

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 27/2010 OF 30TH APRIL, 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 15th April, 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

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

PRESENT BY INVITATION

Applicant, Athi River Power Company Ltd

Mr. John Ohaga - Advocate, Ochieng Onyango, Kibet & Ohaga Advocates
Mr. George Wandati - Assistant, Ochieng Onyango, Kibet & Ohaga Advocates
Ms. Kerubo Ombati - Assistant Ochieng Onyango, Kibet & Ohaga Advocates
Mr. Eric Murungi - Director
Mr. Francis Njuguna - Associate Director
Mr. Joel Weru - Legal Officer
Mr. Joshua Omino - Representative

Procuring Entity, Kenya Power & Lighting Company Ltd

Mr. Stephen Njiru - Advocate, Humphrey & Company Advocates
Ms. Rachel Osendo - Advocate, Humphrey & Company Advocates

- Ms. Veronica Odipo - Lawyer, Humphrey & Company
Advocates
- Mr. Owiti Awuor - Legal Officer
- Mr. Raphael Mwaura - Power System Development Manager

Interested Candidates

- Mr. Kahiro Kimani - Advocate, Melec Powergen Inc.
- Mr. Anders Langhorn - Business Development Manager BG Consortium:
- Mr. Kim Christensen - Director, Semco Maritime
- Mr. Lawrence Riungu - Senior Investment Officer Centum Investments Company
- Mr. Waithaka Mwangi - Director African Link Holdings:

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 was advertised as an Expression of Interest (EOI) on 28th May, 2009. Thirty one bidders responded to the EOI and 22 were shortlisted. The twenty two bidders were issued with the Request for Proposal

documents on 27th July, 2009. The tender under review for the Thika Plant was cancelled and bidders notified vide letters dated 6th January, 2010.

The re-tender was done on 24th January, 2010 when the pre-qualified bidders were invited to submit proposal for the Thika Plant.

Closing/Opening:

The Proposals were to be closed/opened on 7th March, 2010 at 11:00am but later postponed to 22nd March, 2010 at 10 a.m. Nine bids were submitted from the following bidders:-

1. Athi River Power Company Limited
2. Trans-Century Limited
3. Kaluworks Limited
4. African Link Holdings Limited
5. Centum Investments Company
6. Melec Powergen Inc.
7. The BG Consortium: Burmeister & Wain Scandinavian contractors
A/A and Globeleq Advisors ltd
8. Athi Energy Limited
9. Aldwych International Limited

The prices quoted for the two options namely (a) with GOK Sovereign Guarantee and (b) with IDA partial Risk Guarantee MIGA Termination Guarantee were read out and recorded during the opening of the proposals.

EVALUATION

One bidder, Aldwych International holdings limited was disqualified for providing a bid bond that it had submitted in December, 2009.

Technical Evaluation:

The proposals were evaluated technically on the following criteria:-

1. Bidders Technical Capability

- i) At least 2 key individuals proposed to be involved in the Project development to have not less than 10 years experience in similar projects

- ii) Proposed Engineer, Procure & Construct (EPC) contractor to have undertaken at least 2 power generating projects with a capacity of at least 50MW each during the last 10 years.

- (iii) Proposed O&M contractor to have experience in O&M operations of at least 2 power generation projects of a capacity of not less than 50MW each

- iv) For consortium Bids, submission of signed agreement or MOU between consortium members

2. Compliance with Project Implementation Key Milestones

Ability and commitment to achieve full plant commercial operation date by 4th October 2011.

3. Capital Structure and Financial Capability

Ability to finance/secure financing for the project development to achieve the plant full plant commercial operation date by 4th October 2011

4. Outline Design Proposals

- i) Contracted Capacity of 60 - 80 MW net
- ii) Target availability of 85%
- iii) Rated power factor of 0.8 lagging to 0.9 leading

5. O&M Proposals

Maintenance schedules to achieve target availability

6. Approach to Environmental Issues

Commitment to carry out an EIA and implement requirements.

7. Acceptance of the main principles of the Draft PPA

- i) Fuel supply for the plant
- ii) Target availability and contracted capacity
- iii) Pricing structure

- iv) Provision of construction security
- v) Adjustments of bidder's payments for failure to meet operational targets
- vi) Term of PPA for 20 years

All the bidders were found to be responsive to the technical requirements. It was noted that other issues raised by the bidders including the PPA mark-up were to be negotiated with the successful bidder.

Financial Evaluation:

The financial evaluation was carried and the summary results were as follows:

Price Options	Athi Energy Ltd		Athi River Power company Ltd		Globeleg/BWSC 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	178.00	191.00	201.99	233.73	185.70	187.20	190.00	196.00	193.50	193.50	203.52	219.65		206.4	199.82	209.4
Adjusted for evaluation as per the RFP	186.90	200.55	202.17	233.94	188.25	189.77	190.00	196.00	210.43	210.43	209.05	225.62		212.08	202.31	212.0
Discounted Total Energy Cost (Euro)	486,706,377	495,270,841	454,222,862	473,833,999	484,828,021	485,749,173	481,357,034	485,501,760	502,446,200	502,446,200	483,629,935	494,093,056		487,837,944	463,910,983	470,037,82
Discounted Unit Energy Cost (Euro/kWh) with discounted energy	0.1362	0.1386	0.1334	0.1391	0.1406	0.1408	0.1415	0.1427	0.1358	0.1358	0.1384	0.1414		0.1395	0.1347	0.136
	102.1%	102.1%	100.0%	102.5%	105.4%	103.7%	106.1%	105.1%	101.8%	100.0%	103.7%	104.1%		102.8%	101.0%	100.5
RANKING	4	3	1	4	6	6	7	8	3	1	5	7		5	2	2

Assumptions used in the evaluation included the following:

- Projected annual increment in Euro CPI
- Discounting rate used in the evaluation

- Contracted capacity MW
- Specific Fuel Consumption in kJ/kg
- Minimum Lower Calorific value in kJ/kg
- Base fuel price in US\$/MT as provided in the RFP
- CBK mean exchange rate of 22/3/2010 for Euro/US dollar used in the evaluation

The evaluation committee recommended the tender be awarded to the least cost among the technically responsive evaluated bidders as follows:

Options	Bidder	Discounted Unit Energy (Euro/Kwh)
• With GOK Sovereign Guarantee	Athi River Power Company Ltd	0.1334
• With IDA Partial Risk Guarantee MIGA Termination Guarantee	Melec Powergen Inc	0.1358

THE TENDER COMMITTEE DECISION

The Company Tender Committee in its meeting held on 1st April, 2010 adjudicated on the recommendation of the Evaluation Committee. It

approved the entering into negotiations with M/s Melec Powergen Inc for the following reasons:

- i) Offered the lowest discounted energy cost under the IDA -PRG option even after adjustment of their Capacity Charge Rate to 80MW equivalent for evaluation purposes
- ii) Have the lowest actual discounted energy cost for both options; USD 0.1358 with adjustment to price equivalent of 80 MW EURO/kwH; USD 0.1327 without adjustment

Option 1 - with Government of Kenya sovereign guarantee

Option 2 - with IDA Partial Risk Guarantee and MIGA termination guarantee.

Bidders were notified vide letters dated 15th April, 2010

THE REVIEW

The Applicant, Athi River Power Company Ltd lodged this Request for Review on 30th April, 2010. At the hearing, the Applicant was represented by Mr. John Ohaga, Advocate while the Procuring Entity was represented by Mr. Stephen Njiru. The Interested Candidates present included Melec Powergen Inc and Centum Investment Company Ltd, represented by Mr. Kahiro Kimani, advocate and Mr. Lawrence Riungu.

The Applicant requests the Board for the following orders:

- i) "A declaration that the Procuring Entity breached the provisions of the Act;*
- ii) The Applicant's tender be declared the most responsive and the Applicant be declared the successful bidder in accordance with clause 2.10.3.2 of the Request for Proposals as read with Section 82(5) of the Act;*
- iii) In the alternative, the Procuring Entity be directed to carry out a re-evaluation of the tenders in accordance with the Act and the Request for Proposals;*
- iv) The costs of this application be provided for."*

The Applicant raises three (3) grounds of Review which the Board deals with as follows:-

Ground 1: Breach of Sections 2 and 82(1) of the Act

The Applicant, at the hearing, stated that it had cited Section 2 of the Public Procurement and Disposal Act, 2005, (herein after referred to as the Act), which is a general provision, relating to fairness and integrity of the process, but that its appeal was premised primarily on the breach of Section 82 of the Act.

The Applicant alleged that the Procuring Entity failed to abide by the criteria set out in the Request for Proposal and in doing so breached both the Request for Proposal, as well as the Act.

It averred that when the Procuring Entity issued an Addendum offering the GOK Sovereign Guarantee as a proposed payment security to be applied in addition to the IDA Partial Risk Guarantee and MIGA termination guarantee offered in the Request for Proposal. It further averred that the Procuring Entity did not provide an additional criteria in the Addendum to inform the tenderers the basis upon which it proposed to assess the two price options that had been introduced. It stated that the financial evaluation criteria remained as set out in the Request for Proposal (RFP) Clause 2.10.3.2. It further stated that under this clause, for bidders offering more than 80MW, the Capacity Charge Rate that was to be used in the evaluation was the quoted rate adjusted by the ratio 80 to the offered capacity. It also stated that its bid price was deemed to be the lowest at Euro 0.1334 under the GOK Sovereign option, whereas the Successful Bidder's was Euro 0.1358. It claimed that in purporting to determine that the Successful Bidder had given the lowest quoted financial proposal, the Procuring Entity had not made the adjustment, that is, it did not apply the criteria that it had set out in the Request for Proposal.

The Applicant concluded by stating 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.

In its response, the Procuring Entity stated that in the RFP it had provided for one security for payment default and termination which was the IDA Partial Risk Guarantee and MIGA Termination Guarantee, but that at the same time, the Ministry of Energy was pursuing Treasury for the provision of a GOK Sovereign Guarantee. The Procuring Entity added that based on this, it issued an Addendum in which it included the GOK Sovereign Guarantee as another payment security because both were potentially available.

It further stated that it had requested all bidders to give two prices - one under the IDA - MIGA Guarantee and the other one under the GOK Sovereign Guarantee and all bidders did that, except for one who priced its bid under one payment security option only.

It claimed that it had carried out the financial evaluation of the bids strictly in accordance with the formula in the Request for Proposal including all the adjustments, and that the financial evaluation produced two lowest bidders - one for each option, namely, the Applicant for the GoK Sovereign Guarantee option, and the Successful Bidder for the IDA - MIGA Guarantee option. It stated that at that time both payment security options were available.

It averred that the decision it had to make, after the evaluation, was which option it would use and to determine this, it used the actual cost that the customer would pay, and it determined that of the two bidders, the Successful Bidder had the lowest actual discounted energy cost.

The Procuring Entity concluded by stating that the decision of whom to award the tender was not based on preference of one payment security over another. It averred that the determination was based on the lowest actual discounted energy cost which was in accordance with the law and based on objective reason without any new criterion being introduced.

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

An interested candidate, Aldwych International, submitted a written memorandum in which it claimed that its bid had not been evaluated according to the criteria set out in the RFP.

Another interested candidate, Centum Investment Company Limited, also submitted a written memorandum and made representations in support of the Applicant's allegations that the tender had not been evaluated according to the criteria set out in the RFP.

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 2nd March, 2010 issued to the bidders; and the financial evaluation report dated 31st March, 2010.

The Board notes that the RFP had detailed the financial evaluation criteria under clause 2.10.3.2, providing a formula for computing the Cost of Energy, with a note to bidders that:-

Bids of less than 60MW will not be evaluated. For bidders offering more than 80 MW, the Capacity Charge Rate to be used in the evaluation will be the quoted rate adjusted by the ratio 80 to the offered capacity.

The Board further notes that the clause stated that:-

KPLC expects to invite for negotiations, the Bidder evaluated as offering the lowest total Energy Cost (EC) ("Preferred Bidder").

With regard to the relevant provisions in the Addendum, the Board notes that the Addendum at clause 2 Payment Security introduced a Sovereign Guarantee to be issued by the Government of Kenya as a payment security option proposed to be applied in addition to the option already provided for in the RFP; and bidders were required to give two price options based on the applicable security.

The Board finds no preference stated in the Addendum for one guarantee over the other, and no supplementary financial evaluation criteria.

Given that the Procuring Entity did not state any preference for one guarantee over the other, the Board finds that both payment security options were of equal weighting, and as such, the Procuring Entity ought to have invited for negotiations, the bidder with the lowest total Energy Cost (EC) determined by using the Energy Cost formula under clause 2.10.3.2 with the Capacity Charge Rate adjusted by the ratio 80 to the offered capacity where the capacity offered is more than 80MW.

With regard to the financial evaluation report, the Board notes that the Evaluation Committee had recommended the award of the tender to the least cost among the technically responsive evaluated bidders as follows:-

1. With GOK Sovereign Guarantee, the Applicant, at discounted unit energy cost of Euro/kWh 0.1334; and
2. With IDA Partial Risk Guarantee and MIGA Termination Guarantee, the Successful Bidder, at discounted unit energy cost of Euro/kWh 0.1358.

The Board finds that by recommending two bidders, the Evaluation Committee had not identified a "Preferred Bidder" as provided for under clause 2.10.3.2, and as such had not recommended to the Tender Committee who it had determined as the bidder to whom the award of the tender should have been made.

The Board notes that from the Tender Committee minutes of its meeting held on 1st April, 2010, under minute TC/262/10, it approved entering into negotiations with the Successful Bidder, for the following reasons:-

- “
- i) Offered the lowest discounted energy cost under the IDA-PRG option even after adjustment of their capacity charge rate to 80MW for evaluation purposes; and
 - ii) Have the lowest actual discounted energy cost for both options; USD 0.1358 with adjustment to price equivalent of 80MW Euro/kWh; USD 0.1327 without adjustment
- Option 1 – With Government of Kenya sovereign guarantee
Option 2 – with IDA Partial Risk Guarantee and MIGA termination guarantee “

Based on these minutes, the Board observes that with regard to the payment security options, the Tender Committee minutes do not expressly state under which payment guarantee the tender was to be awarded.

In addition, the Board finds that the statement under item ii) above, that the Successful Bidder had the lowest actual discounted energy cost for both options, USD 0.1358 with adjustment to price equivalent of 80MW Euro/kWh; USD 0.1327 without adjustment, is not supported by the Evaluation Committee's financial evaluation report, and further that the figure of 0.1327 (whether in Euro or USD) is not found anywhere in the financial evaluation report. The Board notes that the Procuring Entity conceded at the hearing that this figure was computed after the financial evaluation report was concluded.

Accordingly, the Board finds that the evaluation process was not complete as the Evaluation Committee ought to have determined the Preferred Bidder in accordance with clause 2.10.3.2 of the RFP.

Taking the above into consideration, this ground of appeal succeeds.

Ground 2

This is a statement not backed by breach of the Act or the Regulations, and as such the Board need not make any finding on it.

Ground 3

The Applicant claimed that it had suffered loss and damage as a result of the said breaches.

As the Board has held in its past decisions, costs incurred by tenderers at the time of tendering are commercial risks borne by persons in business.

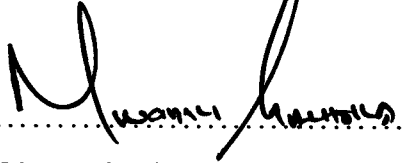
As the Board has already found, the financial evaluation by the Evaluation Committee was not conclusive in that it did not identify a "Preferred Bidder", and the Tender Committee's reasons for awarding the tender to the Successful Bidder were not supported by the findings stated in the financial evaluation report.

Accordingly, the Board orders, pursuant to Section 98 of the Act, that the award to the Successful Bidder is hereby nullified. The Board directs that

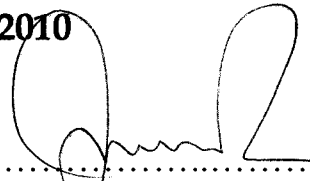
the Procuring Entity should re-evaluate the financial bids of the technically responsive bidders in accordance with the criteria set out in the Request for Proposal and its Addendum.

Finally, the Board notes that vide the Ministry of Energy's letter Ref. ME/CONF/3/2/73A dated 5th May, 2010 to the Procuring Entity, the Government of Kenya Sovereign Guarantee shall not be provided and as such is no longer available as a payment security.

Dated at Nairobi on this 25th day of May, 2010



**Signed Chairman
PPARB**



**Signed Secretary
PPARB**