

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
REVIEW NO.14 /2010 OF 9TH MARCH, 2010

BETWEEN

SOCABELEC EAST AFRICA LIMITED APPLICANT

AND

**THE RURAL ELECTRIFICATION AUTHORITY PROCURING
ENTITY**

Review against the decision of the Tender Committee of the Rural Electrification Authority dated 24th February 2010 in the matter of Tender No. REA/2009/OT/001 for Supply, Installation and Commissioning of 80 KVA and 150 KVA Enclosed Diesel Generators plus Associated Distribution Board at Laisamis, Eldas, Takaba, North Horr, Hulugho, Kiunga and Rhamu.

BOARD MEMBERS PRESENT

Mr. P.M Gachoka	-	Chairman
Mrs. Loise Ruhiu	-	Member
Amb. Charles M. Amira	-	Member
Ms. Judith Guserwa	-	Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Ms. Kerina A. Rota - Secretariat

PRESENT BY INVITATION

Applicant, Socabelec East Africa Ltd

Mr. Muthomi Thiankolu - Advocate, Mohammed Muigai
Advocates
Mr. Georgehandis Khaseka - Advocate, Mohammed Muigai
Advocates
Ms. Wanjiru Ngige - Advocate, Mohammed Muigai
Advocates
Ms. Daisy Munene - Legal Assistant, Mohammed
Muigai Advocates
Mr. Paul Machogu - Advocate, Mohammed Muigai
Advocates

Procuring Entity, Rural Electrification Authority

Prof. Albert Mumma - Advocate, Lumumba, Mumma &
Kaluma Advocates
Mr. Elvis Obok O. Owiyo - Advocate, Lumumba, Mumma &
Kaluma Advocates
Mr. Wilfred Oduor - Procurement Manager
Ms. Rose N. Kalama - Authority Secretary
Mr. Owiti Awuor - Legal Officer, KPLC Ltd

Interested Candidates

- Mr. Andrew Wandabwa - Advocate for Achelis Materials Handling Ltd
- Mr. Ian Alumasa - Manager, Achelis Materials Handling Ltd
- Mr. Kiragu Kimani - Advocate , Global Trade Market Place Ltd
- Mr. Shem Otanga - Lawyer, Global Trade Market Place Ltd
- Mr. Hannington Amol - Lawyer, Global Trade Market Place Ltd
- Mr. Boniface Mwalimu - Project Manager, Global Trade Market Place Ltd
- Mr. Otieno Okeyo - Advocate for Limelight Creations
- Mr. Simon K. Chelugui - Managing Director, Penelly Construction & Engineering Ltd Mr.
- Daniel Muthiani -
- Mr. Samuel Mburu -
- Ms. Francisca Kiptisia -
- Ms. Lydia Wamboi -

Upon hearing the representations of the parties and upon examining all the documents before it, the Board decides as follows: -

BACKGROUND OF AWARD

Advertisement

This tender was advertised by the Procuring Entity on 14th January, 17th May and 30th July, 2009. It attracted no responsive bids thus prompting the Procuring Entity to use restricted procurement method. By a letter dated 19th November 2009, the Procuring Entity invited all the contractors who had responded to the third advertisement notice.

Closing/Opening

The bids were opened on 1st December, 2009. The eleven bidders who responded were as follows:-

1. Flying Horse
2. Global Trade Market Place
3. Limelight Creations Ltd.
4. Penelly Construction & Engineering Co. Ltd
5. Tropical Promotions
6. Solid hut
7. Amiran (k) Ltd
8. Socabelec East Africa Ltd.
9. Achelis Materials Handling Ltd.
10. Electrowatts
11. Superstar International Ltd.

EVALUATION

Technical Evaluation was carried out by an Evaluation Committee chaired by James Muriithi. It was carried out in three stages as follows:

Preliminary Evaluation

This was conducted to determine the responsiveness of the tenders to the mandatory requirements which were set out in the tender documents. It was based on the following parameters:

- Tender Security of 2% of the value on the tender form
- Tender Security Validity of 90 days
- Tender validity of 90 days
- Tender Form
- Declaration Form
- Tender Questionnaire
- Confidential Business Questionnaire
- Certificate of Incorporation
- Catalogues and Brochures
- Audited Accounts (2 years)
- Experience of Key Personnel
- Details of Key performance and Experience

Out of eleven bidders, six bidders namely, Flying Horse, Penelly, Tropical Promotions, Amiran (K) Ltd and Achelis Materials Handling Ltd and

Superstar were disqualified at the preliminary evaluation stage for failing to comply with some of the mandatory requirements.

Technical Evaluation

Technical evaluation was conducted to determine the responsiveness of the tender to the technical specifications set out in the tender documents. Three bidders namely, M/s Global Trade, Limelight Creations Ltd and Electrowatts were found non-responsive for failing to comply with some of the technical specifications. Hence they were disqualified from further evaluation. Only one bidder, Socabelec East Africa Ltd was found responsive having complied with all the technical specifications. Its tender proceeded to financial evaluation.

Financial Evaluation

The tender submitted by Socabelec EA Ltd was subjected to financial evaluation pursuant to paragraph three of Section V of the tender document. Socabelec East Africa was recommended for award of the tender for Takaba and Hulugho at price of Euros 414,071.81 and Kshs. 6,970, 969.40 per each of the stations Exclusive of VAT.

THE TENDER COMMITTEE DECISION

In its meeting held on 21st January, 2010, the Tender Committee considered the evaluation report. However, it sent it back to the evaluation committee

for a re-evaluation having been dissatisfied in the manner the tender submitted by Solid Hut, Global Trade Market Place Ltd and Limelight Creations Ltd were evaluated. The evaluation committee re-submitted the evaluation report with the same recommendations. The tender committee re-considered the evaluation report and made the award as follows:

1. M/S GLOBE TRADE MARKET PLACE

STATION	AWARDED BIDDER	KSHS VAT INCL.
LAISAMIS	Global Trade Market Place Ltd	35,696,031.85
ELDAS	Global Trade Market Place Ltd	35,696,031.85
TAKABA	Global Trade Market Place Ltd	36,409,952.49
TOTAL		107,802,016.19

1. M/S SOCABELEC LTD

STATION	AWARDED BIDDER	KSHS VAT INCL.
NORTH HERR	Socabelec East Africa Ltd	37,123,873.13
RHAMU	Socabelec East Africa Ltd	35,498,816.21
TOTAL		72,622,689.34

2. M/S LIMELIGHT CREATIONS LTD

STATION	AWARDED BIDDER	KSHS VAT INCL.
HULUGHO	Limelight Creations Ltd	36,208,792.53
KIUNGA	Limelight Creations Ltd	35853,804.37
TOTAL		72,062,596.90

Notification letters to the successful and unsuccessful bidders are dated 22nd February, 2010.

THE REVIEW

This Request for Review was lodged on 9th March, 2010 by Socabelec East Africa Limited against the decision of the Tender Committee of the Rural Electrification Authority dated 22nd February, 2010 in the matter of Tender No: REA/2009/OT/001 for Supply, Installation and Commissioning of 80 KVA and 150 KVA Enclosed Diesel Generators plus Associated Distribution Board at Laisamis, Eldas, Takaba, North Horr, Hulugho, Kiunga and Rhamu. The Applicant was represented by Mr. Muthomi Thiankolu, Advocate while the Procuring Entity was represented by Prof. Albert Muma, also an Advocate. Global Trade Market Place, Achelis Materials Handling Ltd and Limelight Creations Ltd, Interested Candidates, was represented by Mr. Kiragu Kimani, Mr. Andrew Wandabwa and Mr. F. O. Okeyo, Advocates.

The Applicant raised twelve grounds of Review and urged the Board to make the following orders:

- a) *"The Decision of the Procuring Entity is hereby annulled to the extent that it requires or expects the Applicant to accept the award on the basis of a price other than that at which it tendered;*
- b) *The Procuring Entity is hereby ordered to enter into contract with the Applicant in terms of its tender price, as required and or anticipated by the Act and the Tender Document;*
- c) *Alternatively, and without prejudice to (a) and (b) above, the tender proceedings are hereby annulled in their entirety;*
- d) *The Applicant is hereby awarded the costs of and incidental to this Application; and*
- e) *Such other or further orders and or directions as the Honourable Board shall deem just and expedient".*

The Board deals with each ground as follows:

Grounds 1- 5 and 10

These grounds have been consolidated as they raise similar issues of the evaluation and the award of the tender.

The Applicant submitted by way of background information, that there have been three rounds of tendering proceedings in respect of this tender. It stated that the first two were in December 2008 and June 2009 and they were terminated by the Procuring Entity. It further stated that it had been the most

responsive bidder in the two tenders that were terminated. Subsequently, the tender which is the subject of this Request for Review was advertised in December, 2009.

The Applicant further submitted that Clause 2.1 of the Tender Document required the bidders to submit a sample of auto extinguishing noise absorbing material. It stated that only two bidders, that is, the Applicant and Achelis Limited submitted a sample as per the tender requirement. Therefore, it argued that in accordance with Regulation 47(1) and 47(2) of the Public Procurement and Disposal Regulations 2006, (hereinafter referred to as the Regulations) the Procuring Entity ought to have rejected all the tenders that did not have a sample.

The Applicant stated that the Procuring Entity informed it by a letter dated 24th February 2010 that it had been awarded two stations out of the seven. It complained that the Procuring Entity awarded it the two stations at a price of Kshs. 35 Million and 37 Million which was lower than the price it had quoted. It stated that the prices which were awarded by the Procuring Entity had not been quoted by any Bidder. It complained that by awarding the tender to it at a different price than what it had quoted, the Procuring Entity contravened the provisions of Section 66 of the Public Procurement and Disposal Act (hereinafter referred to as the Act) and Regulation 50.

The Applicant further submitted that the award of the tender to it at a different price fell short of the fundamental requirements of the Act, as this tender was for supply of differentiated goods. It argued that the tender was for supply of heterogeneous as opposed to homogenous commodities. It stated that the bidders were competing on the basis of products with different brand names, cost of the production and lifespan, among other factors. It argued that it would not be fair to ask a Tenderer to supply an item which has a greater lifespan, higher costs of production and better technology at the same price as a tenderer offering to supply a competing product with different parameters.

In response, the Procuring Entity submitted that the Request for Review was based on allegations that were not supported by documentary or any other evidence.

The Procuring Entity submitted that the tender was for supply, installation and commissioning of generators. It stated that all the tenderers were not manufacturers but were sourcing the generators from abroad. It further stated that all the tenderers provided brochures sourced from the manufacturers of the generators.

The Procuring Entity further submitted that Clause 27.5 of the Tender Document clearly stated that a tenderer was to be awarded a maximum of

two stations. In addition, it pointed out that Clause 27.6 of the Tender Document provided that two stations would be awarded to the least evaluated tenderer. Thereafter, the next compliant tenderer would be awarded two stations at the price of the least evaluated tenderer. The Procuring Entity stated that if it declined to accept the tender at the price awarded, the Procuring Entity reserved the right to award the remaining stations to the initial least evaluated tenderer. The Procuring Entity stated that the tender comprised of seven stations and since there were three compliant tenderers, one tenderer had to be awarded three stations.

On the issue of the sample, the Procuring Entity referred to the technical specifications that were outlined in Section 6 Clause 2.1 (ii) of the Tender Document. It argued that a sample was not one of the mandatory technical requirements. It stated that Clause 2.4 of the Tender Document stipulated the minimum requirement for the engine canopy of the generator. It pointed out that Section 6 at Clause 2.1 (ii) of the Tender Documents stated that the specification of the walls of the canopy which were to be lined with thick heavy density auto extinguishing noise absorbing material. It argued that these specifications were not a sample as argued by the Applicant. It stated that two of the Bidders provided sponges as a sample and the Tender Committee regarded that issue of the sample as a minor deviation in line with Section 64(2) of the Act. It pointed out that this was one of the issues that were re-submitted to the Evaluation Committee for re-evaluation.

On the issue of the price, the Procuring Entity stated that the Applicant quoted for all the seven stations. It pointed out that the Applicant quoted a price per station but also quoted a global price for all the stations that it had tendered for. It further pointed out that the Applicant quoted the same price of Kshs. 53.4 Million for each of the seven stations.

In conclusion on the issue of price, the Procuring Entity stated that the tender price was determined in accordance with Clause 27.6 of the Tender Document. It argued that even though the Applicant had quoted a price of Kshs. 53.4 million per station, there were other bidders who were ready to supply the generators at a price of Kshs. 35 Million and 37 Million per station. It stated that in view of this fact the Tender Committee decided that it was not fair to award the tender at the price of Kshs. 53.4 Million per station, when there were tenderers willing to supply the same generators at a price of Kshs. 35 Million and 37 Million per station.

Achelis Limited an Interested Bidder, supported the submissions of the Procuring Entity but only to the extent that the tender process was flawed. It stated that it did not support the contention by the Applicant that it should be awarded the tender. It also stated that to date it has not received the letter of notification. In addition, it stated that it had submitted a sample and that all the bidders who did not submit a sample should have been disqualified.

The Successful Bidders, Global Trade Limited and Limelight Creations supported the submission of the Procuring Entity. Global Trade Limited stated that if the tender was awarded to the Applicant the Procuring Entity would incur an extra Kshs. 180 Million. It stated that the Procuring Entity was right in spreading the tenders for supply of the goods and services, as this reduced the risk of the tax payers whose money was being used.

It further submitted that there is no express prohibition in the Act or the Regulations to the Procuring Entity reserving itself the right to invite other persons who met the technical specifications to supply at the lowest evaluated price. It stated that this was a clever way of meeting the objectives of the Act of maximizing economy and efficiency as provided in Section 2 of the Act.

The other Successful Bidder Limelight Creations, stated that it was awarded Hulugho and Kiunga Stations which it stated that they were not subject of this Request for Review. It also submitted that the sample was not a mandatory requirement and that it was not used in the evaluation process. It stated that it complied with all the mandatory requirements of the tender and it was the least evaluated tenderer with respect of the two stations.

The Board has carefully considered the submissions of the parties and the documents that were submitted.

The Board has noted that these grounds revolve around the issues of the evaluation and the way the award of the tender was done.

The Board has further noted that the evaluation of the tender was done in three stages namely Preliminary, Technical and Financial Evaluation. Out of the eleven bidders who participated, six were disqualified at the preliminary evaluation stage for failing to comply with the mandatory requirements set out in the Tender Documents. The remaining five bidders proceeded for technical evaluation.

The Evaluation Committee disqualified four bidders for failure to meet a number of technical specifications. As a result, only one bidder Socabelec East Africa Limited, the Applicant was declared technically responsive and it thus proceeded for financial evaluation. The Evaluation Committee recommended award of two stations namely Takaba and Hulugho to Socabelec East Africa Limited, the Applicant herein at its quoted price of Euros 414,071.81 and Kshs. 6,970,969.40 which is an equivalent of Kshs. 53.4 million per station.

The Board has further noted that the recommendations of the Evaluation Committee were tabled at the meeting of the Tender Committee held on 21st January, 2010. The Tender Committee considered the evaluation report and made the following observations:

"Genset Engines

All the bidders were technically responsive on this particular item in all the parameters.

Auxiliaries

Two (2) bidders Ms Global Trade Market Place and Ms Limelight Creations Limited did not provide a sample for noise reduction material and were marked as non-responsive due to that.

The tender Committee observed that samples were requested as per the tender documents. However, other than just acknowledging the same, they were not used for evaluation objectively. The Evaluation Committee only recorded whether the sample was there or not. The Committee averred that it would be unreasonable to eliminate a bidder for failing to provide a sample of noise reduction material and in the real sense the samples provided were never considered during the evaluation exercise. Additionally, even if the evaluation committee wanted to consider the samples in their evaluation, they lacked the technical expertise and equipment to carry out any analyses on the suitability of noise reduction materials.

In consideration of the foregoing, the Tender Committee resolved that no bidder should have been disqualified for lack of provision of the sample because it considered this a minor deviation.

Control Room

All the bidders were technically responsive on this particular item in all the parameters.

Tools

One bidder Solid Hut Investments failed on this parameter. The Tender Committee further noted that Solid Hut should not even have passed Preliminary Evaluation because the Curriculum Vitae provided were not comprehensive.

Switchgear Panel

Two bidders Global Trade Market Place and Lime Light Creations limited had been found non-responsive by the evaluation committee on the requirement on metal clad compartments (CB, Busbar, LV, CT & cable). However, on closer examination, the compartments provided were found to be six as seen in the photo included in the brochures. The Tender Committee noted that the Evaluation Committee made a wrong decision to disqualify the two tenderers on this parameter.

600 Vac Air Circuit Breaker

All the bidders were technically responsive on this particular item in all the parameters.

Current Transformers

Two bidders Ms Global Trade Market Place and Ms Lime light Creations had been found non-responsive by the evaluation committee on the Feeder Panel CT details and the Generator Panel CT Details. The

Tender Committee in consultations with its members who are subject matter experts in electrical engineering observed that the two bidders had offered to provide items of even higher specification than the 1600-800/IA specified by REA. The Tender Committee noted that the Evaluation Committee made a wrong decision to disqualify the two tenderers on this parameter.

Earth Fault Relay/ Sensitive earth Fault relay/ Three-Phase Directional Power relay/ Biased Differential Relay for Generator/Annunciator Relay Unit

Ms Global Trade Market Place and Ms Lime Light Creations had been marked non-responsive by the evaluation committee on the following fronts: the software provided did not have a name, MMI with Keypad and LCD Screen, Serial RS 232 Port.

The Tender Committee observed that these particular items had been identified as provided by the Evaluation Team on the Three-Phase Directional Power Relay. The Tender Committee reiterated that it was not necessary that the unit have so many of the MMI Keypad and Serial ports. The one provided was sufficient and was capable of serving at whatever point.

The Tender Committee noted that the Evaluation Committee made a wrong decision to disqualify the two tenderers on this parameter.

Circuit Breaker Close/Open Switch

All the three bidders were compliant on this particular item.

Technical particulars for the 0.415/33KV Transformer

Global Trade Market Place and Lime Light Creations Limited had been found non-responsive by the evaluation committee for not providing information on the jacking pads. The Tender Committee went through the brochures provided and discovered that this was actually provided in the brochures.

The Tender Committee noted that the evaluation Committee made a wrong decision to disqualify the two tenderers on this parameter.

33KV Autor Reclosure

Global Trade Market Place and Lime Light Creations limited had been found non-responsive by the evaluation committee for leaving the whole technical compliance sheet blank and therefore making no offer for the item at all. The Tender Committee went through brochures provided and discovered that this was actually provided in the documentation. The Tender Committee found this information acceptable and therefore the bidders were responsive on this item.

The Tender Committee noted that the evaluation Committee made a wrong decision to disqualify the two tenderers on this parameter”.

The Tender Committee submitted the Evaluation Report to the Evaluation Committee for a re-evaluation with the following resolutions:

- 1. The evaluation committee to progress M/S Solid Hut tender to the technical evaluation stage since they had been eliminated solely for not attaching certificate for incorporation and that the same certificate of incorporation was available in the original tender document.*

2. *A letter to be written to KPLC to confirm the authenticity of the certificate of completion issued by KPLC in favour of Super Star International Ltd.*
3. *A letter be issued to Electrowatts Ltd to confirm if they have a joint venture with Amiran Communication Ltd*
4. *That the evaluation committee has a look at the technical issues raised by the tender committee as highlighted above.*

The Board notes that the Evaluation Committee wrote back to the Tender Committee on 28th January, 2010 and in a short letter stated as follows:

"Please refer to your request for the re-evaluation of the above tender.

The Evaluation Committee has gone through all the documentation of the bidders as per the request of the Tender Committee and wishes to resubmit their report.

Please note that we have progressed the bidder's Ms Solid Hut through to technical evaluation after confirmation of availability of the Certificate of Incorporation in their original documents.

We however wish to maintain our earlier position on the rest of the issues raised by the tender committee".

The Board has noted that upon receipt of the letter dated 28th January, 2010 from Evaluation Committee, the Tender Committee considered the matters and made the award as follows:

1. M/S GLOBE TRADE MARKET PLACE

STATION	AWARDED BIDDER	KSHS VAT INCL.
LAISAMIS	Global Trade Market Place Ltd	35,696,031.85
ELDAS	Global Trade Market Place Ltd	35,696,031.85
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HULUGHO	Limelight Creations Ltd	36,208,792.53
KIUNGA	Limelight Creations Ltd	35,853,804.37
TOTAL		72,062,596.90

As one can note from the background information set out herein, there was an obvious clash of views between the Evaluation Committee and the Tender Committee. At this stage, the Board observes that upon receipt of the report of the Tender Committee, the Evaluation Committee had a duty to consider the issues raised by the Tender Committee and respond to all the issues that had been raised. The letter dated 28th January, 2010 by the Evaluation Committee does not disclose whether the Evaluation Committee considered the issues raised by the Tender Committee. Further, it is noted that the Evaluation Committee did not prepare any minutes for the re-evaluation exercise.

The Board notes with concern that the way the evaluation and award of the tender was conducted raises serious doubts as to whether the Successful Bidders namely Global Trade Limited and Limelight Creations were technically responsive. On one hand, the Evaluation Committee stated that the two were not responsive. On the other hand, the Tender Committee stated that the two were responsive. It is clear that the two committees were pulling in different directions. In view of this it is clear that the Tender process did not meet the thresholds set out in Section 2 of the Act which outline the objectives of the Act as follows:

“a) to maximize economy and efficiency;

(b) to promote competition and ensure that competitors are treated fairly;

- (c) to promote the integrity and fairness of those procedures;*
- (d) to increase transparency and accountability in those procedures;*
- and*
- (e) to increase public confidence in those procedures.*
- (f) to facilitate the promotion of local industry and economic development. "*

The Board also finds that though the Tender Committee raised issues in its report dated 21st January 2010, it has no powers under the Act or Regulations to carry out an evaluation and subsequently award the Tender. The duties of the Tender Committee are set out in Regulations 10 and 11. The Board notes that Regulation 11 provides as follows:

- (a) "approve a submission ;or*
 - (b) reject a submission with reasons ;or*
 - (c) approve a submission, subject to minor clarifications by the procurement unit or evaluation committee.*
- (2) The tender committee shall not-*
- (a) modify any submission with respect to the recommendations for a contract award or in any other respect;*
 - (b) reject any submissions without justifiable and objective reasons.*
- (3) where the tender committee rejects the recommendation of the evaluation committee, the decision shall provide an explanation and a justification for its decision thereof. "*

In view of the above, the Board finds that it is not clear who was the lowest evaluated Bidder. That being the case, the Board finds that it was not possible for the Procuring Entity to make an objective award in accordance with Clause 27.5 and 27.6 of the Tender Documents. The said Clauses states as follows:

Clause 27.5:

"In exercise of the above discretion, where the employer is satisfied as to the capability of the tenderer in performing a contract as determined under clause 27.2, the maximum number that any one (1) tenderer shall be awarded will be limited to a maximum of 2 Projects".

Clause 27.6 further states as follows:

"After awarding the two (2) projects to the least evaluated tenderer as stipulated in section 27.5 here above the employer shall negotiate with the next evaluated competitive tenderer(s) to accept the award at the least evaluated tender price, with a view to awarding them a share of the balance of the tendered projects. This shall also be subject to a maximum 2 projects as specified in section 27.2. In the event this is not possible, the Employer reserves the right to award the remaining projects to the initial least evaluated tenderer in spite of the fact that the tenderer has been awarded two (2) projects".

The Board holds that it is difficult to determine whether Clause 27 of the tender documents aforementioned was applied correctly in view of the

conflicting positions taken by the Evaluation and Tender Committees. The Board finds that if the Applicant was the only responsive bidder it should have been awarded all the seven stations at a price of Kshs. 53.4 Million each. However, if the other Successful Bidders, Global Trade Ltd and Limelight Creations were technically responsive as observed by the members of the Tender Committee, then it means that by awarding the Tender to the Applicant, an extra sum of shillings 180 Million of Public funds would have been spent without justification.

The Board also finds the Clause 27 of the Tender Documents on the criteria for award is not objective. Since the Procuring Entity had invited tenders for seven different stations and Bidders were to supply products with different brand names, lifespan, cost of production and technology. It is not fair to award a tender to a Successful Bidder at a price which it had not quoted as this amounts to a counter offer.

The Board holds that if the Procuring Entity did not wish to award more than two stations to a bidder, it would have categorized that stations in lots and required the Bidders to tender for not more than two stations.

The Board notes that this tender has been terminated on two occasions in the past. Bearing this in mind, the Procuring Entity should have prepared tender documents with clear specifications and award criteria. Further, the