

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS  
BOARD**

**APPLICATION NO.58/2006 OF 28<sup>TH</sup> DECEMBER, 2006**

**BETWEEN**

**SIMBA ENERGY LTD. (APPLICANT)**

**AND**

**KENYA POWER & LIGHTING CO. LTD. (PROCURING ENTITY)**

**PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Ms Phyllis N. Nganga	-	Member
Mr. Paul M. Gachoka	-	Member
Mr. Joshua W. Wambua	-	Member
Eng. Daniel W. Njora	-	Member
Ms. C. A. Otunga	-	Holding brief for Secretary

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Secretariat
Mr. Henock K. Kirungu	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Simba Energy Limited**

- Suzanne Muthaura - Advocate, Muthaura, Mugambi, Ayugi & Njonjo Advocates  
Phillip Williamson - Advocate, Muthaura, Mugambi, Ayugi & Njonjo Advocates  
Z. G. Mbugua - Director  
Michael Linkersdorfer - Exec. Sales Manager, MAN B&W Diesel

### **Procuring Entity, Kenya Power & Lighting Company Ltd.**

- Kimani Kiragu - Advocate, Hamilton Harrison & Mathews  
Irene Mikangi - Lawyer, Hamilton Harrison & Mathews  
Don Priestman - Chief Executive Officer  
Laurencia Njagi - Company Secretary  
Beatrice Muendo - Chief Legal Officer  
Lucky Rono - Senior Legal Officer  
Patrick I. Mawala - Energy Purchase Manager  
Christopher Shibuyanga - Snr. Engineer Energy Purchase

### **Interested Candidate, AB Consortium**

- Prof. Githu Muigai - Advocate, Mohamed & Muigai Advocates  
Crispin Odhiambo - Advocate, Mohamed & Muigai Advocates  
Mike Scholey - Finance Director, Aldwych International  
Anders Langhorn - Business Development Manager, BWSC

## **BOARD'S DECISION**

Upon hearing the representations of the parties and the Interested Candidates herein, and upon considering the information in all the documents before it, the Board hereby decides as follows:-

### **BACKGROUND**

This tender entailed the supply of an 80-90 MW Power Generating Plant to be located at the Procuring Entity's substation at Rabai, Mombasa. The process was conducted using the Request for Proposal (RFP) procurement method by which the Procuring Entity sought proposals for the design, financing, supply, erection, commissioning, operation and maintenance of a Power Plant on a Build, Own, Operate and Transfer (BOOT) arrangement under which the plant would be operational by March, 2008. It would be transferred back to the Procuring Entity at the end of the Power Purchase Agreement (PPA) term. The tender was advertised in the local dailies on 6<sup>th</sup> June, 2006, and closed/opened on 8<sup>th</sup> September, 2006 in the presence of concerned parties. Five (5) out of the six (6) firms that bought the RFP documents responded by submitting their bids. Two (2) of the firms submitted their bids as a consortium.

The bidders were as follows:-

- a) M/s Aldwych International in consortium with Burmeister & Wain Scandinavian Contractor A/S. (AB Consortium)
- b) M/S Wartsita Development and Financial Services
- c) Globeleq Limited
- d) Simba Energy Limited

The evaluation of proposals was conducted using a three stage approach. The first stage entailed evaluation under the Minimum Qualification Requirements.

The second stage was the Detailed Technical Evaluation, and the third stage was Financial Evaluation. These stages were provided for under Clauses 2.11.3.1, 2.11.3.2 and 2.11.3.3, respectively, of the Instructions to Bidders in the RFP.

The Procuring Entity conducted negotiations with the successful bidder and the Applicant, commencing on 6<sup>th</sup> and 9<sup>th</sup> November, 2006 respectively. A Special Central Tender Committee meeting held on 30<sup>th</sup> November, 2006, under Minute No. CTC/49/06 awarded the tender to M/S AB Consortium, for being the most responsive bidder with the lowest financial tariff of capacity charge rate of EUROS 207.1 KW/YR.

Notification of award letters were issued to all unsuccessful bidders on 30<sup>th</sup> November, 2006.

### **THE APPEAL**

The Applicant filed its Memorandum of Appeal against the Procuring Entity's decision on 20<sup>th</sup> December, 2006. The Applicant was represented by Ms. S. Muthaura, Advocate of Muthaura, Mugambi Ayugi and Njonjo Advocates. The Procuring Entity, was represented by Mr. Kiragu Kimani, Advocate of Hamilton and Mathews who filed their Memorandum of Response on 5<sup>th</sup> January, 2007. The Interested Candidate, the successful bidder, filed its List of Authorities and Outline Submissions on 18<sup>th</sup> January, 2007, through Prof. Githu Muigai, Advocate of Mohamed & Muigai Advocates.

The hearing was held on 18<sup>th</sup> January, 2007 in the presence of all parties. In addition to all original tender documents, minutes and reports normally requested by the Board's Secretariat from the Procuring Entity, other documents filed included:-

- a) Applicant's Reply to the Procuring Entity's Response dated 17<sup>th</sup> January, 2007.
- b) The Procuring Entity's Amended Response to the Memorandum of Appeal dated 18<sup>th</sup> January, 2007.

The Applicant raised ten grounds in its Memorandum of Appeal. The relief it seeks is that the Board should set aside the Procuring Entity's award and lawfully award the tender in adherence with the tender and relevant procurement procedures to the Applicant. The Board has dealt with the grounds of appeal as follows:-

#### **Grounds 1,2,3,4,5, and 6**

These are not grounds of appeal but statements of facts relating to the tender (RFP) process. In particular, grounds 3,4, and 5 lay the grounding for the Applicant's later allegation that it was the preferred bidder as defined in the RFP, having been invited for negotiations and having made the lowest price offer. It therefore ought to have been awarded the project. However, as there is no specific allegation of breach of the Regulations in these grounds, the Board makes no finding on them.

#### **Ground Nos. 7 and 8**

We have combined these grounds as they were argued in tandem. They are allegations that the Procuring Entity breached Regulation 36(5) in not making an award to it whilst its proposal was the most advantageous, and by awarding the

project to a person other than the Applicant, the Procuring Entity was in breach of Regulation 4 on fairness, transparency and non-discrimination.

Counsel for the Applicant argued that by dint of the Applicant having been invited for negotiations by the Procuring Entity, it was the "***Preferred Bidder***" under I.T.T Clause 2.11.3.3.

That Clause provides as follows:

***'Proposals which are judged acceptable following the above evaluation will thereafter be compared on the basis of their bid prices'***

Counsel contended that the Applicant's bid must have passed the evaluations in relation to the minimum qualification requirements and the technical evaluation, as the Applicant was invited for negotiations. This was evident since the RFP document at I.T.T Clause 2.11.3.3 also provides that:

***"KPLC expects to invite for negotiation the Bidder evaluated as offering the lowest total energy cost (EC) ("Preferred Bidder")."***

Counsel pointed out that at tender opening, the prices read out revealed that the Applicant was the lowest priced at a Base Capacity Charge Rate of US\$ 235. Its bid was therefore the most advantageous in terms of Regulation 36(5), having been invited for negotiations in accordance with the RFP provisions.

Further, Counsel argued that if, as suggested by the Procuring Entity in the Applicant's written responses, there were any deficiencies in its proposal, such deficiencies were waived by the Procuring Entity pursuant to I.T.T Clause 2.11.1 of the RFP which provides as follows:-

*“KPLC reserves the right, without qualification, to reject all Proposals, or to waive any formality or technicality in respect of proposals received ...”*

Having waived any deficiency, the Procuring Entity correctly invited the Applicant for negotiations which can only be construed to mean that it was the Preferred Bidder.

Finally Counsel argued, on these grounds, that their bid was successful in all evaluations. It was therefore invited by the Procuring Entity by a letter dated 30<sup>th</sup> October, 2006, to discuss its Proposal for the 80-90 MW Rabai Plant. The negotiations were successfully carried out on the 9<sup>th</sup>, 10<sup>th</sup> and 14<sup>th</sup> November, 2006. They resulted in all issues which had been raised by the Procuring Entity, becoming “non issues”. The Applicant exhibited at pages 105-128 of the Memorandum of Appeal, the minutes of the various negotiation meetings at which all the outstanding issues were mutually resolved and concluded as “non-issues”.

In the said negotiations at which the conclusions were arrived and outstanding issues treated as non-issues, the Procuring Entity was, according to the Applicant, exercising its reserved rights under ITT Clause 2.11.1 to waive any requirements of the RFP. The Applicant, as the Preferred Bidder should therefore have been granted the award of the project and failure by the Procuring Entity to do so was a breach of both Regulations 4 and 36(5).

In reply, Counsel for Procuring Entity pointed out that there were two separate processes that were carried out during the tender. The first was the RFP processed by the Tender Committee and governed by the Regulations. The second was a process exploring the possibility of having a separate power

generation project negotiated outside of the RFP. This second project was to be achieved by single sourcing, and negotiations were conducted by the KPLC Board Sub-Committee on IPP Negotiations.

Counsel conceded that the concurrence of the two processes could have been confusing, but did not amount to a breach of the Regulations. Counsel referred to the letter inviting the Applicant for negotiation and argued that, although in its title it referred to the RFP, the content of the letter clearly revealed that only some aspects of the RFP were to be discussed. In addition, the entity that was negotiating with the Applicant was the KPLC Board Committee on IPP Negotiations. Further, Counsel pointed out that the letter inviting the Applicant for negotiations did not communicate that the Applicant was the Preferred Bidder.

According to Counsel, the Procuring Entity commenced a separate process with the Applicant due to three reasons. First, the Applicant's price in their RFP was very competitive; Secondly, it is undisputed that there is a shortage of power in the country; and thirdly, the Applicant is a Kenyan Company. In this regard, Counsel referred to letters exchanged between the Procuring Entity and the Permanent Secretary Ministry of Energy, and also from the said Permanent Secretary to the PS, Treasury, in which the rationale for the negotiations were given. In the latter letter the Permanent Secretary, Ministry of Energy, sought approval to single source the Applicant as the direct provider of an IPP project for supply of additional power capacity.

With regard to the Applicant's contention that the Procuring Entity had waived certain requirements of the RFP resulting in the invitation of the Applicant as the "Preferred Bidder", Counsel argued that the Procuring Entity did not in fact waive any RFP requirements and that Regulation 13 does not permit waiver of



statutory requirements. Counsel pointed out that the Applicant had been evaluated and did not qualify. In particular, the Applicant had not satisfied the mandatory Minimum Qualification Requirements in ITT Clause 2.11.3.1, which could not be waived. Accordingly, although the Applicant was invited for discussions under a separate process, it had neither demonstrated that it had met the minimum mandatory requirements, nor shown that they had been waived.

Indeed, counsel pointed out that when the RFP was floated, the Applicant had written a letter dated 23<sup>rd</sup> August, 2006 objecting to the inclusion in the RFP of the Minimum Qualification Requirements. It contended that the said Requirements were discriminatory, and sought assurances that they would not be used to disqualify any Kenyan bidder who may not meet the requirements. The Procuring Entity had responded to the said objection by its letter dated 1<sup>st</sup> September, 2006, in which it restated the rationale for the requirements, pointed out that they were non-discriminatory, and re-confirmed that the RFP would include the said requirements. In response, the Applicant had stated that it had taken note of the position but did not agree with the Procuring Entity as the requirements were discriminatory. The applicant then sought confirmation that its bid would "be evaluated on its technical and financial terms". In response the Procuring Entity had indicated in its letter of 8<sup>th</sup> September, 2006, as follows:-

***"We have now received your client's proposal, which we shall evaluate alongside others in accordance with the criteria in our Request for Proposals".***

Counsel therefore argued that the objection to the Minimum Qualification Requirements was never accepted, and evaluation was to be conducted using, inter alia, that criteria, and no waiver was ever exercised or granted.

On his part Prof. G. Muigai for the interested candidate, adopted the arguments of Counsel for the Procuring Entity. He noted that the interested candidate had complied with all the requirements of the RFP. There was therefore no basis for attack of the essential legal validity of the award.

Counsel argued that the Applicant's RFP was merely used as a basis or reference framework for discussion at the meeting between the Applicant and the KPLC Board on IPP Negotiations. At the meeting of 9<sup>th</sup> November, 2006, it appeared that every item in the RFP under discussion was open to review and change which, if the process had concerned the RFP itself, would have been discriminatory as even the site of the project was under review.

Counsel further concurred with the Procuring Entity's Counsel that the statutory or mandatory requirements on qualification on which the Applicant had failed, could not be waived.

Counsel referred to two of the Board's previous cases in which the Board had held that mandatory requirements must be complied with. These were Application Nos.13 and 14/2005 East Coast Enterprises Ltd, and Department of Defence and Application No.15/2004 Aquatech International Co. Ltd. and Pyrethrum Board of Kenya. In particular, the Aquatech case was similar to the present one, in that, there, the tenderer was required to qualify by experience in the subject matter of the tender. Despite lacking the appropriate experience and like qualifications, the applicant in that case was evaluated by the procuring entity. The Board found that the purported evaluation was contrary to the tender provisions and the Regulations.

Counsel urged the Board to disallow the appeal.

The Applicant's Counsel in response, reiterated that the Applicant having been called for negotiations was deemed the preferred bidder. As none of the information concerning the existence of two separate committees of the Procuring Entity or two separate procurement processes had been disclosed to them, arguments in reliance on that information could not be supported. Counsel also pointed out that the letter inviting them for negotiations was very clear that the subject matter was the Applicant's RFP document which they submitted for the Rabai Project, as they had not submitted any proposal for Kipevu.

Mr. Z. Mbugua the Applicant's Director, also spoke on its behalf, and reiterated the arguments on discrimination by the Procuring Entity's adoption of the minimum qualification requirements; their absurdity as policy requirements; and the losses that the Procuring Entity would face on account of their application. He stated that the country would lose an estimated US\$ 80 Million over twenty years if the tender was awarded to the successful bidder.

Counsel further stated that the Procuring Entity's admission on single sourcing revealed the existence of a further breach of Regulations 10 and 35 on Direct Procurement. In any event, the Applicant was never made aware of the Procuring Entity's needs in respect of the alleged direct procurement.

Counsel urged the Board to allow the appeal.

The Board has carefully considered the arguments of all the parties and interested candidate, and has perused the documents before it. The complaint in Grounds 7 and 8 is that the Applicant was treated unfairly by the Procuring Entity's failure to award the tender to it pursuant to Regulation 36(5), as its RFP was the most advantageous in accordance with the criteria and procedure set out in the Request for Proposal.

On careful perusal of the RFP documents, the original submitted tenders, and the original Evaluation Report dated 25<sup>th</sup> November 2006, we analyze the process as follows:-

The RFP at I.T.T. Clause 2.11.3 required evaluation to be conducted in three (3) stages, namely, Minimum Qualification Requirements (ITT 2.11.3.1); Detailed Technical Evaluation (I.T.T. 2.11.3.2) and, finally, Financial Evaluation (I.T.T. 2.11.3.3). This is not contested.

The Tender Evaluation Report shows that stage 1 of the evaluation was carried out for the following bidders:-

S/No.	Name	Outcome
1.	Wartsila Dev. Financial Services (Oy)	Qualified. Proceed to Detailed Technical Evaluation
2.	Aldwych Int/Burmeister Wain (AB Consortium)	Qualified. Proceed to detailed Technical Evaluation
3.	Globeleq	Qualified. Proceed to detailed Technical Evaluation
4.	Simba Energy Ltd	Not qualified. Failed to meet mandatory requirements as per clause 2.11.3.1

The Evaluation Report noted at Appendix II page 35 with regard to the Applicant's proposal under I.T.T. 2.11.3.1, as follows:-

- “(a) No information has been provided to show that the bidder or its staff has any experience or has undertaken/participated in any project of electricity generating plant.

The bidder has not provided projects undertaken.

- (b) In view of (a) above, there is no generating plant to asses.
- (c) The bidder has not provided any reference from any organization showing its involvement or that of its staff in Power Purchase Agreements. References provided are for the proposed EPC and O&M Contractor (MAN B&W).”

At page 2 of the Report, the Evaluation Committee noted as follows:-

***“Simba Energy listed projects carried out by MAN B&W, its proposed CPC and O&M contractor, but the bidder did not identify staff to be involved in the project development. The RFP required Bidder or its staff to demonstrate its participation in development of power generating projects of not less than 50 MW”.***

The qualified bidders proceeded to Detailed Technical Evaluation stage under I.T.T. 2.11.3.2. All were judged acceptable, and were subjected to Financial Evaluation under I.T.T. 2.11.3.3. The outcome of the financial evaluation is reported at paragraph 2(d) Page 6 of the Report as follows:-

***“On the basis of the Technical and Financial Evaluation, AB Consortium is the best evaluated bidder, with the lowest discounted energy cost.”***

The chronology of events, thereafter, was as follows:

By a letter Ref.ME/CONF/2/1/1 dated 13<sup>th</sup> October, 2006 the Permanent Secretary, Ministry of Energy directed the Procuring Entity to negotiate with the Applicant for additional power capacity based on its unsuccessful bid for Rabai.

By a letter dated 25<sup>th</sup> October, 2006, the Procuring Entity's General Manager, invited AB Consortium, the most responsive bidder, for negotiations on their tender on 6<sup>th</sup> November, 2006.

On 30<sup>th</sup> October 2006, the Procuring Entity's General Manager wrote to the Applicant inviting them for negotiations "on certain aspects of your proposal with the Board Sub-committee on IPP negotiations". These were to be held on 9<sup>th</sup> and 10<sup>th</sup> November, 2006.

Negotiations with the Applicant were carried out on 9<sup>th</sup>, 10<sup>th</sup> and 14<sup>th</sup> November, 2006, according to unsigned minutes attached to the Memorandum of Appeal at pages 105-132. Counsel for the Applicant pointed out that the issues for discussion were those listed at page 98 of the Memorandum of Appeal. These included items arising out of subsequent technical evaluation of the Applicant's RFP as pointed out by Counsel for the Procuring Entity. The list aforesaid included:-

- “1. Simba's technical capability for the project ...
8. Signing and firmness of the Proposal
9. Bid security (for Trans-century and not Simba, the bidder)”

The minutes of the negotiation meeting are recorded to have been between the Procuring Entity's IPP Board Sub-committee and the Applicant. A sampling of some of the minutes reflects the following discussions:

9<sup>th</sup> November, 2006

Item I - Simba technical capability which as per RFP, the bidder had not demonstrated. Simba would review and revert.

Item 8 – proposal not signed. Simba would review and revert.

Item 9 – Bid security issued by a third party. Simba was to review and revert.

10<sup>th</sup> November, 2006

Item 4 – Design provided in the Bid was based on Embakasi site. Simba attached a site plan layout proposal and power plant drawings for KPLC to review.

Item 8 – Proposal not signed – Simba Energy will give a power of Attorney authorizing Mr. Simon Kihumba to execute. Way forward: “No issue”.

14<sup>th</sup> November, 2006

IPP/44/06 Simba stated that they preferred to be situated within Kipevu area to minimize on fuel delivery costs. They had identified two undeveloped plots belonging to EPZ and KenGen but they had not approached the owners. KPLC stated they would not provide the site but would give necessary assistance to Simba in acquiring the site.

On 17<sup>th</sup> November, 2006, the Procuring Entity’s General Manager wrote to the Permanent Secretary, Ministry of Energy indicating that negotiations with AB

Consortium, the best evaluated bidder, had been completed, and a meeting would be held with the AB Consortium to complete issues on the PPA (Power Purchase Agreement). Further the letter noted as follows:-

*“In accordance with your directive, contained in the letter Ref. ME/CONF/2/1/1 dated 13<sup>th</sup> October, 2006, that KPLC would negotiate with Simba Energy Limited and award that firm a PPA for the development of additional power capacity based on its unsuccessful bid for Rabai, the Board Committee on IPP negotiations also made a decision that an award to Simba be made for the development of a power plant in Mombasa at a site to be procured by Simba. In this regard a letter of award is expected to be issued to Simba after the meeting of the Board Committee on IPP scheduled to be held on 21<sup>st</sup> November, 2006 to enable Simba to make commitments towards the development of the project. ... Any further capacity should be timed to coincide with the commissioning of the proposed Mombasa – Nairobi Transmission line. Based on the foregoing feasibility study and experience of time taken to obtain concessionary funding, the transmission line is unlikely to be commissioned before the end of 2009.”*

The Procuring Entity also sought, in that letter, for assurance that a firm Government directive would be issued to the Procuring Entity, including consent from the Director of Public Procurement, to procure the power capacity from Simba on a single sourcing basis.

On 27<sup>th</sup> November, 2006 the Permanent Secretary, Ministry of Energy wrote to the Permanent Secretary Treasury a letter Ref.ME/CONF/2/1/14 in which he advised Treasury that the Procuring Entity had decided:



- To negotiate with AB Consortium to reduce its charge to US\$263 per kw per annum closer to that of Simba Energy, and
- To negotiate with Simba to run its power plant in order to take advantage of its lower tariff through single sourcing.

In that letter, the Permanent Secretary, Ministry of Energy, also writing as a member of the Procuring Entity's Board and Member of the IPP Sub-committee on Negotiations acknowledged that Simba was being accorded consideration because of their competitive price:

**“Despite Simba Energy (K) Ltd not having the required minimum qualifications, the firm prepared and submitted a bid which on evaluation was found to be technically non compliant on the basis of the (RFP) criteria”.**

The letter also sought formal authority to single sourcing Simba Energy's power plant at US\$ 235 per KW per annum. Thereafter, the Procuring Entity's Central Tender Committee would approve a PPA for a term of twenty (20) years to Simba. No response to this letter has been availed to the Board.

On 30<sup>th</sup> November, 2006 the Procuring Entity's Central Tender Committee resolved at Minute CTC/496/06 as follows:-

***“CTC approved the award of contract for the development of the Rabai 80-90 mw Power Generating Plant at Rabai under BOOT arrangement to M/s AB Consortium, the most responsive bidder with the lowest financial tariff of capacity charge at Euro 207.1/KW/year.*”**

By a letter dated 30<sup>th</sup> November, 2006 the Applicant was notified that its bid was not successful, and that the technically compliant bidder with the lowest financial offer was AB Consortium. This appeal followed thereafter.

The Board considered it necessary to set out a detailed chronology of the events in order to establish the proper context of the process.

From the foregoing chronology, there is no doubt that the Applicant's proposal was evaluated and found to have failed. However, there is also no doubt that negotiations occurred with both the Applicant and the successful bidder separately.

The question to be answered by the Board is whether, in the circumstances, the Procuring Entity waived the requirements of the RFP which the Applicant's proposal was required to meet.

To answer this question, the Applicant relied on I.T.T. Clause 2.11.1, (the Procuring Entity's right to select any proposal) read together with I.T.T. clause 2.11.3.3 on comparison of proposals which are judged acceptable, following evaluation and invitation for negotiations of the lowest evaluated bidder (the "Preferred Bidder").

I.T.T. 2.11.1 reads as follows:-

***"KPLC reserves the right, without qualification to reject all proposals or to waive any formality or technicality in respect of proposals received ..."***

This clause clearly bestows on the Procuring Entity an inherent power to reject any proposals or to waive any formality or technicality in any proposal. A

“formality” and “technicality” are defined in the Oxford Advanced Learner’s Dictionary as follows:

Formality – “a procedure or official rule; or such a procedure which is thought to be unnecessary, or to have little meaning; a mere formality”.

Technicality - “a technical term or point; a detail of no real importance, a mere technicality”.

Black’s Law Dictionary defines the same word as follows:-

Formality - “Condition in regard to method, order arrangement, use of technical expressions, performance of specific acts, etc ... the term generally refers to “procedure” contrast to “substance”

Technical - “Belonging or peculiar to an art or profession. Technical terms are frequently called in the books “words of art”. Immaterial, not affecting substantial rights without substance”

An interpretation by which I.T.T. Clause 2.11.1 would be rendered to mean that the Procuring Entity could waive mandatory requirements that go to the substance of qualification for participation in a procurement, would be absurd. This would result in unfairness and lack of transparency in the procurement process, as there would be no fixed requirements for qualifications, and procuring entities could then, in any event, waive such requirements for preferred bidders at will.

From the foregoing definitions, it is clear that what the Procuring Entity invested itself with was power to waive only those requirements which can be described as formalities or technicalities.

A similar provision exists in Regulation 30(5) with regard to usual tenders; which provides as follows:

- ***“The procuring entity may regard a Tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics terms and conditions or other requirements set forth in the tender documents...”***

It is evident therefore that terms and conditions that are of a substantive or material nature, or which go to the root of qualification cannot be waived by a procuring entity.

Accordingly, we hold that only mere formalities and technicalities or deviations of a minor nature could be waived by the Procuring Entity.

Our view is bolstered by the fact that the requirements of I.T.T. Clause 2.11.3.1 which the Applicant initially objected to, and on which it failed, were all mandatory minimum qualification requirements as opposed to minor requirements deviation from which would not substantially alter the proposal. At I.T.T. Clause 2.11.3.2, the RFP clearly envisaged that only:-

***“Proposals which meet the mandatory qualification requirements would then be evaluated [under detailed technical evaluation]”.***

I.T.T. Clause 2.11.3.2 also envisages that only:-

**“Proposals which are judged acceptable following the above [detailed technical] evaluation will thereafter be compared on the basis of their bid prices.”**

In this case the Applicant failed in the Minimum Qualification Requirements. In addition it did not provide a bid bond in its name as required, nor did it sign the RFP as required therein. All these are serious or critical omissions which a Procuring Entity cannot waive willy-nilly.

Regulation 13 of the Regulations makes it statutorily mandatory that to qualify to participate in public procurement a candidate must qualify under the qualification criteria set out in the Regulations and in such other criteria as the procuring entity considers appropriate.

The High Court in HCCC (MISC) No. 50/2004 Republic V Public Procurement Complaints, Review and Appeals Board and Kenatco Exparte Kenya Airports Authority, held in respect of Regulation 13, as follows:-

***“To our understanding the regulation provides that for one to participate in the tender one must bring himself within the said provision”***

Further, even if a bidder is evaluated contrary to the qualification provisions, the law would still apply to his participation as there can be no estoppel against a statute.

From the facts of this case, we do not see any attempt by the Procuring Entity to waive the mandatory qualification requirements. We therefore find there was no

waiver. We also hold from the point of view of the law that there could be no waiver of the mandatory qualification requirements.

We therefore find that these grounds of appeal fail.

However, we consider that the following conduct of the Procuring Entity was untenable, imprudent and improper in the circumstances: entertaining parallel procurement proceedings; using information from one on-going procurement proceeding to commence and inform the other; giving preference to one unqualified bidder to the exclusion of other unsuccessful bidders in an attempt to single-source; all these occurred before the conclusion of the RFP in question. This therefore led to a potential breach of the Regulations on confidentiality.

We also note that Globeleq, one of the unsuccessful bidders, provided a letter of credit instead of a bid bond, which the Evaluation Committee did not accept. Globeleq should therefore have been disqualified and not proceeded for further evaluation. However, as they failed in the next stage of evaluation, this omission has no effect to the award.

### **Ground 9**

This was a complaint that the Procuring Entity breached Regulation 30(1) by unlawfully altering or misreporting the financial bids.

Counsel for the Applicant contended that the successful bidders' bid offered a plant which was part diesel, contrary to the RFP. As the Applicant had the lowest bid, the Applicant should have been awarded.

Counsel also argued that the attempt by the Procuring Entity to lower the successful bidder's price downwards was a breach of the Regulations.

In reply, Counsel for the Procuring Entity pointed out that the successful bidder was offering a plant of 89 MW diesel capacity, of which 5 MW was additional steam capacity. He further argued that Regulation 30(1) concerns clarification of tenders and does not apply to RFP procedure which is governed by Regulation 36.

We have considered the submissions of all Counsel and perused the documents in regard to this ground. Apart from the letter from the Permanent Secretary, Ministry of Energy to Permanent Secretary, Treasury, relating to negotiations on the price, there was no evidence that a clarification was sought pursuant to Regulation 30(1) that changed the substance the tender.

Further Regulation 36(4) in any event, permits negotiations of RFP with respect to the content of the bidder's proposals during which the parties may seek or permit revisions thereof.

We find that there is no merit in this ground, and accordingly, it fails.

### **Ground 10**

This was a complaint that the Procuring Entity failed, neglected or declined to provide the Applicant with information relating to the procurement proceedings in breach of Regulation 10(2).

Counsel for the Applicant, in support of this ground exhibited letters to the Procuring Entity requesting release of the summaries of the evaluation and

comparison of the tenders (see pages 137-140 of the Memorandum of Appeal). The Applicant argued that the failure to provide such information prejudiced their ability or opportunity to present their appeal.

In response, Counsel for the Procuring Entity stated that the Procuring Entity acted in good faith in that their understanding of Regulation 10 read together with Regulation 33, requires that there must be a contract in place before disclosure of the summary documents. Counsel stated that there was no intention to disregard the law.

On this ground, the Board notes that Regulation 10 does not provide a timeframe within which the disclosable documents must be released to a requesting candidate. We, however, consider that this should be done within a reasonable time. The Applicant first requested the relevant documents on 11<sup>th</sup> December, 2006, and thereafter its counsel made two further requests on 18<sup>th</sup> and 19<sup>th</sup> December, 2006.

In our view, the Applicant made the request within reasonable time. The Procuring Entity should have provided the summaries as requested. However, we note that the Applicant had opportunity to file its case within time which it did.

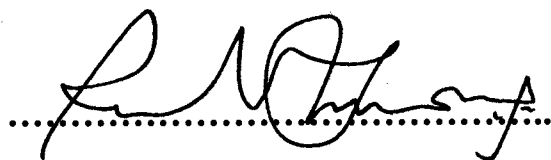
Accordingly this ground succeeds.

Although this ground succeeds, we do not find that there was any serious prejudice occasioned to the Applicant who ably ventilated his case.



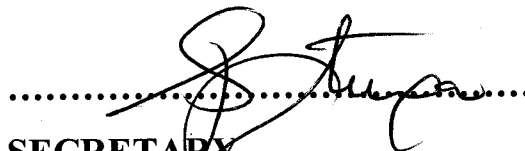
Taking into account all the foregoing matters, this appeal fails, and the Procuring Entity may proceed with the process.

**Delivered at Nairobi on 22<sup>nd</sup> January, 2007**

A handwritten signature in black ink, appearing to be 'A. O. Ochieng', written over a horizontal dotted line.

**CHAIRMAN**

**PPCRAB**

A handwritten signature in black ink, appearing to be 'J. M. Mwangi', written over a horizontal dotted line.

**SECRETARY**

**PPCRAB**

