

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 24 /2010 OF 16TH APRIL, 2010

BETWEEN

LUCY ELECTRIC UK LIMITED

AND

KENYA POWER LIGHTING COMPANY LIMITED

Review against the Decision of the Kenya Power & Lighting Company Limited of 6th April, 2010 in the matter of Tender No. KPLC1/4/3/1/PT/ITT/10/09 for supply, installation and Commissioning of 11 kV Distribution Automation System.

BOARD MEMBERS PRESENT

Mr. P.M Gachoka	-	Chairman
Mrs. Loise Ruhiu	-	Member
Amb. Charles M. Amira	-	Member
Ms. Natasha Mutai	-	Member
Mr. Joshua Wambua	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT: LUCY ELECTRONIC (UK) LIMITED

Mr. Geoffrey Oriaro - Advocate
Mr. Mr. Graham Phyce - Sales Manager
Mr. Chris Murunga - Director (KETCO)

PROCURING ENTITY: KENYA POWER & LIGHTING

COMPANY LTD.

Mr. C. N. Kihara - Advocate (C.N. Kihara & Co. Advocates)
Ms. Anne N. Kaguri - Advocate (C.N. Kihara & Co. Advocates)
Mr. Robert Mahenia - Advocate (C.N Kihara & Co. Advocates)
Ms. Peris Wanjohi - Pupil (C.N Kihara & Co. Advocates)
Mr. Joseph Atwoli - Pupil (C.N Kihara & Co. Advocates)
Mr. Stanley Ngetich - Deputy Manager
Mr. Francis Maina - Telecomms Engineer

INTERESTED PARTIES

SUCCESSFUL TENDERER- EL-MOR

- Ms. Lydia Kariuki - Advocate (Nyachoti & Co.
Advocates)
- Mr. Lindsey Mugambi - Legal Assistant (Nyachoti & Co.
Advocates)

AMIRAN COMMUNICATIONS:

- Mr. Gal Arbel - Sales & Marketing Manager

BACKGROUND OF AWARD

ADVERTISEMENT

The tender was done through an Open International tender. An advertisement was placed on 8th October, 2009 in three local daily Newspapers in Kenya with wide circulation. The following companies bought the tender document:-

1	Raphsons Ltd	8	Etrade	15	SIEMENS Ltd
2	Nortroll AS	9	Limelight Creations	16	Power Energy
3	Lucy Electrical (UK)	10	Panatronic Ltd	17	EL-MOR
4	Areva	11	BNB eng	18	Bus Park Garage
5	Landis Ltd	12	Sustainable Energy	19	Gulf Resources Ltd
6	NOJA Power	13	Tevel Holdings Ltd	20	Powertech 1 st Energy
7	ABB SA Ltd	14	GE EA Services		

CLOSING/OPENING

The tender closing date was 26th November, 2009 and was opened on the same day at 10.30 am by the Procuring Entity staff. This tender is subject of an order of the Board in Case No. 7 and 8 of 2010 in which the Board ruled that the Procuring Entity should conduct a re-

evaluation. The subsequent evaluation is thus a result of the ordered re-evaluation. The tenderers who responded and whose bids were opened were as follows:

1. ABB South Africa Limited
2. El-Mor Electric Limited
3. Lucy Electric UK Limited
4. Powertech 1st Energy
5. Nortroll AS

PRELIMINARY EVALUATION

The Preliminary Evaluation was conducted in accordance with the mandatory requirements as follows:

ITEM	DETAILS	NORTROLL	ABB	POWER TECH	EL-MOR	LUCY
6.1.1						
a)	Submission of Tender Security-					
	<i>i) Validity</i>	27/3/2010	26/3/2010	26/3/2010	30/3/2010	26/3/2010
	<i>ii) Authenticity</i>	Complied	Complied	Complied	Complied	Complied
	<i>iii) Original</i>	Complied	Complied	Complied	Complied	Complied
	<i>iv) Local bank in Kenya</i>	Barclays	CFC Stanbic	Standard Chartered	Barclays	KCB
	<i>v) Strictly in the format required in accordance with the sample Tender Security Form</i>	Complied	Complied	Complied	Complied	Complied
	<i>vi) Sufficiency</i>	Complied	Complied	Complied	Complied	Complied
b)	Submission and considering the Confidential Business Questionnaire fully filled.	Complied	Complied	Complied	Complied	Complied
c)	Submission and considering Tender Form duly completed and signed.	Complied	Complied	Not Complied	Complied	Complied
d)	Submission and considering Company or Firm's Registration Certificate, Pin Certificate, Valid Tax and VAT Compliance Certificates	Complied	Complied	Complied	Complied	Complied

e)	That the Tender is valid for the period required (90 days)	Complied	Complied	undetermined	Complied	Complied
f)	Submission and considering the required number of sets (original and copies) of Tender.	3	3	3	3	3

6.1. **Checking of the following: -**

ITEM	DETAILS	NORTROLL	ABB	POWER TECH	EL-MOR	LUCY
a)	<i>Submission of Copies of relevant Type Test Certificates and their Reports or Test Certificate and their Reports from the designated bodies.</i>	Complied	Complied	complied	Complied	Complied
b)	<i>Submission of relevant quality certificates where required including applicable ISO certifications.</i>	Complied	Complied	complied	Complied	Complied
c)	<i>If required in the Tender Document, submission of the following-</i>					
	<i>(i.) Samples</i>	<i>not required</i>				
	<i>(ii.) Catalogues and or Brochures</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>
	<i>(iii.) Manufacturer's Drawings</i>	<i>not required</i>				
	<i>(iv.) Commentary on the Guaranteed Technical Particulars and Statement of Compliance to Technical Specifications.</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>
	RESPONSIVENESS	RESPONSIVE	RESPONSIVE	NON RESPONSIVE	RESPONSIVE	RESPONSIVE

Four firms were found to be responsive and thus their bids were subjected to Technical Evaluation as per the Tender Document. M/s

Powertech was found to be non-responsive as stipulated in sections 3.28.3 and 6.1.1 (c) of the Tender Document and thus rejected. This was due to absence of a dully filled and signed tender form.

TECHNICAL EVALUATION

The four bidders who passed the Preliminary Evaluation were subjected to a Technical Evaluation as follows:

ITEM	DETAILS	ABB	EL-MOR	NORTROLL	LUCY
a)	<i>For foreign goods, applicable relevant ISO certification.</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>
	<i>For local goods - KEBS Standardization Mark certificates or it's equivalent for goods from other East African Countries.</i>	<i>not required</i>	<i>not required</i>	<i>not required</i>	<i>not required</i>
c)	<i>Type Test Certificates and their Reports or Test Certificates and their Reports from the designated bodies for full compliance with specifications and the relevant Kenyan Standards.</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>
d)	<i>Manufacturer's Authorization.</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>
e)	The following documents shall be submitted with the Tender				
	<i>(i.) Manufacturer's Warranty,</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>
	<i>(ii.) Catalogues and or Brochures,</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>
	<i>(iii.) Commentary on the Guaranteed Technical Particulars and Statement of Compliance to Technical Specifications</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>
	<i>(iv.) Any other technical details required of the Tender.</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>
	RESPONSIVENESS	RESPONSIVE	RESPONSIVE	RESPONSIVE	RESPONSIVE

The four bidders were found to be responsive and were thus subjected to Financial Evaluation.

FINANCIAL EVALUATION

ITEM	DETAILS	ABB	EL-MOR	NORTROLL	LUCY
6.3.1	This will include the following: -				
a)	<i>Confirmation of and considering Price Schedule duly completed and signed.</i>	Complied	Complied	Not Complied	Complied
b)	<i>Checking that the Tenderer has quoted prices based on Delivery Duty Paid (DDP) terms</i>	Complied	Complied	Complied	Complied
c)	<i>Checking submission of Last Financial Year's audited financial statements</i>	Complied	Complied	Complied	Complied
6.3.1.1	<i>Conducting a financial comparison, including conversion of tender currencies into one common currency</i>	Done	Done	Done	Done
6.3.1.2	<i>Correction of arithmetical errors</i>	No errors	No errors	Done, but impossible since some items do not have unit prices	No errors
6.3.1.3	<i>Take into account the cost of any deviation(s) from the tender requirements</i>	Done	Done	Done	Done
6.3.1.4	<i>Ascertaining the financial capability through Last Financial Year's audited financial statements which Statements should conform to International Accounting Standards One (IAS 1) which includes the following:-</i>	Done	Done	Done	Done
a)	Checking and considering that the Tenderer's liquidity ratios are acceptable to KPLC and meet the threshold of:-				
	<i>(i.) Current ratios 1:1 i.e. current assets: current liabilities</i>	1.26	1.18	2.91	2.01
	<i>(ii.) Quick ratios (Acid test) of 1.0 i.e. (Cash + Accounts Receivable + Short Term Investments) divided by Current Liabilities</i>	0.78	1.08	1.89	2.01

ITEM	DETAILS	ABB	EL-MOR	NORTROLL	LUCY
b)	Checking and considering that the Tenderer's Solvency ratios in particular the Debt to Assets Ratio is acceptable to KPLC i.e. meets the threshold of at least 1:1	1.02	1.33	3.42	3.39
c)	Turnover in the Last Financial Year [of at least four (4) times the total tender value].	33,062,780,846.40	2,961,265,504.81	496,168,182.40	15,190,083,285.00
	<i>Value of tender price</i>	427,446,289.67	214,760,422.11	235,950,173.56	235,950,173.56
	<i>How many times Turnover is to tender price</i>	77.35	13.79	2.10	64.38
6.3.1.5	Considering information submitted in the Confidential Business Questionnaire	Done	Done	Done	Done
6.3.2	Considering the following: -				
a)	<i>the Supplier's offered Delivery Schedule against KPLC's requirements.</i>	Not required	Not required	Not required	Not required
b)	<i>the Supplier's offered Terms of Payment against KPLC's terms.</i>	20% down payment	Not given	LC as per KPLC terms	LC as per KPLC terms

NOTE

Nortroll had not duly completed the Price Schedule as required by section 6.3.1 (a), having missed out the unit prices for GSM Modem, GSM modules and step-down transformers.

ABB had Quick ratios (Acid test) of 0.78 as opposed to the required 1.0 as depicted by 6.3.1.4 (a) (ii)

Recommendations

The committee recommended the award to M/s El-Mor- the lowest evaluated bidder at a total cost of USD 2,846,194.

TENDER COMMITTEE'S DECISION

The tender committee met on 1st April, 2010 to award the tender. It approved a re-award of the tender for supply, installation and Commissioning of 11 kV Distribution Automation System to EL-MOR at their quoted price of USD 2,846,194 DDP.

THE REVIEW

This Request for Review was lodged on the 16th April, 2010 by Lucy Electric UK Limited against the decision of the Kenya Power & Lighting Company Limited of 6th April, 2010 in the matter of Tender No. KPLC1/4/3/1/PT/ITT/10/09 for supply, installation and Commissioning of 11 kV Distribution Automation System.

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

- (a) The tender award to Successful tenderer be annulled.
- (b) Tender No. KPLC1/4/3/1/PT/ITT/10/09 for supply installation and commissioning of 11 kV Distribution Automation System be awarded to the Applicant.

The Board deals with the raised twelve grounds of appeal as follows:

Grounds 1 to 6 Breach of Section 66(2) and Regulation 49(2)

These grounds have been consolidated because they raise similar issues on technical non responsiveness.

The Applicant alleged that the Procuring Entity failed to apply the evaluation criteria set out in the Tender Document contrary to Section 66(2) of the Public Procurement and Disposal Act 2005 (herein after referred to as the Act) and Clause 3.37.1 of the Tender Document. It claimed that the successful bidder's tender was technically non responsive for failing to include its *Suppliers Guarantee and Warranty, Manufacturer's Warranty*, the required *Guaranteed Technical Particulars and Statement of Compliance to Tender Specifications*. It stated that these were mandatory requirements under the tender documents' Section VI - Summary of Evaluation Process, Clause 6.2, and Clauses 3.13.3(c) and (d) of the Instructions to Tenderers.

It argued that the Tender Document was amended to suit the successful bidder's request to offer Load Break Switches instead of

the Air Break Switches but that the technical specifications were left open. It alleged that the Load Break Switches offered by the Successful bidder were not compatible with the operating head in use by the Procuring Entity and further, that the successful bidder had failed to state compatibility requirements contrary to Clause 4.2.6 at pages 85 and 106 of the Tender Document.

The Applicant claimed that the Procuring Entity breached Clause 3.9(e) of the Tender Document by failing to consider whether the successful bidder had provided a list of four previous customers of similar goods and a letter confirming completion of the contracts on schedule.

In conclusion it averred that the Procuring Entity breached Clause 3.36 of the Tender Document by failing to consider whether the successful bidder was qualified to perform the contract satisfactorily, and further, that it breached Clause 3.30.2 of the Tender Document together with Regulation 49(2) of the Public Procurement and Disposal Regulations 2006 (herein after referred to as the Regulations) by allowing the successful bidder's technical bid to proceed to financial evaluation while it was non responsive.

In its response, the Procuring Entity stated that it did not breach the said Section, Regulation and clauses of the Tender Document. It claimed that the Applicant had failed to appreciate and take into account that the successful bidder was tendering together with Motorola and that its tender had sufficiently provided the requested guaranteed technical particulars and statement of compliance. It further claimed that the Applicant had failed to appreciate that the successful bidder's tender was based on Load Break Switches that were provided for in Addendum No. 1 dated 2nd November, 2009, and that the said switches could be said to be compatible as they would be used by the Procuring Entity for the first time as envisaged by pages 85 and 106 of the Tender Document.

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

The Board has also perused the copy of the Tender Document issued to the bidders and the evaluation report dated 19th March, 2010. The Board notes that the Tender Documents had detailed evaluation criteria which required the Procuring Entity to evaluate the tenders in three stages, namely, preliminary, technical and financial evaluation. Bidders were required to pass one stage before proceeding to the next stage. The Board further notes that the Procuring Entity conducted the evaluation in the three prescribed stages.

At Preliminary Evaluation, four out of the five firms that submitted bids, were found to be responsive including the Applicant and the successful bidder. These four bidders proceeded to technical evaluation and were determined to be technically responsive as indicated in the evaluation report. The four technically responsive bidders were then financially evaluated, where the successful bidder was found to be the most responsive and lowest evaluated bidder, and was recommended for award of the tender.

The Board has examined the evaluation report and finds that the Procuring Entity used the evaluation criteria contained in the Tender Document in its evaluation of the bids. The Board has also examined the Successful bidder's tender and found that it had tendered together with Motorola for SCADA and two way communications and Delta Systems s.r.l. in Italy for Switch Gear and Load Break Switches Elettropicana Sud and has submitted a duly completed *Guaranteed Technical Particulars, Warranties Statement of Compliance to Technical Specification and Compatibility Statement* in form of Motorola's Declaration of Conformity. The Board also finds that the successful bidder had also provided a list of previous customers for similar items on their tender as required under clause 3.9(e) of the Tender Document. The references as provided were:

1. Weiss Consulting Engineers Limited
2. Arkardy Shein Electrical Engineers Company
3. Kibbuz Ruhama Company
4. Ramot Beit SAP Limited

Based on the foregoing, the Board finds no evidence to support the Applicant's allegations made under these grounds, and accordingly, these grounds of appeal fail.

Grounds 7 to 10 Breach of Section 59(2) of the Act

These grounds have been consolidated because they raise similar issues on alleged financial non responsiveness and subsequent modification of tenders after the deadline for submission of tenders.

The Applicant alleged that the Procuring Entity, failed to consider that the financial bid of the successful bidder was financially non responsive for failing to fill in a price against item no. 7 in the Price Schedule, for failing to quote for overseas training under item 10 in the Price Schedule, and for failing to quote for the cost of undertaking site surveys. It averred that its claims were supported by the financial bid opening minutes. It stated that Clause 3.11.2 of the Tender Document specified that prices indicated on the Price Schedule shall include all costs and that further, Clause 6.3.1 under Financial Evaluation included the confirmation of and considering of Price Schedule whether duly completed and signed. It further alleged that the Procuring Entity modified the Successful bidder's tender by inserting a price of USD 29,348 that had been quoted for local training as the amount also quoted for overseas training. It claimed that the Procuring Entity had also changed the Successful bidder's quote for spares to USD 80,000 from the USD 80,580 that was recorded in the Tender Opening Minutes.

In its response, the Procuring Entity stated that it had not breached the tender conditions nor the Act or Regulations. It claimed that the Successful bidder's original tender document showed that the bidder had filled in zero '0' although in the Procuring Entity's documents done under the computer technology of an excel system, the zero is shown as a dash or a blank. It stated that there was no requirement in the Tender Price Schedule for a bidder to indicate the cost of carrying out a survey. It concluded by stating that the successful bid had been quoted for and that there was no change in the substance or

otherwise of the tender of the Successful candidate. It urged the Board to examine the original tender documents.

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

The Board has perused the Tender Opening Minutes together with the Successful bidder's original Tender Document *Section V - Price Schedule for Goods*, and finds as follows:-

- i) Price Schedule item 7, *Visit to Site Operated by Supplier*, is recorded as item 6 in the minutes and has no figure nor 'dash' recorded for the Successful bidder; whereas, the original tender has a figure of \$0 against it;
- ii) Price Schedule item 10, *Training on equipment, its installation and operation*, is recorded as item 9 in the minutes and is further split into local and overseas training, has a figure of (USD) 29348 recorded for the Successful bidder for local and no figure nor 'dash' recorded against overseas training; whereas Item 10, *Training on equipment, its installation and operation: local - overseas*, in the original tender has a figure of \$ 29,348;
- iii) Item 12, *Recommended Spares and their availability* has a figure of \$ 80580 recorded against it, which is the same figure in the original Tender Document (\$ 80,580).

The Board notes the provisions of Clause 3.11.1 of the Tender Document: - *The Tenderer shall indicate on the appropriate Price Schedule, the unit prices and total tender price of goods it proposes to supply under the contract*, and Clause 3.11.2 that prices indicated on the Price Schedule shall include all costs among other items.

The Board therefore finds that by putting a figure against an item on the Price Schedule, a bidder indicates the price it is offering to supply the goods for under the contract, and the value of the figure is immaterial as long as there is a figure against the item to be supplied. Accordingly, the Board finds that by putting a figure of \$0 against various items in the Price Schedule, item 7 included, the successful

bidder had complied with the tender requirements for completion of the Price Schedule, and as such the Procuring Entity rightly found that the Price Schedule was duly completed and signed in accordance with Clause 6.3.1(a) of Section VI - Summary of Evaluation Process. With regard to the Applicant's allegation that the Successful bidder did not price for the cost of undertaking site surveys, the Board on examination of the Price Schedule finds no provision in the schedule or any requirement in the Tender Document that this cost has to be indicated on the Price Schedule.

With regard to the Applicant's allegation that the Successful bidder's tender figures were changed from what was read out at the tender opening and recorded in the Tender Opening Minutes, the Board finds that there is no evidence to support the allegation given that the figures recorded in the Tender Opening Minutes and the Successful bidder's original document were the same.

Accordingly these grounds of appeal fail.

Ground 11

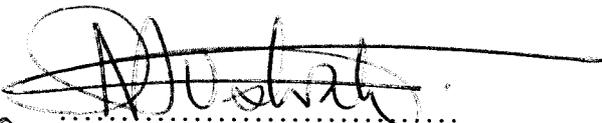
This ground is a general statement not supported by the breach of any Section of the Act or Regulation, and the Board need not make a finding on it.

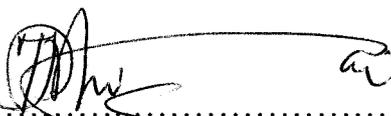
Ground 12

This ground was abandoned by the Applicant at the hearing.

Taking into account the foregoing, and pursuant to Section 98 of the Act, the Board orders that the appeal is hereby dismissed, and that the procurement process may continue.

Dated at Nairobi on this 17th day of May, 2010


.....
for **Signed Chairman**
PPARB


.....
for **Signed Secretary**
PPARB

