

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 5/2010 OF 18TH JANUARY, 2010

BETWEEN

ENERGY TRADING GROUP FZC.....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 6th January, 2010 in the matter of Tender No.KPLC1/9AD/PT/16/09-10 for Request for Proposal for the Design, Financing, Supply, Erection, Commissioning, Operation and Maintenance of Three 60 – 80 MW Power Plants – Plant 1 Athi River.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Eng. C. A. Ogut	-	Member
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Energy Trading Group FZC

- Mr. Antony Njogu - Advocate
- Mr. Varinder Puri - Director Finance
- Mr. Yogesh Kotak - Director

Procuring Entity, Kenya Power & Lighting Company Ltd

- Mr. C. N. Kihara - Advocate, C. N. Kihara & Company Advocates
- Ms. Ann M. Kagiri - Advocate, C. N. Kihara & Company Advocates
- Mr. Robert Mahenia - Advocate
- Ms. Peris N. Wanjohi - Pupil, C. N. Kihara & Company Advocates
- Mr. Raphael Mwaura - Engineer
- Mr. Joseph Urino - Accountant

Interested Candidates

- Mr. Kamau Karori - Advocate, Triumph Power Generation Company
- Ms. Millie Jalega - Advocate, Triumph Power Generation Company
- Mr. Richard Miano - Advocate, Triumph Power Generation Company
- Mr. Abdi R. Haji Abass - Chairman, Triumph Power Generation Company
- Mr. Mohamed Hassan - Consultant, Triumph Power Generation Company
- Mr. Swaleh S. S. Imu - Project Engineer, Triumph Power Generation Company
- Mr. Joel N. Weru - Advocate, Athi River Power Company
- Mr. John K. Kaminya - Engineer, Athi River Power Company
- Mr. Tom Okumu - Deputy Manager, Daewoo International
- Mr. Dan Mwangi - Sales Director Lano's Ltd

BOARD'S DECISION

Upon hearing the Applicant, the Procuring Entity and the Interested Candidates and upon considering the documents and information submitted, 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 twenty two of them were shortlisted. The Request for Proposal documents were issued to the shortlisted bidders on 27th July, 2009.

The Requests for Proposal were opened on 15th December, 2009 after being extended from 26th October, 2009. Five bidders submitted their documents as follows:-

- i) Energy Trading Group FZC
- ii) Athi River Power Company Ltd
- iii) Gulf Power Consortium
- iv) Triumph Power Generation Company Ltd
- v) Melec Powergen Inc.

EVALUATION

The Evaluation was carried out by the Evaluation Committee chaired by Mr. Raphael Mwaura. The evaluation criteria used was as follows:

1. Bidders technical Capability
 - a. At least 2 key individuals proposed to be involved in the project development to have not less than 10 years experience in similar projects

- b. Proposed engineer, procure & Construct (EPC) contractor to have undertaken at least 2 power generating projects with a capacity of at least 50 MW each during the last 10 years
 - c. 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
 - d. For consortium bids, submission of signed agreement or MOU between consortium members
2. Compliance with project implementation key milestones
 - a. Ability and commitment to achieve full plant commercial operation date 15 months after signature date
 3. Capital structure and financial capability
 - a. Ability to finance/secure financing for the project development to achieve the plant full plant commercial operation date by 29th June 2011
 4. Outline design proposals
 - a. Contracted capacity of 60 – 80Mw net
 - b. Target availability of 85%
 - c. Rated power factor of 0.8 lagging to 0.9 leading
 5. O & M Proposals
 - a. Maintenance schedules to achieve target availability
 6. Approach to environmental issues
 - a. Commitment to carry out an EIA and implement requirement
 7. Acceptance of the main principles of the draft PPA
 - a. Fuel supply for the plant
 - b. Target availability and contracted capacity
 - c. Pricing structure
 - d. Provision of construction security
 - e. Adjustments of bidders payments for failure to meet operational targets
 - f. Term of PPA for 20 years

All the five bidders were found to be responsive and were recommended for the financial evaluation of their bids.

Financial Evaluation:

Bidders were required give three price options depending on the type of payment security as follows:-

1. Option A - with government of Kenya sovereign guarantee
2. Option B - with IDA Partial Risk Guarantee and MIGA Termination guarantee
3. Option C - with neither of the guarantees in Option A and B

The summary of the results of the financial evaluation was as tabulated below:

PRICE OPTIONS	MELEC POWER GEN Inc			ATIII RIVER POWER COMPANY LTD			GULF POWER LTD			TRIUMPH POWER GENERATING CO.LTD			ENERGY TRADING GROUP FZC		
	A	B	C	A	B	C	A	B	C	A	B	C	A	B	C
Discounted Escalated Total Energy Cost (Euros)	435,283,637	435,283,637		390,616,986	405,102,563	414,798,945	391,154,099	398,244,095	413,302,493	362,076,338	367,648,211	373,238,085	368,873,312	379,518,714	381,938,124
Discounted Unit Energy Cost (Euros/kWh) with discounted energy	0.1198	0.1198		0.1148	0.1198	0.1219	0.1095	0.1115	0.1157	0.1052	0.1069	0.1085	0.1084	0.1115	0.1123
Ranking	5	4		4	4	4	3	2	3	1	1	1	2	3	2
ASSUMPTIONS															
Projected annual increase in Euro CPI	2.0%	2.0%		2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%
Discounting rate used in the evaluation	12%	12%		12%	12%	12%	12%	12%	12%	12%	12%	12%	12%	12%	12%
Contracted Capacity MW	86.00	86.00		80.02	80.02	80.02	84.00	84.00	84.00	80.90	80.90	80.90	80.00	80.00	80.00
Specific Fuel Consumption in kg/kWh	0.2040	0.2040		0.2128	0.2128	0.2128	0.2150	0.2150	0.2150	0.1910	0.1910	0.1910	0.2115	0.2115	0.2115
Minimum Lower Calorific Value in kJ/kg	41,100	41,100		40,436	40,436	40,436	41,100	41,100	41,100	42,700	42,700	42,700	40,585	40,585	40,585
Base fuel price in US\$/MT as provided in the RFP	465.00	465.00		465.00	465.00	465.00	465.00	465.00	465.00	465.00	465.00	465.00	465.00	465.00	465.00
Exchange rate of September 2009 for Euro/US dollar used in the evaluation	1.455	1.455		1.455	1.455	1.455	1.455	1.455	1.455	1.455	1.455	1.455	1.455	1.455	1.455

The Evaluation Committee recommended the award of the tender for Plant 1 at EPZ, Athi River as follows:-

Options	Bidder recommended for award	Discounted Unit Energy Cost (Euros/kWh)
A - with GOK Sovereign Guarantee	Triumph Power Generating Co. Ltd	0.1052
B- with IDA Partial Risk Guarantee	Triumph Power Generating Co. Ltd	0.1069
C - without Sovereign Guarantee or IDA PRG	Triumph Power Generating Co. Ltd	0.1085

THE TENDER COMMITTEE DECISION

The Company Tender Committee in its meeting held on 30th December, 2009 deliberated on the recommendations of the Evaluation Committee. It awarded the contracts to the bidder who was the lowest evaluated in option B.

THE REVIEW

The Request for Review was lodged on 18th January, 2010 by Energy Trading Group FZC. The Review is against the decision of the Kenya Power and Lighting Company Ltd in the matter of Request for Proposal for the Design, Financing, Supply, Erection, Commissioning, Operation and Maintenance of Three 60 – 80 MW Power Plants – Plant 1 Athi River.

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

- i) The Procuring Entity's decision as communicated to the Applicant in the letter dated 6th January 2010 be set aside and nullified.

- ii) The Tender No. KPLC1/9AD/PT/16/09-10 in respect of Plant 1, Athi River, be awarded to the Applicant being the lowest properly evaluated bidder in conformity with the provisions of the Public Procurement and Disposal Act, 2005, the Public Procurement and Disposal Regulations, 2006, and in conformity with evaluation criteria set out in the tender documents.
- iii) In the alternative and without prejudice to prayer 2 above, the Procuring Entity do properly and correctly evaluate the bids submitted by all the bidders in Tender No. KPLC1/9AD/PT/16/09-10 in conformity with the provisions of the Public Procurement and Disposal Act, 2005, the Public Procurement and Disposal Regulations, 2006, and in conformity with objective evaluation criteria.
- iv) The Procuring Entity be ordered to pay the costs of and incidental to these proceedings.
- v) Such other relief as the Board may deem just and expedient.

At the hearing the Applicant was represented by Mr. Anthony Njogu, Advocate, while the Procuring Entity was represented by Mr. C. N. Kihara, Advocate. The interested candidates present included Triumph Power and Athi River Power Company Ltd represented by Mr. Kamau Karori, Advocate and Mr. Joel N. Weru, Advocate respectively.

GROUND 1, 2, and 4 Breach of Sections 2, 31, 34, 82, & 85(2)

These grounds have been consolidated as they raise similar issues on the evaluation of the bids.

The Applicant submitted that the criteria used for the financial evaluation was not objective, did not allow for a competitive and fair comparison of bids. It further submitted that paragraph 3.3.2 of the Instructions to Bidders (ITB) provided that the

Power plants were to be fired by Heavy Fuel Oil (HFO) and bidders were to submit information to confirm the grade, specification, characteristics, sourcing arrangement and arrangements for the maintenance of the Security Stock. In this regard, it argued that it was the bidder's responsibility to determine the heavy fuel oil that they were going to use. It informed the Board that one of the Bidders namely M/s Transcentury had sought clarification from the Procuring Entity on the minimum calorific value of fuel acceptable to the Procuring Entity for HFO to be used in the plant(s). It stated that the Procuring Entity answered that the bidder was to indicate its on value based on its survey of what was available in the market. It further stated that it was clear that each bidder was to source for fuel with its own unique characteristics based on its bid.

The Applicant submitted that the Procuring Entity proceeded to fix one specific price in evaluating the proposals, despite informing the bidders to not only source for its own heavy fuel oil but also confirm its characteristics. It referred the Board to Clause 2.7.9.4 of the ITB which provides that "Base Fuel Price" (expressed in US\$/MT), as deemed to be US\$465/MT. It stated that the Base fuel Price was one of the factors to be considered in determining the energy cost in relation to the financial evaluation under section 2.11.3.2 of the ITB. It argued that the use of the formulae for the financial evaluation was flawed. It submitted that the Procuring Entity was aware of the relation between the cost of heavy fuel oil and the calorific value of oil that bidders were proposing to use in the plant provided as follows:-

- (a) Section 2.7.9.4 of the ITB which deemed the Base Fuel Price fixed US\$465/MT contained a note providing that the actual supply of fuel and fuel prices would be determined by the actual fuel supplied under the fuel supply agreement actually supplied by the successful bidder.
- (b) Section 5.4 of Annex 1 provided the format for the proposals and stated that the base fuel price was fixed. Further, each bidder was to propose a specific grade of HFO with its own calorific value and price.

(c) The draft Power Purchase Agreement (PPA) provisions that dealt with the calculation of fuel charges included the calorific value of fuel to be used in determination of the fuel charges for operation of the power plants and the actual price used in determining fuel charge rate.

The Applicant further submitted that the Procuring Entity had accepted the Successful Bidder's tender which provided for gas oil and not heavy fuel oil as provided in the tender documents. It stated that this issue was addressed in the Affidavit sworn by Mr. Varinder Puri for the Applicant according to which, the price quoted by the Successful Bidder would result in a price difference of 43%. It further stated that it had obtained written information from two independent sources, Geochem and Fal oil company ltd to the effect that oil of calorific value of 42700kj/kg was not heavy fuel oil. It submitted that Sections 31 and 34 of the Act set out the qualifications for award of a tender to a bidder. It submitted that at pages 128 and 130 of the reply affidavit of the Successful Bidder, its suppliers proposed to supply fuel of 42,000 kj/kg and not the minimum calorific value of 42,700 which was the Successful bidder's quotation.

In conclusion, the Applicant submitted that the Procuring Entity was in breach of Section 2 of the Act. It stated that the objectives of the Act were to maximize the economy and efficiency in procurement and to ensure fair competition between all bidders who had submitted their proposals. It argued that there was no a like for like comparison as different bidders were offering fuel with different characteristics and oil which was priced differently. In this regard, it argued that bids were not compared in an objective manner since the difference in cost between the fuels was not factored in.

In response, the Procuring Entity submitted that the Request for Review was filed out of time in regard to the complaint that fixing of the pricing at US\$ 465/MT which was used as an evaluation criteria was flawed.

The Procuring Entity stated that paragraph 1.1 of the Expression of Interest, contained the summary on the project entitled “The Medium Speed Diesel IPP Project”. It further stated that the calorific value was defined at paragraph 8 of its affidavit as “the amount of energy to be produced per unit of Fuel used” and admitted that oil has various characteristics and properties.

Eng. Raphael Mwaura on behalf of the Procuring Entity informed the Board that the Procuring Entity was procuring Medium Speed Diesel Engines fired by Heavy Fuel Oil. It also stated that heavy fuel oil is different from diesel and averred that the Successful Bidder provided heavy fuel oil and not gas oil (diesel) as argued by the Applicant.

The Procuring Entity stated that Section 31(3) of the Act provides as follows:

“The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents or the request for proposals or quotations or, if a procedure is used to pre-qualify persons, in the documents used in that procedure”.

It further stated that Section 31(4) provides as follows:

“The procuring entity shall determine whether a person is qualified and that determination shall be done using the criteria and requirements set out in the documents or requests described in subsection (3)”.

The Procuring Entity argued that the cited Sections of the Act had not been breached as there was no evidence in the evaluation reports. It further argued that the Applicant had not demonstrated any omission or variation of the criteria that was set out in the Tender Documents.

The Procuring Entity submitted that there was no evidence to support the allegation that the Successful Bidder provided for gas oil rather than HFO.

The Procuring Entity further submitted that the criteria for the financial evaluation was to be based on the comparison of the unit cost of energy. It stated that under Clause 2.11.3.2 of ITB, the evaluation comprised of three parameters, namely; Base capacity charge rate, Base energy charge rate and Specific fuel consumption which were used to calculate the Base Fuel charge rate.

It argued that for the Applicant to succeed in its Request for Review, it ought to demonstrate that the criteria as set out in the Tender Document was not applied. It further argued that the specific fuel consumption was multiplied by the fixed fuel price of US\$465/MT and an Annual Load Factor of 65% as capacity utilisation of the plant.

The Procuring Entity submitted that the Applicant was wrong in its assessment that the Successful Bidders' fuel cost was 43% above the Applicants Bid. It further submitted that the said cost was based on the assumption that the bid by the Successful Bidder was on gas oil. It questioned the letter from Fal Oil Company Ltd on the ground that though the letter was dated 10th of December, 2009, the Applicant had not exhibited the letter dated 9th December, 2009 to which Fal Oil Company was responding to. As regards the letter from Geo-Chem dated 13th January, 2010, it argued that there was no evidence before the Board as to the expertise of the author of the said letter.

The Procuring Entity denied that the Applicant would have been the lowest evaluated bidder if the Applicant would have been disqualified.

In regard to breach of section 2 of the Act, the Procuring Entity submitted that the Applicant had not cited any objectives of the Act that were breached. It further submitted that the procurement was advertised properly and that the Applicant did not state that it was misled by the evaluation criteria.

The Successful Candidate, M/s Triumph Power Generation Company supported the submissions by the Procuring Entity. It stated that the letter dated 10th of December, 2009 from Fal Oil Company Ltd made reference to the specific calorific value that was submitted by it. It argued that by that date, the tenders had not been opened and therefore the information regarding its bid was not within the knowledge of the Applicant. It argued that the reason why the letter was not annexed to the affidavit was that the Applicant did not want the Board to know the contents of the said letter.

With regard to the letter from Geo Chem, the Successful Bidder stated that this was an estimate of a standard and the veracity could not be guaranteed and argued that its bid was responsive.

An Interested Candidate (Athi River Power) supported the submissions of the Applicant and stated that the tender evaluation was flawed.

The Board has carefully considered the submissions by parties and the documents that were presented.

The Board notes that three issues arise for determination namely:-

- (i) Whether the formulae in the tender documents for the financial evaluation was flawed.
- (ii) Whether the Procuring Entity considered bids from a tenderer who did not meet specific requirements of the Request for Proposal and in particular whether the Successful Bidder provided for Gas Oil instead of the Heavy Fuel Oil that was stipulated and

- (iii) Whether the actions of the Procuring Entity were contrary to the objectives set out in Section 2 of the Public Procurement and Disposal Act 2005 (hereafter referred to as the Acts).

The Board notes that this tender was for design, financing, supply, erection, commissioning, operation and maintenance of three new 60-80- MW Medium speed Diesel electricity generating plants on a build own and operate arrangement. According to this arrangement, the Successful Bidder was to become a signatory to Power Purchase agreements obliging it to design, finance, supply, erect, commission operate and maintain plants and to sell the electricity generated by the power plants to the Procuring Entity

It is clear from the submission of the Applicant that save for the formula used in the evaluation there is no dispute at all on all the other technical details of the Tender Documents.

It is also clear that the main issue raised by the Applicant related to the formula for financial evaluation which is set out in Clause 2.11.3.2 of the tender documents. The said formula provided as follows:

$$EC = \frac{CCR_b \times 100 + ECR_b + FCR_b}{8760 \times ALF}$$

Where:

EC = Energy cost (US\$/kWh) based on prices bid computed at an Annual load factor of 65% as indicated above;

CCR_b = Base Capacity Charge Rate (US\$/kW/year) bid as defined under Paragraph 2.7.9 of this RFP, (including the escalable and non –escalable components) as at October 2009, based on column A in paragraph 5 of Annex 1.

ALF = Annual Load Factor as a percentage (65%)

$ECR_b =$ Base Energy Charge Rate (US\$/kWh) Bid as defined under Paragraph 2.7.9 of this RFP, as at October 2009, based on Column A in paragraph 5 of Annex 1

$FCR_b =$ Base Fuel Charge Rate (US\$/kWh) bid as defined under Paragraph 2.7.9 of this RFP, as at October 2009, as required under paragraph 5 of Annex 1.”

The Board also notes clause 2.7.9.4 of the instructions to Tenderers defined the base fuel change rate as follows:-

“For the purpose of evaluating the bids the Base Fuel Charge Rate shall be defined as follows:

$$FCR_b = SFC \times FP_b / 1000$$

Where:

$FCR_b =$ Base Fuel Charge Rate (expressed in US\$/kWh)

$SFC =$ Specific Fuel Consumption of the plant at site conditions (expressed in kg/kWh) on a lower calorific value and Net Electrical Output basis.

$FP_b =$ Base Fuel Price (expressed in US\$/MT), deemed to be US\$465/MT

Note: Actual fuel prices applicable in the Agreed PPA will be in accordance with the Fuel Supply Agreement to be entered into between the Selected Bidder 9s) and the fuel supplier(s) following the procurement arrangement described in the Draft PPA(s).

Bidders are expected to provide price/tariff proposals on the above assumptions. The detailed position regarding taxes is specified in Annex 1."

It is not in dispute that this is the formula that was applied by the Procuring Entity in the financial evaluation. The financial evaluation was based on a comparison of the unit cost of energy under a specific operating regime for the concerned power plant and to which the evaluation comprised of the following parameters:-

- (i) The bidders capacity charge in US\$ per each KW.
- (ii) The bidders base energy charge; the Procuring Entity was to pay in US\$ for the energy according to the units of energy sold to it; and
- (iii) The Base charge.

The Board notes that the Applicant argued that the use of a fuel base rate of US\$465/MT by the Procuring Entity was wrong as the Bidders were sourcing for its own fuel and that the calorific value of fuel provided by the bidders were different. The Board further notes that the Procuring Entity submitted that the fixed Base fuel price at US\$465/MT was the prevailing market price for HFO delivered in Nairobi and since the project had a life span of 20 years, it was not possible to have a fixed price in the Power Purchase Agreement. It stated that the fixed base fuel price of USD 465/MT was provided in the tender document to enable a fair comparison of the various tenders.

The Board also notes that the formula for evaluation which was clearly set out in the tender document was applied uniformly in the evaluation of all the bids. The Board has noted the Procuring Entity received a total of seventy four questions by the various bidders before the closing of the tender. The only question raised in regard to the formula as set out in Clause 2.11.3.2. was in regard to the Annual Load Factor (ALF) which the Procuring Entity said was correct. The Board notes that there was no query

at all in regard to the Base Fuel Price of US\$ 465/MT which was stipulated in the tender documents.

It is noteworthy that the Applicant did not at any time seek any clarification on the formula either at the pre-bid meeting or by writing to the Procuring Entity.

The Board notes that the price of fuel is not a constant factor and therefore it was fair to include a Base Fuel price in the tender document for purposes of uniform evaluation of the all the tenders. The Act provides in Section 81 (2) (e) that the Procuring Entity shall set out in the Request for Proposal the procedures and criteria to be used to evaluate and compare the technical and financial proposals. Upon examining the financial evaluation report, the Board notes that the Procuring Entity did not use any criterion which was not stipulated in the tender documents. The Board therefore finds that the allegations of the Applicant that the formula in the tender document was flawed is an afterthought.

On the second issue as to whether the Successful Bidder quoted Gas Oil or Heavy Duty Oil in its tender, the Board notes that the Applicant relied on two letters from Fal oil company dated 10th December 2009 and Geo-Chem dated 13th January 2010. On its part, the Successful Bidder relied on letters dated 21st January, 2010 from Bin Johar General Trading from Reyoung General Trading dated 25th January 2010. The Board notes that the two parties did not produce copies of the letters which they had written seeking for information. To enable the Board give weight to the said letters, the respective parties should have produced the letters that generated the answers. In any event, as the Board has stated severally, tenders are evaluated on the documents that comprise the tender and those letters were not part of the tender document.

The Board further finds that there is no evidence to support the allegation that the Successful Bidder quoted Gas Oil in their tender.

As regards the issue as to whether the Procuring Entity has contravened Section 2 of the Act on the objectives, the Board notes that this was a Request for Proposal which clearly provided the criteria for evaluation. The Board finds that there is no evidence to support the allegation that the Procuring Entity contravened the provisions of Section 2 of the Act.

Taking all the above matters into consideration these grounds of appeal fails

Ground 3 - Breach of Section 45(3)

The Applicant submitted that the procuring Entity refused to provide it with information on the evaluation pursuant to section 45(3) and (5) of the Act. It further submitted that it had requested for a copy of the procurement proceedings pursuant to section 45(3) and 45(5) of the act .It argued that the Procuring Entity refused to provide it with the procurement records.

In response, the Procuring Entity stated that the letter by the Applicant dated 11th Jan.2010 was general and therefore it could not act on it.

The Board notes that in the letter dated 11th January, 2010 by the Applicant requested to be supplied with copies of the procurement records in accordance with Section 45(3) and (5) of the Act.

The Board finds that Section 45 (3) is only applicable after contract has been awarded or the proceedings have been terminated.

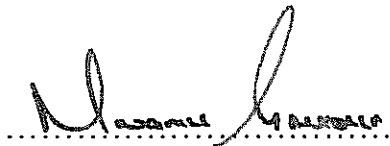
The Board finds that bidders are only entitled to a summary of the evaluation as provided in Section 44(3) of the Act and not all the procurement records as requested by the Applicant. The Board notes that Section 44(3) and 45(5) of the Act do not provide the period within which the summary should be provided. However, the

Board has stated in the past that such summary should be provided within a reasonable period.

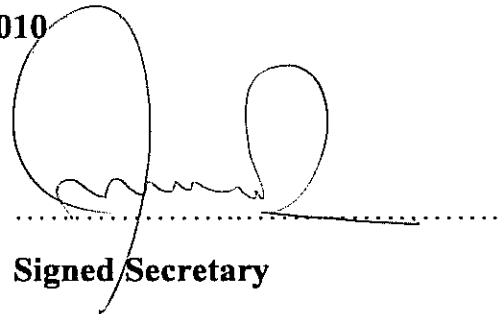
Taking all the above matters to be considered this Request for Review fails and is hereby dismissed.

The procurement process may proceed.

Dated at Nairobi on this 16th day of February 2010



Signed Chairman



Signed Secretary