

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 25/2011 OF 24TH JUNE, 2011

BETWEEN

**CONSORTIUM OF MITSUBISHI HEAVY INDUSTRIES LTD &
MITSUBISHI CORPORATION.....APPLICANT**

AND

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

Review against the decision of the Kenya Electricity Generating Co. Ltd in the matter of Tender No. ICB KGN/OLKIV and KGN1 for Design, Supply and installation of the Olkaria IV and Olkaria I Additional Units 4 & 5 Geothermal Power Project.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Akich Okola	-	Member
Ms. Judith A. Guserwa	-	Member
Mr. Sospeter Kioko	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mrs. P. K. Ouma - Holding Brief For Secretary
Mr. N. M. Soita - Secretariat
Ms. S. Miano - Secretariat

PRESENT BY INVITATION

Applicant, Mitsubishi Heavy Industries Ltd & Mitsubishi Corporation.

Mr. Anthony Njogu - Advocate
Mr. Desmond Odhiambo - Advocate
Mr. George Muchiri - Legal Student
Mr. Riysu Kaneko - General Manager, Nairobi
Mr. Yuichiro Sakasuchi - Manager
Mr. Shoyiro Saito - Manager
Mr. Tsuroshi Suzuki - Manager
Mr. Hideshi Kamamoto - Manager
Mr. Makoto Hoshikana - Manager
Mr. R. Mwangi - Manager

Procuring Entity, Kenya Electricity Generating Company Ltd.

Mr. Kiragu Kimani - Advocate
Ms. Michi Kirimi - Advocate
Ms. Emily Njiru - Advocate
Mr. Thomas Louis - Advocate
Ms. Monah Gichuyia - Advocate
Ms. Beatrice Koske - Chief Legal Officer
Mr. Alfred Useko - Legal Officer
Ms. Jacinta Charaggu - Legal Officer
Mr. Steve Coopek - Engineer

Mr. Peter Cunningham	-	Commercial Manager
Mr. David Kagiri	-	Project Manager
Mr. Patrick Kimemia	-	Supplies Chain Management
Mr. Isaac Mano	-	CPMO

Interested Candidates

Mr. George Oraro	-	Advocate, Hyundai Engineering Company Ltd & Toyota Tsusho
Mr. Walter Amoko	-	Advocate, Hyundai Engineering Company Ltd & Toyota Tsusho
Mr. C.H. Ha	-	Director, Hyundai Engineering Company Ltd & Toyota Tsusho
Mr. T. Hirota	-	Group Leader, Hyundai Engineering Company Ltd & Toyota Tsusho
Mr. M. Savasaki	-	Project General Manager, Hyundai Engineering Company Ltd & Toyota Tsusho
Mr. D. J. Kim	-	Deputy General Manager, Hyundai Engineering Company Ltd & Toyota Tsusho
Mr. T. Miyamoto	-	Assistant General Manager, Hyundai Engineering Company Ltd & Toyota Tsusho
Mr. M. Sugimura	-	Manager, Hyundai Engineering Company Ltd & Toyota Tsusho
Mr. Joseph Kinyua	-	Manager, Hyundai Engineering Company Ltd & Toyota Tsusho
Mr. Zul Alibhai	-	Advocate Marubeni Corporation
Mr. Amol Hannington	-	Advocate, Marubeni Corporation
Mr. Nadeem Anjarwalla	-	Advocate, Marubeni Corporation
Mr. H Ikegai	-	General Manager, Nairobi Marubeni

		Corporation
Mr. S. Yamashita	-	Deputy General Manager, Marubeni Corporation
Mr. J Oburu	-	Manager, Marubeni Corporation
Mr. G.N. Githu	-	Manager Iberdrola & Alstom
Mr. Al Gonzalez	-	Manager, Iberdrola & Alstom

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 OF AWARD

Advertisement

The General Procurement Notice was issued on 27th April 2010 while the Specific Procurement Notice for Olkaria I Additional Units 4 & 5 Geothermal Power Plant EPC (Contract B.1) and Olkaria IV Geothermal Power Plant EPC (Contract B.2) were advertised in the Daily Nation Newspaper of 8th June 2010 and East African of 14th June 2010.

Closing/Opening:

The closing date of Bid submission for International Competitive Bidding (ICB) for the above contracts was on 24th February 2011. The following four bidders responded:

1. Marubeni Corporation
2. Mitsubishi Heavy Industries Ltd & Mitsubishi Corporation Consortium
3. Consortium of Iberdrola Ingeniera y Construccion & Alstom (IIC&A)

4. Consortium of Hyundai Engineering Company Ltd & Toyota Tsusho Corporation.

The four bidders were issued with bidding documents on 3rd November 2010.

EVALUATION

The bids were evaluated by a Committee consisting of the Procuring Entity's Technical Consultants M/s Sinclair Knight Merz (SKM) specialists who were responsible for the preparation of the Bid Documents, other members of the SKM Project team and key representatives from KenGen.

The evaluation and comparison of bids followed the sequence set out in the World Bank Evaluation Guide which was considered in five parts as follows:

1. Identification, Bidding process and Bid Submission
2. Bid Opening, Validity and Methodology
3. Preliminary examination and Determination of Substantial Responsiveness
4. Detailed Examination of Bids
5. Determination of award

Preliminary Examination and Determination of Substantial Responsiveness

Preliminary examination was undertaken to determine whether each bid was complete, substantially responsive and acceptable for detailed evaluation. This stage addressed Bid verification, Eligibility, Bid security, Completeness of Bid and Substantial Responsiveness as provided in the Bid documents. A summary of the results of this evaluation stage are as provided in the table below:

Bidder (a)	Verification (b)	Eligibility (c)	Bid security (d)	Completeness of Bid (e)	Substantial Responsiveness (f)	Acceptance for Detailed Examination
Hyundai Engineering Limited & Toyota Tsusho Corporation (HEC&TTC)	Yes	Yes	Yes	Yes	Yes	Yes
Iberdrola IC and Alstom (IIC&A)	No	No	Yes	No	No	No
Marubeni Corporation (MaC)	Yes	Yes	Yes	Yes	Yes	Yes
Mitsubishi Heavy Industries Limited and Mitsubishi Corporation (MHI&MiC)	Yes	Yes	Yes	Yes	Yes	Yes

One bidder, M/s Iberdrola IC and Alstom was disqualified at this stage for failure to meet all verification, Eligibility, Completeness of Bid and Substantial Responsiveness requirements. The remaining three firms namely; Consortium of Hyundai Engineering Co. Ltd & Toyota Tsusho, Marubeni Corporation and Mitsubishi Heavy Industries Ltd & Mitsubishi Corporation Consortium proceeded to Detailed Evaluation.

An arithmetic check was undertaken on each of the bids. An unconditional discount was offered by Marubeni Corporation and this discount was incorporated in the bid prices. The other two bidders gave a bid price with no further unconditional discounts.

Detailed (Technical) Evaluation

At this stage, bidders were evaluated on their plant proposal. All the three bids submitted by Consortium of Hyundai Engineering Co. Limited & Toyota Tsusho Corporation; Marubeni Corporation; and Mitsubishi Heavy Industries limited & Mitsubishi Corporation Consortium were considered technically compliant with the Bid document requirements apart from non material deviations.

The Consortium of Hyundai Engineering Co. Limited & Toyota Tsusho Corporation included a list of 56 technical clarifications and deviations for Contract B.1 and 57 for Contract B.2 which were evaluated explicitly in addition to the overall technical evaluation of the bid. A large number of non material deviations were recorded, however, many of them are of a very minor nature as can be recognized by the fact that the overall cost adjustment applied for the technical non material deviations is 1,807,000 USD (including a small amount for additional costs that may be incurred by the Employer) equivalent to 0.9 percent of the corrected bid price of 199,079,628 USD for Contract B.1 and 191,393,659 USD for Contract B.2. The cost adjustments were included in the economic evaluation.

Marubeni Corporation included a list of 379 deviations and clarifications for Contract B.1 and 363 for contract B.2 on the technical aspect which were evaluated explicitly in addition to the overall technical evaluation of the Bid. A large number of non material deviations associated with the bid were recorded. However, many of them are of a very minor nature as can be recognized by the fact that the overall cost adjustment applied for technical non material deviations is 1,394,000 USD representing 0.5 % of the corrected bid price of 241,434,545 USD for Contract B.1 and 1,254,000 USD representing 0.5% of the corrected bid price of 237,861,281 USD for contract B.2. The cost adjustments were included in the economic evaluation.

Mitsubishi Heavy Industries Limited & Mitsubishi Corporation Consortium included a schedule of 270 declared exceptions and clarifications for Contract B.1 and 268 for Contract B.2 which were evaluated explicitly in addition to the overall technical evaluation of the bid. A large number of non material

deviations were recorded associated with the bid. However, many of them are of a very minor nature as can be recognized by the fact that the overall cost adjustment applied for technical non material deviations is 1,394,000 USD representing 0.5% of the corrected bid price of 241,434,545 USD for Contract B.2 while though a large number of non material deviations associated with the bid for Contract B.1 were of a minor nature, four items account for 5,200,000 USD which represents more than half of the total cost adjustment applied for technical non material deviations (8,285,200 USD). The cost adjustment for technical non material deviations represents approximately 3.9% of the corrected bid price of 214,046,504 USD. The cost adjustments were included in the economic evaluation.

The detailed technical evaluation of the bids confirmed that each of the bids are considered to be technically compliant with the Bid Document requirements other than for a number of non material deviations. Price adjustments were estimated for deviations as appropriate and these price adjustments have been included in the economic evaluation.

Two of the bids submitted by Consortium of Hyundai Engineering Co. Limited & Toyota Tsusho Corporation and Marubeni Corporation have cost adjustments of less than one percent of the corrected bid price but Consortium of Mitsubishi Heavy Industries Limited & Mitsubishi Corporation had a price adjustment representing approximately four percent of the corrected bid price.

Economic evaluation of the responsive bids confirmed that the lowest evaluated bid was submitted by the consortium of Hyundai Engineering Co. Limited & Toyota Tsusho Corporation.

RECOMMENDATION

The Bid Evaluation Committee recommended that the Consortium of Hyundai Engineering Co. Limited & Toyota Tsusho Corporation be invited to enter negotiations expected to lead to the concurrent awards of a Contract for the Olkaria I Additional Units 4 & 5 Geothermal Power Plant Contract and Contract for the Olkaria IV Geothermal Power Plant EPC Contract. The expected contract price for B.1 Contract would be 195,209,230 USD equivalent after cross discount and 187,753,840 USD equivalent for Contract B.2. These contract prices compare favourably to the Engineer's estimate of 217,140, 000 USD equivalent indicated in the preliminary design report.

THE REVIEW

The Request for Review was lodged by the Consortium of Mitsubishi Heavy Industries Ltd & Mitsubishi Corporation on 24th June 2011 in the matter of Tender No. ICB KGN/OLKIV and KGN1 for Design, Supply and Installation of the Olkaria IV and Olkaria I Additional Units 4 & 5 Geothermal Power Project. The Applicant was represented by Mr. Anthony Njogu, Advocate while the Procuring Entity was represented by Mr. Kiragu Kimani, Advocate. The Interested Candidates Toyota Hyundai and Marubeni Corporation were represented by Mr. George Oraro, Advocate and Mr. Zul Alibhai, Advocate, Respectively.

The Applicant raised two grounds of review as follows:

1. *"The Procuring Entity is carrying out its evaluation and would appear to be considering a non-responsive bid that is not in accordance with the specific requirements of the bidding documents issued on 3rd November 2010. As such, the Procuring Entity has acted in breach of sections 62, 64*

and 66 of the Public Procurement and Disposal Act, 2005, Regulations 47 and 48 of the Public Procurement and Disposal regulations, 2006 and the Instructions To Bidders at Clause 28, 30 and 35.

- 2. The Procuring Entity is conducting the procurement process in a manner that is contrary to the specific objectives of the Act as stated at Section 2 thereof, as well as in the Instructions to Bidders. The Applicants are therefore justifiably apprehensive that they will be denied the opportunity to fairly compete in a manner contrary to the provisions of the Public Procurement and Disposal Act and this has compromised the integrity and fairness of these tender proceedings."*

The Applicant sought the following orders:

- 1. "The technical aspects of the Applicants' complaint be reviewed and examined by the Board with the assistance of independent technical experts, as the Board is allowed to appoint under the provisions of Regulation 85 of the Regulations.*
- 2. That the Board do examine and evaluate the evaluation process in these procurement proceedings to confirm the fairness and objectivity of the process and in particular to review the following:*
 - (a) All original and copy bids received by the Procuring Entity and the clarifications received from all the bidders.*
 - (b) All records and minutes documenting the technical evaluation process undertaken by the Procuring Entity and in particular the technical evaluation report and any minutes of the technical evaluation committee and the tender committee adopting the same.*
 - (c) All correspondence received by the Procuring Entity in relation to the procurement process and in particular relating to complaints about the*

guaranteed output, steam rate and the heat balance figures cited by the bidders.

(d) Any correspondence between the Procuring entity and the project financiers in relation to the evaluation process.

(e) The Bid Forms submitted by the bidders and in particular, the technical schedules from Section IV, Part 04 and Part 05 of the Bid Documents;

(i) Section 01 - Steam Turbine

(ii) Section 25 - Performance Data

(iii) The heat and mass balance diagrams attached to the Performance data schedules at section 25.

(iv) The Functional Guarantees set out in Form FUNC, under Section IV Part 05 of the Bid Documents.

3. The Procuring Entity be directed award the tender to the lowest evaluated bidder from the bids submitted by all the compliant bidders in ICB No. KGN/OLKIADDITUNITS AND KGN/OLKIV 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.

4. The Procuring Entity be ordered to pay the costs of and incidental to these proceedings.

5. Such other relief as this Honourable Board may deem just and expedient."

At the commencement of the hearing the Procuring Entity and the Interested Party, Toyota Hyundai raised the following Preliminary Objections;

PRELIMINARY OBJECTION BY PROCURING ENTITY

The Procuring Entity lodged a Preliminary Objection on 29th June, 2011 based on the following grounds:

1. *"The Board has no jurisdiction to entertain the application filed herein as it has been filed out of time.*
2. *Without prejudice to 1 above, the request for review is frivolous and vexatious and made solely for the purpose of delaying the procurement proceedings.*
3. *The Board has no jurisdiction to take over the role of an evaluation committee with respect to a tender that has not been concluded.*
4. *The Board has no jurisdiction to grant any orders that are contrary to the provisions of the Public Procurement and Disposal Act (hereinafter the Act) and more particularly section 44 thereof.*
5. *The request for review is an attempt to unduly influence or exert pressure on the respondent to take a particular action which favours or tends to favour the applicant and is contrary to section 135(1)(d) of the Act. No request for review can be founded on acts that may be of a criminal nature.*
6. *The request does not meet the requirements of Section 93 of the Act in that, it does not identify any breached of a duty imposed on the procuring entity.*
7. *The applicant has in breach of clause 27.2 of the instruction to bidders attempted to influence the evaluation."*

PRELIMINARY OBJECTION BY INTERESTED CANDIDATE

The consortium of Hyundai Engineering Co. Ltd and Toyota Tsusho Corporation lodged a Preliminary Objection on the Request for Review on 11th July, 2011 based on the following grounds:

- a) *"The Request for Review is premature and this Honourable Board has no Jurisdiction to entertain it as the Applicant is unable to identify and/or rely upon any act and/or omission by the Procuring Entity which would entitle it (the Applicant) to invoke this Honourable Board's jurisdiction under section 93 of the Public Procurement and Disposal Act, 2005 ("the Act").*
- b) *The Request for Review is an attempt by the Applicant to influence the evaluation and comparison on the tender in breach of the provisions of section 38 of the Act and Clause 27.2 of the Tender.*
- c) *The reliefs sought require this Honourable Board to constitute itself as a Tender Evaluation Committee contrary to the Act and the Regulations.*
- d) *The allegation by the Applicant at ground 1 of the Review cannot be made without access to confidential information in breach of section 44 of the Act and section 27.1 of the tender and would therefore be unlawful. It is clear from the documents annexed to the statement that the Applicant obtained confidential information relating to Hyundai/Toyota's bid."*

The Procuring Entity submitted that when one looks at Section 93 (2) and 95 of the Public Procurement and Disposal Act (The Act), the Board has wider powers than a court of law dealing with a civil matter. It argued that the Board has power to investigate objections raised by a party and if it concludes that the Request for Review is frivolous, it has power to dismiss the Request for Review under Section 93(2) (d).

The Procuring Entity further submitted that the entire Request for Review was filed out of time. It stated that the breaches alleged to have been committed occurred on 24th February 2011 when the tender was opened. The Procuring Entity referred the Board to letters dated 8th April, 2011, 13th April, 2011, 9th May, 2011, 10th May, 2011, 13th May, 2011, 31st May, 2011, and 14th June, 2011 which were included in the Applicants Request for Review. It stated that a casual look of the letters confirmed that the Applicant knew what was going on in the evaluation process.

The Procuring Entity argued that even if the letter dated 11th May 2011 was taken to be the date when the Applicant became aware of the breaches, the Request for Review was filed out of time. In conclusion on this issue, the Procuring Entity argued that the Board had no jurisdiction to hear the matter as the Request for Review was filed out of time.

The Procuring Entity further alleged that the grounds based on breach of Sections 2, 62, 64, and 66 and Regulations 47 and 48 are too general and do not meet the requirements of the Act. It argued that the grounds do not meet the requirements of Regulation 73 (2) (a) of the Act as they are not specific. It stated that the Applicant has engaged on a fishing expedition and what it was attempting to do was to get material information relating to the evaluation.

On the ground raised by the Applicant that the Board should have an expert, it argued that Regulation 85 gives the Board the power to invite an expert when it considers that it does not have the necessary expertise.

In conclusion, the Applicant submitted that the letters dated 8th April, 2011, 13th April, 2011, 9th May, 2011, 10th May, 2011, 13th May, 2011, 31st May, 2011, and

14th June, 2011 breached Sections 38 and 44 of the Act. Further the action of the Applicant also offends Section 134 (1) (d) of the Act. It stated that the letters demonstrated conduct that may be described as criminal and it would be contrary to public policy to allow a party to file a Request for Review based on conduct amounting to criminal nature.

Finally, the Procuring Entity submitted that the entire Request for Review was frivolous and should be dismissed.

On its part the Interested Party, Hyundai Engineering Company Ltd and Toyota Tsusho associated itself with the submission of the Procuring Entity. In addition, it submitted that the performance level, and output guarantees submitted by each bidder were read out on 24th February 2011 when the tenders were opened. It therefore argued if the Applicant was right that the performance requirement of any bidder were non-responsive, then they had an obligation to file their Request for Review within 14 days from that date.

The Interested Party also submitted that the grounds by the Applicant were not factual but speculative. It stated that the grounds expressly stated "*It would appear the procuring Entity is considering a non responsive bid*" which clearly showed that the Applicant was not stating a factual position. It argued that the Applicant quoted Sections 62, 64 and 66 and Regulations 47 and 48 together with Clauses 28, 30 and 35 of the Tender documents without giving any facts how and why those Sections and Regulations were violated. It also relied on Section 2 of the Act. It stated that Section 2 of the Act stipulates the general purpose of the Act and it had not prescribed a specific provision which was capable of being violated. It stated that the Applicant did not disclose the

reasons for the complaint as required by Regulation 73 in that it failed to give reasons of complaints and particular of the alleged breaches.

In conclusion, the Interested Party argued that the Request for Review had not invoked the jurisdiction of the Board. It cited the Board's ruling in Application *No. 28/2008 between Sanitam Services (EA) Ltd and Kenya Polytechnic University College*.

In response, the Applicant relied on the famous case of Mukisa Biscuits and stated that a Preliminary Objection should only be considered if the facts are correct and agreed upon.

On the issue whether the Request for Review was filed out of time, the Applicant stated that time for purposes of Regulations 73 (2) (c) (i) starts to run when a bidder becomes aware of the breach. It stated that as a bidder it had no information on how the process of evaluation was conducted as it could only get such information after the award. It stated that it only became aware that the award had been made when it received an email on 11th June 2011 from one of its subcontractors, H. Young. It stated that it filed the Request for Review on 24th June 2011, which was within the stipulated 14 days. It also argued that the alleged breaches were still ongoing and therefore the Request for Review was filed within time.

On the issue that it had not identified the breaches that were committed, the Applicant stated that under Section 93 of the Act, it was only required to state the basis of the complaint, which it had done. It stated that it had raised many issues of fact and was only after a full hearing that those issues could be determined.

On the issue that the letters it had written to the Procuring Entity amounted to an attempt to influence the evaluation, the Applicant stated that Clause 27.3 of the Tender Document allowed such communication. It also stated that such communication was allowed under Section 44 (2) of the Act.

In conclusion, the Applicant stated that all the issues raised by the Procuring Entity and the interested Party were not matters that could be argued as a Preliminary Objection under Section 93 (2) of the Act.

The other Interested Party, Marubeni Corporation, stated that the real issue raised in the Preliminary Objection was whether the Request for Review was frivolous. It stated that the allegation that the Request for Review was frivolous could be true or not true. Therefore, before the Board could make such a determination it ought to hear the parties on merits.

The Interested Party urged the Board to consider the overriding objectives of the Act as set out in Section 2 and not to determine the matter on technicalities. In conclusion, the Interested Party stated that the Request for Review raised pertinent issues and urged the Board to dismiss the Preliminary Objection and hear the Request for Review on merits.

The Board has considered the submission by the parties and considered the documents that were presented before it.

The issues that arise for determination are as follows;

- i) Whether the Request for Review is frivolous and should therefore be dismissed under Section 93 (2) (d) and Section 95 of the Act.

- ii) Whether the Request for Review was filed out of time contrary to Regulation 73 (2) (c)(i).
- iii) Whether the Applicant has breached Sections 38, 44 and 135 of the Act by engaging in conduct that can be construed to be an attempt to influence the evaluation process

On the first issue on frivolity, the Board notes that Sections 93 (2) (d) and 95 provide as follows;

“93 (2) The following matters shall not be subject to the review under subsection (1)-

(a).....

(b).....

(c).....

(d) where an appeal is frivolous.

Section 95

The Review Board may dismiss a request for a review if the Review Board is of the opinion that the request is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or the procurement.”

As can be noted Section 93 (2) (d) of the Act provides that the Board has no jurisdiction to hear and determine an appeal which is frivolous. Section 95 of

the Act provide that the Board may dismiss the Request for Review if in its opinion the Request is frivolous, vexatious or was made solely for the purpose of delaying the procurement proceedings or the procurement.

The Board has noted that a number of points were raised by the parties as follows;

- (i) Whether the grounds of review are mere allegations that are not backed by any facts or particulars.
- (ii) Whether the Applicant has cited breach of Section 2, 62, 64, 66 and Regulations 47 and 48 without giving any particulars of the alleged breaches.
- (iii) Whether the entire Request for Review has any substance or is based on speculation and this amounts to an exercise of fishing for evidence.
- (iv) whether the Request for Review was filed out of time

Having considered the submissions by the parties, the Board notes that the submissions by the Procuring Entity and the Interested Candidate Hyundai Engineering Company Ltd and Toyota Tsusho raises several factual issues. The submissions on those factual issues could be true or not true. To make a conclusive determination on those issues it is necessary that all the issues be argued on merit. After hearing all the parties the Board will be in a position to make a reasoned decision.

In view of the above the Board holds that the issues raised by the Procuring Entity and Interested Candidate Hyundai Engineering Company Ltd and Toyota Tsusho on issue of frivolity cannot be decided as a preliminary issue.

On the issues of whether the Request for Review was filed out of time, the Board notes that Regulation 73 (2) (c) (i) provides as follows;

73) The request referred to in paragraph (1) shall-

(a);

(b);

(c) be made within fourteen days of-

(i) the occurrence of the breach complained of where the request is made before the making of an award; or

(ii)....."

It is clear that under this Regulation a party who wishes to file a Request for Review before an award, must do so within 14 days from the date of the breach.

The Board has noted that the Applicant wrote numerous letters to Procuring Entity after the tender opening. The said letters were written on several dates as follows; 8th April, 2011, 13th April, 2011, 9th May, 2011, 10th May, 2011, 13th May, 2011, 31st May, 2011, and 14th June, 2011

Undoubtedly, the said letters raise a lot of issues in regard to the evaluation process. However, before the Board can make a determination, as to whether the said letters disclose the breaches that were committed, it is necessary to allow the parties to ventilate their arguments. It would be

unfair for the Board to shut out the Applicant at this stage without giving it an opportunity to explain the basis and the reasons for writing those letters. In the premises this limb of the Preliminary Objection also fails.

On the question whether the Applicant has breached Sections 38, 44 and 135 of the Act, the Board notes that the said provisions provides as follows:

Section 38

"38.(1) After the deadline for the submission of tenders, proposals or quotations –

(a) no person who submitted a tender, proposal or quotation shall make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders, proposals or quotations; and

(b) no person who is not officially involved in the evaluation and comparison of tenders, proposals or quotations shall attempt, in any way, to influence that evaluation and comparison.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable on conviction –

(a) if the person is an individual, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding three years or to both; or

(b) if the person is a corporation, to a fine not exceeding ten million shillings."

Section 44

'44.(1) During or after procurement proceedings, no procuring entity and no employee or agent of the procuring entity or member of a board or committee of the procuring entity shall disclose the following –

- (a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;
 - (b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests or inhibit fair competition;
 - (c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or
 - (d) The contents of tenders, proposals or quotations.
- (2) This section does not prevent the disclosure of information if any of the following apply –
- (a) the disclosure is to an employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;
 - (b) the disclosure is for the purpose of law enforcement;
 - (c) the disclosure is for the purpose of a review under Part VII or an investigation under Part VIII or as required under section 105;
 - (d) the disclosure is pursuant to a court order; or
 - (e) the disclosure is allowed under the regulations.
- (3) Notwithstanding the provisions of subsection (2) the disclosure to an applicant seeking a review under Part VII shall constitute only the summary referred to in section 45(2)(e).
- (4) Any person who contravenes the provisions of this section shall be guilty of an offence."

Section 135

"135.(1) No person shall –

- (a) Obstruct or hinder a person carrying out a duty or function under this Act or exercising a power under this Act;

- (b) Knowingly lie to or mislead a person carrying out a duty or function under this Act or exercising a power under this Act;*
- (c) Delay without justifiable cause the opening or evaluation of bids or the awarding of contract beyond the prescribed period;*
- (d) unduly influence or exert pressure on any member of a tender committee or on any employee or agent of a procuring entity to take a particular action which favours or tends to favour a particular bidder; or*
- (e) open any sealed bid, including such bids as may be submitted through the electronic system and any document required to be sealed, or divulge their contents prior to the appointed time for the public opening of the bid or documents.*
- (2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence."*

There is no doubt that the evaluation process is a confidential exercise and that any party who attempts to influence the evaluation process commits a breach of the Act. The Applicant has stated that it wrote the letters to the Procuring Entity and that Clause 27.3 expressly allowed the bidders to do so. The Board notes that the said clause state as follows;

"Notwithstanding ITB 27.2, from the time of bid opening to the time of Contract award, if any Bidder wishes to contact the Employer on any matter related to the bidding process, it should do so in writing."

The Board has to make a determination as to whether the said letters fall within the provision of Clause 27.3 of the Tender Documents.

To be able to do so it is vital that arguments be made by the parties on that issue. Again as stated before, this cannot be argued as a preliminary issue. In

the interest of justice, such an issue that would amount to a criminal activity should be argued on merit to allow the Board to make a reasoned decision.

On the issue whether the Request for Review was filed out of time, the Board notes that this revolves around the letters dated 8th April, 2011, 13th April, 2011, 9th May, 2011, 10th May, 2011, 13th May, 2011, 31st May, 2011, and 14th June, 2011 that were written to the Procuring Entity by the Applicant. As already stated, parties should make submissions on those letters to enable the Board determine the effect of those letters. It will therefore be premature for the Board to make a finding before allowing the Applicant to explain the reasons for writing those letters. Further, the Board will only be able to make a determination whether the Applicant was aware of the breaches after hearing submissions on the contents of those letters.

In conclusion, the Board holds that all the issues raised by the Procuring Entity and the Interested Candidate cannot be determined as preliminary issues as envisaged under Section 93 (2) of the Act. Accordingly, the Preliminary Objections fails and the Board holds that the Request for Review should be heard on merit.

The Board deals with the grounds of review as follows:

Grounds 1 and 2 - Breach of Sections 2, 62, 64, 66 and Regulations 47 and 48

These grounds have been consolidated because they raise an issue about the fairness and integrity of the tender process.

The Applicant stated that the Procuring Entity was carrying out the evaluation of the bids and that it appeared that the Procuring Entity was considering a

non-responsive bid that was not in accordance with the specific requirements of the bidding documents. It submitted that by doing so the Procuring Entity had breached Sections 62, 64 and 66 of the Public Procurement and Disposal Act, 2005 (herein after "the Act"), Regulations 47 and 48 of the Public Procurement and Disposal Regulations, 2006 (hereinafter "the Regulations") and the Instruction to Bidders Clauses 28, 30 and 35.

The Applicant alleged that the non-responsive bid was that of the Toyota Hyundai Consortium and that it was non-responsive because the guaranteed net output figures, namely 143.72MW (Contract B1) and 143.318MW (Contract B2), as read out at the bid opening, were technically not feasible with the current state of technology in the geothermal power plant industry and the particular level of machinery sought for in the tender. It further alleged that because the Applicant, Toyota Hyundai and another bidder, Marubeni Consortium, offered steam turbine generators manufactured from Japan, the various capacities and capabilities of the manufacturers' machinery was well known to each bidder's engineers as were the output levels.

It averred that it suspected that Toyota Hyundai's net output figures were gross output figures which were contrary to the Instructions to Bidders. It further averred that it suspected that Toyota Hyundai were allowed by the Procuring Entity to change its guaranteed output figures from gross to net output under the guise of clarification of the tender after the submission of the bids, which it claimed was in effect manipulating and changing the evaluation criteria after bid opening.

The Applicant claimed that it could also have been possible that Toyota Hyundai filled in the bid opening form with the guaranteed outputs without providing key parameters with the aim of supplying these after bid opening during the clarification process, thus treating the gross output figures as net outputs. It submitted that it had on several occasions written to the Procuring Entity, as it was permitted to by Clause 27.3 of the Instructions to Bidders, alerting the Procuring Entity to the shortcomings of the Toyota Hyundai Consortium's net output figures; but that the Procuring Entity only acknowledged its receipt of the complaints twice.

The Applicant stated that the only possible reason that the Procuring Entity was evaluating a non-responsive bid would appear to be an attempt to give one bidder an undue advantage over the others. It submitted that it was justifiably apprehensive that it was being denied the opportunity to compete fairly which was contrary to the provisions of Section 2 of the Act. It stated that this had compromised the fairness and integrity of the tender process.

The Applicant requested the Board to allow one of its engineers to explain the technical impossibility of Toyota Hyundai's net output figures at the hearing; and for the Board to appoint an independent technical expert, as allowed for under Regulation 85, to review and examine the technical aspects of the Applicant's complaint. It further requested the Board to examine and evaluate the evaluation process to confirm the fairness and objectivity of the process in particular to the bids as submitted by the bidders and clarifications sought thereof by the Procuring Entity, the minutes of the technical evaluation process, correspondence in relation to the complaints about the net output figures,

correspondence between the Procuring Entity and the financiers and the technical schedules submitted by bidders.

In conclusion, the Applicant submitted that the Kenyan public would bear the cost of any loan repayments to the project's financiers, which would be arduous if the guaranteed output figures are not achieved, and that this would happen if a bidder whose guaranteed output figures are not achievable is selected to undertake the project.

An Interested Candidate, Marubeni Consortium, fully aligned itself with the Applicant's submissions. It stated that going by the figures that were read out at the tender opening, it was clear that the bid by Toyota Hyundai was not technically achievable and therefore the Procuring Entity in its evaluation was considering a bid that was not responsive. It also alleged that the Procuring Entity had breached Regulation 46 by evaluating the tenders beyond the 30 days provided for under the said Regulation.

In its response, the Procuring Entity stated that the Applicant's allegations were frivolous and should be dismissed. It confirmed that no award of the contract had been made and that the evaluation process was technically still ongoing in view of the financiers' guidelines. It stated that the evaluation reports prepared on 29th and 30th March, 2011, were a first stage of the evaluation and that there were various steps that the financiers required the Procuring Entity to undertake before making an award and sending the notification of award.

The Procuring Entity further stated that the financier's agreements allowed for the evaluation period to be completed within the tender validity period which

was 180 days and that this period was yet to expire. It submitted that given that the evaluation process was still ongoing, it would be contrary to the financiers' guidelines to allow the Applicant to go into details of Toyota Hyundai's bid on the aspect of guaranteed output or the public examination of the bid as the Request for Review sought. It averred that delving into such detailed examination of Toyota Hyundai's bid would lead to the disclosure of proprietary information and breach of trade secrets.

The Procuring Entity submitted that it had evaluated responsive bids in accordance with the Instructions to Bidders and that it was not continuing with the evaluation of a non responsive bid as argued by the Applicant and the Interested Candidate, Marubeni. It further stated that the minimum guaranteed net output required under the tender documents was 133MW and that it had only proceeded to evaluate bids which offered net outputs in excess of this figure. It submitted that under the financiers' agreements, the financiers had power to review every step of the procurement process and that the financiers had been kept informed at every stage of the tendering process. It further submitted that in view of this, the financiers would have objected if the Procuring Entity had been evaluating a non-responsive tender.

In conclusion, the Procuring Entity stated that it had sufficient expertise in evaluation of tenders of similar nature and that it has never had to exercise its right to reject a project due to non-performance or where a contractor has failed to achieve the guaranteed performance. It further submitted that failure by a contractor to achieve guaranteed output would cause irreparable damage to the contractor's reputation in a field where there are no more than five firms worldwide capable of undertaking such works and there would also be large penalties payable to the Procuring Entity, which would constitute a deterrent to

bidders who were not technically capable of delivering guaranteed outputs stated in their bids.

On its part, the other Interested Candidate, Toyota Hyundai, opposed the Request for Review. It stated that the Request for Review was frivolous and based on speculations. It argued that the Applicant was inviting the Board to do an evaluation of the tender process which was not a function of the Board. It stated that it had provided a technically responsive bid and that it had the capacity to provide the guaranteed outputs.

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

With regard to the Applicant's request to demonstrate that Toyota Hyundai's bid was technically not feasible, the Board notes that its role was to review the tender process and not to act as an evaluation committee which is what the Board would effectively become if it were to have engaged an expert to review and examine the Applicant's complaint that Toyota Hyundai's bid was technically not feasible. This notwithstanding, the Board gave the Applicant an opportunity to do a power point presentation on the technical aspect of the tender. However, the Applicant attempted to do a critique of the bid by Toyota Hyundai but it was stopped at that point for the following reasons:-

1. For the Applicant to do an objective critique it would have had to have the Technical Bid for Toyota Hyundai while the bid evaluation was still at the confidential stage as envisaged by Section 44 of the Act.

2. The Procuring Entity would have been called upon to respond and to review all the technical aspect of the Toyota Hyundai's bid thereby disclosing confidential information of one bidder to all the other bidders.
3. Toyota Hyundai, which all along maintained that it had provided a technically responsive bid would have been called upon to demonstrate that it had indeed submitted a technically feasible bid.
4. All the other bidders would also have been called upon to demonstrate responsiveness of their bids.

It is clear that if the Board was to allow this to happen, it would have constituted the entire process to a technical evaluation of the bids which is a function of the Evaluation Committee of a Procuring Entity.

The Board has examined the Procuring Entity's tender report and notes that the evaluation report was concluded on 30th March, 2011; and that there has been no notification of award.

The Board notes the provisions of Regulation 51(2) which require the evaluation report prepared under Regulation 51(1) to be considered by the Tender Committee, prior to awarding the contract or taking any other action in relation to the procurement as may be necessary.

The Board further notes the provisions of Regulation 11(1) as follows:-

"In considering submissions made by the procurement unit or evaluation committees, the tender committee may -

- a) Approve a submission; or*
- b) Reject a submission with reasons; or*

c) Approve a submission, subject to minor clarifications by the procurement units or evaluation committee."

In view of the above cited Regulations and that the evaluation report is yet to be submitted for consideration by the Tender Committee, the Board holds that if it were to abide by the Applicant's prayers to determine whether the Procuring Entity has considered a non-responsive tender in its evaluation of the bids, it would be usurping the functions of the Tender Committee whose role it is to examine and review the Evaluation Committee's tender report and its recommendations.

Further, the Board notes that this tender was conducted under the JICA, EIB and AFD guidelines which require that the Procuring Entity would seek for a "No Objection" at every stage. Therefore if the Board was to intervene at this stage as requested by the Applicant, it would be usurping the powers of the Tender Committee and the Financiers of the project. It therefore follows that the Tender Committee and the Financiers decision on the award needs to be made before the Board can review and determine whether in this instance a non-responsive bid was evaluated and recommended for award of the tender.

None the less, the Board has reviewed the tender report prepared by the Procuring Entity's technical consultants, Sinclair Knight Merz, and finds that the guaranteed net output figures for the Toyota Hyundai Consortium's bid were stated in the tender report as the figures read out at the tender opening, namely 143.72MW (Contract B1) and 143.318MW (Contract B2). The tender report does not mention any change in the guaranteed output figures from gross to net as suspected by the Applicant in its claim.

As the Board has already stated, its primary role as an administrative body is to check whether the Procuring Entity has given out a tender with clear specifications; an objective evaluation criteria; and whether in making an award a Procuring Entity has followed that criteria and observed the objectives of the Act as set out in Section 2.

Consequently these grounds of review fail.

On the issue raised by the Interested Candidate Marubeni, that the tender evaluation was not completed within thirty days as required by Regulation 46, the Board notes as follows:-

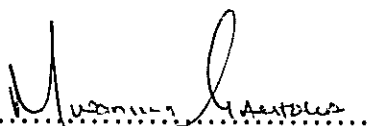
1. This tender was conducted under the JICA, EIB and AFD guidelines and some of the requirements were in conflict with the Act and the Regulations. For example, under the Act and the Regulations, bidders are not permitted under Section 38 of the Act to communicate with the Procuring Entity during the evaluation process. However, Clause 27.3 of the ITB allows bidders to contact the Procuring Entity on any matter related to the bidding process from the time of bid opening to the time of contract award.
2. That JICA Evaluation guide for Pre-qualification and Bidding under the Japanese ODA loans Section I Clause 6, states that

“ the Borrower should complete the evaluation of the bids within the bid validity period stipulated in the bidding documents.”

The Board notes that the bidding documents had specified a bid validity period of 180 days and therefore the evaluation period was effectively 180 days and as such the Procuring Entity has not breached Regulation 46 as the loan agreement prevails in case of a conflict as envisaged in Section 7 of the Act.

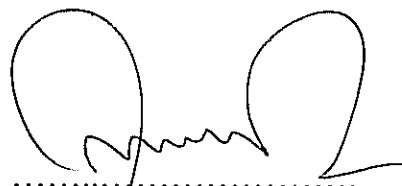
Taking into account the foregoing, the Board finds that this Request for Review has no merit and is hereby dismissed. The Board orders, pursuant to Section 98 of the Act, that the procurement process may continue.

Dated at Nairobi on this 25th day of July, 2011



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CHAIRMAN
PPARB



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SECRETARY
PPARB

