

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 36/2010 OF 18<sup>TH</sup> JUNE, 2010**

**BETWEEN**

**ATHI RIVER POWER COMPANY LTD**

**(APPLICANT)**

**AND**

**KENYA POWER & LIGHTING COMPANY LTD**

**(PROCURING ENTITY)**

Review against the decision of the Tender Committee of the Kenya Power and Lighting Company Ltd dated 4<sup>th</sup> June, 2010 in the matter of Tender No. KPLC/9AD/PT/16/10-11 for the Design, Financing, Supply, Erection, Commissioning, Operation and Maintenance of a new 60 – 80 MW Medium Speed Diesel Plant at Thika.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. Judith A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Sospeter Kioko	-	Member

**IN ATTENDANCE**

Mrs. Pamela K. Ouma - Secretariat  
Ms. Kerina A. Rota - Secretariat

**PRESENT BY INVITATION**

**Applicant, Athi River Power Company Ltd**

Mr. Elias Masika - Advocate, Ochieng Onyango Kibet & Ohaga  
Advocates  
Mr. George Wandati - Legal Assistant, Ochieng Onyango Kibet &  
Ohaga Advocates  
Ms. Wanjiru Ngige - Legal Assistant, Ochieng Onyango Kibet &  
Ohaga Advocates  
Mr. Eric Murungi - Director  
Mr. Joshua Omino - Consultant  
Mr. Joel Wenya - Lawyer

**Procuring Entity, Kenya Power and Lighting Company Ltd**

Mr. Joe N. Mwanthi - Advocate Humphrey & Co. Advocates  
Ms. Margaret N. Kimani - Advocate Humphrey & Co. Advocates  
Mr. Robert Mahenia - Advocate  
Mr. Antony Mbunya - Legal Officer III  
Mr. Patrick Mtwala - Manager, Energy

### **Interested Candidates**

- Mr. Tonui Benard Kibet - Advocate, Melec Powergen Inc.
- Mr. Anders Langhorn - Business Deployment Manager, BG Consortium
- Mr. Kenneth Kamau - Analyst, Centum Investments Company
- Mr. Allan Munyua - Trans- Century Ltd
- Mr. C. Yida - Finance, Trans- Century Ltd

### **BOARD'S DECISION**

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

### **BACKGROUND**

The tender award to M/s Melec Powergen Inc in tender No. KPLC/9ad/pt/16/10-11 was challenged at the Review Board in Application No. 27/2010 of 30<sup>th</sup> April, 2010. The Board annulled the award of the tender and ordered the Procuring Entity to re-evaluate the financial bids of the technically responsive bidders in accordance with the criteria set out in the Request for Proposal and its addendum.

### **RE-EVALUATION OF THE FINANCIAL BIDS**

The Procuring Entity re-evaluated the bids based on the ruling of the Review Board and noted the fact that it had required bidders to quote under two price option. It noted that the option for the GOK Sovereign

Guarantee would not be provided and it therefore evaluated bids based on the IDA Partial Risk Guarantee & MIGA Termination Guarantee. The summary of the re-evaluation was as follows:

Price Options	Athi Energy Ltd	Athi River Power company ltd	Globeleq/B WSC consortium	Centum investments	Melec Powergen Inc	Trans-Century ltd	African Link Holdings Ltd	Kaluworks Ltd
Base Capacity charge rate in euro/Euro equivalent/kW/yr								
As quoted by bidder	191.00	233.73	187.20	196.00	193.50	219.65	206.4	209.44
Adjusted for evaluation as per the RFP	200.55	233.94	189.77	196.00	210.43	225.62	212.08	212.06
Discounted escalated Total Energy Cost (Euro)	495,270,841	473,833,999	485,749,173	485,501,760	502,446,200	494,093,056	487,837,944	470,023,782
Discounted Unit Energy Cost (Euro/kWh) with discounted energy	0.1386	0.1391	0.1408	0.1427	0.1358	0.1414	0.1395	0.1364
	102.1%	102.5%	103.7%	105.1%	100.0%	104.1%	102.8%	100.5%
<b>RANKING</b>	<b>3</b>	<b>4</b>	<b>6</b>	<b>8</b>	<b>1</b>	<b>7</b>	<b>5</b>	<b>2</b>

The Evaluation Committee then recommended the award be made to the quoted price of 193.5 Euro/KW/Yr, 0.0074 Euro/KWh and Specific fuel Consumption of 0.1990 kg/KWh, being the lowest evaluated among the technically responsive evaluated bidders.

## THE TENDER COMMITTEE DECISION

The Procuring Entity Tender Committee in its meeting held on 2<sup>nd</sup> June, 2010 deliberated on the recommendation of the Evaluation Committee and approved the award of the contract for the development of the Thika MSD Plant to M/s Melec Powergen Inc at their quoted prices as follows:

Capacity Charge Rate	-	€ 193.50/kW/Yr
Energy Charge rate	-	€ 0.0074/kWh
Specific Fuel Consumption	-	€0.199kg/kWh

The bidders were notified of the outcome of the tender vide letters dated 4<sup>th</sup> June, 2010.

## **THE REVIEW**

The Applicant, Athi River Power Company Ltd lodged this Request for Review on 18<sup>th</sup> June, 2010 against the decision of Procuring Entity in the matter of Tender No. KPLC/9AD/PT/16/10-11 for the Design, Financing, Supply, Erection, Commissioning, Operation and Maintenance of a new 60 – 80 MW Medium Speed Diesel Plant at Thika.

At the hearing, the Applicant was represented by Mr. Elias Masika, Advocate while the Procuring Entity was represented by Mr. Joe N. Mwanthi, Advocate. The Interested Candidates present included Melec Powergen Inc, BG Consortium, Centum Investment and Transcentury Company Ltd represented by Mr. Tonui B. Kibet, Advocate, Mr. Anders Langhorn, Mr. Kenneth Kamau and Mr. C Yida respectively.

The Applicant requests the Board for the following orders:

1. *"A declaration that the Applicant had the lowest total Energy Cost and is therefore the 'Successful Bidder' in accordance with the RFP;*
2. *A declaration that the Procuring Entity was in breach of Section 100(3) for not complying with the Board's decision dated 25<sup>th</sup> May 2010;*
3. *The Respondent do bear the costs of this application;"*

The Applicant raised two (2) grounds of Review which the Board deals with as follows:-

**Grounds 1 and 2: Breach of Sections 82(1) and 100(3) of the Act**

These grounds have been combined because they raise similar issues.

The Applicant alleged that the Procuring Entity was in breach of the provisions of the Request for Proposal (herein after 'RFP'), the Public Procurement and Disposal Act, 2005 (herein after 'the Act') and the Board's ruling in Application No. 27/2010.

It averred that the Procuring Entity had erred in declaring M/s Melec Powergen Inc. the successful bidder on the basis of the lowest discounted energy cost rather than on the lowest total energy cost as provided for under clause 2.10.3.2 of the RFP.

It further averred that during re-evaluation of the financial bids, the Procuring Entity took into consideration an irrelevant factor which was in contravention of Section 82(1) of the Act. It asserted that from the Board's ruling that the single criterion available to the Procuring Entity was that the determination of the preferred bidder should have been the lowest energy cost irrespective of the guarantee option under which the bidder offering this cost was evaluated. It further asserted that notwithstanding the fact that the Sovereign Guarantee option was not available during the re-evaluation stage, it should have been declared the preferred bidder for having the lowest total energy cost because the Sovereign Guarantee became unavailable after the initial financial evaluation and not before; and that the Board determined that the criterion for determining the preferred bidder was guarantee neutral.

The Applicant concluded by stating that by failing to comply with the decision of the Board, the Procuring Entity was in breach of Section 100(3) of the Act.

In its response, the Procuring Entity stated that it had carried out the financial re-evaluation of the technically responsive bidders in accordance

with the RFP, the Addendum thereto and taking due cognisance of the fact that the Sovereign Guarantee was no longer available as noted by the Board in its ruling. It further stated that the Applicant's averment that the unavailability of the Sovereign Guarantee should not have been taken into account at re-evaluation, was tantamount to saying that it should have ignored a specific observation and guidance made by the Board, and equally tantamount to saying that it should have knowingly offered an option which it knew was no longer available.

It averred that in its financial re-evaluation of the technically responsive bids, it evaluated the proposals made under option 2, MIGA-IDA Partial Risk Guarantee, in accordance with the formula set out in clause 2.10.3.2 of the RFP and established that the Successful Bidder, M/s Melec Powergen Inc., had the lowest discounted energy cost. It further averred that the bidder with the lowest discounted energy cost was automatically the bidder with the lowest total energy cost because the discounted energy cost was just but an expression of the present value of the money to be paid to the bidder over the term of the Power Purchase Agreement.

The Successful Bidder fully aligned itself with the Procuring Entity's submissions.

An Interested Candidate, BG Consortium, submitted a written memorandum in which it claimed that if one of the payment guarantee options ceased to be available after the deadline for submission of tenders,



the Procuring Entity ought to have invited bidders to submit new financial proposals based on the available option.

The Board has carefully considered the submissions of the parties and examined the documents submitted before it.

The Board has also perused the copy of the tender document (RFP) and Addendum 1 dated 2<sup>nd</sup> March, 2010 issued to the bidders; and the financial re-evaluation report dated 31<sup>st</sup> May, 2010.

The Board notes that Clause 2.10.3.2 of the RFP, provided a formula for computing the Energy Cost (EC) and that *KPLC expects to invite for negotiations, the Bidder evaluated as offering the lowest total Energy Cost (EC) ("Preferred Bidder")*.

The Board further notes that the clause provided for the calculation of a discounted Energy Cost for the Term using a discounted rate of 12% per annum for financial comparison.

Upon examination of the re-evaluation report the Board notes that the Procuring Entity applied uniformly across all bidders the 12% discount rate per annum over the twenty year term of the Power Purchase Agreement. Therefore, whether the Procuring Entity was making a comparison of the

Total Energy Cost or the Discounted Energy Cost, the ranking in terms of pricing of the financial bids would remain the same.

Accordingly, this limb of the appeal fails.

The second limb of the appeal is with regard to the issue as to whether the Procuring Entity ought to have during the re-evaluation considered that the Government of Kenya Sovereign Guarantee was no longer available.

The Board has carefully considered the Applicant's argument that notwithstanding the fact that the Sovereign Guarantee option was not available during the re-evaluation stage, it should have been declared the preferred bidder for having the lowest total energy cost because the Sovereign Guarantee became unavailable after the initial financial evaluation and not before.

The Board notes that the Addendum to the RFP at Clause 2 Payment Security states that:-

*'As payment security one of the following instruments is proposed to be applied;*

*(a) A Sovereign Guarantee .....*

*(b) An IDA Partial Risk Guarantee and MIGA termination guarantee .....*

*Bidders are required to give two price options based on the applicable security as follows;*

*Option A With GOK sovereign guarantee*

*Option B With IDA Partial Risk Guarantee and MIGA termination guarantee*

.....'

The Board finds that bidders were required to submit two offers – one under Option A with GOK sovereign guarantee and the other under Option B with IDA Partial Risk and MIGA termination guarantee. The Board notes that the Applicant submitted bids under each of the two options. Effectively, this meant that each bid would be considered independently under each option.

From the wording of Clause 2 of the Addendum to the RFP, it is clear that one of the two Options was proposed to be used. As the Board found in Application 27/2010, neither of the Options was stated as preferred over the other and as such the preferred bidder was to have been the one offering the lowest total energy cost. Effectively, the Procuring Entity had to accept to apply the Payment Security which offered the lowest total energy cost.

However, the Board also noted in its decision in Application No. 27/2010, that vide the Ministry of Energy's letter Ref. ME/CONF/3/2/73A dated 5<sup>th</sup> May, 2010 to the Procuring Entity, Option A GOK Sovereign Guarantee was no longer available as a Payment Security proposed to be applied. The Board finds that the effect of this is that the Applicant's offer made under

Option A, and indeed all other bidders' offers made under Option A, were no longer available for acceptance by the Procuring Entity.

In arriving at its ruling in Application No. 27/2010, the Board had also taken cognisance of the Applicant's allegation, that it was the lowest evaluated bidder under both the GOK Sovereign and the IDA - MIGA Guarantee options taken holistically and that its prayers were for a re-evaluation of the bids rather than a re-tender. Indeed, the Board granted the prayer for re-evaluation of the bids.

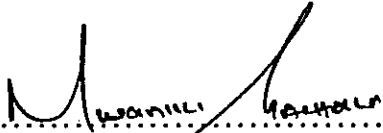
The Board has examined the financial re-Evaluation Report and finds that the Procuring Entity only re-evaluated technically responsive bids submitted under Option 2.

With regard as to whether the Applicant was the lowest evaluated bidder, the Board notes from the re-Evaluation Report that the Applicant's discounted unit energy cost was 0.1391 Euros/kWh whereas the Successful Bidder's was 0.1358 Euros/kWh. The Board therefore, finds that the Applicant's bid under Option 2 was not the lowest evaluated bid.

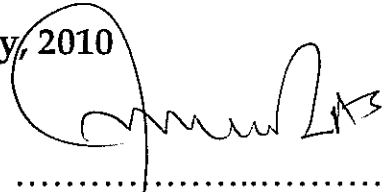
Accordingly, this limb of the appeal also fails.

Subsequently, this Request for Review fails and is hereby dismissed. The Board orders, pursuant to Section 98 of the Act, that the procurement process may continue.

Dated at Nairobi on this 14<sup>th</sup> day of July, 2010

  
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Signed Chairman  
PPARB

  
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Signed Secretary  
PPARB

