REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 46/2011 OF 2ND DECEMBER, 2011

BETWEEN

ACACIA ENERGY LIMITED.....APPLICANT

AND

GEOTHERMAL DEVELOPMENT COMPANY (GDC).....PROCURINGENTITY

Review against the decision of the Tender Committee of Geothermal Development Company (GDC) dated 7th October, 2011 in the matter of Tender No. GDC/HQS/009/2011-2012 for the development of 800MW geothermal power plants in Bogoria Silali Block Phase 1.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Eng. C. A. Ogut	-	Member
Mr. S.M. Kioko	-	Member
Ms. N. Mutai	-	Member
Mr. A. Okola	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mr. N.M. Soita	-	Secretariat
Ms. M.K. Namadi	-	Secretariat

PRESENT BY INVITATION

Applicant, Acacia Energy Limited

Mr. Mwaniki Gachuba - Advocate, Onyoni Opini & Gachuba

Mr. Alex Kieme - Chief Executive Officer

Mr. Robert Waiganjo - Consultant

Procuring Entity, Geothermal Development Company (GDC)

Mr. Cyprian M. Wekesa - Advocate, Wekesa & Simiyu Advocates

Mr. Richard Malebe - Advocate, Wekesa & Simiyu Advocates

Mr. Manyonge Leonard - Litigant, Wekesa & Simiyu Advocates

Mr. Patrick Kapto - Supply Officer

Interested Candidate

Mr. Yida Kemoli - Transcentury

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

Advertisement

The Procuring Entity advertised the Tender for Development of 800MW Geothermal Power Plants in Bogoria Silali Block Phase 1 on 9th and 11th March, 2011.

Closing/Opening:

The tender closed/opened on 8th August, 2011 at 1400hrs. The following nineteen (19) bidders submitted their bids;

1. Gulf Resources Ltd
2. Flames Merchant Ltd
3. Mitsui & Co. Ltd
4. Orascom construction Industries
5. Energy Development Corporation
6. Punj Lloyd
7. Ormat International Ltd
8. Acacia Energy
9. Tata Power company
10. Kenya Electricity Generating Company
11. Electrawinds & ElectroConsult SPA
12. Geothermal Development International
13. Geo Energy
14. Magma/Alterra Power Corporation
15. Nu Planet clean Energy
16. Centum & Enex
17. Transcentury
18. Sechilienne Sidec
19. Deepak Cable(India) Ltd

Evaluation

The evaluation of the above bids was done from 5th – 9th of September, 2011 by a committee chaired by Caleb Indiatsi. The evaluation was carried out based on the criteria provided in the call for expression of Interest. The results of the evaluation plus the criteria employed were as tabulated below;

No	Firm	Country	Incorporation details including, Articles of Association,Memorandum of Understanding and Certificates of Incorporation	Detailed background and structure including correspondence details and the lead firm where applicable	List and location of power plant projects of atleast 30MW implemented in the last 10 years(atleast one project)	Demonstrated capability to mobilize US$ 400 million (support document from credible financiers)	Certified copies of Audited annual reports for the last 5 years	List of consultant /contractors including the lead project managers in their organization	Declaration of pending litigations(should not be more than 10%) net worthy	Pass /Fail
1	Gulf Resources	Kenya	√	√	x	√	√	√	√	Fail
2	Flames Merchant Limited	Kenya	√	√	√	x	x	√	√	fail
3	Mitsui & co. ltd	Japan	√	√	√	√	√	√	√	Pass
4	Orascom construction industries	Egypt	√	√	√	√	√	√	√	Pass
5	Energy Development Corporation	philipines	√	√	√	√	√	√	√	pass
6	Punj-Lloyd	India	√	√	√	√	√	√	√	Pass
7	Ormat International ltd	USA	√	√	√	√	√	√	√	Pass
8	Acacia Energy	Kenya	√	x	√	√	x	√	√	Fail
9	Tata power company	India	√	√	√	√	√	√	√	Pass
10	Ken Gen	Kenya	√	√	√	√	√	√	√	Pass
11	Electrical winds & Electrical consult SPA	Belgium /Italy	√	√	√	√	√	√	√	Pass
12	Geothermal Development International	USA	√	√	√	√	√	√	√	Pass
13	Geo Energy	India	√	√	x	√	x	√	x	Fail

14	Magma Energy/Altera Group	Canada	√	√	√	√	√	√	√	Pass
15	Nu Planet Clean Energy	RSA	√	X	X	√	√	√	√	Pass
16	Centum & Enex	Kenya	√	√	√	√	√	√	√	Pass
17	Trascentury	Kenya	√	√	√	√	√	√	√	Pass
18	Sechilienne Sidec	France	√	√	√	√	√	√	√	Pass
19	Deepak Cable(India) ltd	India	√	√	√	√	√	√	√	Pass

The following fourteen (14) firms met all the requirements;

NO.	FIRM	COUNTRY
1	Orascom Construction Industries	Egypt
2	Energy Development Corporation	Philipines
3	Mitsui & co. Ltd	Japan
4	Punj-Lloyd	India
5	Ormat International Limited	USA
6	Tata power company	India
7	Ken Gen	Kenya
8	Electrawinds & Electroconsult SPA	Belgium/Italy
9	Geothermal Development international	USA
10	Altera power corporation	Canada
11	Centum & Enex	Kenya
12	Transcentury	Kenya
13	Sechilienne Sidec	Framce
14	Deepak Cable(India) Ktd	India

The following five (5) firm's bids were found to be no-responsive and thus disqualified;

NO.	FIRM	COUNTRY
1	Gulf Resources	Kenya
2	Flames Merchant Limited	Kenya
3	Acacia Energy	Kenya
4	Geo Energy	India
5	Nu Planet Clean Earth	South Africa

Recommendations

The evaluation committee recommended the following fourteen (14) firms for shortlisting and to be invited to submit their Request for Proposal:-

NO.	FIRM	COUNTRY
1	Orascom Construcion Industries	Egypt
2	Energy Development Corporation	Philipines
3	Mitsui & Co Ltd	Japan
4	Punj-Lloyd	India
5	Ormat International Ltd	USA
6	Tata Power Company	India
7	Ken Gen	Kenya
8	Electrawinds & Electroconsult SPA	Belgium / Italy
9	Geothermal Development International	USA
10	Altera Power Corporation	Canada
11	Centum & Enex	Kenya
12	Transcentury	Kenya
13	Sechelienne Sydec	France
14	Deepak Cable(India) Ltd	India

TENDER COMMITTEE'S DECISION

The Tender Committee in its 9th meeting held on 7th October, 2011 under Minute No. 10/TC 9/2011:12 adopted the recommendations of the Evaluation Committee and approved the fourteen (14) shortlisted firms to be invited to submit their Requests for Proposal.

Both the successful and unsuccessful firms, including the applicant were notified of the outcome of the evaluation process vide letters dated 12th October, 2011 that were sent on 18th October, 2011.

THE REVIEW

The Applicant Acacia Energy Limited lodged this Request for Review on 2nd December, 2011 against the decision of Geothermal Development Company (GDC) in tender No. GDC/HQS/009/2011-2012 for the development of 800MW geothermal power plants in Bogoria Silali Block Phase 1. The Applicant was represented by Mr. Mwaniki Gachuba, Advocate while the Procuring Entity was represented by Mr. Cyprian M. Wekesa. The Interested Candidate present was M/s Transcentury represented by Mr. Yida Kemoli.

The Applicant requests the Board for the following orders:-

1. *Geothermal Development Company (GDC) includes Acacia consortium in the list of candidates shortlisted to submit proposals under the call for the Expression of Interest for Development of 800MW Geothermal Power Plants in Bogoria-Silali Block Phase 1.*

PRELIMINARY OBJECTION

The Applicant in its Request for Review raised 5 (five) grounds of review. However, the Board noted that the Procuring Entity, in its written submissions in response to the Request for Review, questioned whether the Board had

jurisdiction to hear the Application because it alleged that it had been filed out of time.

The Board proceeded to hear the parties on that issue.

The Procuring Entity alleged that the Applicant's Request for Review had been filed out of time. It submitted that it had written a letter on 12th October, 2011, to the all the bidders notifying them whether they were successful or not. It further submitted that it had sent the said letter to the Applicant by scanning the letter and attaching it to an email to the Applicant's Chief Executive Officer on 18th October, 2011.

It stated that the Applicant had acknowledged, by email to the Procuring Entity, the receipt of the notification letter on 25th October, 2011. It further stated that the Applicant in that email attached a written letter requesting to know the reasons why it had not been successful.

It averred that having notified both the successful and unsuccessful bidders at the same time, its notification to the bidders was in accordance with Section 67(2) of The Public Procurement and Disposal Act (herein after the 'Act'); and that by having communicated the notification in writing vide letters dated 12th October, 2011, it had complied with Section 37(2) of the Act which required that communication between the Procuring Entity and the bidders be in writing. It further averred that its sending of the notification letters by email did not amount to electronic communication, but a method of delivering the written communication.

It submitted that the delivery methods available were by post, hand delivery and email transmission; and it chose email transmission to deliver the notification letter. It further submitted that the Act did not prescribe any

delivery method and as such it could not have breached any provision of the Act in this respect.

The Procuring Entity quoted the provisions of Regulation 73(2)(c) of The Public Procurement and Disposal Regulations, 2006 (hereinafter, the 'Regulations'), stating that the Applicant should have lodged its Appeal within 14 days of having been notified on 18th October, 2011, and that the last day available to the Applicant to lodge its Request for Review was on or about 2nd November, 2011.

It concluded by submitting that by lodging its appeal on 2nd December, 2011, the Applicant's application was out of time, and as such the Board had no jurisdiction to hear the Request for Review.

In its response, the Applicant alleged that the Procuring Entity had breached Section 67(2) of The Public Procurement and Disposal Act (herein after referred to as the Act) by failing to communicate to it the notification in writing as required under Section 37 of the Act. It further alleged that the notification emailed to it on 18th October, 2011, was electronic communication, for which the Procuring Entity had not sought directions from the Public Procurement Oversight Authority (hereinafter 'PPOA') to use as a method of communication, as required to under Section 37(3) of the Act.

It submitted that if the Board was persuaded that indeed there was proper notification in accordance with the Act, the appeal window only opened on 3rd November, 2011, when it received by email the reasons for which its bid was not successful, and as such the appeal window closed on 18th November, 2011. It admitted that in that instance its Request for Review was filed out of time, but through no fault of the Applicant.

It submitted a sworn affidavit from Jacob Omondi, an associate of Ario & Company Advocates, stating that the firm had received instructions from the Applicant on 10th November, 2011, to file an Appeal on its behalf, and further which stated reasons for the delay in filing the Appeal on 2nd December, 2011. The Applicant further submitted that an advocate's mistake should not make a client suffer, and it relied on the decision in civil suit number 171 of 2001 Remco Limited Vs Mistry Jadua Parbat 7 Co Ltd and Two Others; and Trust Bank Vs Portway Stores (1993) Ltd and Four Others.

The Applicant presented a second sworn affidavit from its Chief Executive Officer, stating that its previous advocate, Ario & Company Advocates had caused the filing of the request for review to be done out of time, and that it had instructed a new advocate, Mwaniki Gachumba of Onyoni Opini & Gachumba Advocates, who represented the Applicant at the hearing.

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

The Board notes that the letters of notification to both the successful and unsuccessful bidders were all dated 12th October, 2011, and dispatched via email on 18th October 2011. The Board further notes the Applicant's acknowledgement to the Procuring Entity on 25th October, 2011, of receipt of the emailed letter dated 12th October, 2011. These are facts which are not disputed by either party. The questions the Board has to consider are whether the Procuring Entity by dispatching the notification letters by email breached Section 37 of the Act which requires that all communication from the Procuring Entity to the bidders to be in writing, and whether the emailed notification constituted the electronic communication referred to in Section 37(3) of the Act for which the Procuring Entity had not sought written directions from the PPOA as required by the Act.

As the Board has already noted, the Procuring Entity had written the letters of notification to the bidders which were dated 12th October, 2011; and this fact is not disputed by the parties. These letters of notification then had to be delivered to the bidders and the most common method the Board has seen in past requests for review are by ordinary post, registered post, courier (hand delivery). The Board finds that email delivery of a notification letter, which is in writing, is no different from the common methods of delivery where these letters are attached (after being scanned) to the said email. The Board further finds that the letter of notification was indeed attached to the Procuring Entity's email because the said letter was acknowledged as having been received by the Applicant in its email response to the Procuring Entity on 25th October, 2011.

With regard to prescribed methods of delivery of written communication in the Act or its Regulations, the Board does not find any such prescribed methods, and as such the Procuring Entity is not restricted to using any particular method. In its past decisions, the Board has consistently placed the burden of proof of evidence of delivery of notification on the Procuring Entity to substantiate that the Applicant had indeed received the notification letter. Where delivery is by electronic means, there must be proof of receipt as evidence of acknowledgement of the notification. In this case, the Applicant admitted having received the letter of notification sent vide email.

In conclusion, the Board finds that the notification letter was in writing in compliance with Section 37 of the Act and delivered to the Applicant and other bidders by scanning the said letter and attaching it to the email; and that this did not constitute electronic communication as envisaged by the Act.

Accordingly, the Board finds that the appeal window opened on 19th October, 2011, the day after the Applicant received the emailed notification letter, and closed 14 days after, on 2nd November, 2011.

The Board notes that the Applicant instructed its first advocate in the matter, Ario & Company Advocates, on 4 November, 2011 and paid its fees on 10th November, 2011, which dates were both after the appeal window had closed.

The Applicant's argument that the appeal window started only after it received reasons as to why it was unsuccessful on 2nd November, 2011, has no basis in the Act or its Regulations. As the Board has already found, there was proper notification as required by the Act, therefore, the Request for Review should have be made within 14 days of the notification as stipulated in Regulation 73(2)(ii).

The Board is alive to the fact that procurement is a regimented process with clear timelines prescribed by the Act for each stage. These timelines have to be adhered to by both the Procuring Entity and Bidders, and bidders participating in public procurement ought to acquaint themselves with the Act and its Regulations. A bidder who files an application out of time only has itself to blame.

Therefore, taking all the above into consideration, the Applicant's Request for Review having been lodged on 2nd December, 2011, when the appeal window closed on 2nd November, 2011, was clearly filed out of time.

Accordingly, the Appeal is hereby dismissed.

The Board orders, pursuant to Section 98 of the Act, that the procurement process may continue.

Dated at Nairobi on this 23rd day of December, 2011

CHAIRMAN
PPARB

SECRETARY
PPARB