

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO. 64/2007 OF 20TH NOVEMBER, 2007

BETWEEN

WEB ENGINEERING LIMITED.....APPLICANT

AND

MINISTRY OF ENERGY.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of Ministry of the Energy in the matter of Tender No. MOE/06/2007-2008 for Supply, Installation, Testing and Commissioning of Solar Power System to 29 No. Dispensaries and Health Centres in ASAL Districts of Mandera and Wajir.

PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Amb. C. M. Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Holding Brief for Secretary
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PRESENT BY INVITATION FOR APPLICATION NO.64/2007

Applicant, Web Engineering Limited

Mr. Alex Masika	-	Advocate for the Applicant
Mr. James Muriuki	-	Managing Director
Mr. Peter Githinji	-	Marketing Manager
Mr. Desiderio Mutua	-	Sales Engineer

Procuring Entity, Ministry of Energy

Mr. Morrison Mugoya	-	Chief Procurement Officer
Eng. Kiremu Magambo	-	Renewable Energy Specialist

Interested Candidates

Mr. Joseph Mbugua	-	Sales Representative, Power ware Systems
Mr. Njau Ndungu	-	Corporate Sales Manger, PowerPoint Systems (EA) Limited
Mr. Cosmas Musyoki	-	Sales Representative, PowerPoint Systems
Mr. Samuel Njoroge	-	Manager, Electronics and Technology

BOARD'S DECISION

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

BACKGROUND

The Tender is for Supply, Installation, Testing and Commissioning of Solar Power System to 29 No. Dispensaries and Health Centres in ASAL Districts of Mandera and Wajir. It was advertised on 1st September, 2007 in three Daily newspapers namely the Nation, the Kenya Times and the People. It attracted 13 tenderers of which 9 were returned. It closed/opened on 21st September, 2007 at 10.00 a.m.

The tenders that were opened by the tender opening committee were as follows:-

Bidder No.	Name of Firm	Amount of Tender	Bid Security Kshs.	Bank
1.	Electronics Technology Ltd	34,103,446.00	682,089.00	Equity Bank
2.	Davis & Shirliff	44,377,951.00	887,000.00	Standard Chartered
3.	Liteline Enterprises Ltd	51,867,136.00	1,186,750.00	I & M Bank
4.	Power point Systems (EA) Ltd	46,606,400.00	932,128.00	Southern Credit
5.	Powerware Systems Ltd	54,340,213.80	1,120,000.00	Barclays
6.	Kenital Solar Ltd	74,394,587.00	1,487,892.00	NIC Bank
7.	Pisu & Company Ltd	63,445,740.00	1,280,000.00	I & M Bank
8.	Key, Locks, Alarms & Automobile Centre	65,317,396.37	1,306,347.93	ABC Ltd
9.	Web Engineering Ltd	53,677,059.61	1,200,000.00	EABS Bank

THE EVALUATION OF THE TENDER

During the evaluation, it was observed that bidder No.3 submitted only one tender document instead of two as required in line with Clauses 16 and 17 of the Instructions to Tenderers. The bid was thus disqualified.

A summary of the preliminary observations by the Evaluation Committee showed that bidders 1, 2, 4, 5, 6, 7, 8 and 9 qualified while bidder No.3 did not qualify for submitting a security bond from an Insurance Company.

Compliance

The bids had their form of tender, bid security, tender questionnaire and confidential business questionnaire evaluated for compliance with the requirements of the tender. Non-compliance would disqualify the bid. The findings were as follows:-

		Bid 1	Bid 2	Bid 3	Bid 4	Bid 5	Bid 6	Bid 7	Bid 8	Bid 9	
1	Form of tender properly filled and signed	Y	Y	Y	Y	Y	Y	Y	Y	Y	
2	Bid security	Provided in accordance with clause 41(3) of PP&D Regulations of 2006	Y	Y	Y	Y	Y	Y	Y	Y	
		Equivalent to 2% of tender sum	Y	N	N	Y	Y	Y	Y	Y	Y
		Valid for 120 days (from 21/9/07 to 19/01/08) in accordance with clause 41(4) of PPD Regulations of 2006 and Tender Documents	Y	Y	Y	Y	Y	Y	Y	Y	Y

3	Tender questionnaire	Y	Y	Y	Y	Y	Y	Y	Y	Y
4	Confidential Business questionnaire	Y	Y	Y	Y	Y	Y	Y	Y	Y
	Remarks	C	NC	NC	C	C	C	C	C	C

Notes: C - Compliant
NC - Not compliant

A summary shows that 7 bidders i.e. 1, 4, 5, 6, 7, 8 and 9 qualified. Bidder No.2 did not qualify as the ownership of the company could not be ascertained. Bidder No.3 did not qualify for the company was not wholly Kenyan-owned contrary to Clause 39(8)(a) of Public Procurement & Disposal Act, 2005.

Technical Compliance

The Tender Documents required that the bids should meet the minimum specifications for fluorescent fittings, crystalline solar modules, solar accumulators (Batteries), inverters/chargers and charge controllers. Failure to meet these minimum specifications would disqualify the bid(s).

M/s Power point Systems' bid was checked for arithmetical errors and none were found.

Members discussed and observed that most of the local firms participating in the tender for Solar Energy installation were unable to meet the set standards of solar specifications hence leading to lack of a serious competition. Previous tenders had been won by one bidder who did not participate in the current tender.

Members discussed and agreed to award the tender to the Lowest Responsive Evaluated Bidder No.4 M/s Power Point Systems (EA) Ltd of P.O. Box 6321 – 00200, NAIROBI at a contract price of Kshs.44,606,400 (Kenya shillings forty four million, six hundred and six thousand, four hundred five) exclusive of Kshs.2,000,000.00 being a contingency amount.

X THE REVIEW

This Appeal was lodged on 20th November, 2007 by Web Engineering Limited, against the decision of the Tender Committee of the Ministry of Energy, in the matter of Tender No. MOE/06/2007-2008, for Supply, Installation, Testing and Commissioning of Solar Power System to 29 No. dispensaries and health Centres in ASAL Districts of Mandera and Wajir.

The Applicant was represented by Mr Alex S. Masika, Advocate, while the Procuring Entity was represented by Eng.Kiremu Magambo. Power Point Systems (EA) Ltd, an Interested Candidate, was represented by Mr. Njau Ndungu, the General Manager.

The Applicant requested the Board to make the following orders:

1. That the Board prohibits the Ministry of Energy from acting or deciding unlawfully or from following an unlawful procedure with disregard of the Public Procurement Regulations;
2. The said decision of the Procuring Entity be annulled;
3. The Contract be awarded to the Applicant; and
4. The Ministry of Energy to pay the Applicant the costs of the Appeal.

At the commencement of the hearing, the Applicant sought leave to amend prayers 2 & 3 of the request for review to read as follows:

- 1)
- 2) That the Board be pleased to annual the entire decision of the Procuring Entity.
- 3) That the Board be pleased to award the Applicant the tender.

The Procuring Entity had no objection to the amendment of prayer No.2. However it objected to the granting of prayer 3 of the Applicant's Request for Review.

The Board informed the parties that all decisions of the Board are guided by Section 98 of the Public Procurement & Disposal Act, 2005 and therefore the hearing proceeded on merit.

The Applicant raised three grounds of Appeal and the Board deals with them as follows:

Ground 1(a), 1(b) & 1(c) on Breach of Sections 66(2), 66(3) (a), 66 (3)(b) and 66(4) of the Public Procurement and Disposal Act, 2005.

The three grounds have been consolidated since they raised similar complaints.

The Applicant submitted that the Procuring Entity, at an advanced stage of the Technical Evaluation, invited seven bidders to submit Technical proposals for consideration. The Applicant argued that its bid had been wrongly disqualified at the Technical Evaluation stage. It further argued that the Bid Analysis report did not use all technical criteria and/or features of required equipment set out in the Tender Document, in determining technical compliance or non-compliance. The Applicant further submitted that the Procuring Entity breached section 66(2) of the Public Procurement & Disposal Act, 2005 by failing to adhere to the evaluation criteria set out in the Tender Document and instead introducing new criteria. It alleged that the Procuring Entity used "Battery type" as a new criterion and that this was used as the basis for disqualifying the Applicant.

The Applicant further pointed out that the Procuring Entity had attempted to modify the Tender documents by not following the laid down criteria. Where the criteria set out in the Tender Document was applied, it was also done selectively. According to the Applicant, this was done by the Procuring Entity to give some bidders undue advantage.

According to the Applicant, the Evaluation Committee in its Bid Analysis report ignored the fact that it had committed itself in writing, under its bid, to deliver and install equipment and/or products that meet the stated minimum technical specifications under paragraph F of the Tender Document. It argued that the Procuring Entity had breached the Ministry's own stated evaluation criteria. However, the Applicant stated that it had supplied a Battery of superior quality than that which had been specifically

asked for and therefore, it met the minimum technical specifications in the Tender Document.

In conclusion, the Applicant argued that the Tender process was flawed, and it queried the legality of the two evaluation reports. It further argued that the Procuring Entity had disqualified it on the basis of the same brochures which it had submitted before the closure of the bids. It pointed out that the Procuring Entity modified the evaluation criteria and the substance of the Tender, hence breaching Section 59(3) and Regulation 11(2) of the Public Procurement and Disposal Act, 2005 and the Regulations thereof.

In response, the Procuring Entity denied that it had breached section 66 of the Public Procurement & Disposal Act, 2005. It stated that it had followed all the procedures, in line with the Public Procurement & Disposal Act, 2005. It further submitted that during bid evaluation, the Evaluation Committee had found all bidders to be non-compliant and made the following two recommendations to the Tender Committee:

- (a) The Tenders be cancelled and new tenders be called afresh through re-advertisement.

OR

- (b) In order not to lose on time, those bidders who had responded and had their bids disqualified because of not complying with Technical specifications only, be requested to give technical details of the equipment they intend to supply, as a clarification.

The Procuring Entity submitted that the Ministerial Tender Committee, in its meeting of 4th October, 2007 resolved “**members agreed that the bidders be invited to resubmit all the technical specifications afresh for re-evaluation**”. Bidders who had not complied with the technical specifications were then invited through a letter dated 5th October, 2007 to resubmit detailed technical specifications. It further submitted that whereas one of the roles of the Tender Committee was to reject tenders, the Tender Committee took consideration of the time the tender process would take and observed that the same bidders could have participated in the same tender. The Procuring Entity stated that pursuant to Section 62(1) of the Act, it only sought for clarification from bidders to assist in the evaluation and comparison of the tenders. It further argued that under Section 59(3) of the

Act, the Tender Committee had considered this issue as a minor deviation since no substance of the Tender was changed by requesting bidders to resubmit technical details.

The Procuring Entity argued that the criteria set out in the Tender Document that was not included in the Bid Analysis did not add any value to the Tender Evaluation. It further argued that the Applicant's bid did not meet the critical criteria and that was the ground for its disqualification. The Procuring Entity submitted that the issue before the Board was based on 'Terminology' and the Applicant did not supply the Battery that was specified in the Tender Document.

In conclusion, the Procuring Entity submitted that the Applicant had introduced new criteria by committing itself in writing in their bid to deliver and install ONLY equipment and/or products that meet the stated minimum technical specifications under paragraph F of the Tender Document.

The Board has carefully examined the documents submitted by the Procuring Entity and have noted that tender No. MOE/06/2007-2008, the subject matter of Request for Review, was advertised on 31st August, 2007. The Board has noted that there were two evaluation reports done for the said Tender. The Board has observed that Section 59 (2) & (3) prohibits both the Procuring Entity and the bidders from making any changes to the substance of the Tender.

Further Regulation 11 sets out what the Tender Committee is required to do after receiving submissions from the Evaluation Committee. Regulation 11(2) requires the Tender Committee not to modify any submissions with respect to the recommendations for a contract award or in any other respect. There is no provision in the Act or in the Regulations that permit a Procuring Entity to request bidders who were not able to meet tender requirements to submit new information under the guise of seeking clarification

In the circumstances, the Board's findings are that the Evaluation process was not conducted in accordance with the Act and the Regulations.

Accordingly these grounds of appeal succeed.

Taking into account all the foregoing matters, the Appeal succeeds and the Tender is hereby annulled.

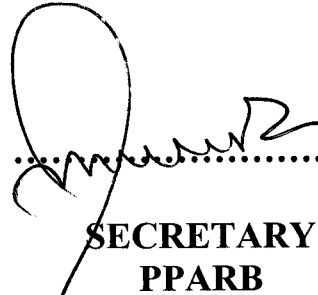
Accordingly, the Procuring Entity may re-tender.

Date at Nairobi on this 18th day of December, 2007.



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**

