

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 2/2010 OF 12th JANUARY, 2010

BETWEEN
ZHONGMAN PETROLEUM & NATURAL GAS GROUP COMPANY
LTD.....APPLICANT

AND

KENYA ELECTRICITY GENERATING COMPANY
LTD.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Electricity Generating Company Ltd dated 24th December, 2010 in the matter of Tender No. OLK 150 for the Supply of 2 New 1500 HP Electric Land Rigs and Associated Equipment.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Ms. Judith A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Amb. C. M. Amira	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Zhongman Petroleum & Natural Gas Group Co. Ltd

- | | | |
|---------------------|---|--|
| Mr. Zul Alibhai | - | Advocate, Anjarwala & Khanna Advocates |
| Ms. Noela Lubano | - | Advocate, Anjarwala & Khanna Advocates |
| Mr. Oriaro Geoffrey | - | Advocate, Oriaro & Company Advocates |
| Dr. Sheilesh Patel | - | Local Representative |
| Mrs. Patel | - | Consultant |
| Mr. N. Ogutu | - | Consultant |

Procuring Entity, Kenya Electricity Generating Company

- | | | |
|---------------------|---|-------------------------------------|
| Mr. Kiragu Kimani | - | Advocate, Hamilton Harris & Mathews |
| Ms. Michi Kirimi | - | Advocate, Hamilton Harris & Mathews |
| Mr. Amol Hannington | - | Lawyer, Hamilton Harris & Mathews |
| Ms. Beatrice Koske | - | Chief Legal Officer |
| Mr. Dennis Onwonga | - | Legal Manager |
| Mr. Patrick Kimemia | - | Procurement Manager |

Interested Candidates

- | | | |
|-----------------------|---|---|
| Mr. Kingori Kariuki | - | Advocate, Shengli Oil Fields Highland
Petroleum Equipment Co. Ltd |
| Mr. P. S. Kisaka | - | Advocate, China Petroleum Technology &
Development Corporation |
| Mr. Laban Waweru | - | Area Sales Manager, China Petroleum
Technology and Development Corporation |
| Mr. Mandela Nelson | - | Sales representative, China Petroleum
Technology and Development Corporation |
| Mr. Rehnelallah Jamal | - | Manager, Regional Bargains |

Mr. Chris Murunga	-	Representative, Lanzhou LS- National Oilwell Petroleum Engineer Co. Ltd
Mr. Ndung'u James	-	Manager, Yashinoya Trading Company Ltd
Mr. Nick Leang	-	Manager, Avic International Holding Corporation

BOARD'S DECISION

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

BACKGROUND

The tender was advertised as an Expression of Interest (EoI) on 28th August, 2009 in the Daily Nation Newspaper and the Procuring Entity's website. The tender was to be closed on 29th September, 2009 but was extended to 13th October, 2009 as a result of requests for clarification from bidders. The following tenders were submitted:-

1. Regional Bargains Ltd
2. Zhongman Petroleum & Natural Gas Group Ltd
3. Avic International Holdings Corporation
4. Shengli Oilfields Highland Petroleum Equipment Co. Ltd
5. Gaoyou Huaxing Petroleum Manufacturing Co. Ltd
6. Zhongke Petroleum Equipment Co.Ltd
7. Lanzhou L. S. National Oilwell Petroleum Engineering Co. Ltd
8. Gulf Resources Ltd
9. Yashinoya Trading Co. Ltd
10. Shanghai Zhenhua Heavy Industry Co. Ltd
11. China Petroleum Technology & Development Corporation

12.Drilmec S.p.A Drilling Technologies .

The Evaluation was carried out by the Procuring Entity and the Tender Committee awarded the supply of the two rigs to M/s Shengli Oilfield Highland Petroleum Equipment Co. Ltd.

THE REVIEW

The Request for Review was lodged on the 12th January, 2010 by Zhongman Petroleum & Natural Gas Group Co. Ltd against the decision of Kenya Electricity Generating Company Ltd, regarding the award of Tender No. OLK 150 for the Supply of 2 New 1500 HP Electric Land Rigs and Associated Equipment. The Applicant was represented by Mr. Zul Alibhai, Advocate, while the Procuring Entity was represented by Mr. Kimani Kiragu and Ms. Michi Kirimi. The Successful Bidder was represented by Mr. Kingori Kariuki, Advocate, while M/S. China Petroleum Technology and Development was represented by Mr. P. S. Kisaka, Advocate.

PRELIMINARY OBJECTION

At the commencement of the hearing, the Procuring Entity indicated that it had filed a notice of Preliminary Objection which it wished to argue before the hearing of the Request for Review.

The Procuring Entity referred the Board to the Notice of Preliminary Objection it had filed on the 19th January, 2010 which set out the grounds of the Preliminary Objection as follows:-

“(Pursuant to Rule 77 (1) of the Public Procurement and Disposal Regulations 2006) (Hereinafter referred to as the Regulations).

TAKE NOTICE that the Procuring Entity shall raise a preliminary objection at the hearing of the Applicant's Request for Review dated 12th December, 2009 on the grounds that the Public Procurement Administrative Review Board has no jurisdiction to entertain this application on the following grounds:

- 1. Notification under section 67 of the Public Procurement and Disposal Act (Hereinafter referred to as the Act) was issued on 24th December 2009.**
- 2. The Notice was delivered to the Applicant on 28th December 2009.**
- 3. The Request for Review is made out of the statutory period of 14 days prescribed under regulation 73 (2) of the Public Procurement and Disposal Regulations, 2006."**

Accordingly the Board directed pursuant to Regulation 77 (4) that the preliminary Objection be argued by the Parties.

The Procuring Entity argued that the Applicant had filed the Request for Review outside the fourteen (14) days appeals window provided for under Regulation 73(2) (c) (ii) of the Public Procurement and Disposal Regulations, 2006 (hereinafter "the Regulations"). It stated that the Board did not have jurisdiction to entertain the Request for Review in view of the provisions of Section 93 as read together with Section 2 of the Public Procurement and Disposal Act, 2005 (hereinafter "the Act").

It further argued that the Applicant being one of the unsuccessful bidders was notified of the outcome of the award by a letter dated 24th December, 2009. The said letter was delivered to the registered office of the Applicant's Company at Shanghai-China as per the address indicated in its tender documents. It stated that the letter of notification was delivered by TNT express Courier a company

contracted by the Procuring Entity. The Procuring Entity provided a document, a Consignment Tracker from the courier which had evidence of delivery on the 28th December, 2009 to the Applicant's physical address.

The Procuring Entity further argued that even if the fourteen days appeal window started to run with effect from 28th December, 2009 which was the date the letter of notification was received by the Applicant, the appeal window lapsed on 11th January, 2010. Therefore the filing of the Request for Review on the 12th of January, 2010 was outside the stipulated appeal window. It argued that the Board had no powers under the Act or the Regulations to extend enlarge and/ or admit a Request for Review out of time. It referred the Board to the provisions of Rule four (4) of the Court of Appeal Rules and Order 49 of the Civil Procedure Rules which gave the Court of Appeal and the High Court power to exercise the discretion of extension of time. It made further reference to various case law in which the issue of jurisdiction was considered. It cited the case of the **Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1** in which the Court of Appeal held that jurisdiction was everything and without it a Court or Tribunal should ground its tools at the first instance.

It also referred the Board to **Civil Appeal No. 244 of 2000 Mary Osundwa-vs-Nzoia Sugar Company Ltd** in which the Court of Appeal dismissed an appeal lodged out of time.

In conclusion, it urged the Board to uphold the Preliminary Objection and reject the Request for Review on the ground that it was filed out of time.

In response, the Applicant stated that although the notification of the award was made by the Procuring Entity vide its letter of 24th December, 2009 the same was

delivered to the Applicant's duly authorized representative a Mr. L. Chundi on 30th December, 2009. It stated that the letter was delivered to the Applicant's office in Shanghai-China instead of delivery being made to a Mr. Martin Han based at Beijing in China, who was the duly appointed contact person. It stated that the notification letter was sent to the applicant's offices situated in Shanghai and was received by a Secretary one Mrs. Zhang on the 28th December, 2009 who was not conversant with the English language and the said notification was handed over to Mr. L. Chundi, the President of the Applicant's Company on 30th December, 2009.

The Applicant argued that the time started to run on 30th December, 2009 and the Request for Review filed on 12th January, 2010 was therefore within the fourteen days Appeal window. It referred the Board to the Provisions of Section 67(2) of the Act and Regulation 73 which in its opinion do not address the issue of dispatch or acknowledgement of the notification letters.

It cited **Request for Review No. 25 of 2009 - Consky Engineering Services Ltd and Kajiado North District** in which the Board found that there was no evidence of the dispatch of the notification letters. In the said case, the Board allowed the Request for Review as the notification letter had been sent to the wrong address.

The Applicant urged the Board to note that the Notification letter in this tender was sent on Christmas Eve, 24th December, 2009 and as at 11th January, 2010 when it lodged its appeal it was within the permissible appeal window period. It submitted that the Procuring Entity had the option of effecting Notification by email or fax but chose to send a letter and that notification to the parties at the same time could only be done by e-mail and fax, not through a letter.

It finally submitted that the Procuring Entity had not complied with the information supplied to it in Schedule C in the Instruction to Tenderers (ITT). It stated that a bidder was required to provide the contact person which was a mandatory requirement. It stated that it had given the name of Mr. Martin Han as the contact person. However, the Procuring Entity ignored that and instead used a different contact person in the name of L. Chundi. It prayed for dismissal of the Preliminary Objection to pave way for the hearing of the Request for Review on merit.

Mr. Kingori Kariuki for the successful bidder associated himself with the submissions of the Procuring Entity in support of the Preliminary Objection.

One of the interested Parties namely M/S. China Petroleum Co. Ltd, associated itself with the argument of the Applicant by stating that the Preliminary Objection as filed was not grounded on points of law but rather on matters of fact. It also argued that it had not received a notification of the award but conceded that it had not filed any appeal arising from the matter.

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

The Board notes that the notification letters to the successful and unsuccessful bidders are dated 24th December, 2009. The Procuring Entity has adduced evidence attached to the affidavit of one David Onwenga to support its assertion that the notification letter to the applicant was delivered to their registered office at Shanghai- China by an International Courier namely TNT Express . The Board notes that the letter was received and stamped at the Applicant's office on 28th December, 2009. The receipt of the subject letter in the Applicant's office on 28th

December, 2009, at Shanghai is not denied by the Applicant save that the person Mrs. Zhang, who is alleged to have received the letter was allegedly neither conversant with the English language nor was she the duly appointed contact person.

The Board finds that the Procuring Entity's notification letter dated 24th December, 2009 was delivered to the Applicant's registered office as provided in Schedule C of the Instruction to Tenderers (ITT). The letter was addressed as follows:

***“Zhongman Petroleum & Natural Gas Group Company Ltd,
35 F, 707 Zhang Yang Road, Pudong New Area,
Shanghai 200120,
P. R. CHINA
Attn: Mr. Li Chundi”***

The Board further finds that the aforesaid notification was done in accordance with the requirements of Section 67(2) of the Act which provides for simultaneous notification to be effected by the Procuring Entity. All the letters to the successful and unsuccessful bidders were dispatched on 24th December, 2009 by the registered courier.

The Board also notes that the person whose name was forwarded to the Procuring Entity as the one with the Power of Attorney to act on behalf of the applicant was one L. Chundi whose office was given as being situated at Shanghai – China as per Schedule C aforesaid. This is the same person the Procuring Entity addressed the letter of notification dated 24th December, 2009 as the contact person.

As the Board has already noted, the letters to the successful and unsuccessful bidders were sent by registered courier on 24th December, 2009. Accordingly, time for the purposes of the Appeal window started running on 25th December, 2009. Therefore the last day for lodging the Request for Review was 7th January, 2010.

The Board has further noted that in the affidavit of the Applicant by one Mrs. Zhang it is stated that the letter of notification was received on 28th December, 2009. She further gives explanation at paragraph 3 that the letter could not be opened until 30th December, 2009 as Mr. L. Chundi was not in the office. With respect, the Board observes that those are internal administrative issues that cannot affect time for purposes of the appeal window.

The Board further finds that even if one was to take the said date of 28th December, 2009 as the date of notification, time for the purposes of the appeal window started running on 29th December, 2009 and the last day for lodging the appeal would have been 11th January, 2010. The Board has also noted that on the said date 11th January, 2010 the Applicant made an attempt to file the Request for Review but due to failure to comply with Regulation 73 the Applicant went back with the documents for rectifications.

The Board also notes that the Request for Review was filed and duly paid for at the secretariat on the 12th of January, 2010, one day after the appeal window had closed. The filing receipt number A 3964128, in respect of the Request for Review shows that payment was effected on the 12th January, 2010 which is the date the documents were lodged and paid for at the secretariat. Indeed, the Board has noted that the affidavit filed by the Applicant's contact persons M/S. Martin Han, L. Chundi and Mrs. Zhang have referred to Application No. 2 as having been filed on 12th January, 2010 and not 11th January, 2010.

In the circumstances, the Board holds that the Request for Review was lodged out of time and it has no mandate to extend or enlarge the time within which to admit the Request for Review.

Accordingly, the Board finds that the Request for Review as filed herein was time barred and hence the Board has no jurisdiction to hear and determine it. The Preliminary Objection is hereby upheld and the Request for Review is hereby dismissed.

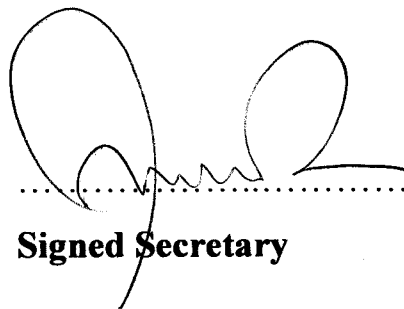
Consequently, the Procuring Entity may proceed with the tender process.

There will be no order as to costs.

Dated this 8th day of February, 2010

A handwritten signature in black ink, appearing to read "M. M. HAITORA", written over a horizontal dotted line.

Signed Chairman

A handwritten signature in black ink, written over a horizontal dotted line.

Signed Secretary

