

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW  
BOARD**

**APPLICATION NO. 65/2007 OF 20<sup>TH</sup> NOVEMBER, 2007**

**BETWEEN**

**WEB ENGINEERING LIMITED.....APPLICANT**

**AND**

**MINISTRY OF ENERGY.....PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Ministry of Energy in the matter of Tender No. MOE/09/2007-2008 for Supply, Installation, Testing and Commissioning of Solar Power System to 15 No. Schools, Dispensaries and Health Centres in ASAL Districts of Marsabit

**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
Mr. S. K. Munguti	-	Member

**IN ATTENDANCE**

Mr. I. K. Kigen	-	Holding Brief for Secretary
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## **PRESENT BY INVITATION FOR APPLICATION NO. 65/2007**

### **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. Henry Ndege	-	Wilken Telecommunication, General Manager
Mr. Njau Ndungu	-	Corporate Sales Manger, PowerPoint Systems (EA) Limited
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 was for Supply, Installation, Testing and Commissioning of Solar Power System to 15 No. Schools, Dispensaries and Health Centres in ASAL Districts of Marsabit.

It was advertised on 1<sup>st</sup> September, 2007 in three daily newspapers, namely the Nation, the Kenya Times and the People. It attracted 13 tenderers out of which 9 were returned. It closed/opened on 21<sup>st</sup> September, 2007 at 10.00 a.m.

The following were the firms that returned their bids:-

1. Solar World;
2. Davis & Shirtliff;
3. Web Engineering Ltd;
4. Wiken Telecoms;
5. Pisu & Company Ltd;
6. Kenital Solar Ltd;
7. Solar Taa & Rural Credit;
8. Liteline Enterprises Ltd;
9. Powerware Systems Ltd; and
10. Electronics Technology Ltd.

### **THE EVALUATION OF THE TENDER**

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

After evaluation, the committee recommended Wilken Telecommunications Limited to be awarded the contract at a tender sum of Kshs. 40,979,311 (Kenya shillings forty million, nine hundred and seventy nine thousand, three hundred and eleven five).

### **THE REVIEW**

This Request for Review was lodged on 20<sup>th</sup> November, 2007 by Web Engineering Ltd. against the decision of the Tender Committee of Ministry of Energy, in the matter of Tender No. MOE/09/2007-2008 , for Supply, Installation, Testing and Commissioning of Solar Power System to 15 No. Schools, Dispensaries and Health Centres in ASAL Districts of Marsabit.

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

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 regard 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.

This Request for Review was heard concurrently with Application No. 64/2007. The two Requests for Review involved the same parties and raised similar complaints.

Prior to the commencement of the hearing, the Applicant sought leave to amend prayers 2 & 3 of the Request for Review. Further, both parties informed the Board that they were adopting and relying on their respective submissions made in appeal No.64/2007 touching on similar issues, and in addition argued as follows:-

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 Section 66(2), 66(3) (a), 66 (3) (b) and 66(4) of the Public Procurement and Disposal Act,2005.**

In addition to the submissions made in Appeal No. 64/2007, the Applicant submitted further on the cited grounds of appeal as follows:

The Applicant submitted that the Procuring Entity had advertised for the Tender in the daily newspapers on 31<sup>st</sup> August, 2007. It argued that during the technical evaluation, the Procuring Entity realized that all bidders were non-responsive and made two recommendations to the Tender Committee as follows:

- (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 Applicant further submitted that instead of recommending re-tendering, the Tender Committee directed the Procuring Entity to request bidders who had responded and had their bids disqualified for failing to comply with the Technical specifications only, to submit technical details of the equipment they intended to supply, as a clarification. The Applicant stated that the Procuring Entity sought the said clarification by requesting for the same brochures that had been submitted by the bidders. It further argued that the Procuring Entity did not invite all the ten bidders who had been disqualified.

The Applicant argued that the entire tender process was flawed. It submitted that the Tender Committee was supposed to have either rejected or awarded the Tender. It further submitted that the tender process was not fair, objective and transparent. It also pointed out that the Procuring Entity had ignored the criteria set out in the Tender Document.

In conclusion, the Applicant submitted that the tender process, having been flawed, should be nullified.

In response, the Procuring Entity adopted the submissions it had made in appeal No. 64/2007 and urged the Board to dismiss the Request for Review.

The Board has carefully examined the documents submitted by the Procuring Entity and noted that Tender No. MOE/06/2007-2008, the subject matter of Request for Review was advertised on 31<sup>st</sup> August, 2007. The Board has noted that there were two evaluation reports 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 the duties of the Tender Committee after receiving recommendations from the Evaluation Committee.

Further, 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. Therefore, the Board holds that there is no provision in the Act or in the Regulations that allowed the Procuring Entity to request bidders who were not able to meet tender requirements to submit new information as a clarification

In the circumstances, the Board's holds that the Evaluation Process was not conducted in accordance with the Act and the Regulations.

Accordingly, these grounds of appeal succeed.

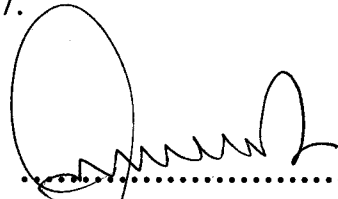
Taking into account all the foregoing matters, the Appeal succeeds and the tender is hereby annulled.

The Procuring Entity may re-tender.

Date at Nairobi on this 18<sup>th</sup> day of December, 2007.



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**CHAIRMAN**  
**PPARB**



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**SECRETARY**  
**PPARB**