

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 14/2016 OF 4TH MARCH, 2016

BETWEEN

RENTCO EAST AFRICA LIMITED/ LANTECH

AFRICA LIMITED, TOSHIBA

CORPORATION CONSORTIUM..... APPLICANT

AND

KENYA ELECTRICITY GENERATING

COMPANY LIMITED (KENGEN).....PROCURING ENTITY

The Review against the decision of Kenya Electricity Generating Company Limited in the matter of Tender No. KGN-GRD-09-2015 for the Request For Proposals (RFP) for leasing of 50MW wellheads geothermal power generation units at Olkaria geothermal field on build, lease, operate and maintain basis.

BOARD MEMBERS PRESENT

- | | |
|--------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Peter Ondieki | - Member |
| 3. Nelson Orgut | - Member |
| 4. Hussein Were | - Member |
| 5. Rosemary Gituma | - Member |

IN ATTENDANCE

1. Philip Okumu - Secretariat
2. Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant – Rentco East Africa Ltd/Lantech Africa Ltd

1. Innocent Muganda - Advocate
2. Stephen Mwangi - Director, Rentco
3. Aquinas Wasike - CEO, Lantech

Procuring Entity – Kenya Electricity Generating Company

1. Kiragu Kimani - Advocate
2. Irene Kashindi - Advocate
3. Victor Rapando - Lawyer

Interested Parties

-
1. Hassan Chimngeni - Legal Clerk, Bonfide C&F Co. Ltd
 2. Arthur Mwai - Ops Manager, Bonafide C&F Co. Ltd
 3. John Mwangale - Manager Projects, Toyota Tshusho

BOARD'S DECISION

Upon hearing the representations by the parties and the interested candidates before the Board and upon considering the information in all the documents before it, the Board decides as follows.

BACKGROUND OF AWARD

KenGen is seeking companies or consortiums to lease Wellheads Power Generation Units on a build, operate and maintain basis. This project is envisaged to utilize geothermal wells that cannot be connected to the conventional power plants due to low pressure (below 5 Bara) and wells outside the conventional power plant perimeter.

The Procuring Entity is looking for a leasing firm (individual or consortium) to lease a minimum of 50MW Wellheads units and operate and maintain the equipment for a period of 15 years in Olkaria at the lowest rental fee. The Procuring Entity expects to achieve the following objectives from the leasing agreement

- i. Generate Additional MW to meet the 5000+ 40-Month Challenge
- ii. Generate revenue and profit from the difference in the cost of leasing and the revenue from the electricity generated from the leased wellheads at the Feed-In-Tariff of 8.8US Cents per KWhr.
- iii. The Procuring Entity will from this revenue recoup the cost of drilling the geothermal well.

A 15 Year Operating lease was justified because there would be minimal financial input from KenGen and it will not appear in KenGen's balance sheet and will thus not affect its loan covenants.

The contracted capacity has to be in place and fully operational within Fourteen (14) months from the date of contract signing. Prospective Geothermal Wellhead

lessor either as individual firms or consortia, were required to be fully experienced or have the necessary financial, technical and human resources to implement the project within the stipulated time.

The selected lessor would then enter into a Master Lease Agreement (MLA) with the Procuring Entity (KenGen). The Procuring Entity will develop and supply steam to the Provider who will generate electricity from the steam via the leased wellhead generators. The steam will be delivered by the KenGen at the Power Plant Boundary at the interface between the Procuring Entity and the Provider. To this effect a Steam Supply Agreement (SSA) will be signed with the successful lessor.

Power Evacuation facilities and connection to the national grid was to be implemented by the successful lessor. The successful lessor will facilitate the connection and termination of the generated power to the existing high voltage substations within the greater Olkaria for evacuation through the existing Transmission lines.

KenGen will enter into Power Purchase Agreement(s) (PPA) with Kenya Power and Lighting Company Limited (Kenya Power) for the generated power.

The Procuring Entity will enter into a Master Lease agreement and an operation and maintenance contract with the successful lessor.

KenGen Tender Committee through its minute vide KTC(PPD, ACT 2005)/286/10-2014 approved the EOI that shortlisted the following firms as shown in Table 2 below;

Table: Shortlisted firms

No.	Firm	Country
1	Transcentury Ltd, Power Machines & Civicon Ltd	Russia and Kenya
2	Green Energy Group, Verkis, Maralal & Trans Africa Co. Ltd	Norway, Iceland and Kenya
3	Ormat International, Inc	USA
4	Geothermal Development Associates	USA
5	Marubeni Corporation	Japan
6	RentCo East Africa Ltd, LanTech & Toshiba	Kenya
7	Quantum Power East Africa BV, Group Five, Fuji Electric & Power Engineers	USA, Japan, SA and Kenya

REQUEST FOR PROPOSAL

The Request for Proposal (RFP) was sent out to the shortlisted firms on the 4th February 2015 with a closing date of 20th April 2015. The bid submission date was extended to 20th May 2015 vide Addendum Number 2 which was sent out to all bidders. All bidders acknowledged receipt.

There was a mandatory site visit and pre bid conference held on the 23rd February 2015. Representatives from all the invited firms attended.

Submission of RFP

Of the seven (7) shortlisted firms, two (2) firms; Marubeni Corporation and Green Energy Group, Verkis, Maralal & Trans Africa Co. Ltd did not submit their proposals. The remaining five (5) firms submitted their proposals by the closing date of 20th May 2015.

TENDER PROCESSING (BID EVALUATION)

The evaluation was based on the criteria stipulated in Clause 5.4 of the Request for Proposal.

Evaluation Results

The evaluation results are as per the Tables below;

Preliminary & Mandatory Requirements (Responsiveness) - Results

Criteria	Geothermal Development Association (GDA)	The consortium of Transcentury, Power Machines OJSC & Civicon	Ormat International Inc.	The consortium of RentCo East Africa, LanTech Africa & Toshiba Corp	Quantum Power East Africa
Validity of the proposal	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed
Domestic Participation	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed
Bid Certification Form	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed
Bid characteristic	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed
Acceptance of terms and conditions	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed
Permits and approvals scheduling	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed

Technical Evaluation Results table

Criteria	Geothermal Development Association (GDA)	The consortium of Transcentury, Power Machines OJSC & Civicon	Ormat International Inc.	The consortium of RentCo East Africa, LanTech Africa & Toshiba Corp	Quantum Power East Africa
Bidder's Technical Capability	Single Flash & ORC (Exergy or Turboden)	Binary Technology (Power Machines OJSC)	ORMAT Energy Converter (ORC) (ORMAT)	Condensing Turbine Technology (Toshiba Corporation)	Single Flash Steam Cycle Turbine (M+M)
Compliance with Project Implementation	For consortium Bids, submission of signed Consortium agreement or joint venture agreement between consortium members	Yes	N/A	Yes	N/A
	Ability and commitment to achieve full plant commercial operation 14 months from the MLA signing date. The MLA is expected to be signed by the Employer and Lessor	Yes	Yes	Yes	Yes

Criteria	Geothermal Development Association (GDA)	The consortium of Transcentury, Power Machines OJSC & Civicon	Ormat International Inc.	The consortium of RentCo East Africa, Lantech Africa & Toshiba Corp	Quantum Power East Africa
Output	53.47	50.549	46.23	58.42	25.93
Availability Factor	95%	95%	98%	99%	95%
Estimated Life of the facility	>25 Years	40 Years	25 Years	> 30 Years	25 Years
Evacuation plan	Yes	Yes	Yes	Yes	Yes
O&M Proposals	Yes	Yes	Yes	Yes	Yes
TECHNICAL COMPLIANCE	QUALIFIED	QUALIFIED	NOT QUALIFIED	QUALIFIED	NOT QUALIFIED

Detailed Computation of Wellhead Capacity (MW)

Well No.	Geothermal Development Association (GDA)			The consortium of Transcentury, Power Machines OJSC & Civicon			Ormat International Inc.			The consortium of RentCo East Africa, Lantech Africa & Toshiba Corp			Quantum Power East Africa		
	Gr oss	Aux	Net	Gr oss	Aux	Net	Gr oss	Aux	Net	Gr oss	Aux	Net	Gr oss	Aux	Net
OW-6V	5.03	0.74	4.29	2.8	0.361	2.439	3.72	0.49	3.23	4.44	0.375	4.065	4	0.24	3.76
OW-39A	1.65	0.26	1.39	1.8	0.222	1.578	1.52	0.2	1.32	1.56	0.175	1.385			0
OW-707	3.41	0.49	2.92	2.1	0.28	1.82	3.46	0.48	2.98	3.74	0.175	3.565			0
OW-724	2.82	0.4	2.42	3.9	0.444	3.456	2.92	0.41	2.51	3.29	0.175	3.115	5.2	0.31	4.89
OW-791A	2.91	0.43	2.48	2.1	0.278	1.822	2.15	0.28	1.87	2.65	0.175	2.475			0
OW-802	34.5	4.32	30.21	23.3	1.851	21.44	23	2.9	20.1	12.33	0.62	11.7	8	0.5	7.5

	Geothermal Development Association (GDA)		The consortium of TransCentury, Power Machines OJSC & Civicon		Ormat International Inc.		The consortium of RentCo East Africa, Lantech Africa & Toshiba Corp		Quantum Power East Africa		
	3			9			5	05			
OW-802A			1.7 7	0.22 2			9.2 4	8. 61 5	1	0.6 2	
OW-802B			10. 1	1.5 48			3.0 1	2. 83 5	0. 4	9.7 8	
OW-804							6.6 4	6. 26 5		0	
OW-804B					10 .4 4	1.3 5	4.9 8	4. 60 5		0	
OW-805C	2. 68	0.39	2.2	1.8 97	1. 31	0.1 7	4.6 1	4. 23 5		0	
OW-903	2. 69	0.39	2.1	1.8 22	1. 44	0.1 7	2.1 3	1. 95 5		0	
OW-905A	2. 27	0.33	1.8	1.5 68	1. 32	0.1 6	1.8 3	1. 65 5		0	
OW-907B	3. 7	0.47	2.8	2.0 39	1. 78	0.2 2	2.1 2	1. 94 5		0	
TOTAL (MW)	61 .6 9	8.22	56. 77	50. 54 9	53 .0 6	6.8 3	62. 57	58 .4 2	2 7. 6	1.6 7	25. 93

The following two (2) firms; Ormat International Inc. and Quantum Power East Africa failed to meet the minimum technical requirements as per the RFP.

a) Ormat International Inc

Ormat International Inc gave a guaranteed output of 46.23MW which is less than the guaranteed 50MW stipulated in the Request for Proposal. This makes them technically non-compliant.

b) Quantum Power East Africa

Quantum Power East Africa made a fatal deviation from the provisions from the Request for Proposal. They removed the 7 wells out of the 14 wells alleging that they are not economically viable.

This deviation is material and makes them technically non-compliant.

Recommendation

Based on the foregoing evaluation and in line with the Evaluation Tables above, the following 3 firms were recommended to proceed to the next stage of financial evaluation having satisfied the requirements for technical compliance.

Table: Recommended Firms

No.		Net Output
1	RentCo East Africa Ltd, LanTech & Toshiba	58.42 MW
2	Geothermal Development Associates	53.47 MW
3	TransCentury Ltd, Power Machines & Civicon Ltd	50.55 MW

The KenGen Tender Committee vide Minute KTC(PPD,ACT 2005)/864/06-2015 dated 11th June, 2015 granted approval for the opening of the financial proposals of the three firms.

FINANCIAL EVALUATION

Opening of the Financial Proposals

The financial proposals for the firms which passed the technical evaluation stage were opened on the 15th June, 2015 and their Monthly Rental Fees and Amortized Monthly Connection Fees were announced.

The following is the summary of the bid costs as they were read out during the opening of the financial proposals:

Table: Bid Prices summary as read out during opening of Financial Proposals

No.	Firm	Net Output	Monthly Rental Fee (USD)	Amortized Connection Cost (USD)	Total Cost (USD)
1	RentCo East Africa Ltd, LanTech & Toshiba	58.42 MW	2,771,170.66	47,574.27	2,818,744.93
2	Geothermal Development Associates	53.47 MW	2,628,610.00	12,373,158 **	2,697,349.77
3	TransCentury Ltd, Power Machines & Civicon Ltd	50.55 MW	2,323,563.00	107,715.00	2,431,278.00

*** The Connection Cost read out for Geothermal Development Associates was for the 15 Year duration and not amortized as a monthly connection cost as guided by the RFP.*

Financial Evaluation Criteria

Clause 5.5 of the RFP details the evaluation criteria that was to be used.

The criteria examined the following;

- i. That the proposals are complete,
- ii. That the proposals have been properly signed,
- iii. That all the annexes that are required by the Request for Proposal are furnished, and
- iv. That the Proposals were responsive.

The committee examined and confirmed that all the financial proposals

complied with the above requirements.

Table: Preliminary Financial Evaluation

	Criteria	Geothermal Development Association (GDA)	The consortium of TransCentury, Power Machines OJSC & Civicon	M/s RentCo East Africa, LanTech Africa & Toshiba Corp
1	Price Schedules	Confirmed	Confirmed	Confirmed
2	Financing Plan	Confirmed	Confirmed	Confirmed
3	Cost Breakdown	Confirmed	Confirmed	Confirmed
4	Buyout Provisions	Confirmed	Confirmed	Confirmed

Combined Technical and Financial Evaluation

It was observed that the net output used in the financial proposal by the bidders was the one that had been submitted in their technical proposals. This did not tally with the net output as evaluated in the technical stage. The committee used the evaluated net output for each bidder to carry out the financial evaluation as captured in the table below.

Table: Net output (MW)

Firm	Net Output (MW) as submitted	Net output (MW) as evaluated
RentCo East Africa Ltd, LanTech & Toshiba	58.44	58.42
Geothermal Development Associates	53.50	53.47
TransCentury Ltd, Power Machines & Civicon Ltd	51.00	50.55

It was noted that the consortium of TransCentury Ltd, Power Machines & Civicon Ltd proposed a tariff rate of USD 0.065 and indicated that they used a capacity factor of 96%. However on evaluation the committee established that this tariff rate could only be realized by using a capacity factor of 98%.

As provided by the RFP (Section 12.0, Vol II – Bidders’ response package), the committee used a capacity factor of 96% for the evaluation of all the proposals. By so doing the evaluated tariff rate for the

consortium of TransCentury Ltd, Power Machines & Civicon Ltd was USD 0.069 and not the USD 0.065 in their submission.

It was also noted that Geothermal Development Associates in their proposal gave a lump-sum figure of USD 12,373,158 for connection costs and which was not amortized as required by the RFP. The committee amortized this costs for the 15-year duration of the lease to establish a figure comparable to what the other bidders had offered. This amortized figure was then used in the financial evaluation.

The Table below shows the comparison of the capacity factor, output MW and the respective costs for each of the bidders. A cost benefit analysis was carried out using the above parameters to arrive at the lowest evaluated bidder with the highest gain to KenGen.

Table: Combined Technical & Financial Evaluation

Parameters	Geothermal Development Associates	TransCentury Ltd, Power Machines & Civicon Ltd	RentCo East Africa Ltd, LanTech & Toshiba
Guaranteed Output MW	53.47	50.55	58.42
Capacity Factor (%)	96%	96%	96%
Monthly Rental Equipment Cost (USD)	2,628,610.00	2,323,563.00	2,771,170.66
Amortized Monthly Connection Cost	68,739.77	107,715.00	47,574.27
Total Monthly Cost	2,697,349.77	2,431,278.00	2,818,744.93
Bidder's Evaluated Tariff Rate per KWh	0.072	0.069	0.069
KenGen Balance KWh (USD)	0.016	0.019	0.019
Projected KenGen Monthly Gain (USD)	600,166.52	686,099.05	785,273.25

Based on the above evaluation the bidders were ranked on the basis of the Projected KenGen Monthly Gain (USD) as per the Table below;

Table: Ranking of Combined Technical & Financial Evaluation

	Bidder	Projected KenGen Monthly Revenue	Rank
I	RentCo East Africa Ltd, LanTech & Toshiba	USD. 785,273.25	1
II	TransCentury Ltd, Power Machines & Civicon Ltd	USD. 686,099.05	2
III	Geothermal Development Associates	USD. 600,166.52	3

Conclusion and Recommendations

Based on the above evaluation, M/s RentCo East Africa Ltd, LanTech & Toshiba emerged as the highest ranked consortium amongst the three bidders evaluated as per the RFP.

It was therefore recommended that:

- i. KenGen issues a letter of intent (LOI) and invite the consortium of M/s RentCo East Africa Ltd, LanTech & Toshiba to undertake a detailed pre-contract negotiation on their proposal of leasing 58.42MW guaranteed output wellhead generators at their total monthly rental fee of USD 2,818,744.93 (Two Million, Eight Hundred and Eighteen Thousands, Seven Hundred and Forty Four and Ninety Three Cents)
- ii. Further financial analysis and modelling was to be done as part of financial due diligence to ascertain the viability of the project as per the bidder's proposal. The due diligence should incorporate KenGen costs and risks.

THE REQUEST FOR REVIEW

The Applicant filed this Request for Review on 4th March, 2016 challenging the decision of the procuring entity M/s Kenya Electricity

Generating Company Limited (Kengen) to terminate the award of the Tender NO. KGN-GRD-09-2015 MW Wellhead Geothermal Power General Units at Olkaria Geothermal Field on Build Lease, operate and maintain basis as contained in the procuring entity's various letters the last one being the letter dated 25th February, 2016 written by the firm of M/s Hamilton Harrison and Mathews (HH&M) on behalf of the procuring entity.

During the hearing of the Request for Review the Applicant was represented by Mr. Innocent Muganda while Mr. Kiragu Kimani Advocate appeared on behalf of the procuring entity.

The Applicant and the procuring entity filed numerous documents, submissions and lists of authorities before the Board. One of the documents which the procuring entity filed was a notice of Preliminary Objection dated 11th March, 2016 challenging the Applicant's Request for Review on the following grounds:-

1. That the Board has no jurisdiction to entertain the application filed herein as it has been filed out of time on the ground that the Applicant was notified of the termination of the tender by a letter dated 9th November, 2015, more than 4 months ago.
2. That the Board had no jurisdiction to grant the orders in that:-
 - a) The orders sought in effect seek an order of specific performance which falls outside the powers and mandate of this Board.
 - b) The orders sought are contrary to the objectives set out in Section 2 of the Public Procurement and Disposal Act 2005

(hereinafter the 2005 Act) and the guiding principles set out in Section 3 Public Procurement and Disposal Act 2015 (the 2015 Act).

- c) The orders sought in as far as they seek to enforce any purported order made by the High Court or this Board fall outside the powers of this Board.
3. The request does not meet the requirements of Section 93 of the 2005 Act and Section 167 of the 2015 Act in that it does not identify any breaches of a duty imposed on the procuring entity by the Act or the Regulations.
4. The Request for Review is frivolous and vexatious within the meaning of Section 93(2) (d) of the 2005 Act and Section 172 of the 2015 Act.

When this Request for Review came up for hearing before the Board for the first time on 21st March, 2016, the Board directed that the Preliminary Objection be heard together with the substantive Request for Review on the ground that the issues that the procuring entity sought to canvass in the Preliminary Objection were not based on admitted facts or on pure points of law and were based on contested facts which could only be determined after an examination of the facts in issue.

The Applicant's case

Mr. Muganda who appeared on behalf of the Applicant in this matter relied on the Request for Review dated 3rd March, 2016, the statement in support of the Request for Review and the written submissions filed by the Applicant with the Board together with his oral submissions.

Mr. Muganda submitted before the Board that the Applicant consortium was one of the bidders which participated in the tender the subject matter of this Request for Review. He stated that the bid by the Applicant and the other bidders were evaluated to conclusion and at the end of the exercise the Applicant was adjudged as the successful bidder.

Counsel for the Applicant submitted that upon the Applicant being declared the successful bidder one of the bidders which had participated in the procurement, namely the Consortium of M/s OJSC Power Machines Limited, Transentury Limited and Civicon Limited lodged a Request for Review No. 38 of 2015 before the Board on 22nd July, 2015 challenging the award of the subject tender to the Applicant consortium.

Counsel for the Applicant submitted that the procuring entity was named as the Respondent in the Request for Review application in which the Applicant also participated and that upon the full hearing of the Request for Review the Board dismissed the Request for Review and allowed the procurement process to proceed in a decision given on 21st August, 2015.

Counsel for the Applicant further submitted that upon the dismissal of the Request for Review number 38 of 2015, the consortium of OJSC Power Machines Limited, Transcentury Limited and Civicon Limited lodged a judicial review application number NAI HC JR No. 284 of 2015 before the High Court at Nairobi where it sought to overturn the decision of the Board.

Upon filling the said application, the same was first placed before the Honourable Justice Mumbi Ngugi who granted the Applicant leave and directed that the leave operates as stay. The judicial review application eventually came up for hearing before the Honourable Justice G V Odunga who heard the judicial review application on its merits and in a ruling given on 19th January, 2016 dismissed the same with costs. The Applicant produced a copy of the ruling given by the Honourable Justice G V Odunga at pages 303 to 388 of the Request for Review.

Counsel for the Applicant further submitted that the consortium of M/s OJSC Power Machines Limited, Transcentury Limited and Civicon Limited were again dissatisfied with the decision given by the Honourable Justice G V Odunga and lodged an appeal in the Court of appeal being NAI CA Civil Appeal No. 28 of 2016. The Applicant produced the Memorandum of Appeal at the handwritten pages 289 to 293 of the record of the Request for Review now before the Board.

Turning to the main cause of the dispute now before the Board, Counsel for the Applicant submitted that during the course of the hearing of the Request for Review before the Board in application number 38 of 2015 and judicial Review Application No. 284 of 2015, the procuring entity maintained that the evaluation process and the award of the tender to the Applicant was proper and urged both the Board and the High Court to uphold the same.

Counsel for the Applicant however submitted that on or about 9th November, 2015 the procuring entity purported to terminate the

procurement process. The Applicant however resisted this attempt in a letter dated 13th November, 2015 and pointed out to the procuring entity that it could not terminate the procurement process since the Review Board had already heard and determined the dispute relating to the award of the tender and further that there was a pending application before the High Court challenging the Board's decision given on 21st August, 2015.

Counsel for the Applicant submitted that Counsel for the procuring entity wrote a second letter dated 25th February, 2016 to Counsel for the Applicant informing them that the tender which had been awarded to the successful consortium had been terminated.

The Applicant challenged the two letters conveying the purported termination and submitted that the procuring entity could not lawfully terminate the award of the subject tender to the Applicant in view of the decision of the Board and the High Court since the Board's decision had become final under the provisions of Section 100 of the Public Procurement and Disposal Act 2005.

Counsel for the Applicant further submitted that the decision of the Board had not only become final but that the said decision had also been affirmed by the High Court in judicial Review application number 284 of 2015 and while relying on the Provisions of Section 100(3) of the Public Procurement and Disposal Act 2005 stated that the action by the procuring entity was in breach of the Review Board and the High Court and was therefore null and void under the said Section.

Counsel for the Applicant urged the Board to find that this was a case of abuse of the due process and urged it to express itself strongly in this matter.

He relied on among other cases, the case of **Horse Bridge Network Systems (E.A) Ltd –vs- Central Bank of Kenya (PPARB) No. 65 of 2012** where the Board set aside a termination of an award of a tender and held that a procuring entity could not be allowed to deliberately fail to comply with the decision of the Board.

He also relied on the case of **Selex Systemi Intergrati –vs- The Public Procurement Administrative Review Board and Another (Nai HC Misc. Appl. No. 1260 of 2007)** where the High Court held that the Board has jurisdiction to inquire into the issue of whether a termination was valid or not.

Counsel for the Applicant also relied on the case of **Sherbiz Supplies Limited and Kenya Airports Authority PPARB No. 8 of 2014** for the proposition that where the Board had made a decision which had become final it was not open for procuring entity to terminate an award of the tender.

He therefore urged the Board to allow the Applicant's application with costs.

The procuring entity's response

Mr. Kiragu Kimani learned Counsel for the procuring entity opposed the Applicant's Request for Review and started off his submissions by arguing the preliminary objections on jurisdiction.

On the issue of whether the Applicants Request for Review had been filed out of time, Counsel for the procuring entity submitted that the Applicant was notified that the award of the tender to it had been terminated on 9th November, 2015 and that the Applicant ought to have filed it's Request for Review within 14 days from the date of notification under the Provisions of Section 167 of the Public Procurement and Asset Disposal Act No. 33 of 2015 or within 7 days of notification under Regulation 73 of the Public Procurement and Disposal Regulations 2006. Counsel for the procuring entity stated that the letter dated 9th November, 2015 had been served on the Applicant on 10th November, 2015 and that is when the days started running.

Counsel for the procuring entity noted that in addition to relying on the letter dated 9th November, 2015, the Applicant had also relied on the letter dated 15th February, 2016 addressed by Counsel for the procuring entity to Counsel for the Applicant which the Applicant produced at pages 1 and 2 of the Request for Review. Mr. Kiragu however submitted that this letter could not amount to a letter of termination of a tender since it was a letter from one advocate to another advocate and could not therefore form the basis for termination of a tender or for filling a Request for Review and was at best an affirmation of what had been communicated earlier.

On the issue that the letter dated 9th November, 2015 was issued by the procuring entity to the successful bidder while judicial review application no. 284 of 2015 was pending hearing and determination before the Honourable Justice Odunga and during the existence of the

order of stay order issued by the Honourable Lady Justice Mumbi Ngugi, Counsel for the procuring entity submitted that the letter of termination was written and served on the Applicant before a judgment had been delivered in the judicial review application. Counsel for the procuring entity additionally stated that the order of stay only stopped the implementation of the decision of the Board permitting the procurement process from proceeding and that a termination could not be described as implantation.

Counsel for the procuring entity argued that even assuming there was an order of stay, the order came to an end on 19th January, 2016 when the Court delivered its decision in the judicial review application in the High Court and that the Applicant had 14 or 7 days to file the Request for Review under the new Act or the Regulations after the delivery of the judgment by the High Court.

Counsel for the procuring entity urged the Board to find that the Applicant's Request for Review had therefore been filed out of time and relied on the decision in the case of the **Republic -vs- The Public Procurement and Review Board & 2 Others (2015) eKLR** where the Honourable Justice W. Korir held that where a Request for Review had been filed out of time, the Board did not have jurisdiction to hear and determine it.

On the second ground of preliminary objection, Counsel for the procuring entity submitted that the Board did not have the jurisdiction to grant the orders sought since what the Applicant was essentially

seeking for orders in the nature of a mandatory injunction or an order of specific performance.

He submitted that under the Provisions of the Act and the Regulations, the Board was not empowered to issue the said orders but conceded that the Board could inquire into the question of whether a termination of an award or a procurement process was valid or not.

On the issue of whether it was proper for the procuring entity to terminate the award of the tender to the successful bidder when the Review Board had made a decision and the High Court was considering the judicial review application, Counsel for the procuring entity submitted that there was nothing wrong in that since there was no order in force preventing the procuring entity from terminating the tender. He stated that the only thing which the court had barred the procuring entity from doing was signing the contract and no more.

Turning to the position taken by the procuring entity during the hearing of proceedings before the Board in the Request for Review No. 38 of 2015 and in Judicial Review No. 284 of 2015 and the Judicial Review Application before the Board, Counsel for the procuring entity conceded that the procuring entity had in both these proceedings conceded that the evaluation and the award of the tender to the Applicant were proper and maintained that the procurement process should be allowed to proceed. He however stated that the procuring entity had changed its position since it had realised that mistakes had been made.

The procuring entity stated in paragraphs 20, 21 and 22 of its written submissions in this application that the reason why the procuring entity had decided to terminate the award of the tender to the Applicant was because the procuring entity had been summoned by the parliamentary investment committee of the National Assembly to discuss the tender it learnt that the Applicant had submitted falsified financial information in another tender and that as a result of this the Board of Directors of the procuring entity convened and embarked on a review and inspection of the documents submitted by the Applicant in this tender.

The procuring entity stated that it is this inspection and review that revealed that the financial proposal which the Applicant had submitted at the EOI stage included letters from the Applicant's bankers in which the procuring entity was listed as the borrower in the Applicant's proposed financing structure. The procuring entity stated that this error was not picked up during the EOI and the financial proposal stage due to an inadvertent error. The procuring entity stated that it is as a result of this realization that it decided to terminate the award of the tender to the Applicant as this would go against the objectives of the tender as the procuring entity did not intend to take a loan.

On the issue of who terminated the award of the tender made to the Applicant, Counsel for the procuring could not state with certainty who sat during the making of that decision but urged the Board which had the benefit of the original minutes to look at the same and ascertain the names of the members who sat in the committee.

Counsel for the procuring entity conceded during the course of his submissions that the termination of the award of the tender to the Applicant had not be affected pursuant to the Provisions of the Public Procurement and Disposal Act 2005 or the Public Procurement and Assest Disposal Act No. 33 of 2015 but was based on the Board of Directors decision taken in the best interest of the company.

Counsel for the procuring entity therefore urged the Board to dismiss the Applicant's Request for Review with costs.

The Applicant's response

In a short response to the submissions made by Counsel for the procuring entity's response, Counsel for the Applicant stated that the procuring entity's admission tht the purported termination of the award of the tender to the Applicant was not based on any law was a sufficient ground for setting aside or annulling the procuring entity's decision to terminate the award of the tender made to the Applicant consortium.

Counsel for the Applicant submitted that it's Request for Review had been filed within time in view of the letters dated 9th November, 2015 and 25th February, 2016 which were binding on the procuring entity and stated that the submission by Counsel for the procuring entity that the letter dated 15th February, 2016 could not found a cause of action had no basis. He stated that the procuring entity could not purport to terminate an award of a tender made after the Board had made a decision which had been affirmed by the High Court and that it was unlawful for the procuring entity to purport to terminate the award of the tender to the

Applicant when there were decisions in existence which were binding on the procuring entity.

He further submitted that the reasons given by the procuring entity for the purported termination were belated and were not available or valid and amounted to a gross abuse of the process and an abuse of power. Counsel for the Applicant submitted that the Board has the jurisdiction and the power to grant the orders sought.

He therefore urged the Board to grant the orders sought in the Request for Review.

THE BOARD'S DECISION

The Board has considered the Request for Review, the statement in support thereof, the Response thereto, the written and the oral submissions made by the parties before the Board and upon a consideration of all the foregoing matters and although the Request for Review filed by the Applicant set out a total of 31 grounds in support of the Request for Review and the procuring entity's Preliminary Objection dated 11th March, 2016 set out a total of 3 grounds of Preliminary Objection, the Board has considered the totality of the said documents and is of the view that all grounds in the Request for Review and the notice of preliminary objection raise three issues, namely:-

- i) Whether the Board has jurisdiction to hear and determine the Request for Review as framed since the Applicant is seeking for mandatory orders.**
- ii) Whether the Applicant's Request for Review was filed out of time thereby depriving the Board of the jurisdiction to hear and determine the same.**

(iii) If the answer to (i) and (ii) above are in the negative, whether the procuring entity lawfully terminated the procurement process the subject matter of this Request for Review.

ISSUE NO. 1

Whether the Board has jurisdiction to hear and determine the Request for Review as framed since the Applicant is seeking for mandatory orders.

On the first ground of the procuring entity's Preliminary Objection on jurisdiction, the Board finds that what the Applicant is challenging is the procuring entity's right and power to terminate the award of the subject tender. Though Counsel for the procuring entity submitted that the procuring entity did not base its decision to terminate the procurement process on any particular provisions of the Public Procurement and Disposal Act 2005 or the Public Procurement and Asset Disposal Act 2015 but rather on the Provisions of Section 2 of the Public Procurement and Disposal Act 2005 and Article 227 of the Constitution, the Board however finds that the only Provisions under which a procuring entity can terminate a procurement process is under the Provisions of Section 36 of the under the Public Procurement and Disposal Act 2005 and or under Section 63 of the Public Procurement and Asset Disposal Act No. 33 of 2015. The procuring entity's argument that it's action was anchored on the provisions of Section 2 of the old Act and Article 227 of the Constitution cannot therefore stand since the law has expressly provided for the manner in which a procuring entity can terminate a procurement process. The Provisions of Section 2 of the Act and Article 227 of the Constitution on the other hand deal with the broad objectives of procurement as set out in the Constitution and the Act.

As a matter of general law, the High Court and the Board have severally held that the Board has the jurisdiction to inquire into whether any purported termination of a Procurement Process was undertaken in accordance with the law.

The leading decision by the High Court on the issue of termination is the case of **Selex Sistemi Intergretti –vs- The Public Procurement Administrative Review and the Kenya Civil Aviation Authority (NAI HC Misc. Application No. 1260 of 2007)** where the High Court (both Justices G. Nyamu and G. Dulu) held that the Board has jurisdiction to hear and determine any grievance arising from the exercise of the power conferred upon a Procuring Entity under the Provisions of Section 36 of the Act. The High Court further held that Section 36 (6) does not oust the jurisdiction of the Court or the Board to hear any grievance arising under the Provisions of Section 36 of the Act.

The decision by the High Court in the case of **Selex Systemi Integreti** has been followed by the court and the Board in several other cases such as in the case of **Horse Bridge Network Systems (EA) Ltd –vs- Central Bank of Kenya Ltd PPARB 65 of 2012** and more recently in the case of **AON Kenya Insurance Brokers Limited –vs- Teachers Service Commission (PPARB 8 of 2015)** where the Board was of the unanimous view that based on the binding nature of the High Court decision in the case of **Selex Sistemi intergreti**, the Board has jurisdiction to inquire into the question of whether a termination has lawfully been effected by a procuring entity or not.

Counsel for the procuring entity during the course of the hearing of this Request for Review indeed conceded that the Board can inquire into any issue of the propriety of a termination.

In view of the above decided cases, the Board is therefore unable to accept the first limb of the procuring entity's challenge on the Board's jurisdiction to hear any issue touching on the propriety of a termination of a procurement process and this ground of the procuring entity's Preliminary Objection therefore fails and is dismissed.

ISSUE NO. 2

Whether the Applicant's Request for Review was filed out of time thereby depriving the Board of the jurisdiction to hear and determine the same.

Turning to the procuring entity's argument that the Board does not have jurisdiction to hear and determine the Request for Review before it on the ground that the Request for Review was filed out of time, the Board has considered the written and the oral submissions made before it by the parties together with all the documents that were relied upon by them. As the Board has already observed, this dispute first arose after the procuring entity through a letter dated 9th November, 2015 sought to terminate the award of the tender made to the Applicant consortium. The procuring entity's first letter of termination met resistance and elicited a protest from the Applicant vide a letter dated 13th November, 2015 addressed to the procuring entity by the Applicant consortium and which appears at page 5 of the Request for Review in which the Applicant was informing the procuring entity that the procuring entity could not lawfully terminate the award of the tender made to the

Applicant since the matter had been determined by the Public Procurement Administrative Review Board and was pending in the High Court for a judicial review application.

The record of the Request for Review shows that nothing happened thereafter until 19th January, 2016 when the Honourable Justice G. V. Odunga dismissed the judicial review application thereby re-affirming the Board's decision which had allowed the Procurement process herein to proceed. Pages 162 and 163 of the Applicant's Request for Review additionally shows that immediately upon the filling of Judicial Review No. 284 of 2015 in the High Court and more particularly on 2nd September, 2015, the Honourable Lady Justice M. Ngugi issued an order of stay stopping the procuring entity from entering into any contract with the 2nd interested party or implementing and or executing any contract whatsoever and or dealing with any issue concerning the subject tender.

The record of the Request for Review additionally shows that upon the dismissal of the judicial review application by the Honourable Justice G. V. Odunga on 19th January, 2016, Counsel for the Applicant M/s Sagana, Birik & Company Advocates wrote to the Managing Director of the procuring entity seeking the finalization of the contract between the parties and the commencement of the implementation of the project immediately.

Instead of responding to this letter directly, the procuring entity however chose to do so through its advocates letter and in the letter

dated 25th February, 2016 addressed by Counsel for the procuring entity to Counsel for the Applicant, Counsel for the Applicant referred the Counsel for the procuring entity to the procuring entity's letter dated 9th November, 2015 purportedly terminating the procurement proceedings and reiterated in the last paragraph of the said letter the reason for the purported termination and it is upon receipt of this second letter that the Applicant filed the present Request for Review.

The Board has considered the rival submissions made by the parties regarding this issue and finds that on the date when the procuring entity issued the first letter notifying the Applicant that its tender had been terminated there was in force a decision dated 21st August, 2015 by the Board where the Board had found that the procurement process herein was proper and directed that it proceeds. The procuring entity participated in those proceedings and filed a response dated 28th July, 2015 in answer to the Request for Review and a further response to the Request for Review dated 13th August, 2015. In both these documents and in its submissions before the Board Counsel for the procuring entity affirmed that the Applicant's tender had been properly evaluated and urged the Board to allow the process to be concluded.

The decision of the Board was affirmed by the High Court in judicial review application No. 284 of 2015 and therefore become final and binding on the parties under the Provisions of Section 100 of the Act.

As at the date when the first letter of termination was issued by the procuring entity on 9th November, 2015 and the second letter by Counsel for the procuring entity on 25th February, 2016, the decision of the Board

and the Court still stood and under the Provisions of Section 100(3) of the Public Procurement and Disposal Act 2005 the letters by the procuring entity purporting to terminate the award of the tender to the procuring entity were null and void by operation of law and the Board holds that the same could not have prevented the Applicant from challenging the purported termination particularly coming on the face of two decisions one by the Board and the other one by the High Court.

The Board held in the case of **Sheribiz Supplies Limited -vs- Kenya Airports Authority (PPARB NO. 8 of 2014)** that once the Board had given a decision which was binding under the Provisions of Section 100 of the Act a procuring entity could not purport to terminate the procurement process.

Still on the same issue, the record of the Request for Review shows that the procuring entity issued two letters purporting to inform the Applicant that it's tender had been terminated. The first letter is dated 9th November, 2015 while the second letter is dated 25th February, 2016 and was written by Counsel for the procuring entity.

The letter dated 9th November, 2015 was issued during the pendency of judicial Review proceedings before Justice Odunga when a stay order was already in force and after parties had fully argued their respective cases before the judge.

The second letter was issued by Counsel for the procuring entity after the procuring entity was fully aware that the court had dismissed the Judicial Review application and affirmed the Board's decision.

During the hearing of the Request for Review, Counsel for the procuring entity sought to argue that the Applicant could not rely on the second letter because a letter from an advocate addressed to another advocate was in his view not valid for the purposes of terminating a procurement process.

The Board is however of the respectful view that the position taken by Counsel for the procuring entity is wrong for the reason that an advocate is an agent of his client and his actions bind the client.

Having issued a second letter of notification of the purported termination, the Applicant was perfectly within its rights to seek to challenge the contents of that letter within the period of 14 days stipulated under the Provisions of Section 167 of the Public Procurement and Asset Disposal Act No. 33 of 2015 and did so within the period of 14 days had not lapsed.

Counsel for the procuring entity argued that even if the letter of 25th February, 2016 could found a cause of action, then the Applicant was still under an obligation to file its Request for Review within a period of Seven (7) days from the date of that letter under Regulation 73(2)(i) of the Regulations.

The Board has however held in the case of **Toddy Civil Engineering Company Limited –vs- Coast Water Services Board (Application No. 6 of 2016)** that by virtue of Section 8 of the Third Schedule to the Act (Transitional Clauses) parts III and XV of the new Act have come into force and that by virtue of Section 167(1) of the new Act, an Applicant can request for administrative review within Fourteen (14) days of the date of the occurrence of any breach of duty by a procuring entity or upon being served with a notification by a procuring entity notwithstanding the fact that the procurement process commenced before 7th January, 2016.

The second limb of the procuring entity's Preliminary Objection therefore also fails and is accordingly disallowed and the Board will now proceed and consider whether the procurement process herein was properly terminated or not.

ISSUE NO. 3

If the answer to (i) and (ii) above are in the negative, whether the procuring entity lawfully terminated the procurement process the subject matter of this Request for Review.

Turning to this ground of review, the Board has already held that the decision given by the Board on 21st August, 2015 and which was affirmed by the High Court in its ruling dated 19th January, 2016 has become final. The Board has also held that once the Board has given its decision under Section 100 of the Act, a procuring entity cannot thereafter purport to terminate the procurement process.

The High Court and the Board have also previously held that a procuring entity which seeks to terminate a procurement process must comply with the law on termination and that the power must be exercised by the relevant organ of the procuring entity for legitimate reasons following the law and the procedure set out in the Act.

The Board has perused through the minutes dated 3rd November, 2015 which purportedly noted the anomalies in the Applicant's financial proposal thereby leading to a decision to terminate the award of the tender and has compared the said minutes with the initial minutes of the tender processing/evaluation committee and the tender committee and finds that upon the conclusion of the tender evaluation process and the award of the same by the tender committee, the procuring entity decided to put together a different team of people to purportedly carryout what was clearly a financial re-evaluation.

According to the available records, the tender processing committee for this tender was first appointed on 20th May, 2015 and comprised the following people:-

1. Peter Chege - Asst. Manager Wellheads – chair
2. Shadrack Munyalo – Asst. Manager Finance
3. Robert Korir - Ag. Asst, Manager Project Execution
4. George Ominde – Chief Legal Officer
5. Jeffer Gesaka – Chief Procurement Officer.
6. Clety Mwambia – Chief Steam Field Engineer.
7. Francis Kioko – Senior Engineer
8. Rotich Kibet - GRD

On 24th June, 2015 the procuring entity replaced one Engineer Francis Kioko who was away with one Mr. Micheal Ogonji. The duly constituted tender processing committee carried out the full evaluation process to it's conclusion and made a recommendation of the award of the tender to the Applicant which recommendation was accepted by the tender committee.

Negotiations were subsequently held and a contract agreement was prepared between Retco East Africa Ltd and Lantech Africa Limited which was signed by representatives of the procuring entity on 2/9/2015. The only parties who had not signed the contract agreement by then were the bidders.

Strangely however, the procuring entity constituted another group comprising of the following people to re-look at the same tender which had been evaluated to conclusion pursuant to a paper allegedly prepared by one Robert Korir:-

1. Simon Ngure -Regulatory & Corporate Affairs Director
(Chairman)
2. Mr. Philip Yego - Supply Chain Director (Secretary)
3. Mr. Moses Wekesa - Business Development Director
4. Mr. David Muthike - Strategy & Business Performance Director
5. Mr. Joel Ngugi - Operations Manager, Projects
6. Mr. Henry Nyachae - Finance Manager
7. Mr. David Mwangi - Legal Manager.

The above composition shows that the people who set to do what clearly amounted to a financial re-evaluation were not members of the tender

processing committee or the tender committee. They were therefore strangers for all intents and purposes and what they purported to do therefore amounted to an act of interference with the procurement process.

The Board has held in several cases as illustrated by the decision in the case of **AON Kenya Insurance Brokers Limited -vs- The Teachers Service Commission PPARB Appl. NO. 8 of 2015** that the law does not permit persons who are not members of the tender processing committee or the tender committee to participate in a tender process unless their participation is allowed by the Provisions of Section 26 of the Public Procurement and Disposal Act 2015 under which the subject tender was evaluated and purportedly terminated.

The decision to terminate the award of tender made infavour of the Applicant was therefore made by people who were strangers to the evaluation process as known to law and cannot therefore stand.

The other factor that has influenced the Boards decision in it's finding that the purported termination was unlawful was Mr. Kiragu Kimani's own admission that the procuring entity's decision to terminate the tender was not anchored on any specific provision of the Public Procurement and Disposal Act 2005 or the Public Procurement and Disposal Act 2005 or the Public Procurement and Asset Disposal Act No. 33 of 2015.

However and the Board has already observed a decision to terminate must either be anchored on the Provisions of Section 36 of the old Act or Section 63 of the new Act and the procuring entity's decision which was admittedly not based on any of the two Provisions of the law cannot stand.

In paragraphs 19, 20, 21 and 22 of it's response, the procuring entity stated that the decision to review and inspect the Applicant's tender was done pursuant to instructions by it's Board of Directors arising from questions raised by the Parliamentary Investment Committee regarding some improprieties which the Applicant had allegedly been involved in another tender and that the inspection and the review had revealed that the documents submitted by the Applicant at the EOI stage as well as in the financial proposal included letters from Retco's Bankers in which the procuring entity was listed as the borrower in the Applicant's proposed financing.

The Board has however looked through all the documents submitted to it by the procuring entity in it's response dated 21st March, 2016 and has been unable to locate any evidence of this allegation. The reason given in both the letters dated 9th November, 2015 and 25th February, 2016 was in fact that the financing and the related supporting documents were inconsistent with the objectives of the project.

If this was infact the case the tender processing committee ought to have realised this but it did not. A perusal of the minutes of 3rd November,

2013 where the issue of the purported termination was raised did not also point out this specific issue.

The Board is of the view that even if this reason was valid, the procuring entity ought to have raised the issue at the hearing of the Request for Review No. 38 of 2015 which the procuring entity fully participated in. It fully supported the tender evaluation process and the eventual award. The procuring entity insisted both before the Board in Review No. 38 of 2015 and in judicial Review No. 284 of 2015 in the High Court that the evaluation process leading up to the award of the tender to the Applicant was proper and all the documents filed and the oral submissions made in those proceedings supported that view. The Board cannot therefore now allow the Applicant to change that position as such an attempt would amount to an abuse of the court process and the process of the Board. A party to any proceedings cannot be allowed to make particular submissions at one point aimed at achieving a particular result and once that result has been achieved then seek to change its position after that result has been achieved and the matter concluded.

The Board finds this to be a peculiar case of party which is willing to go to any length including ignoring a binding decision of the Board which has been upheld by the High Court in order to ensure that a successful bidder does not enjoy the fruits of its success. The inevitable consequence of such an action is to invite the Board to intervene since allowing such an action to stand will not only undermine the authority of the Board and the Court but will promote what appears to be a clear

case of impunity and will end up creating confusion and uncertainty in the procurement process.

In order to prevent this mischief and in order to uphold the sanctity of the Procurement process and the decisions given in procurement matters, the Board finds that the Applicant's application dated 3rd March, 2016 and which was filed with the Board on 4th March, 2016 has merit and the same is allowed in terms of the following orders:-

FINAL ORDERS

In the exercise of powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act No. 33 of 2015, the Board makes the following orders on this Request for Review:-

- a) **The Applicant's Request for Review dated 3rd March, 2016 and which was filed with the Board on 4th March, 2016 be is hereby allowed in the following terms:-**

- b) **The decision of the procuring entity purporting to terminate to the Applicant of the Tender for KGN-GRD-09-2015 for Leasing of 50MW Wellbeads Geothermal Power Generation Units at Olkaria Geothermal Field and Build, Lease, Operate and Maintain Basis as contained in the minutes of the procuring entity held on 3rd November, 2015 and as communicated to the Applicant vide the procuring entity's letter dated 9th November, 2015 and 25th February, 2016 respectively be and are hereby declared null and void and the same be and are hereby set aside.**


c) The procuring entity be and is hereby directed to complete the procurement process herein including forwarding the contract agreement executed by the procuring entity on 2/9/2015 for execution by the Applicant in line with the Board's decision in the Request for Review No. 38 of 2015 as affirmed by the High Court in NAI HC Judicial Review Application No. 284 of 2015 within Seven (7) days from todays date.

d) The procuring entity shall furnish the Board with the evidence of compliance with order (c) above at the expiry of the said period of Seven (7) days form todays date.

e) The Applicant is awarded the costs of this Request for Review to be agreed or taxed failing which the Applicant will be at liberty to file it's bill of costs before the Board for assessment.

Dated at Nairobi on this 24th day of March, 2016.


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CHAIRMAN
PPARB


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SECRETARY
PPARB