TETRA TECH ES. INC PROTEST

The Level 1 Authority summarized the Challenger’s areas of concern, as follows:

Technical Evaluation Panel (TEP) violated MCA-Nepal Bid Challenge System Rule 1.2 (a) (iii) and evaluation was flawed and contrary to the RFP requirements

The Technical Evaluation panel overlooked the structure of Challenger’s Association and arbitrarily and incorrectly determined that the Association members as sub-consultants and therefore, their project experience, presented as part of the TECH-4 – EXPERIENCE OF THE CONSULTANT was not considered.

The Evaluation was flawed and contrary to the RFP requirements that specify the evaluation of offerors who form an Association rather than proposing a prime-subcontractor structure.

4.0 THE COMMENT FILED BY, TRACTEBEL (hereafter "The Interested Party").

The Interested Party has filed a comment on 07 July 2023. Tractebel submitted comment states:



1. the Protest does not clearly show that the Challenger will suffer irreparable harm if the Challenged Procurement is not suspended; and
2. the suspension of the Challenged Procurement will compromise public interest.

Tractebel sought relief as follows: We request MCA-Nepal to reject the claims raised and relief sought by the challenger and reject their proposal because of unfair bidding behavior.

5.0 THE LEVEL 1 AUTHORITY DETERMINATION ON THE ISSUES RAISED BY TETRA TECH ES, INC. IN THE CHALLENGE

Under due consideration and examination of the issues brought forth by the Challenger, in addition to the Comments submitted by the Interested Party, the Level 1 Authority reached the following determinations:

5.1 Technical Evaluation Panel (TEP) violated MCA-Nepal Bid Challenge System Rule 1.2 (a) (iii) and evaluation was flawed and contrary to the RFP requirements

It was noted that the submitted challenge is about the Challenger's claim that their submission should have been considered as an Association during the evaluation and not as a Sub-consultant relationship and thus the evaluation report needs to be revised before proceeding further in the evaluation process. The Level 1 Authority went through the RFP, Technical Proposal, MCC PPG requirements and has following observations:

- 5.1.1 In adherence to ITC A(b), the term "**Associate**" is defined as any entity that constitutes a part of the Association that forms the Consultant. It is expressly clarified that a **Sub-Consultant does not qualify as an Associate**.

ITC A(c), the terms "**Association**", "association", "Joint Venture", or "joint venture" pertain to a consortium of entities that collectively form the Consultant, with or without a legal status distinct from that of its members.

Furthermore, as stated in ITC A(kk), the terms "Sub-Consultant" means any person or **legal entity** with whom the **Consultant subcontracts any part of the Services**.

It was noted that *Tetra Tech ES, Inc* under TECH-1 stated:

"We are submitting our Proposal in Association with:

1. *K&A Engineering Consulting, P.C., 445 Hamilton Ave, Suite 406, White Plains, NY 10601, 914-607-7115*
2. *Virtuous Energy Pvt. Ltd, Unit No. A-3/75, Shop No. 3, Sector 11, Rohini, New Delhi, 110085*
3. *ADMC Engineering Pct. Ltd., Shreenagar Marg, New Baneshwor, Kathmandu, Nepal, P.O. Box No. 24083, Kathmandu"*



and attached an Intent of Association Agreement (Page 21 to 24), where they have shown their intention to form an association.

ITC 12.10 and ITC 17.3 (b) requires the Consultant to submit the Power of Attorney and Annexes of TECH-1 state that the “Power of Attorney demonstrating that the person signing has been duly authorized to sign the Proposal on behalf of the Consultant and its Associates;” and in support Tetra Tech ES, Inc has also attached **Letters of Association** issued by other three entities. These three **Letters of Association** provide power of attorney to Llyr Rowland of Tetra Tech ES, Inc to sign the proposal. In addition, these three letters clearly state the following:

1. **Letter of Association** from K&A Engineering Consulting:
“We understand that Tetra Tech intends to serve as prime and lead consultant on this proposal and K&A Engineering Consulting, P.C. will be a Sub-Consultant”
2. **Letter of Association** from Virtuous Energy:
“We understand that Tetra Tech intends to serve as prime and lead consultant on this proposal and Virtuous Energy Private Limited will be a Sub-Consultant”
3. **Letter of Association** from ADMC Engineering Pvt. Ltd.:
“We understand that Tetra Tech intends to serve as prime and lead consultant on this proposal and ADMC Engineering Pvt. Ltd. will be a Sub-Consultant”

Tetra Tech ES, Inc has also attached an Executive Summary and stated there that:

“Tetra Tech and our sub-contractors K&A Engineering Consulting (USA/Nepal), Virtuous Energy (India) and ADMC Engineering (Nepal) bring extensive and relevant experience to successfully undertake the MCA-Nepal Construction Supervision engagement.”

Concerning the issue of sub-contractors, MCA-Nepal issued the following clarification request:

“You have submitted your proposal with K&A Engineering Consulting P.C., Virtuous Energy Pvt. Ltd., ADMC Engineering Pvt. Ltd. as sub-consultant. As per clarification #1 (232) “The Sub-Consultant shall only be provided in the Form Tech-4, if the Consultant wants their Sub-Consultant to be approved. In this case, the Consultant need to provide details of what the Consultant wants to subcontract and provide relevant details required under RFP. Sub-Consultant experience under MCC and MCA need to be included under Form TECH-5”. Please identify on which page number of your technical proposal we will find the responsibility of each proposed sub-consultants.”

In response, Tetra Tech ES, Inc stated the following:

A handwritten signature in black ink is written over a blue circular stamp. The stamp features a globe in the center, with the text 'Tetra Tech ES, Inc' around the top edge and 'Nepal' at the bottom. The signature is a cursive-style name, possibly 'Llyr Rowland'.

*“Tetra Tech has **incorrectly** referred to our association members as sub-consultants in the executive summary of our technical proposal. Tetra Tech submitted its proposal in association with “K&A Engineering Consulting P.C., Virtuous Energy Pvt. Ltd., ADMC Engineering Pct. Ltd.” as per the ITC Clause 5.7 – “Joint Ventures or Associations”. Our Technical proposal includes “Intent of Association Agreement” in which Tetra Tech ES, Inc. is designated as the lead member of the association.”*

Hence, the Challenger admits in this response that a mistake was made in its proposal.

5.1.2 Level 1 Authority noted the following:

The Challenger’s claim that entities K&A Engineering Consulting P.C., Virtuous Energy Pvt. Ltd. and ADMC Engineering Pvt. Ltd. should be considered as an Association has broader consequences compared to what the Challenger has claimed namely to revise their evaluation score. The claim and its consequences were reviewed and presented below:

- a. TECH-1 states that the Challenger is forming an association and Tetra Tech ES, Inc. has attached the Intent of Association Agreement in support, which is an intention to form association. While Tetra Tech ES, Inc. has attached “Letter of **Association**” from all the three entities makes an absolute declaration that all the three entities will be Sub-Consultant to the Prime and Lead Consultant (Tetra Tech ES, Inc.). The expressions used make reference to Tetra-Tech and entities issuing the “**Letter of Association**” is Lead Consultant and Sub-Consultant. It is unlikely that all the three entities would make same error in issuing a letter of association indicating they are all as Sub-Consultant.
- b. The “INTENT OF ASSOCIATION AGREEMENT” identifies the Challenger’s entities as “Members”, not as an “Associate”.
- c. The TEP took its decision based on the statements made and documents presented by the Consultant; three different consultants presented three different Letters of Association clearly stating that they will be Sub-Consultant. Thus, the Challenger’s protest/challenge that MCA-Nepal incorrectly classified the Association members as sub-consultants is incorrect.
- d. All the above stated documents submitted, and statements made under 5.1.1 are by the Challenger under their Technical Offer. It is to be noted that no priority of the Technical Offer document was stated either in the RFP or in the Technical Offer. Through its protest the Challenger is claiming that the TEP should accept only one set of documents and statements. The TEP cannot be directed to use only one set of statements and documents and ignore others. The TEP could not ignore the letters authorized by the three entities providing an absolute declaration about their status as sub-consultant. The TEP evaluated the proposal based on the submission of the Challenger and provisions made as per the RFP requirements.
- e. The Executive Summary of the submitted Technical Proposal (Page 6) clearly described Tetra Tech and the aforementioned entities as sub-contractors of Tetra Tech. Furthermore, all parties have signed an Intent of Association Agreement on page 21 to Page 24 of the



- proposal, creating a contradictory stance as these firms have simultaneously agreed to the role of sub-consultant while also signing the Intent of Association. In addition, the contradictory stance of the Challenger is further corroborated by the definition of “Lead Member” included in “Intent of Association Agreement”. The relevant provision states that the “Lead Member” is authorized as Association’s agent to sign agreements in Association’s name, the “Letter of Association” makes it very clear that authorization given to Tetra Tech to sign the proposal for subjected RFP their behalf as sub-consultants.
- f. On pages 18, 19, and 20 of the submitted proposal on the “Letter of Association”, K&A Engineering Consulting P.C., Virtuous Energy PVT. LTD., ADMC Engineering PVT. LTD. have expressly signed letters confirming their role as sub-consultants, thereby granting Tetra Tech the power of attorney. This signifies the entities ' consent to perform as sub-consultants and suggests a lack of awareness of how the Challenger presented the proposal.
 - g. The submission of the Technical Proposal Submission Form exhibits an **Association** with three other firms, along with supporting documents outlined in the Annexes. The Letter of Association issued by the three entities providing the Power of Attorney to Llyr Rowlands of Tetra Tech Es, Ins, confirms their role as sub-consultants.
 - h. The Letters entitled "Letter of Association" in which the entities are providing the Power of Attorney, were addressed to Tetra Tech by K&A Engineering Consulting P.C., Virtuous Energy PVT. LTD. and ADMC Engineering PVT. LTD on various dates. Subsequent to these letters, the Intent of Association Agreement was signed by all parties. It was noted that for K&A Engineering Consulting P.C. the Letter of Intent is signed by a different person compared to the person providing the PoA to the signatory. Further, Tetra Tech has failed to submit any PoA from other three entities authorizing their ARs to sign any “Intent of Association Agreement” with Tetra Tech in relation to Procurement MCA-N/ETP/QCBS/006.
 - i. The TEP was selected for the purpose of evaluating the Proposals received and evaluated the Content of Proposal as presented by the Consultant as per the requirements of the RFP.
 - j. Tetra Tech has acknowledged a mistake in the executive summary of the proposal in response to a clarification request, by referring to the three firms as sub-contractors. It is pertinent to note that any inaccuracies in the proposal cannot be rectified at the request for clarification during the evaluation of the proposal. It is also to be noted that as per ITC 23.1 of RFP “No change in the prices or substance of the Proposal shall be sought, offered, or permitted except to confirm the correction of arithmetic errors discovered by the MCA Entity in the evaluation of the Proposals.” and as per Section III, 3.5 Determination of Responsiveness, such changes will be considered as material deviation as if accepted or rectified, would unfairly affect the competitive position of other Consultants presenting substantially responsive Proposals. Hence, Tetra Tech’s attempt to change the substance of its bid/proposal technically during its response to MCA-Nepal’s Request for Clarification is not accepted/considered by the TEP.
 - k. The TEP considered the absolute declaration made by the Challenger partner under three different Letters of Association that they are Sub-Consultants.



- l. The Letters of Association dispatched by the three respective entities suitably specify the Procurement Number and maintain relevancy. Nonetheless, the document titled "Intent of Association Agreement" falls short of delineating the Client or the Prime Contract, thereby resulting in an ambiguity in the context of Clause VII. This pertains to 'Liability and Compliance with the Prime Contract'. Due to this lack of clarity, the aforementioned "Intent of Association Agreement" is deemed non-acceptable by the MCA-Nepal to decide the relationship between Tetra Tech and other three entities as Association in relation to Procurement MCA-N/ETP/QCBS/006.
- m. Pursuant to the review conducted by the First Level Authority, it is noted that authorization for Mr. Llyr Rowlands of Tetra Tech to sign the subject RFP proposal was duly obtained via the "Letter of Association" from all three entities. However, the signatories on the "Intent of Association Agreement" present an inconsistency, with the sole exception of entity ADMC Engineering Pvt. Ltd, which displays identical signatures on both documents.
Particularly, it is observed that the signatories representing Tetra Tech differ between the "Letter of Association" and the "Intent of Association Agreement." Specifically, different individuals have executed these documents on behalf of Tetra Tech.
Furthermore, it is highlighted that no Power of Attorney has been granted to sign the "Intent of Association Agreement" on behalf of the entities K&A Engineering Consulting P.C., Virtuous Energy Pvt. Ltd and thereby, this material absence of authorization has rendered the submitted "intent of Association Agreement" unacceptable to MCA-Nepal.
- n. Upon thorough assessment, the Level 1 Authority concludes that the TEP has carried out its duties in accordance with these stipulations, thereby negating any infringement of the RFP requirements. Therefore, the Challenger's claim, stating otherwise, is unsubstantiated as the TEP has acted within the prescribed procedural parameters.

5.1.3 Pursuant to ITC sections, Clause 5.7 regarding *"Joint Ventures or Associations In the case where a Consultant is, or proposes to be, a joint venture or other Association (a) all members of the joint venture or Association must satisfy the legal, financial, litigation, eligibility and other requirements set out in this RFP; (b) all members of the joint venture or Association will be jointly and severally liable for the execution of the Contract; and (c) the joint venture or Association will nominate a representative who will have the authority to conduct all business for and on behalf of any and all the members of the joint venture or the Association if awarded the Contract, during Contract performance"*

A. Further as per ITB 12.5 (a) Information on the Consultant's financial capacity is required (Form TECH-2A of Section IV A) unless otherwise **stated in the PDS**. The PDS 12.5 states "Information on the Consultant's financial capacity is required (Form TECH-2A of Section IV A)." and TECH-2A requires:

1. If the Proposal is submitted by a joint venture, all parties of the joint venture are required to submit the financial capacity information requested. The reports should be



submitted in the order of the Associate's significance in the joint venture, greatest to least.

2. In case of Joint Venture, the information shall be provided by all entities.

Given that Form TECH-2A uses the defined term "Associate" and states that reports should be submitted in the order of Associate's significance in the joint venture, it can be deduced that the all the members/associates or the Association are also required to submit the financial capacity information requested.

B. In addition, as per ITC 26.1 "In accordance with the MCC PPG, the Consultant's performance on earlier contracts will be considered a factor in the MCA Entity's qualification of the Consultant's evaluation. The MCA Entity reserves the right to check the performance references provided by the Consultant or to use any other source at the MCA Entity's discretion. If the Consultant (including any of its Associates or joint venture/association members) is or has been party to an MCC funded contract (either with MCC directly or with any MCA Entity, anywhere in the world), whether as lead Consultant, affiliate, Associate, subsidiary, Sub-Consultant, or in any other role, the Consultant must identify the contract in its list of references submitted with its Proposal using Technical Form. Failure to include any such contracts may be used to form a negative determination by the MCA Entity on the Consultant's record of performance in prior contracts."

Upon review, the Level 1 Authority has found the following:

Financial Capacity requirement under TECH-2A:

As an Association the Challenger has failed to submit the financial capacity information (Audited financial statements for the last three (3) years, supported by audit letters or Certified financial statements for the last three (3) years, supported by tax returns) for all entities as requested in Form TECH-2A, denoting the Financial Capacity of the Consultant for *K&A Engineering Consulting (USA/Nepal)*, *Virtuous Energy (India)* and *ADMC Engineering (Nepal)*.

In light of this omission, the TEP was compelled to act, concluding that the Challenger assumes the role of a Principal and Lead Consultant for the other three Entities, as these requirements do not extend to Sub-consultants.

If the TEP would have evaluated *K&A Engineering Consulting (USA/Nepal)*, *Virtuous Energy (India)* and *ADMC Engineering (Nepal)* as Joint Venture/Associate, the Associate would have failed to satisfy this requirement.

Challenger Past Performance on MCC Funded Contract – ITC 26.1 and TECH-5

The Challenger failed to furnish the requisite Form TECH-5. References of MCC-Funded Contracts for the other partner firms. As per ITC 26.1, it is a mandatory requirement to



disclose any previous experience on MCC funded projects (either as a consultant or sub-consultant) in the proposal. Failure to include any such contracts may be used to form a negative determination by the MCA Entity on the Consultant's record of performance in prior contracts. This is particularly applicable to ADMC Engineering Pvt. Ltd, given its prior engagement as a sub-consultant under TECH-4 on MCA Nepal project and another Contract (Forest Census) with MCA-Nepal, which is not mentioned under TECH-4. The absence of such critical documentation is a marked deviation from the prescribed submission protocol, rendering the Challenger's submission incomplete for a Joint Venture/Association consideration and Technical Proposal would have been rejected as per ITC 26.1 due to negative determination by the MCA-Nepal on the Consultant's record of performance, should TEP would have considered K&A Engineering Consulting (USA/Nepal), Virtuous Energy (India) and ADMC Engineering (Nepal) as Joint Venture/Associate.

Since the Challenger has not submitted Financial Capacity information as per ITC 12.5 (a) & TECH-2A, and has not submitted information as per requirement ITC 26.1 & TECH-5, in case entities were to be considered associates as claimed in the Protest by the Challenger, the proposal would have failed to satisfy the requirement of ITC 7.4, which states "The Consultant is expected to examine all instructions, forms, terms, and Terms of Reference in this RFP. Failure to furnish all information or documentation required by this RFP may result in the rejection of the Proposal.", and ITC 12.1, which states "In preparing their Proposal, Consultants are expected to examine in detail the documents comprising the RFP. Failure to provide the information requested may result in rejection of a Proposal."

- 5.1.4 It was noted that the Challenger in their Technical Proposal has submitted conflicting documents and statements about their partnership. While in the executive summary they have stated that the association entities are Sub-Contractors and in the three Letter of Association from the entities the nature of the association is declared as Sub-Consultant, at the same time the entities have also attached an Intent of Association Agreement, where they have shown intention to form an Association. The information contained in these statements and documents makes one statement and document in contradiction and hence untrue due to another statement in other presented documents. The submission of the Technical Proposal by Tetra Tech introduced ambiguity to confuse the evaluation panel by submitting two different types of documents and statements. However, by looking at all documents submitted by Tetra Tech and other entities and after taking note of conspicuous absence of material documents and information (detailed under paragraph 5.1.3 and 5.1.4) the TEP has arrived at the right conclusion that the nature of association between Tetra Tech and other entities is indeed of between principal consultant and sub-consultants.

The technical proposal submission TECH-1 form states that "We hereby declare that all the information and statements made in this Proposal are true and accept that any misinterpretation contained in it may lead to our disqualification."

Section III of RFP, 3.5 Determination of Responsiveness states:



“The MCA Entity’s determination of a Proposal’s substantial responsiveness is to be based on the contents of the Proposal itself. For purposes of this determination, a substantially responsive Proposal is one that materially conforms to the requirements of the RFP without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that:

(a) if accepted, would:

(i) affect in any substantial way the scope, quality, or performance of the Services specified in the RFP; or

(ii) limit in any substantial way, inconsistent with the RFP, the MCA Entity’s rights or the Consultant’s obligations under the proposed Contract; or

(b) if rectified, would unfairly affect the competitive position of other Consultants presenting substantially responsive Proposals.

Any deviations for mandatory criteria/requirements shall be considered material deviation.”

The TEP considered the relationship between Challenger and other entities as between principal consultant and Sub-Consultant based on the absolute declaration made by all the entities under three different Letters of Association issued by three different entities and the Challenger’s statement that their Entities are Sub-Consultants. However, through its Protest, the Challenger is claiming that the Challenger and its Entities should be considered in association which is not acceptable based on documents and evidence submitted.

Upon meticulous examination, the Level 1 Authority has concluded that the TEP has acted in strict adherence to the stipulated RFP requirement. Thus, any allegation of non-compliance is devoid of merit as the Panel’s actions have been found to be fully compliant with the outlined RFP requirements.

5.1.5 In response to the allegation that the TEP has neglected to adhere to the criteria stipulated in the RFP Qualification Table under Section 3.7. The Level 1 Authority has undertaken a comprehensive review and noted that Tetra Tech ES, Inc. satisfied the requirement of Section III, 3.7 Qualification Table as Single Entity and the proposal has not been submitted by a joint venture or association. Based on this assessment, it has been determined that the TEP has acted in complete compliance with the aforementioned RFP requirements. Consequently, the Challenger’s claim suggesting otherwise is deemed without ground, as the Panel’s actions have been found to be fully in line with the delineated rules and stipulations.

The Level 1 Authority also noted that there is no provision in the RFP that prevents the Consultants to associate (as Joint Venture or Association) with other Consultants as they may deem necessary to enhance their capabilities or any consultant is allowed to bid independently along with other entities as sub consultants. Level 1 Authority has determined that Tetra Tech ES Inc. entered into relationship with other three entities as Sub-Consultants. Therefore, their claim of being in association with other entities is not acceptable in the same procurement process.



5.1.6 The Level 1 Authority concluded that the Challenger has not provided clear and convincing evidence that the procurement rules were violated and failed to document and support its claims.

5.1.7 The Level 1 Authority concluded that there is no violation of any procurement rules, and that the proposal of the Challenger was evaluated as per the RFP Provisions.

In light of these findings, the Level 1 Authority maintains that the TEP has acted correctly and within the requirements of the RFP. Consequently, the Challenger's claim alleging an erroneous designation of Association members as sub-consultants is unfounded and unacceptable.

6.0 CONCLUSION

The Level 1 Authority went through the challenge submitted and the comment received in detail and finds that the Bid Challenge submitted by Tetra Tech ES, Inc. in respect of Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project is without any merit, both on facts and claims.

Regarding the non-consideration of the three entities as Associates but considering them as Sub-Consultant, and hence not evaluating the entities as an Associate, the evidence assessed by this Authority unequivocally supports the stance that the TEP acted within the framework of the guidelines set forth in the RFP. The evidence presented and reviewed demonstrates that the TEP acted correctly and within the guidelines of the RFP. The Challenger's claims have been found to be unsubstantiated, with no clear and convincing evidence provided to demonstrate any breach of procurement rules. Therefore, the claim asserting that the TEP erroneously designated Association members as Sub-Consultants and not evaluating these entities of the Challenger as Associate is dismissed as it is deemed unfounded and the detailed reasoning has been mentioned in paragraph 5.1.4 and 5.1.5.

As per Rule 1.3 of the BCS, for a Protest to prevail a Challenger must prove by clear and convincing evidence that (a) the Procurement Action (i) violates the Procurement Rules; or (ii) is arbitrary or capricious or characterized by an abuse of discretion; and (b) the Challenger has suffered or will suffer loss or injury because of the Procurement Action. Level 1 authority determined that the Challenger has failed to prove its claim under Rule 1.3 of the BCS.

Further, as per Rule 2.1.2 (a) and after reviewing the submitted challenge the Level 1 Authority has decided to reject the Protest because the Challenger has failed to meet its burden of proof under Rule 1.3



Further, the Level 1 Authority finds that the evaluation processes and the technical evaluation report results are consistent with the evaluation requirements laid out in the Request for Proposal document and that there were no flaws in the process.

In summary, the Level 1 Authority concludes that this protest/bid challenge is without basis and upholds the decisions and actions taken by MCA-Nepal and rejects the Protest/Bid Challenge on Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project. As per the provisions in BCS Rule 1.8, the procurement suspension shall be lifted five Business Days after this decision has been sent in accordance with BCS Rule 2.4. An Appeal can be filed in accordance with the procedures of the **BCS Rule 3.2** on or before the fifth (5th) Business Day after the notice of the Level 1 Authority decision is posted in accordance with **BCS Rule 2.4**.

Dated this 14th day of July 2023





Khadga B. Bisht:

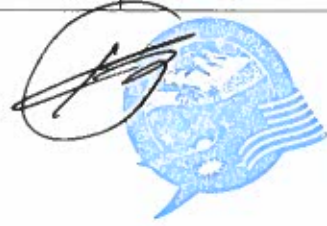


Level I Authority (Executive Director of MCA-Nepal)

Copy to: Secretariat, Bid Challenge System, MCA-Nepal (For circulation to all bidders), MCC Washington DC.

ANNEXES

Annex	Document	Attachment
Annex – 1	Protest/Bid Challenge Submitted by Tetra Tech ES, Inc.	 Tetra Tech_MCA Nepal_Protest for MC.
Annex – 2	Notice of Filing Protest - Published on MCA Nepal website	 Adobe Acrobat Document
Annex – 3	Comment received	 Tractebel Letter to MCA_04072023.pdf  Annexure-B - BCS - Tractebel Engineering



Annex – 1 Protest/Bid Challenge Submitted by Tetra Tech ES, Inc.



June 28, 2023

Procurement Agent
Millennium Challenge Account Nepal (MCA-Nepal)
2nd & 3rd Floor, East Wing,
Lal Durbar Convention Centre,
Yak & Yeti Complex, Durbar Marg,
Kathmandu, Nepal

Re: Protest Regarding Evaluation of Technical Proposal and Assigning Lower Technical Score - RFP Ref: MCA-N/ETP/QCBS/006: Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project

Dear Procurement Agent,

Tetra Tech ES, Inc. (hereafter referred to as Tetra Tech) protests the evaluation and scoring of our Technical Proposal for the Consultancy Services RFP referenced above. This protest is based on MCA-Nepal Bid Challenge System (BCS) Rule 1.2(a)(iii). The qualifications and experience scores awarded by the technical evaluation panel were arbitrary and erroneous in failing to score the Association's full organizational capabilities and experience as specified in the solicitation. Tetra Tech was adversely impacted by the evaluation error due to MCA-Nepal's misinterpretation of our partnership structure. The harm is a material omission of evaluation points that Tetra Tech believes impacts the ranking of offerors. Please see the full BCS Annex A Form of Protest below.

Tetra Tech requests suspension of the procurement referenced above. Failure to suspend the procurement will result in irreparably lost economic costs for Tetra Tech and Association members because the lost opportunity costs and proposal preparation costs will have been wasted. Tetra Tech and Association members will also lose the opportunity to receive a meaningful debriefing of our proposal as the current debriefing is fundamentally flawed. In addition, the Association seeks the following relief available under BCS Rule 2.2: (1) require MCA-Nepal to revise the procurement proceedings to conform to the evaluation criteria; (2) reevaluate the Tetra Tech Association offer to consider its full corporate capabilities and experience; (3) perform a new ranking of technical proposals; and (4) proceed with the procurement based on the revised technical rankings.

The following is a narrative summary of the Annex A factors for the Authority's consideration. The Technical Evaluation panel overlooked the structure of our Association and arbitrarily and incorrectly determined that the Association members are sub-consultants and therefore their project experience, presented as part of the TECH-4 – EXPERIENCE OF THE CONSULTANT was not considered. This determination was communicated to Tetra Tech in MCA-Nepal's debrief note dated June 26, 2023. A

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

comment pertaining to evaluation criteria row 1.1 states that, “Sub-consultants' experiences not looked into it.”

This note shows that the evaluation was flawed and contrary to the RFP requirements that specify the evaluation of offerors who form an Association rather than proposing a prime-subcontractor structure. First, RFP sections A(b) and A(c) define Associate as “any entity that is a member of the Association that forms the Consultant. A Sub-Consultant is not an Associate.” Section 5.2 further specifies that a Consultant offeror may be a combination of entities if supported by a letter of intent.

In compliance with RFP requirements, Tetra Tech’s Technical Proposal included Letters of Association from partner firms (page 18), and a signed Intent of Association Agreement (page 21). The Agreement satisfies the requirements of RFP sections 5.7, 12.4, and the criteria in the section 3.7 Qualification Table. Tetra Tech and its Association partners are therefore properly qualified to participate in the competition as an Association according to MCA-Nepal’s rules.

As a qualified Association, the Tetra Tech proposal presents combined qualifications as stated in the instructions to Form TECH-4 EXPERIENCE OF THE CONSULTANT:

Using the format below, ***provide information on each relevant assignment for which your firm, and each Associate for this assignment***, was legally contracted either individually as a corporate entity or as one of the major companies within an association, for carrying out consulting services similar to the ones requested under the Terms of Reference included in this RFP. (emphasis added)

The quotation clearly shows that the qualifications of all Associates are to be evaluated and scored. In addition, Form TECH-3 ORGANIZATION OF THE CONSULTANT requires “a brief description of the background and organization of your firm/entity ***and of each Associate for the assignment.***” (emphasis added) The Tetra Tech Association, the "Consultant," therefore presented its combined qualifications in support of evaluation criteria 1, Organizational Capability and Experience of the Consultant, and these combined qualifications should have been scored. The arbitrary, erroneous, and incorrect decision to not consider the full capabilities and experience of the Association resulted in our technical proposal being awarded a materially lower technical score than should have properly been awarded.

Tetra Tech’s proposal includes four members in an Association. These include K&A Engineering Consulting (USA/Nepal), Virtuous Energy (India), and ADMC Engineering (Nepal). Tetra Tech ES, Inc. (USA) is the lead member. Tetra Tech submitted a clarification letter dated April 11, 2023 responding to MCA-Nepal’s query that verified that our proposal was submitted as an Association (as defined under ITC Clause 5.7 “Joint Ventures or Associations”).

Thus, it is clear that only Tetra Tech’s project experience was considered for the evaluation. This oversight in not considering our team as an Association resulted in Tetra Tech receiving a lower technical score by up to ten points as elaborated in the table below.

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

Tetra Tech ES, Inc. in association with K&A Engineering Consulting P.C., Virtuous Energy Pvt. Ltd., ADMC Engineering Pct. Ltd.				
MCA-Nepal Debrief Response			Tetra Tech Response	
Description	STRENGTHS	WEAKNESSES	Points Allocated as per the RfP	Additional Experience of the Association Members
Criteria 1 - Organizational Capability and Experience of the Consultant				
Evidence of organizational capability and relevant experience in the execution of projects of a similar scale and complexity in the power sector, as follows:				
Overall organizational capability in engineering and expertise under Supervision of Transmission Line and Substations based on FIDIC Yellow Book conditions of Contract – at least 4 Projects of more than value USD 4 Million each with similar experience		2 projects of value more than US\$ 4 million each but no mention of FIDIC Form of Contract. Sub-consultants' experiences not looked into it.	6	In addition to the Tetra Tech led projects, our Association brings two additional project experience (as described on 71-72 pages of our technical proposal): K&A Engineering: 1. Smart Generation and Transmission (“SGT”) Communication Backbone 2. Moses-Adirondack Smart Thus, our Association partially meets this criterion and should receive additional points.
Technical supervision of works and contractors including review and approval of final designs and supervision of construction, including all environmental, health & safety, and resettlement requirements.				
a) Experience in design review of Transmission line in two similar projects (minimum 220 kV for TL)		Experience in one relevant project only	1	In addition to the Tetra Tech led project, our Association brings three additional project qualifications (as described on 70-78 pages of our Technical Proposal): K&A Engineering: 1. Life Extension & Modernization Program (TELM) 2. Moses-Adirondack Smart Path Reliability Virtuous Energy: 1. Construction Supervision for 765 kV D/C Bhuj – Banaskantha & 400 kV D/C Banaskantha – Radhanesda Transmission Lines. The Association meets these criteria and should receive the full point.

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

Tetra Tech ES, Inc. in association with K&A Engineering Consulting P.C., Virtuous Energy Pvt. Ltd., ADMC Engineering Pct. Ltd.				
MCA-Nepal Debrief Response			Tetra Tech Response	
Description	STRENGTHS	WEAKNESSES	Points Allocated as per the RfP	Additional Experience of the Association Members
b) Experience in design review of Substation in two similar projects (minimum 380 kV for GIS Substation)		No Experience in 380kV GIS Substation, but has experience in GIS in lower voltage	1	Our Association has the project qualifications (as described on page 73 of our Technical Proposal): K&A Engineering: 1. Life Extension & Modernization Program (TELM) The Association partially meets these criteria and should receive additional points.
c) Experience shall include construction supervision of at least two (2) transmission line infrastructure projects with a similar scope of work (minimum 220 kV for TL) during the last 10 years in a developing country context, with an increasing preference for experience in hilly terrain.		Experience in one relevant project only	5	In addition to the Tetra Tech led project, our Association brings four additional project qualifications (as described on 75-78 pages of our Technical Proposal): Virtuous Energy: 1. Construction Supervision for 765 kV D/C Bhuj – Banaskantha & 400 kV D/C Banaskantha – Radhanesda Transmission Lines. 2. Project Management and Construction Supervision of 400 kV Transmission Lines and GIS substation project in Bihar 3. Supervision of 400 kV double circuit Transmission project in Punjab 4. Construction Supervision for 400 kV Double Circuit Quad Moose Transmission Line and 400 kV Bays at Akola Substations in Maharashtra. The Association meets these criteria and should receive full five points.

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

Tetra Tech ES, Inc. in association with K&A Engineering Consulting P.C., Virtuous Energy Pvt. Ltd., ADMC Engineering Pct. Ltd.				
MCA-Nepal Debrief Response			Tetra Tech Response	
Description	STRENGTHS	WEAKNESSES	Points Allocated as per the RfP	Additional Experience of the Association Members
d) Experience shall include construction supervision of at least two (2) GIS Substation with a similar scope of work (minimum 380 kV for GIS Substation) during the last 10 years in a developing country context, with an increasing preference for experience.		No Experience in 380kV GIS Substation, but has experience in GIS in lower voltage	5	Our Association has project experience working on two GIS Substations at voltage greater than 380 kV (as described on pages 75-76 of our Technical Proposal): Virtuous Energy: Project Management and Construction Supervision of 400 kV Transmission Lines and GIS substation project in Bihar: <u>1. 400 kV GIS substation at Darbhanga (1,000 MVA) & 2. 400 kV GIS substation at Motihari (400 MVA)</u> The Association meets this criteria and should receive full five additional points.
e) Construction supervision experience in environmental, health & safety, TIP, GSI and resettlement requirements in at least one in Transmission Line and one in Substation projects in Voltage level 132kV and above.	Two Projects of Construction Supervision in required field		2	No comment

We request MCA-Nepal to consider the project experience of our Association members as outlined in the table above and re-adjust our technical score regarding “Criteria 1 - Organizational Capability and Experience of the Consultant.”

Sincerely yours,



Llyr Rowlands


President, Tetra Tech ES, Inc.

llyr.rowlands@tetrattech.com

+1 703.387.2139

Annex A

Form of Protest

Challenger		
Name: Tetra Tech ES, Inc. and Association Members		
Choose one: <input checked="" type="checkbox"/> Bidder <input type="checkbox"/> Potential Bidder		
(For legal persons only) Country under whose laws Challenger was organized: United State of America		
Postal address for Protest purposes: 1320 North Courthouse Road, Suite 600, Arlington, VA, USA 22201		
Email address for Protest purposes: Llyr.Rowlands@tetratech.com	Telephone number for Protest purposes: +1 (703) 387-2100	Fax number for Protest purposes: +1 (703) 243-0953
Name of authorized representative for the Protest (if any): Llyr Rowlands		
Signature of Challenger or authorized representative: 		

Challenged Procurement
Name: Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project
Number: MCA-N/ETP/QCBS/006

Protest	
Date when Challenger became aware of Procurement Action: June 22, 2023	Date of Filing of Protest: June 27, 2023
Description of Procurement Action: MCA-Nepal Request for Proposals for Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project. RFP was issued 10 Jan 2023.	
Procurement Rules provisions violated by Procurement Action: The Technical Evaluation Committee violated MCA-Nepal Bid Challenge System Rule 1.2(a)(iii). The scores awarded by the technical evaluation panel were arbitrary and erroneous in failing to score the offeror's full organizational capabilities and experience as specified in RFP sections A(b), A(c), 5.7, 12.4, and the criteria in the Qualification Table at section 3.7.	
Explanation of reason why Procurement Action constitutes a violation of the Procurement Rules provisions: The qualification and experience scores awarded to the Tetra Tech proposal by the technical evaluation panel were arbitrary and erroneous in failing to score the Association's full organizational capabilities and experience as specified in the solicitation. The Technical Evaluation panel overlooked the structure of our Association and arbitrarily and incorrectly determined that the Association members are sub-consultants and therefore, their project experience, presented as part of the TECH-4 – EXPERIENCE OF THE CONSULTANT was not considered. This determination was communicated to Tetra Tech in	

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

MCA-Nepal's debrief note dated June 26, 2023, that includes comment pertaining to evaluation criteria row 1.1. It states that, "Sub-consultants' experiences not looked into it."

This note shows that the evaluation was flawed and contrary to the RFP requirements that specify the evaluation of offerors who form an Association rather than proposing a prime-subcontractor structure. First, RFP sections A(b) and A(c) define Associate as "any entity that is a member of the Association that forms the Consultant. A Sub-Consultant is not an Associate." Section 5.2 further specifies that a Consultant offeror may be a combination of entities if supported by a letter of intent.

In compliance with RFP requirements, Tetra Tech's Technical Proposal included Letters of Association from partner firms (page 18), and a signed Intent of Association Agreement (beginning on page 21). The Agreement satisfies the requirements of RFP sections 5.7, 12.4, and the criteria in the section 3.7 Qualification Table. Tetra Tech and its Association partners are therefore properly qualified to participate in the competition as an Association according to MCA-Nepal's rules.

As a qualified Association, the Tetra Tech proposal presents combined qualifications as stated in the instructions to Form TECH-4 EXPERIENCE OF THE CONSULTANT:

Using the format below, provide information on each relevant assignment for which your firm, *and each Associate for this assignment*, was legally contracted either individually as a corporate entity or as one of the major companies within an association, for carrying out consulting services similar to the ones requested under the Terms of Reference included in this RFP. (emphasis added).

The quotation clearly shows that the qualifications of all Associates are to be evaluated and scored. In addition, Form TECH-3 ORGANIZATION OF THE CONSULTANT requires "a brief description of the background and organization of your firm/entity *and of each Associate for the assignment*." (emphasis added). The Tetra Tech Association, the "Consultant," therefore presented its combined qualifications in support of evaluation criteria, Organizational Capability and Experience of the Consultant, and these combined qualifications should have been scored. The arbitrary, erroneous, and incorrect decision to not consider the full capabilities and experience of the Association resulted in our technical proposal being awarded a materially lower technical score than should have properly been awarded.

Thus, it is clear that only Tetra Tech's project experience was considered in the evaluation. This oversight in not considering our team as an Association resulted in Tetra Tech receiving a lower technical score by up to ten points as elaborated in the table included in the narrative above.

Explanation of reason why Challenger has been harmed by Procurement Action: Tetra Tech was harmed due to the Technical Evaluation Committee's abuse of discretion. The harm is a material omission of evaluation points that Tetra Tech believes impacts the ranking of offerors. Tetra Tech and its Association members invested significant time and expenses in preparing a proposal that deserves a fair evaluation according to the stated criteria in the RFP. The lost opportunity costs due to an arbitrary and erroneous determination by the Technical Evaluation Committee are significant. The investment of time and resources in forming the Association and developing the proposed project could have been put to profitable use pursuing other opportunities. A fair reevaluation of the proposal would remedy this loss.

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

If Challenger requests suspension of the Challenged Procurement, explanation of reason why Challenger will suffer irreparable harm if the Challenged Procurement is not suspended:

Tetra Tech requests suspension of procurement for RFP Ref: MCA-N/ETP/QCBS/006: Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project. Failure to suspend the procurement will result in irreparably lost economic costs for Tetra Tech and Association members because the lost opportunity costs and proposal preparation costs will have been wasted. Tetra Tech and Association members will also lose the opportunity to receive a meaningful debriefing of our proposal as the current debriefing is fundamentally flawed.

Relief Sought

Description of relief sought: In addition to suspension of the procurement, the Association seeks the following relief available under BCS Rule 2.2: (1) require MCA-Nepal to revise the procurement proceedings to conform to the evaluation criteria; (2) reevaluate the Tetra Tech Association offer to consider its full corporate capabilities and experience; (3) perform a new ranking of technical proposals; and (4) proceed with the procurement based on the revised technical rankings.

Explanation of reason why Challenger is entitled to relief sought: Tetra Tech and Association members are entitled to relief as qualified offerors for the subject solicitation. MCA-Nepal was negligent in arbitrarily and erroneously ignoring its own solicitation instructions and evaluation criteria. This resulted in lost direct and indirect opportunity costs to Tetra Tech and the Association. We are only seeking a fair evaluation and opportunity to compete for the award on a level field with our competitors.

Annex – 2 Notice of Filing Protest - Published on MCA Nepal website

**Notice of Filing a Protest under
Procurement of Consultancy Services for Construction Supervision
for Transmission Lines and Substations Activities for
Electricity Transmission Project**

MCA-N/ETP/QCBS/006

Date: 30 June 2023

This is to notify all Consultants that submitted a proposal for the above-described procurement MCA-N/ETP/QCBS/006 that MCA-Nepal has received a protest as per the MCA-Nepal Bid Challenge System.

The nature of the protest is: The Challenger stated that The Technical Evaluation Committee violated MCA-Nepal Bid Challenge System Rule 1.2(a)(iii). The scores awarded by the technical evaluation panel were arbitrary and erroneous in failing to score the offeror's full organizational capabilities and experience as specified in RFP sections A(b), A(c), 5.7, 12.4, and the criteria in the Qualification Table at section 3.7. The Challenger sought a relief to suspend the procurement process and sought further relief available under BCS Rule 2.2: (1) MCA-Nepal to revise the procurement proceedings to conform to the evaluation criteria; (2) reevaluate the Tetra Tech Association offer to consider its full corporate capabilities and experience; (3) perform a new ranking of technical proposals; and (4) proceed with the procurement based on the revised technical rankings.

A copy of the protest is attached to this notice.

Name of Challenger: **Tetra Tech ES, Inc. and Association Members (as per Bid Challenge submitted)**

The procurement process is hereby automatically suspended until a final decision with respect to the Protest/Challenge is issued or the Level 1 Authority lifts the suspension. The financial proposal opening scheduled on 3 July 2023 is postponed until further notice; MCA-Nepal will request the Password of the financial proposal once a new financial opening date and time will be notified to the Consultants, as applicable.

All Consultants are advised on their right to file a Comment on this challenge in accordance with **Rule 1.6 of the Bid Challenge System** and failure to file a Comment in the required time period (no later than 5 Business Days after the Secretariat sends this Notice of the Protest) will prevent any future participation in the Protest.



June 28, 2023

Procurement Agent
Millennium Challenge Account Nepal (MCA-Nepal)
2nd & 3rd Floor, East Wing,
Lal Durbar Convention Centre,
Yak & Yeti Complex, Durbar Marg,
Kathmandu, Nepal

Re: Protest Regarding Evaluation of Technical Proposal and Assigning Lower Technical Score - RFP Ref: MCA-N/ETP/QCBS/006: Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project

Dear Procurement Agent,

Tetra Tech ES, Inc. (hereafter referred to as Tetra Tech) protests the evaluation and scoring of our Technical Proposal for the Consultancy Services RFP referenced above. This protest is based on MCA-Nepal Bid Challenge System (BCS) Rule 1.2(a)(iii). The qualifications and experience scores awarded by the technical evaluation panel were arbitrary and erroneous in failing to score the Association's full organizational capabilities and experience as specified in the solicitation. Tetra Tech was adversely impacted by the evaluation error due to MCA-Nepal's misinterpretation of our partnership structure. The harm is a material omission of evaluation points that Tetra Tech believes impacts the ranking of offerors. Please see the full BCS Annex A Form of Protest below.

Tetra Tech requests suspension of the procurement referenced above. Failure to suspend the procurement will result in irreparably lost economic costs for Tetra Tech and Association members because the lost opportunity costs and proposal preparation costs will have been wasted. Tetra Tech and Association members will also lose the opportunity to receive a meaningful debriefing of our proposal as the current debriefing is fundamentally flawed. In addition, the Association seeks the following relief available under BCS Rule 2.2: (1) require MCA-Nepal to revise the procurement proceedings to conform to the evaluation criteria; (2) reevaluate the Tetra Tech Association offer to consider its full corporate capabilities and experience; (3) perform a new ranking of technical proposals; and (4) proceed with the procurement based on the revised technical rankings.

The following is a narrative summary of the Annex A factors for the Authority's consideration. The Technical Evaluation panel overlooked the structure of our Association and arbitrarily and incorrectly determined that the Association members are sub-consultants and therefore their project experience, presented as part of the TECH-4 – EXPERIENCE OF THE CONSULTANT was not considered. This determination was communicated to Tetra Tech in MCA-Nepal's debrief note dated June 26, 2023. A

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

comment pertaining to evaluation criteria row 1.1 states that, “Sub-consultants' experiences not looked into it.”

This note shows that the evaluation was flawed and contrary to the RFP requirements that specify the evaluation of offerors who form an Association rather than proposing a prime-subcontractor structure. First, RFP sections A(b) and A(c) define Associate as “any entity that is a member of the Association that forms the Consultant. A Sub-Consultant is not an Associate.” Section 5.2 further specifies that a Consultant offeror may be a combination of entities if supported by a letter of intent.

In compliance with RFP requirements, Tetra Tech’s Technical Proposal included Letters of Association from partner firms (page 18), and a signed Intent of Association Agreement (page 21). The Agreement satisfies the requirements of RFP sections 5.7, 12.4, and the criteria in the section 3.7 Qualification Table. Tetra Tech and its Association partners are therefore properly qualified to participate in the competition as an Association according to MCA-Nepal’s rules.

As a qualified Association, the Tetra Tech proposal presents combined qualifications as stated in the instructions to Form TECH-4 EXPERIENCE OF THE CONSULTANT:

Using the format below, ***provide information on each relevant assignment for which your firm, and each Associate for this assignment***, was legally contracted either individually as a corporate entity or as one of the major companies within an association, for carrying out consulting services similar to the ones requested under the Terms of Reference included in this RFP. (emphasis added)

The quotation clearly shows that the qualifications of all Associates are to be evaluated and scored. In addition, Form TECH-3 ORGANIZATION OF THE CONSULTANT requires “a brief description of the background and organization of your firm/entity ***and of each Associate for the assignment***.” (emphasis added) The Tetra Tech Association, the "Consultant," therefore presented its combined qualifications in support of evaluation criteria 1, Organizational Capability and Experience of the Consultant, and these combined qualifications should have been scored. The arbitrary, erroneous, and incorrect decision to not consider the full capabilities and experience of the Association resulted in our technical proposal being awarded a materially lower technical score than should have properly been awarded.

Tetra Tech’s proposal includes four members in an Association. These include K&A Engineering Consulting (USA/Nepal), Virtuous Energy (India), and ADMC Engineering (Nepal). Tetra Tech ES, Inc. (USA) is the lead member. Tetra Tech submitted a clarification letter dated April 11, 2023 responding to MCA-Nepal’s query that verified that our proposal was submitted as an Association (as defined under ITC Clause 5.7 “Joint Ventures or Associations”).

Thus, it is clear that only Tetra Tech’s project experience was considered for the evaluation. This oversight in not considering our team as an Association resulted in Tetra Tech receiving a lower technical score by up to ten points as elaborated in the table below.

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

Tetra Tech ES, Inc. in association with K&A Engineering Consulting P.C., Virtuous Energy Pvt. Ltd., ADMC Engineering Pct. Ltd.				
MCA-Nepal Debrief Response			Tetra Tech Response	
Description	STRENGTHS	WEAKNESSES	Points Allocated as per the RfP	Additional Experience of the Association Members
Criteria 1 - Organizational Capability and Experience of the Consultant				
Evidence of organizational capability and relevant experience in the execution of projects of a similar scale and complexity in the power sector, as follows:				
Overall organizational capability in engineering and expertise under Supervision of Transmission Line and Substations based on FIDIC Yellow Book conditions of Contract – at least 4 Projects of more than value USD 4 Million each with similar experience		2 projects of value more than US\$ 4 million each but no mention of FIDIC Form of Contract. Sub-consultants' experiences not looked into it.	6	In addition to the Tetra Tech led projects, our Association brings two additional project experience (as described on 71-72 pages of our technical proposal): K&A Engineering: 1. Smart Generation and Transmission (“SGT”) Communication Backbone 2. Moses-Adirondack Smart Thus, our Association partially meets this criterion and should receive additional points.
Technical supervision of works and contractors including review and approval of final designs and supervision of construction, including all environmental, health & safety, and resettlement requirements.				
a) Experience in design review of Transmission line in two similar projects (minimum 220 kV for TL)		Experience in one relevant project only	1	In addition to the Tetra Tech led project, our Association brings three additional project qualifications (as described on 70-78 pages of our Technical Proposal): K&A Engineering: 1. Life Extension & Modernization Program (TELM) 2. Moses-Adirondack Smart Path Reliability Virtuous Energy: 1. Construction Supervision for 765 kV D/C Bhuj – Banaskantha & 400 kV D/C Banaskantha – Radhanesda Transmission Lines. The Association meets these criteria and should receive the full point.

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

Tetra Tech ES, Inc. in association with K&A Engineering Consulting P.C., Virtuous Energy Pvt. Ltd., ADMC Engineering Pct. Ltd.				
MCA-Nepal Debrief Response			Tetra Tech Response	
Description	STRENGTHS	WEAKNESSES	Points Allocated as per the RfP	Additional Experience of the Association Members
b) Experience in design review of Substation in two similar projects (minimum 380 kV for GIS Substation)		No Experience in 380kV GIS Substation, but has experience in GIS in lower voltage	1	Our Association has the project qualifications (as described on page 73 of our Technical Proposal): K&A Engineering: 1. Life Extension & Modernization Program (TELM) The Association partially meets these criteria and should receive additional points.
c) Experience shall include construction supervision of at least two (2) transmission line infrastructure projects with a similar scope of work (minimum 220 kV for TL) during the last 10 years in a developing country context, with an increasing preference for experience in hilly terrain.		Experience in one relevant project only	5	In addition to the Tetra Tech led project, our Association brings four additional project qualifications (as described on 75-78 pages of our Technical Proposal): Virtuous Energy: 1. Construction Supervision for 765 kV D/C Bhuj – Banaskantha & 400 kV D/C Banaskantha – Radhanesda Transmission Lines. 2. Project Management and Construction Supervision of 400 kV Transmission Lines and GIS substation project in Bihar 3. Supervision of 400 kV double circuit Transmission project in Punjab 4. Construction Supervision for 400 kV Double Circuit Quad Moose Transmission Line and 400 kV Bays at Akola Substations in Maharashtra. The Association meets these criteria and should receive full five points.

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

Tetra Tech ES, Inc. in association with K&A Engineering Consulting P.C., Virtuous Energy Pvt. Ltd., ADMC Engineering Pct. Ltd.				
MCA-Nepal Debrief Response			Tetra Tech Response	
Description	STRENGTHS	WEAKNESSES	Points Allocated as per the RfP	Additional Experience of the Association Members
d) Experience shall include construction supervision of at least two (2) GIS Substation with a similar scope of work (minimum 380 kV for GIS Substation) during the last 10 years in a developing country context, with an increasing preference for experience.		No Experience in 380kV GIS Substation, but has experience in GIS in lower voltage	5	Our Association has project experience working on two GIS Substations at voltage greater than 380 kV (as described on pages 75-76 of our Technical Proposal): Virtuous Energy: Project Management and Construction Supervision of 400 kV Transmission Lines and GIS substation project in Bihar: <u>1. 400 kV GIS substation at Darbhanga (1,000 MVA) & 2. 400 kV GIS substation at Motihari (400 MVA)</u> The Association meets this criteria and should receive full five additional points.
e) Construction supervision experience in environmental, health & safety, TIP, GSI and resettlement requirements in at least one in Transmission Line and one in Substation projects in Voltage level 132kV and above.	Two Projects of Construction Supervision in required field		2	No comment

We request MCA-Nepal to consider the project experience of our Association members as outlined in the table above and re-adjust our technical score regarding “Criteria 1 - Organizational Capability and Experience of the Consultant.”

Sincerely yours,



Llyr Rowlands


President, Tetra Tech ES, Inc.

llyr.rowlands@tetrattech.com

+1 703.387.2139

Annex A

**Form of
Protest**

Challenger		
Name: Tetra Tech ES, Inc. and Association Members		
Choose one: <input checked="" type="checkbox"/> Bidder <input type="checkbox"/> Potential Bidder		
(For legal persons only) Country under whose laws Challenger was organized: United State of America		
Postal address for Protest purposes: 1320 North Courthouse Road, Suite 600, Arlington, VA, USA 22201		
Email address for Protest purposes: Llyr.Rowlands@tetratech.com	Telephone number for Protest purposes: +1 (703) 387-2100	Fax number for Protest purposes: +1 (703) 243-0953
Name of authorized representative for the Protest (if any): Llyr Rowlands		
Signature of Challenger or authorized representative: 		

Challenged Procurement
Name: Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project
Number: MCA-N/ETP/QCBS/006

Protest	
Date when Challenger became aware of Procurement Action: June 22, 2023	Date of Filing of Protest: June 27, 2023
Description of Procurement Action: MCA-Nepal Request for Proposals for Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project. RFP was issued 10 Jan 2023.	
Procurement Rules provisions violated by Procurement Action: The Technical Evaluation Committee violated MCA-Nepal Bid Challenge System Rule 1.2(a)(iii). The scores awarded by the technical evaluation panel were arbitrary and erroneous in failing to score the offeror's full organizational capabilities and experience as specified in RFP sections A(b), A(c), 5.7, 12.4, and the criteria in the Qualification Table at section 3.7.	
Explanation of reason why Procurement Action constitutes a violation of the Procurement Rules provisions: The qualification and experience scores awarded to the Tetra Tech proposal by the technical evaluation panel were arbitrary and erroneous in failing to score the Association's full organizational capabilities and experience as specified in the solicitation. The Technical Evaluation panel overlooked the structure of our Association and arbitrarily and incorrectly determined that the Association members are sub-consultants and therefore, their project experience, presented as part of the TECH-4 – EXPERIENCE OF THE CONSULTANT was not considered. This determination was communicated to Tetra Tech in	

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

MCA-Nepal's debrief note dated June 26, 2023, that includes comment pertaining to evaluation criteria row 1.1. It states that, "Sub-consultants' experiences not looked into it."

This note shows that the evaluation was flawed and contrary to the RFP requirements that specify the evaluation of offerors who form an Association rather than proposing a prime-subcontractor structure. First, RFP sections A(b) and A(c) define Associate as "any entity that is a member of the Association that forms the Consultant. A Sub-Consultant is not an Associate." Section 5.2 further specifies that a Consultant offeror may be a combination of entities if supported by a letter of intent.

In compliance with RFP requirements, Tetra Tech's Technical Proposal included Letters of Association from partner firms (page 18), and a signed Intent of Association Agreement (beginning on page 21). The Agreement satisfies the requirements of RFP sections 5.7, 12.4, and the criteria in the section 3.7 Qualification Table. Tetra Tech and its Association partners are therefore properly qualified to participate in the competition as an Association according to MCA-Nepal's rules.

As a qualified Association, the Tetra Tech proposal presents combined qualifications as stated in the instructions to Form TECH-4 EXPERIENCE OF THE CONSULTANT:

Using the format below, provide information on each relevant assignment for which your firm, *and each Associate for this assignment*, was legally contracted either individually as a corporate entity or as one of the major companies within an association, for carrying out consulting services similar to the ones requested under the Terms of Reference included in this RFP. (emphasis added).

The quotation clearly shows that the qualifications of all Associates are to be evaluated and scored. In addition, Form TECH-3 ORGANIZATION OF THE CONSULTANT requires "a brief description of the background and organization of your firm/entity *and of each Associate for the assignment*." (emphasis added). The Tetra Tech Association, the "Consultant," therefore presented its combined qualifications in support of evaluation criteria, Organizational Capability and Experience of the Consultant, and these combined qualifications should have been scored. The arbitrary, erroneous, and incorrect decision to not consider the full capabilities and experience of the Association resulted in our technical proposal being awarded a materially lower technical score than should have properly been awarded.

Thus, it is clear that only Tetra Tech's project experience was considered in the evaluation. This oversight in not considering our team as an Association resulted in Tetra Tech receiving a lower technical score by up to ten points as elaborated in the table included in the narrative above.

Explanation of reason why Challenger has been harmed by Procurement Action: Tetra Tech was harmed due to the Technical Evaluation Committee's abuse of discretion. The harm is a material omission of evaluation points that Tetra Tech believes impacts the ranking of offerors. Tetra Tech and its Association members invested significant time and expenses in preparing a proposal that deserves a fair evaluation according to the stated criteria in the RFP. The lost opportunity costs due to an arbitrary and erroneous determination by the Technical Evaluation Committee are significant. The investment of time and resources in forming the Association and developing the proposed project could have been put to profitable use pursuing other opportunities. A fair reevaluation of the proposal would remedy this loss.

**Construction Supervision for Transmission Lines and Substations Activities
for Electricity Transmission Project; MCA-N/ETP/QCBS/006**

If Challenger requests suspension of the Challenged Procurement, explanation of reason why Challenger will suffer irreparable harm if the Challenged Procurement is not suspended:

Tetra Tech requests suspension of procurement for RFP Ref: MCA-N/ETP/QCBS/006: Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project. Failure to suspend the procurement will result in irreparably lost economic costs for Tetra Tech and Association members because the lost opportunity costs and proposal preparation costs will have been wasted. Tetra Tech and Association members will also lose the opportunity to receive a meaningful debriefing of our proposal as the current debriefing is fundamentally flawed.

Relief Sought

Description of relief sought: In addition to suspension of the procurement, the Association seeks the following relief available under BCS Rule 2.2: (1) require MCA-Nepal to revise the procurement proceedings to conform to the evaluation criteria; (2) reevaluate the Tetra Tech Association offer to consider its full corporate capabilities and experience; (3) perform a new ranking of technical proposals; and (4) proceed with the procurement based on the revised technical rankings.

Explanation of reason why Challenger is entitled to relief sought: Tetra Tech and Association members are entitled to relief as qualified offerors for the subject solicitation. MCA-Nepal was negligent in arbitrarily and erroneously ignoring its own solicitation instructions and evaluation criteria. This resulted in lost direct and indirect opportunity costs to Tetra Tech and the Association. We are only seeking a fair evaluation and opportunity to compete for the award on a level field with our competitors.

Annex – 3 Comment received

TRACTEBEL ENGINEERING pvt. ltd.

Intec House
37, Institutional Area, Sector 44
Gurgaon 122 002 (Haryana) – INDIA
tel. +91 124 469 85 00 - fax +91 124 469 85 86
engineering-in@tractebel.engie.com
tractebel-engie.com

To

**Secretariat
Millennium Challenge Account Nepal**
2nd & 3rd Floor, East Wing,
Lal Durbar Convention Centre,
Yak & Yeti Complex, Durbar Marg,
Kathmandu, Nepal



YOUR REF.: email dated 30.06.2023.
OUR REF: BDY/MCA-Nepal/68

Writer: Rakesh BHATT

Direct tel. +91 124 469 85 00 - Direct fax +91 124 469 8586
e-mail: rakesh.bhatt@tractebel.engie.com

Confidential Restricted Internal Public

Date: 04.07.2023

Dear Sir(s):

Sub: Procurement of Consultancy Services for Construction Supervision for Transmission Lines and Substations Activities for Electricity Transmission Project (RFP Ref: MCA-N/ETP/QCBS/006) – Tractebel Letter regarding the protest on evaluation of technical proposal

This is with reference to your email dated 30.06.2023 wherein we received information related to protest raised by one of the bidders on the evaluation of technical proposals done by MCA Nepal and the tender agent for subject bid.

We believe and understand that MCA- Nepal and MCC have well establish and transparent procurement process which is fair and provides equal opportunity to all bidders based on the merit of technical proposal submitted by various bidders. Further, we believe that MCC procurement guidelines were followed in letter and spirit during the long evaluation process and present technical ranking is outcome of the same process.

Further, the table on page no. 3-5 of challenger's letter clearly indicates the weakness in challenger's technical proposal informed during the de-briefing by MCA-Nepal and the comments are self-explanatory on the deficiencies in organizational experience and the criteria in the qualification table at section 3.7. Consideration of any additional project reference/credential to establish challenger's experience clearly violates MCA/MCC's procurement process.

In light of the above, we request MCA-Nepal to reject the claims raised and relief sought by the challenger and reject their proposal because of unfair bidding behaviour and practices as this may affect the overall technical ranking and evaluation process which may further result in financial loss to other bidders effecting the outcome of procurement process.

We trust in the fairness of the client in the evaluation process and have no concerns that the decision to award the contract will go to the best bidder technically/economically.

For and on behalf of Tractebel Engineering Pvt. Ltd, India

Sachin GARG
General Manager
(Business Development)
Mobile: +91 99118 61031
Email: sachin.garg@tractebel.engie.com

Ranjan CHAKRAVARTI
Sr. Vice President
(Energy)
Mobile: +91 9910994138
Email: ranjan.chakravarti@tractebel.engie.com

For and on behalf of Tractebel Engineering GmbH

Mihovil Ivas
Head of Department
Power Grids & Systems

Leon Pfeifer
Business Development
Sales T&D Manager

For and on behalf of SMEC International Pty Ltd, Australia

Mallikarjunagouda Patil
Country Director, Nepal