

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.55/2009 OF 10TH DECEMBER, 2009

BETWEEN

VOITH HYDRO GmbH & Co.....APPLICANT

AND

**KENYA ELECTRICITY
GENERATING CO. LTD.....PROCURING ENTITY**

● Review against the decision of the Tender Committee of the Kenya Electricity Generating Co. Ltd dated 15th October, 2009 in the matter of tender No. KIND 001-Electrical and Mechanical for Implementation of Third Unit and Rehabilitation: Kindaruma Power Station

BOARD MEMBERS

Mr. P. M. Gachoka - Chairman
Mr. Joshua W. Wambua - Member
● Mr. Sospeter Kioko - Member
Mr. Akich Okola - Member
Ms. Natasha Mutai - Member

IN ATTENDANCE

Mr. C. R. Amoth - Board Secretary
Mr. P. M. Wangai - Secretariat

Ms. Kerina Rota - Secretariat

PRESENTERS BY INVITATION

Applicant, Voith Hydro GmbH & Co.

Mr. Andrew Wandabwa - Advocate, Wandabwa Advocates
Mr. Kijana Muriuki - General Manager
Mr. Pichowsu Norbert - Director, Marketing
Mr. Clans Sommits - Director, Proposal Management

Procuring Entity, Kenya Electricity Generating Co. Ltd

Mr. Kiragu Kimani - Advocate, Hamilton Harrison & Mathews Advocates
Ms. Michi Kirimi - Advocate, Hamilton Harrison & Mathews Advocates
Mr. Hannington Omol - Advocate, Hamilton Harrison & Mathews Advocates
Mr. David Kagiri - Projects Execution Manager
Ms. Beatrice Koske - Chief Legal Officer
Mr. Peter Chege - Senior Projects Engineer

Interested Candidates

Mr. Peter Gachuhi - Advocate for Andritz VA Tech
Ms. Esther Kinyenje Opiyo - Advocate for Andritz VA Tech
Mr. James Mwangi - Advocate for Alstom Hydro France
Mr. J. Brahmbhaff - Advocate for Alstom Hydro France
Mr. Christopher Decouto - Business Development Director

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates herein, the Board decides as follows: -

BACKGROUND OF AWARD

This tender was first advertised by the Procuring Entity on 3rd December, 2008. The initial closing/opening date of the tender was 18th March, 2009 before it was extended to 8th May, 2009. Out of fifteen bidders who bought bid documents, the following three tenderers submitted their bids before the deadline for submission of tenders:

Bidder	Tender Sum		
	Euro	Kshs	Equivalent (Kshs)
Alstom Hydro	37,269,829.92	545,869,043.50	4,446,406,452.49
Andritz Hydro	42,411,510.72	171,969,372.77	4,812,937,096.47
Voith Hydro	43,762,761.00	-	4,900,171,957.50

Evaluation

This was conducted jointly by the Procuring Entity and M/S Scott Wilson Consultants. It was done in three stages namely preliminary, technical and financial evaluation stages in that order.

Preliminary Evaluation

This was conducted in three stages to determine the responsiveness of the tenders to the tender requirements specified in the Instruction to Tenderers (ITT). These were as follows:

- a) Conformance to tendering requirements pursuant to Clause 9;
- b) Conformance to Qualification criteria pursuant Clause ;
- c) Conformance to substantial responsiveness pursuant to Clause 23.

All the tenderers were found responsive and hence qualified for technical evaluation.

Technical Evaluation

This was done to check compliance of the tenders to the technical specifications and was based on the following parameters:

- Turbine and associated equipment
- Generator and associated equipment
- Generator transformers and associated equipment
- Auxiliary transformers
- Unit control and SCADA systems
- Protection and meeting equipment
- 415 switchboard
- DC equipment
- Cabling and associated equipment
- Earthing
- Lighting and small power installation
- 132/11 kV switchyard Equipment

- Rehabilitation of miscellaneous mechanical points
- Intake gates screens and associated equipment
- Spillway gate controls and associated equipment

All tenders were found technically responsive and they qualified for the financial evaluation.

Financial Evaluation

The financial evaluation was done by adjusting the tender price as follows:

- (a) Making correction of errors pursuant to Clause 24;
- (b) Including provisional sums for cables listed under Schedule F
- (c) Day works where priced competitively;
- (d) Exclusion of all other provisional sums and any contingencies;
- (e) Price adjustments for differing times for completion
- (f) Price adjustments for differing guaranteed values as follows:
 - i. Unit 3 turbine efficiency
 - ii. Generator average weighted efficiency
 - iii. Generator transformer losses
- (g) Price adjustment for minor non-substantial deviations

Upon completion of the technical and financial evaluation, the tender submitted by Andritz Hydro emerged the lowest evaluated tenderer and was recommended for the award of the tender at its tender price of Euro 44, 319, 293.28 and Kshs. 174, 626, 115.36 excluding Provisional sums. This was equivalent to Kshs. 4, 812, 397.47.

In its meeting No. 36 held on 15th September, 2009, the Tender Committee concurred with the recommendation of the Evaluation Committee and awarded the tender to Andritz Hydro.

The Committee further authorized the submission of the evaluation report to KfW, the financier, for "No Objection". By a letter dated 12th October, 2009, KfW gave "No Objection".

Letters of notification to the successful and unsuccessful tenderers are dated 15th October, 2009.

THE REVIEW

This Request for Review was lodged by Voith Hydro GmbH & Co. on 10th December, 2009 against the decision of the Tender Committee of the Kenya Electricity Generating Co. Ltd dated 15th October, 2009 in matter of tender No. KIND 001 E & M for Implementation of a Third Unit & Rehabilitation of Kindaruma Power Station. The Applicant was represented by Mr. Andrew Wandabwa, Advocate while the Procuring Entity was represented by Mr. Kiragu Kimani, Advocate. Alstom Hydro France and Andritz Hydro, Interested Candidates, were represented by Mr. James Mwangi and Mr. Peter Gachuhi, both Advocates, respectively.

The Applicant has raised four grounds of appeal and urged the Board to order that:

1. The Procuring Entity's decision awarding the tender to Andritz VA Tech be annulled.

2. The Procuring Entity's decision awarding the tender to Andritz VA Tech be substituted with one awarding the subject tender to the Applicant as it was the 2nd lowest bidder.
3. Cost of the review is awarded to the Applicant.

PRELIMINARY OBJECTION BY THE PROCURING ENTITY

The Procuring Entity raised a Preliminary Objection to the Request for Review pursuant to Regulation 77 on the ground that it had been filed out of time and therefore the Board had no jurisdiction.

The Procuring Entity argued that the Request for Review was filed by the Applicant on 10th December 2009 and was out of time. In support of this claim, the Procuring Entity stated that the notification to the Applicant that its tender was not successful was communicated by a letter dated 15th October, 2009. It further stated that there was no doubt that the Applicant received this letter as evidenced by the fact that it replied to it vide its letter dated 19th October, 2009. It argued that having notified the Applicant on 15th October, 2009, the appeal window of fourteen days prescribed by Regulation 73(2) (c), started running from 16th October, 2009 and lapsed on 30th October, 2009. It further argued that even if one were to take the date of response by the Applicant to the Procuring Entity's letter as the effective date of notification, then, counting from that date which is 19th October, 2009, the appeal window would have lapsed on 3rd November, 2009. It stated that the Act sets time limits within which certain actions should be taken in recognition of the fact that the procurement process should move smoothly and be concluded within the specified time.

The Procuring Entity submitted that the Board had a duty to determine first the question as to whether it had jurisdiction before dealing with the merits of the Request for Review. In support of this contention, it cited the case of *Owners of the Motor Vessel "Lillan" v Caltex Oil (Kenya) Ltd.* [Civil Appeal No. 50 of 1989], in which the Court of Appeal stated that where the issue of jurisdiction is raised, a court had a duty to deal with that question first, and the case of *Lavington Security Ltd v. Agricultural Finance Corporation* [Application No. 51/2009] in which the Public Procurement Administrative Review Board came to the same conclusion.

Finally, the Procuring Entity urged the Board to dismiss the Request for Review on the ground that it had no jurisdiction to deal with it.

In response, the Applicant opposed the Preliminary Objection as being misconceived. It stated that the Request for Review raised issues which occurred after notification of award and which went to the root of the tendering process. It claimed that there were continuing breaches of the Act and Regulations, among which was the fact that the contract had not been signed, notwithstanding the fact that the tender document provided that it should be signed within thirty days of notification. In its view, the failure to sign the contract was due to the fact that there were attempts being made by the Procuring Entity to alter the technical specifications. It argued that insofar as there had been no notification of the ongoing breaches, Regulation 73(2) (c) (ii) would not apply. This being the case therefore, the Applicant argued, the Request for Review was within time.

The Applicant further argued that a party had a statutory right to appeal at any time under Section 93(1) of the Act so long as a contract has not been signed and so long as the subject matter of the appeal did not fall within those exceptions under the Section 93(2) of the Act namely:

- (a) the choice of a procurement procedure pursuant to Part IV;
- (b) decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;
- (c) where a contract has been signed in accordance to Section 68; and
- (d) where an appeal is frivolous.

The Applicant submitted that Section 93 of the Act allows a bidder to appeal at any time before the contract is signed, so long as there is a breach of the Act or Regulations. On the other hand, Regulation 73(2) (c) (i) and (ii) limit the right to appeal to within fourteen days of the occurrence of the breach complained of where the Request for Review is made before the making of an award, and notification of the award, respectively. It argued that in this case the breaches complained of occurred after notification and, therefore, do not fall under the ambit of Regulation 73(2) (c) (i) or (ii). It stated that the breaches in this case occurred after notification of the award and before the contract was signed and are, accordingly, admissible under Section 93(1) of the Act.

The Applicant further argued that Regulation 73, to the extent that it purports to limit the period within which an aggrieved bidder must file a Request for Review, is in conflict with Section 93(1) of the Act in that the right of appeal prescribed under the said Section is not time bound. It

submitted that if there was a conflict between the Act and the Regulations, then the Act must take precedence. In support of this argument, the Applicant referred to Section 31(b) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya, which states that "no subsidiary legislation shall be inconsistent with the provisions of an Act." It cited the cases of *Odinga and others v Nairobi City Council*, [East Africa Law Reports, 1990-1994], *Komassai Plantation Ltd v The Bank of Baroda*, [East Africa Law Reports (2003) 2], to further support its argument that where a subsidiary legislation is inconsistent with the principal statute, the subsidiary legislation must fall. The Applicant further argued that where a statute gave an absolute right of an appeal, regulations were merely directory and not mandatory, and that therefore they could not be interpreted to be in conflict with the Act. In support of this submission the Applicant cited the case of *Abeid v Badbes*, [East Africa Law Reports, 1968].

Lastly, the Applicant argued that in any event, Regulation 73 does not apply to breaches which have occurred after notification, which was the case in this instance. It stated that Regulation 73 only applies to breaches that occur before the making of an award or after notification of award to the bidders.

In conclusion, the Applicant urged the Board to dismiss the Preliminary Objection and hear the Request for Review on its merits.

An interested party, Alstom Hydro France, opposed the Preliminary Objection and associated itself with the submissions of the Applicant. It

argued that the statutory right of appeal is created by statute and could not be taken away by a subsidiary legislation.

Another Interested Party, Andritz Hydro, supported the Preliminary Objection and argued that the contention that the right to review is open to a party so long as a contract had not been signed was wrong as matter of fact and law.

In reply, the Procuring Entity stated that that there was no conflict between Section 93 of the Act and Regulation 73. It argued that Section 93 of the Act provides the basis for a party to exercise its right to apply for a Request for Review on tenders. It submitted that the said Section gives threshold which an Applicant must attain in order to seek a review namely that; a candidate as defined by the Act; risk suffering loss or damage by reason of breach. As regards Regulation 73, it argued that it merely amplifies Section 93 of the Act by prescribing the timelines within which an aggrieved party must seek an administrative review. It stated that in this respect the right to challenge a decision was no different from those found in other appeals processes, such as in the Court of Appeal, where the right is enshrined in the Act and the procedures set out in the Rules; and also in the Civil Procedure Act, where the procedures, including the timelines, are set out in the Orders.

Regarding the Interpretation and the General Provisions Act, the Procuring Entity stated that part A of that statute supported its position in that Section 93 of the Act allows for the subsidiary legislation to contain matters of procedure. As the case of *Abeid v Badbes*, [East Africa Law Reports,

1968], the Procuring Entity stated that whereas the regulation in that case was directory as found by the court, Regulation 73 was different in that it was framed in mandatory terms.

The Board has carefully considered the submissions by the parties and considered the documents before and decides as follows:

There is no dispute about the fact that the Applicant was notified by the Procuring Entity about the fate of its tender following the evaluation of the tenders. The letter of notification is dated 15th October, 2009. The Applicant received that letter and responded to it on 19th October, 2009 as follows:

**"LETTER OF REGRET
IMPLEMENTATION OF THIRD UNIT & REHABILITATION PROJECT
KINDARUMA**

Dear Sir,

We are referring to your letter dated 09-10-15,

Having been your successful partner for the last 20 years with experience of many projects, including the successful commissioning of Kiambere lately and the supply and commissioning of two new governors for Kindaruma during the last three months we are surprised to learn that Voith Hydro has not been entrusted with the execution of the above-mentioned order. Without saying our competitors are also experienced and well-known companies in the business, however, neither Alstom nor Andritz had been entrusted with projects on the Tana River,

and we cannot imagine that our competitors have the same experience.

We, therefore, would like to understand, why our bid was not successful in the end. In particular as we know from the price opening that our bid in our opinion was competitive. For this reason we have the following queries that we ask you to answer:-

- 1. Who was awarded the order?*
- 2. From the technical side and based on our knowledge of the market regarding our competitors we cannot imagine there are significant differences in the efficiencies. Thus the technical evaluation of the three bidders should be on the same level. Please advise us concerning the technical bid evaluation*
- 3. With regard to the completion time we have checked the project very carefully as we had our experts at site. So, we took of course the opportunity to perform an extensive assessment of the plant. The latest experience values regarding shut down, etc. have been available to Voith due to the a.m. projects and have influenced our estimation of completion. It has always been our objective to guarantee a perfect and timely rehabilitation and the additional installation of a new unit. Therefore, Voith is always checking the time schedules from a very early stage on in order to perform a perfect rehabilitation on one hand and -of course- on the other hand to avoid claims resulting from extension of time, etc. We cannot imagine that our competitors have this experience and would be surprised if KenGen has accepted less experienced and*

shorter completion time for the project execution, compensated maybe by longer shut down times during the project implementation.

4. *Due to the above mentioned situation you may understand that we are really very surprised that we were not awarded with the order and kindly ask you to reconsider your decision.*

With kind regards

Voith Hydro GmbH & Co. KG"

The Board has noted that the Applicant raised several issues as to why it was not awarded the tender.

The question which arises naturally is why the Applicant took no steps to protect its rights under Section 93(1) of the Act by seeking the review of the decision of the Procuring Entity within the time prescribed in Regulation 73.

The Board notes that in its submissions, the Applicant stated that subsequent to notification, it had become aware that the Procuring Entity had been and continued to breach the Act and the Regulations to its detriment. The Board has further noted that the Applicant stated that its intention of filing this Request for Review was stop the Procuring Entity from continuing to commit these breaches.

The Board observes that the right to review is set out under Section 93(1) of the Act which sates as follows:-

“Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations may seek administrative review as in such manner as may be prescribed.”

The Board further observes that Regulation 73(2) (c) (i) and (ii) prescribes the period within which a candidate who feels dissatisfied with the decision of a Procuring Entity may seek administrative review. The said Regulation provides that a review “shall be made within fourteen days of-

(i) the occurrence of the breach complained of where the request is made before the making of an award; or

(ii) the notification under sections 67 or 83 of the Act”:

The Board finds that the notification of the award was communicated to the Applicant on 15th October, 2009. It is a matter of fact which has not been disputed by the Applicant that following this notification, it took no steps to challenge the decision of the Procuring Entity within the period prescribed under Regulation 73(2) (c) (ii). It is this failure by the Applicant to act in a timely manner that forms the basis of this Preliminary Objection. The Procuring Entity argued that the time for lodging an appeal prescribed by the Regulations having lapsed, the Board had no jurisdiction to entertain the Request for Review.

It is now settled law that before a court or a tribunal deals with the merits of any matter before it, it must first satisfy itself that it had jurisdiction. This is the crux of the Court of Appeal decision in the case of **Owners of the Motor Vessel "Lillan S"** which the Procuring Entity had relied on in asserting the claim that the Board must first determine its jurisdiction before considering whether to hear the Request for Review on its merits.

The Board has in the past dealt with the issue of whether it had jurisdiction or not. In the case of **Lavington Security Ltd v. Agricultural Finance Corporation [Application No. 31/2008]** the Board ruled that it lacked jurisdiction to hear the material application because it was filed out of time. Similarly, in the case of **Intersecurity Services Ltd v Kenya Electricity Generating Company Ltd, [Application No. 51/2009]** the Board dealt with the Preliminary Objection in which its jurisdiction was challenged and came to the conclusion that it had jurisdiction. It is clear that an aggrieved bidder must lodge its Request for Review within fourteen days as provided for under Regulation 73(2) (c).

The Board notes that in order to escape capture by the seemingly clear provisions of Regulation 73(2) (c) and the body of procurement case law decided under it, the Applicant has based its case on Section 93(2) of the Act. It has argued that this Section confers a statutory right on a candidate so long as an appeal is lodged before a contract is signed. The Section provides that the following shall not be subject to the review under Section 93 (1) of the Act:-

(a) the choice of a procurement procedure pursuant to Part IV;

(b) a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;

(c) where a contract is signed in accordance to section 68; and

(d) an appeal is frivolous.

The Applicant argued that in this case the contract arising from the award had not been signed and, accordingly, its statutory right to appeal derived from Section 93(2) (c) was not ousted. In the view of the Applicant, Regulation 73(2) (c), which circumscribes the period within which an aggrieved party is allowed to challenge the decision of a Procuring Entity, must be read in a restrictive way so as to apply only to those two situations set forth in the Regulation, namely, where the occurrence of the breach was before the making of the award and on notification of the award. In other words these timelines do not cover other breaches that the Act or Regulations may contemplate. The effect of this argument is that for as long as a contract remains unsigned, an aggrieved party retains the right to challenge the decision of a Procuring Entity on any matter touching on the procurement process, whether occurring before, or after the award is made.

The Board has considered this argument and finds that it lacks merit for the following reasons. First, to leave the question of when to appeal totally at the discretion of a candidate would create uncertainty in the procurement process. It is clear that the Act and the Regulations go to great lengths to fix timelines in the tender process. The whole procurement process is a highly regimented regime which requires actions to be performed within certain timelines. Examples of these timelines are found in sections 36(3), 52(3) (h), 55, 58(3), 59(1)(b), 59(2), 66(6), 67, 68(2), 71(c),

and 97, among others, and the review procedures as specified in Regulations 73, 74, 77 and 78, among others.

Secondly, Section 93(1) provides that the procedures for the review are to be in "such a way as may be prescribed." These procedures have been prescribed by Regulation 73 which makes it mandatory that an appeal must be filed within fourteen days of the occurrence of the breach or after notification of award. It is clear that there is no conflict between Section 93 of the Act and Regulation 73 (2) (c) as far as the prescribed time of lodging a Request for Review is concerned.

The Board finds that the Applicant failed to file its Request for Review within the statutory period prescribed under Regulation 73(2), (c) (ii).

As regards the arguments that the Applicant was complaining of the breaches that occurred after notification, the Board finds as follows:

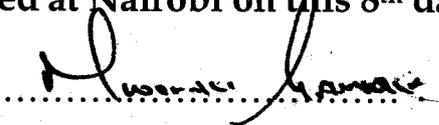
1. That the Applicant wrote a letter dated 19th October, 2009 raising various issues on the way the tender was conducted. However, the Applicant did not file a Request for Review with the Board.
2. Grounds 1, 2 and 3 of the Request for Review relates to matters that happened before the notification of award. The Board notes that any complaints on those issues ought to have been filed within fourteen days as envisaged under Regulation 73 (2) (c).

3. Section 93(2) of the Act sets out the matters that cannot be reviewed by the Board. It does not confer a right to a Review of a procurement proceeding by an aggrieved bidder as argued by the Applicant.

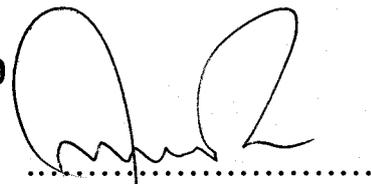
Accordingly the Board has no jurisdiction to hear this Request for Review.

The Preliminary Objection succeeds and the Request for Review is hereby dismissed. Accordingly, the procurement process may continue.

Dated at Nairobi on this 8th day of January, 2010



Chairman, PPARB



Secretary, PPARB

