

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 23/ 2017 OF 6TH MARCH, 2017

BETWEEN

SUDI CHEMICAL INDUSTRIES LIMITED APPLICANT

AND

GEO THERMAL DEVELOPMENT

COMPANY LIMITED PROCURING ENTITY

Review against the decision of the Geothermal Development Company Limited in the matter of Tender No. GDC/ICB/DPL/014/2016-2017 for the supply of drilling detergent for geothermal wells.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Eng. Weche R. Okubo, OGW - Member
3. Mr. Nelson Orgut - Member

IN ATTENDANCE

1. Stanley C. Miheso - Sitting in for the Secretary
2. Evelyne Abuga - Secretariat

Present by invitation

Applicant –Sudi Chemical Industries Limited

1. Kipkorir Rotich - Advocate, Sagana, Biriq & Co. Advocates
2. H. Roy Pattni - Managing Director

Procuring Entity–Geothermal Development Company Limited

1. Donald P. Kipkorir -Advocate, KTK Advocates Ltd.
2. KikaneaTopati - Advocate
3. Justus Muhambi - SCO
4. Benard Owuor - SCO

Interested Parties

1. Caroline Kibiwott - Advocate, Odex Chemicals
2. Japheth Mugut - Director, Odex Chemicals
3. Sebestian Mwangangi - Sales, Odex Chemicals
4. Gathoni Mbuguah - Pupil, Odex Chemicals

THE BOARD’S DECISION

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

BACKGROUND OF AWARD

The Government of Kenya, represented by Geothermal Development Company Limited which is a state corporation under the Ministry of Energy,

received funding from the African Development Bank (AfDB) for implementation of the Menengai Geothermal Development Project. The subject tender is for the procurement for Supply of Drilling Detergent for Geothermal Wells.

SCOPE OF CONTRACT AND APPROXIMATE COST

The scope of supply is as summarized below:

No.	Name of Goods	Brief Description	Quantity
1.	Drilling Detergent for Geothermal Wells	210 litres drum of drilling detergent.	3,000 Drums

- i) Estimated cost at the time of appraisal: USD 1,050,000
- ii) Actual cost for the proposed contract: KSH 78,900,000 (USD. 775,641.90)

Table 1A: Identification		
1.1	Name of Borrower	Government of Kenya
1.2	Loan/Grant number	ADF Loan No. 2100150026101
1.3	Date of effectiveness	July 10, 2012
1.4	Closing date	-----
(a)	Original	December 31 st 2017
(b)	Revised	N/A
1.5	Name of project	Menengai Geothermal Development Project
1.6	Purchaser (or Employer)	
(a)	Name	Geothermal Development Company Limited
(b)	Address	P.O Box 100746 – 00101, Nairobi, Kenya
1.7	Name of Contract	Tender for Supply of Drilling Detergent for Geothermal Wells

1.8	Contract number (identification)	GDC/ICB/CBS/014/2016-2017
1.9	Contract description	Tender for Supply of Drilling Detergent for Geothermal Wells
1.10	Cost estimate	USD 1,050,000
1.11	Method of procurement (check one)	ICB
1.12	Prior review required	Yes
1.13	Domestic preference allowed	No
1.14	Regional preference allowed	No
1.15	Fixed price contract	Yes
1.16	Co-financing, if any:	None
(a)	agency name	N/A
(b)	per cent financed by agency	N/A

BIDDING PROCESS

Invitation for Bids

International Competitive Bidding was used as per AfDB guidelines for procurement of goods and was advertised in the following media;

- i. *Nation* Newspaper on 21st September 2016
- ii. *Standard* Newspaper on 23rd September 2016
- iii. UNDB Website
- iv. IFMIS Portal
- v. GDC Website www.gdc.co.ke.

Table 1B: Bidding Process		
2.1	General Procurement Notice first issue date	January 27, 2012
2.2	Prequalification, if required	None

(a)	Number of firms prequalified	N/A
(b)	Date of Bank's no-objection	N/A
2.3	Specific Procurement Notice	September 21, 2016
(a)	Name of national newspaper	The Nation and Standard Newspaper
(b)	Issue date	September 21, 2016
(c)	Name of international publication	UNDB website
(d)	Issue date	September 21, 2016
(e)	Address of the Web site(s)	http://www.devbusiness.com/ProjectViewer.aspx?ProjectID=66938&ProjectType=1
(f)	Issue date	September 21, 2016
2.4	Standard Bidding Document	
(a)	Title, publication date	Tender for Supply of Drilling Detergent for Geothermal wells, September 21, 2016
(b)	Date of Bank's no-objection	September 19, 2016
(c)	Date of issue to bidders	September 21, 2016
2.5	Number of firms issued documents	Twelve (12)
2.6	Amendments to documents, if any	Two (2)
(a)	List all issue dates	November 3, 2016
(b)	Date(s) of Bank's no-objection	N/A
2.7	Date of pre-bid conference, if any	N/A
2.8	Date minutes of conference sent to bidders and Bank	N/A
3.1	Bid submission deadline	November 8, 2016; 11:00hrs EA
(a)	Original date, time	November 8, 2016; 11:00hrs EA
(b)	Extensions, if any	N/A
3.2	Bid opening date, time	November 8, 2016; 11:00hrs EA
3.3	Record of bid opening, date sent to Bank	---
3.4	Bid validity period (days or weeks)	
(a)	Originally specified	150 days
(b)	Extensions, if any	None

BID OPENING

The tenders closed and were opened on 8th November, 2017 at 11.00 a.m. where the names of the bidders were read out.

TABLE 2. BID PRICES (AS READ OUT)

Bidder No.	Bidder Identification			Read-out Bid Price(s)		Modifications or Comments or Discount
	Name	City/State or Province	Country	Currency	Amount(s) or %	
1.	Mobile Edge Ltd	Nairobi	Kenya	USD	584,410.32	2% discount if 50% payment made or back to back LC opened by GDC
				KES	59,609,852.6	
2.	Factmill Consulting Ltd	Lagos	Nigeria	USD	670,300	Price Inclusive of Taxes
3.	Comarco Supply Base EPZ Ltd	Nairobi	Kenya	KES	96,115,425	Price Inclusive of Taxes
				USD	946,950	
4.	Steveco Chemicals E.A Ltd	Nairobi	Kenya	KES	83,520,000	Price Inclusive of Taxes Discount of KES 1,000 on any plastic drum returned for recycling
5.	Sudi Chemicals Industries Ltd	Nairobi	Kenya	USD	981,980	2.5% discount upon receipt of LPO for 1500 drums on or before 15 th December, 2016 and balance on or before 15 th March, 2017. 5% discount upon receiving LPO on or before 31 st January, 2017 for all the 3000 drums
				KES	99,180,000	

Bidder No.	Bidder Identification			Read-out Bid Price(s)		Modifications or Comments or Discount
	Name	City/State or Province	Country	Currency	Amount(s) or %	
6.	Odex Chemicals Ltd	Nairobi	Kenya	KES	91,524,000	Price Inclusive of 16% Vat.
7.	Lex Oilfield Solutions	Nairobi	Kenya	KES	49,914,000	Price Exclusive of Taxes
8.	Altair Company Ltd	Nairobi	Kenya	USD	828,000	Price Inclusive of all Taxes
9.	Infraenergy Services Ltd	Nairobi	Kenya	USD	844,200	Price Exclusive of Taxes
10.	Shandong Kerui Petroleum Equipment Company Ltd	Shandong Province	China	USD	771,000	Price Exclusive of Taxes
11.	Techspa General Supplies Ltd	Nairobi	Kenya	KES	14,500	Price per drum Price Inclusive of Taxes
12.	Synergy Power Systems Ltd	Nairobi	Kenya	USD	887,400	Price Inclusive of 16% Vat

PRELIMINARY EXAMINATION FINDINGS

TABLE 3A-PRELIMINARY EXAMINATION COMMERCIAL RESPONSIVENESS

2.1 Eligibility
<i>Nationality in accordance with ITB 4.2.</i>
No- conflicts of interests as described in ITB 4.3.
Not having been declared ineligible by the Bank as described in ITB 4.4.
Compliance with conditions of ITB 4.5

Not having been excluded as a result of <i>the Borrower's country laws</i> or official regulations, or by an act of compliance with UN Security Council resolution, in accordance with ITB 4.8
2.2 Historical Contract Non-Performance
<i>Non-performance of a contract did not occur within the last Five (5) years prior to the deadline for application submission, based on all information on fully settled disputes or litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the Dispute Resolution Mechanism under the respective contract, and where all appeal instances available to the bidder have been exhausted.</i>
Not being under execution of a Bid-Securing Declaration pursuant to ITB 4.6 for 5 years
All pending litigation shall in total not represent more than fifty percent (50%) of the Bidder's net worth and shall be treated as resolved against the Bidder.
2.3 Financial Performance
Submission of audited balance sheets or if not required by the law of the bidder's country, other financial statements acceptable to the Purchaser, for the last Three (3) years to demonstrate the current soundness of the bidders financial position and its prospective long term profitability.
<p>Criterion 1: $Current Ratio = \frac{Liquid Assets}{Liquid Liabilities} \geq 1$ Criterion 2:</p> <p>$Debt Ratio = \frac{Total Debt}{Total Assets} \leq 1$</p>
Minimum average annual turnover of KES 105 Million (USD 1.05M), calculated as total certified payments received for contracts in progress or completed, within the last five (5) years
The Bidder must demonstrate access to, or availability of, financial resources such as liquid assets, unencumbered real assets, lines of credit, and other financial means, other than any contractual advance payments to meet:
(i) the following cash-flow requirement: USD 1, 500 Million
and
(ii) the overall cash flow requirements for this contract and its current commitments.
2.4 Experience

Experience as Supplier, in at least **three (3)** contracts within the last Ten (10) years, each with a value of at least KES 30 Million (USD 300,000), that have been successfully and substantially completed and that are similar to the proposed Goods and Related Services. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section IV, Bidding Forms.

Completeness of Bid

a) Bid Validity Period : 150 Days

b) Original Bid Security of **USD 25,000**

c) The Bid Security of a JVCA shall be in the name of the JVCA that submits the bid. If the JVCA has not been legally constituted into a legally enforceable JVCA at the time of bidding, the Bid Security shall be in the names of all future partners as named in the letter of intent referred to in ITB 4.1.

d) Validity period for Bid Security (pg 18 of itb): **178 days.**

e) Power of Attorney for the person(s) signing the tender on behalf of the Supplier.

f) Manufacturer's Authorization, using the form included in Section IV of the tender document.

g) Audited accounts for the last three (3) years

h) Fully completed letter of bid

i) Fully completed Schedules as per ITB 14.8

j) JVCA agreement as per ITB 4.1(a)

k) Delivery period **Not later than six (6) months**

l) Language of Bid : **English**

m) Bidder should submit sample two (2) clear containers of two (2) ltrs each well labelled of the drilling detergent with their bids.

Qualified (Q) / Not-Qualified (NQ)

BIDDERS WHO QUALIFIED IN THE PRELIMINARY EXAMINATION

The following bidders qualified in the preliminary examination

1. M/s Odex Chemicals Ltd (Kenya) (Bidder 6)
2. M/s Shandong Kerui Petroleum Equipment Co. Ltd (Bidder 10)

PRELIMINARY EXAMINATION: TECHNICAL RESPONSIVENESS

The technical evaluation stage involved the following requirements;

- Material Safety Data Sheet (MSDS) of the Drilling detergent showing conformity to technical specification MUST be provided with the bid.
- Analysis shall be conducted at GDC Laboratories in the presence of bidders' representative who chose to attend. Bidders shall be notified of the date for Laboratory testing of the samples not sooner than seven (7) days prior to commencement of the testing.

TABLE 3.2.1 - TECHNICAL REQUIREMENT FOR DRILLING DETERGENT:

	Technical Requirement	BIDDERS	
		BIDDER 6	BIDDER 10
1.	Material Safety Data Sheet (MSDS) of the Drilling detergent showing conformity to technical specification MUST be provided with the bid	Y	Y
	QUALIFIED (Q) / NOT- QUALIFIED (NQ)	Q	Q

The qualified bidders were sent invitation letters to attend the sample analysis at the GDC laboratory in Menengai, Nakuru County on the 14th and 15th December, 2016.

TABLE 3.2.2 – SAMPLE ANALYTICAL RESULTS

	PARAMETER	LIMIT	BIDDERS	
			BIDDER 6	BIDDER 10
1.	Physical appearance	Light (pale) brown liquid	Light brown liquid	Light brown liquid
2.	pH	9-10	9	11
3.	Density (g/cm ³)	1.01 -1.06	1.021	1.037
4.	Conductivity (µmhos/cm)	20,000 – 25,000	24,350	31,550
5.	Viscosity (cP)	>600Cp	2,144	433
6.	Chloride (ppm)	≤60 ppm	421	5,579
7.	Stability at 250°C	Stable	Stable	Not Stable
8.	Foaming characteristics	Not less than 20 mm	40	24
9.	Sludge formation	Should not form sludge	-	-
	QUALIFIED (Q) / NOT-QUALIFIED (NQ)		Q	NQ

BIDDER WHO DID NOT QUALIFY IN THE TECHNICAL EXAMINATION

M/s Shandong Kerui Ltd was declared non-responsive having failed to meet the thresholds in the five (5) out of the eight (8) tested parameters

Comments on the Computation Errors/Value Added Tax (VAT)

1. Odex Chemicals Ltd (Bidder 6)

- The bidder's Price as read-out included 16% VAT of KES 12,624,000 which was adjusted on the total read-out price of KES 91,524,000.00 to KES 78,900,000.00

RECOMMENDATION FOR CONTRACT AWARD

TABLE 9. PROPOSED CONTRACT AWARD

1.	Lowest evaluated responsive bidder (proposed for contract award). (a) name (b) address	Odex Chemicals Ltd P.O Box 72390-00100, Nairobi info@odexchem.co.ke ; sales@odexchem.co.ke	
2.	If bid submitted by agent, list actual supplier. (a) name (b) address	N/A	
3.	If bid from joint venture, list all partners, nationalities, and estimated shares of contract.	N/A	
4.	Principle country(ies) of origin of goods/materials.	Kenya	
5.	Estimated date (month, year) of contract signing.	February, 2017	
6.	Estimated delivery to project site/completion period.	6 Months	
		Currency(ies)	Amount(s) or %
7.	Bid Price(s) (Read-out)	KES	91,524,000
8.	Corrections for Errors	KES	None
9.	Discounts	KES	None
10.	Other Adjustments (16% VAT)	KES	12,624,000
11.	Proposed Award	KES	KES 78,900,000 (USD 775,641.90)
12.	Disbursement Category	Component B: Well Drilling – Acquisition of Offshore Drilling Materials	

Professional opinion

The Head of Procurement issued her professional Opinion in which she stated that procurement is in line with AfDB guidelines for procurement of goods & works and is therefore recommended for approval

She went on to recommend the approval of the Accounting Officer to award to M/s Odex Chemicals Limited being the lowest evaluated bidder at a total cost of Kshs. 78,900,000.00 exclusive of taxes as recommended by the evaluation committee and No objection letter from AfDB.

THE REQUEST FOR REVIEW

This Request for Review was lodged by M/s Sudi Chemical Industries Limited on 6th March, 2017 in the matter of the tender No. GDC/ICB/DPL/014/2016-2017 for Supply of Drilling Detergent for Geothermal Wells.

The Applicant sought for the following orders:-

- a) The Honourable Board do annul the award of the tender to Odex Chemicals Limited;*
- b) The Honourable Board do give directions to the procuring entity to re-evaluate the bids submitted with regard to tender No. GDC/ICB/DPL/014/2016-2017 for supply of drilling detergent for geothermal wells and/or award the Applicant the tender;*
- c) Costs of the review;*
- d) Any other orders that deem just and fit in the circumstances.*

During the hearing of the Request for Review the Applicant was represented by Mr. Kipkorir Rotich while the procuring entity was represented by Mr. Donald Kipkorir. The successful bidder on the other hand was represented by M/s Caroline Kibiwot.

All the parties to this Request for Review filed their respective submissions. Both the Applicant's and the successful bidder's submissions were filed on the same day namely on 21st March, 2017 while the procuring entity's submissions had been filed a day earlier namely on 20th March, 2017. The Board has considered the Applicant's Request for Review dated 3rd March, 2017, the statement in support of the said statement which was sworn by one Hemanshu Roy Pattni on 3rd March, 2017 together with all the annexures thereto. The Board has also considered the responses filed by the procuring entity and the successful bidder together with the original tender documents, the evaluation report and all the other confidential documents placed before the Board. It is clear from all the above documents and the submissions made by the parties that this Request for Review raised three issues namely:-

- a) **Whether the Board has jurisdiction to hear and determine this Request for Review by virtue of the provisions of Section 6 of the Public Procurement and Asset Disposal Act of 2015.**
- b) **Whether the Applicant included a Power of Attorney in its tender document.**
- c) **Whether the Applicant's tender was properly declared as non-responsive by reason of the Applicant's failure to include a manufacturer's authorization as part of its tender document.**

Having identified the issues for determination, the Board will now proceed and address each of the above issues in the order set out above:-

ISSUE NO. I

Whether the Board has jurisdiction to hear and determine this Request for Review by virtue of the provisions of Section 6 of the Public Procurement and Asset Disposal Act of 2015.

On the first issue framed for determination, it was the procuring entity's case that the Board does not have the jurisdiction to hear and determine this Request for Review on the ground that the source of funds for the project was the African Development Bank. It was its case therefore that the project being a donor funded project the Board did not have the jurisdiction to hear and determine the Request for Review under the Provisions of Section 6 of the Public Procurement and Asset Disposal Act.

The Applicant however resisted the procuring entity's submissions and stated that the Board had the requisite jurisdiction to entertain the Request for Review by virtue of the Provisions of Section 6(3) of the Act which states that the disposal of any or all goods or public accruing to Kenya as a result of procurement activities shall be subject to the provisions of the Act.

The successful bidder did not associate itself with the submissions of either party but simply stated at paragraphs 2, 3, and 4 of its submissions that it had complied with the provisions of the Public Procurement and Asset Disposal Act.

The Board has considered the arguments made by both the Applicant and the procuring entity relating to the issue of jurisdiction and finds that the source of funding for the subject project was in the form of a loan advanced to the

Government of Kenya by the African Development Bank which will have to be repaid back to the Bank from public funds. It is therefore public money within the definition of the Act and any procurement involving public money is governed by the provisions of Article 227 of the Constitution and the Public Procurement and Asset Disposal Act by virtue of the Provisions of Section 6(3) of the said Act.

The Board considered a similar situation in the case of **Webb Fountaine Group F2 - LLC -vs- The Kenya Revenue Authority (PPARB NO. 27 of 2015)** which dealt with the old Act whose provisions were similar to those in the present Act and where the Board held that where the funds used were from a loan which was eventually to be repaid from public funds then the procurement was subject to the provisions of the Public Procurement Act (now the Public Procurement and Asset Disposal Act). The Board stated as follows at page 36 of its decision which was also upheld by the High Court:-
“For the avoidance of doubt, the Board wishes to state that subject to the contents of the Memorandum of Understanding or the financing agreement, the Board has jurisdiction to entertain disputes arising from a Procurement involving Public funds including negotiated grants and loans and that the Provisions of Sections 6(1) and 7 of the Public Procurement and Disposal Act 2005 only relate to the resolution of any conflict that may arise between the Provisions of the Act and the donor conditions. The Board while considering such cases will therefore consider each case based on its particular facts and circumstances”.

The Board has additionally looked at the African Development Bank Rules and Procedures for procurement of goods and works produced by the

procuring entity and particularly Clause 2.43 headed the Applicable law and settlement of disputes dealing with arbitration. The Board is however of the respectful view that the said Clause is only applicable where a contract has been signed. This is evidenced by the first line of the provisions of the said Clause which states that the conditions of contract shall include provisions dealing with the applicable law and the forum for the settlement of disputes. A contract in a tender process can only come into existence after the tender has undergone the evaluation and the award process. An arbitration process however can only be conducted where parties formally agree to subject themselves to the arbitration process in writing.

The objection by the procuring entity challenging the Board's jurisdiction to hear and determine this Request for Review is therefore disallowed.

ISSUE NO. II

Whether the Applicant included a Power of Attorney in its tender document.

The letter of notification dated 24th February, 2017 and which appears at page 1 of the Applicant's Request for Review shows that the first ground on the basis of which the Applicant's tender was declared as being non-responsive was that the Applicant did not include as part of its tender document a Power of Attorney for the person(s) who was to sign the tender.

The Applicant contended that it had set out the particulars of the person who was authorised to sign the tender on its behalf as provided for in Section IV (bidding forms) of the tender document.

The Applicant further stated that Clause 20.2 of the instruction to bidders appearing at Section II of the tender document labelled the "Bid Data Sheet"

did not confine the form of the authorization to a power of Attorney alone but it allowed a bidder to provide any other form of an authorization.

The Applicant stated that the use of the words "such as" in item 20.2 at page 1-32 of the tender document allowed for the use of some other document which was comparative to a Power of Attorney and that it was therefore enough to set out the particulars of its Managing Director in the bidder information sheet as the authorized agent.

The Applicant further stated that even if this requirement was not met this amounted to a minor deviation under the provisions of Section 79(2) of the Act which states that a responsive tender shall not be affected by a minor deviation that does not materially depart from the requirement. The Applicant in addition relied on the Provisions of Clauses 28.2 and 28.3 appearing at pages 1-22 and 1-23 of the tender document and submitted that the tender document defined what would amount to a minor deviation, reservation and omission and that if there was any non-compliance with the requirement, such a deviation could not warrant the disqualification of the Applicant from the tender process.

In a brief response to the submissions made by the Applicant, the procuring entity stated that the requirement for a bidder to confirm its authorised signatory through a Power of Attorney or any other like document was compulsory.

It further stated that the requirement did not amount to a minor deviation under the provisions of Section 79(2) and or Clauses 28.2 and 28.3. The procuring entity therefore invited the Board to look at the said provision of

the Act and clauses of the tender document and find that they do not amount to minor deviations.

The Board has perused the blank tender document which provides as follows under clause 20.2:-

20.2: "The original and all copies of the bid shall be typed or written in indelible ink and shall be signed by a person duly authorized of sign on behalf of the bidder. This authorization shall consist of a written confirmation as specified in the BDS and shall be attached to the bid. The name and position of each person signing the authorization must be typed or printed below the signature. All pages of the bid where entries have been made shall be signed or initiated by the person signing the bid".

While clause 20.2 of the instructions to tenderers (ITB) provides as follows:-

"ITB 20.2: The written confirmation of authorization to sign on behalf of the bidder shall indicate.

The name and description of the documentation required to demonstrate the authority of the signatory to sign the bid such as a Power of Attorney; and"

Criteria number 28.2 and 28.3 state as follows:-

28.2: A substantially responsive bid is one that meets the requirements of the Bidding documents without material deviation, reservation or omission

a) **"Deviation" is a departure from the requirements specified in the bidding document.**

- b) "Reservation" is the setting of limiting conditions or withholding from complete acceptance of the requirements specified in the bidding document; and
- c) "Omission" is the failure to submit part or all of the information or documentation required in the bidding document.

28.3: A material deviation, reservation or omission is one that,

- a) If accepted, would:
 - i) affect in any substantial way the scope, quality or performance of the requirements as specified in Section VI; or
 - ii) limit in any substantial way, inconsistent with the bidding document, the purchaser's rights or the bidder's obligations under the proposed contract; or
- b) if rectified, would unfairly affect the competitive position of other bidders presenting substantially responsive bids".

While Section 79(2) and (3) of the tender document provide as follows:-

79(2): A responsive tender shall not be affected by

- a) minor deviations that do not materially depart from the requirements set out in the tender documents; or
- b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall:-

- a) Be quantified to the extent possible; and
- b) Be taken into account in the evaluation and comparison of tenders".

It is clear from the provisions of Clause 20.2 of the tender document and the instruction to tenderers that each bidder who participated in the tender

process herein was required to include as part of its tender document a written authorization which was to be executed and included as part of the tenderers tender document.

The Board further finds that Clause 20.2 of the instructions to tenderers did not confine and was not emphatic that the authorization had to be in the form of a Power of Attorney only. The use of the words "such as" therefore left room for bidders to elect other forms of authorization.

The Board has looked at the Applicant's original tender document and the annexes flagged as B and C and notes that they contained the Form of Bid Securing Declaration dated 8th November, 2016 and the bidders information sheet dated the same day and finds that the Applicant gave the name of Hemanshu Roy Pattni of P. O. Box 55331-00200 Nairobi Kenya as its authorised agent. The Applicant also provided three telephone addresses and two email addresses for the purposes of any communication between it and the procuring entity. The two documents were therefore sufficient for the purposes envisaged by Clause 20.2 of the tender document and Clause 20.2 of the Instructions To Tenderers which gave bidders a wide discretion with regard to the form of a written authorization.

The procuring entity therefore left the door wide open when it used the words "such as" in the tender document and the Applicant cannot therefore be faulted on this ground. Based on the above findings it is not therefore necessary to determine whether the omission to include a Power of Attorney in the tender document was a minor deviation or not.

This ground of the Applicant's Request for Review therefore succeeds and is therefore allowed.

ISSUE NO. III

Whether the Applicant's tender was properly declared as non-responsive by reason of the Applicant's failure to include a manufacturer's authorization as part of its tender document.

On the issue of the manufacturer's authorization, the Applicant stated that it was a manufacturer of the drilling detergent and thus it did not need to submit the manufacturer's authorization as required by the Provisions of Clause 16.2 of the tender document which specified that the said Clause only applied to those who do not manufacture or produce the goods the subject matter of the tender. The Applicant produced several letters showing that it had been supplying the drilling detergent to the procuring entity since 1980 but put emphasis on the letter dated 8th November, 2016 to fortify its position that it was a manufacturer of the product.

In response to the Applicant's contention, the procuring entity stated that the requirement for a manufacturer's authorization was a mandatory requirement and was not discretionary. The procuring entity stated that the Applicant's failure to comply with the requirement amounted to a fundamental breach of the requirements of the tender document and that the Applicant was rightly disqualified from the tender process on that account.

The successful bidder did not offer any direct comment on this and the other issues raised above and all its submissions extending to 13 paragraphs were aimed at defending the award to it by the procuring entity and urged the Board to uphold the award.

Clause 16.2 of the tender document which governs the issue of the manufacturer's authorization provides as follows:-

16.2: "If so required in the BDS, a bidder shall submit the manufacturers' authorization, using the form included in Section IV, of the Bidding Forms where the Bidder does not manufacture or produce the goods it offers to supply".

While Clause 16.2 of the instruction to tenderers states as follows:-

"ITB 16.2: "The Bidder shall submit with its bid, the manufacturer's authorization for the following part: For all schedules".

The Board has looked at the tender document and has further established that the tender document provided a format for the manufacturer's authorization at page 1-55 of the bidding forms which also appears at page 151 of the Applicant's Request for Review. This form required a manufacturer whether it be a bidder or not to insert the name of the authorised representative of the manufacturer and the signature and the date when the authorization was given.

The Board has perused the entire tender document submitted by the Applicant and has not found a manufacturer's authorization in the form set out at page 1-55. The Applicant instead annexed letters from itself stating that it was a manufacturer. The Board is however afraid to state that a letter from a bidder cannot amount to proof that it is a manufacturer and just like all other bodies which produce detergents or other substances of a similar nature, there must be an authority charged with the responsibility of certification or any other form of ensuring the quality of the product.

Simply put, the fact that one alleges that it is a manufacturer of a particular product or is a member of a particular profession requires proof from a third party particularly where such a proof is required.

While the Board is sympathetic with the Applicant, it is not in a bidder's interest to ignore a specific requirement in the tender document. It may also be as well that the Applicant manufactured the detergent in 1980 onwards but this tender was for the years 2016 -2017. The Applicant ought to have produced a manufacturer's authorization signed by itself to prove this fact. The Applicant therefore took a risk when it failed to comply with such a straight forward requirement and was therefore the author of its own misfortune.

Having failed to meet the above threshold, this ground of the Applicant's Request for Review therefore fails and is dismissed.

Overallly therefore and in view of the Board's findings on issue number III above, the Applicant's Request for Review fails and the same is dismissed on the following terms:-

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders on this Request for Review.

- a) **The Applicant's Request for Review dated 6th March, 2017 in respect of Tender No. GDC/ICB/DPL/014/2016-2017 for the supply of drilling detergent for geothermal wells is dismissed.**

- b) **The Procuring Entity is therefore at liberty to proceed with the procurement process herein**

c) In view of the fact that each party was partly successful in this Request for Review, each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 27th day of March, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB

