

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 51/2010 OF 21st SEPTEMBER, 2010

BETWEEN

LIMELIGHT CREATIONS LTD.....APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LTD.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Power & Lighting Company Ltd dated 1st September, 2010 in the matter of Tender No. KPLC1/6D/PT/D/02/10 for Supply, Installation and Commissioning of 50 KW Wind Turbine at Habaswen.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Amb. C. M. Amira	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Limelight Creations Ltd

Mr. Arimi Kimathi - Advocate, Arimi Kimathi & Co. Advocates
Ms. Winnie Wambui - Advocate, Arimi Kimathi & Co. Advocates

Procuring Entity, Kenya Power & Lighting Company Ltd

Mr. David Mbaya John - Advocate, David John Mbaya & Co.
Advocates
Ms. Catherine Koyier - Advocate, David John Mbaya & Co.
Advocates
Mr. Robert Mahenia - Advocate
Mr. Onesmus M. Maina - Assistant Engineer

Interested Candidates

Mr. Olivier Lauvaux - Regional Director, Socabelec E. A. Ltd
Mr. Zacharia Mbugua - Winafrique Energy

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

The Procuring Entity advertised the tender for supply, Installation and Commissioning of 50KW Wind Turbine at Habaswein in the Daily Newspaper dated 1st April, 2010

Closing/Opening:

The bids closed/opened on 27th May, 2010. The bidders who submitted bids as at opening were as follows:

1. Skynet Communication
2. Limelight Creations
3. Power Technology
4. Optima Energy
5. Socabelec East Africa Ltd
6. Winafrique Technologies Ltd
7. ETES Power (China)
8. Power Technologies Solution

EVALUATION

Tender evaluation was carried out in three stages namely Preliminary, Technical and Financial.

Preliminary Evaluation:

The bids were evaluated for responsiveness on the following parameters:

- i) Tender Security;
- ii) Tender Security Validity;
- iii) Tender Security authenticity;
- iv) Tender Security value given;
- v) Tender Prices validity (120 days);
- vi) Confidential Business questionnaire;

- vii) Copy of certificate of incorporation
- viii) Tax Compliance;
- ix) Tender document copies submitted (3 No.);
- x) Literature/Brochures

	Item	Optima energy	ETTES Power (china)	Winafrique Energy	Socabelec E.A. Ltd	Limelight Creations Ltd	Power Technology Solutions Ltd	Skynet Communications
1.	Tender security	Equity Bank	Kenya Orient Insurance LTD	GA Insurance	CBA	Eco Bank	Equity Bank	Fidelity Bank
2.	Tender Security Validity	Valid 27 th September 2010	Valid 180 days from submission date	Valid 22 nd September 2010	Valid 23 rd September 2010	Valid 23 rd September 2010	25 th December 2010	Valid 27 th September 2010
3.	Tender Security authenticity	Authentic	Authentic	Authentic	Authentic	Authentic	Authentic	Authentic
4.	Tender Security value given	Kshs.1,000,000	Kshs.600,000	Kshs.1,700,000	Kshs.87,684.80 and Euros 7118.40	Kshs.1,400,000	Kshs.600,000	Kshs.1,500,000
5.	Tender Prices validity (120 days)	120 days	120 days	120 days	120 days	120 days	120 days	120 days
6.	Confidential Business questionnaire	Not submitted	submitted	submitted	submitted	submitted	Not submitted	submitted
7.	Copy of certificate of incorporation	Submitted	Submitted (only for ETTES, China) No details for local agent Norton)	Submitted	Submitted	Submitted	Submitted	Submitted
8.	Tax Compliance	Not Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted
9.	Tender document copies submitted (3 No.)	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted
10.	Literature/ Brochures	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted
11.	Comments-responsive/ not responsive	Non responsive	Responsive	Responsive	Responsive	Responsive	Non responsive	Responsive

The following firms were found to be responsive and therefore recommended to proceed for technical evaluation

1. Skynet Communication
2. Limelight Creations
3. Socabelec East Africa Ltd
4. Winafrique Technologies Ltd
5. ETES Power (China)

Technical Evaluation

A summary for the Technical Evaluation was as follows:

	Description	Marks	ETES Power (China)	Winafrique Technologies Ltd	Socabelec E.A Ltd	Limelight Creations	Skynet Communications
1.	50KW wind turbine complete with alternator, tower, wind turbine controls, control cables, power cables from alternator to switch gear with protective cable trays, energy storage batteries of 50kW DC-AC inverter with three phase output.	80	37.60	53.60	80.00	60.80	58.40
2.	Switchgear control panel (for the wind turbine system to be placed in the existing control room) complete with relays circuit breakers, bus bar, current transformer, instrumentation	20	13.20	16.40	18.30	18.10	17.70
	TOTAL	100	50.80	70.00	98.30	78.90	76.10

The following three firms were found to be technically responsive and therefore recommended to proceed for commercial/financial evaluation.

1. Limelight Creations Ltd
2. Socabelec East Africa Ltd
3. Winafrique Technologies Ltd

Financial Evaluation

The bids were evaluated on the financial responsiveness and the results were as tabulated.

Item	Description	Socabelec E.A Ltd		Skynet Communication Ltd		Limelight Creations Ltd	Winafrique Technologies Ltd
		Foreign Total Price in Euros	Local Total Price in Kshs	Foreign Total Price in Euros	Local Total Price in Kshs	Local Total Price in Kshs	Local Total Price in Kshs
1	Plant, Equipment and mandatory spares parts supplied from abroad	317,040.00+		320,000.00		28,558,000.00	56,369,936.48
2	Plant, Equipment and mandatory spares parts supplied from within Kenya	-		-	19,154,000.00	-	6,867,571.20
3	Local transportation, insurance and other incidental services	-	1,120,000.00	-	2,900,000.00	4,250,000.00	960,480.00
4	Factory Acceptance Test for TWO KPLC Engineers	10,080.00		7,000.00		840,000.00	992,000.00
5	Installation Services	28,800.00	3,264,240.00		3,876,000.00	6,125,000.00	6,874,240.00
		355,920.00	4,384,240.00	327,000.00	25,930,000.00	39,773,000.00	72,064,227.68
	Exchange rate @	98.2364	1.00	98.2364	1.00	1.00	1.00
		34,964,299.49	4,384,240.00	32,123,302.80	25,930,000.00	39,773,000.00	72,064,227.68
			39,348,539.49		58,053,302.80	39,773,000.00	72,064,227.68

The Evaluation Committee then recommended that the tender be awarded to M/s Socabelec East Africa Ltd the lowest compliant bidder at a tender price of Euros 355,920.00.

THE TENDER COMMITTEE DECISION

The Tender Committee, in its meeting held on 1st September, 2010, awarded the tender to M/s Socabelec East Africa at their tender price of Euros 355,920.00 and Kshs. 4, 384, 240.00.

THE REVIEW

The Request for Review was lodged on 21st September, 2010 by Limelight Creations Limited against the Decision of the Tender Committee of Kenya Power and Lighting Company Limited in the Tender for Supply, Installation and Commissioning of 50Kw Wind Turbine at Habaswein. The Applicant was represented by Mr. Arimi Kimathi, Advocate while the Procuring Entity was represented by Mr. David Mbaya John, Advocate. The Interested Party, Socabelec Limited was represented by Mr. Olivier Lauvaux.

The Applicant requested the Board for the following orders:

- (a) "The Decision of the Procuring Entity be annulled and the Tender be awarded to the Applicant herein.*
- (b) The Procuring Entity be ordered to enter into a Contract with the Applicant in terms of its tender price as required and/or anticipated by the Act and the Tender Document.*
- (c) The Applicant be awarded costs of and incidental to this Application, and*
- (d) Such other or further Orders and/or directions as this Honourable Board may deem just and expedient to grant."*

The Applicant raised seven grounds of review which the Board deals with as follows:

Grounds 1, 2, 3, 4, 5 - breach of Section 2 and 31 (1) (a) of the Act and Clause A 1.7.3 (5) of the Tender Document.

These grounds were argued together by the Applicant and the Board will therefore address them together.

The Applicant submitted that the Procuring Entity breached Clause A 1.7.3 (5) by failing to take into consideration the said clause in the Financial Evaluation process. It stated that in the Confidential Business Questionnaire it had disclosed the names of its shareholders and that all the shareholders were Kenyan Citizens and locally incorporated companies fully owned by Kenyans. It argued that the Successful Bidder, Socabelec E.A. Ltd did not provide information to show it was a company owned by Kenyans. Accordingly, the Applicant argued that it should have been given preference during the financial evaluation in accordance with Clause A 1.7.3(5).

The Applicant stated that the Procuring Entity failed to take into consideration that the Applicant was a 100% Kenyan owned company with Kenyan directors and shareholders. It argued that the Procuring Entity unlawfully and irregularly invited and accepted bids from a bidder who was neither eligible nor qualified to participate in the tender. It stated that this was a breach of Sections 2 and 31(1) (a) of the Public Procurement and Disposal Act, 2005 (herein after referred to as "the Act").

In conclusion, the Applicant submitted that the Procuring Entity breached Regulation 66(2) for failing to give the reasons for its disqualification within fourteen (14) days. It stated that it wrote to the Procuring Entity by a letter dated 16th September, 2010 which was duly acknowledged by the Procuring Entity on 20th of September, 2010. It further stated that the Procuring Entity had not given the reasons as required by Regulation 66 (2).

In response, the Procuring Entity stated that it did not breach Clause A 1.7.3(5) in that the firms that participated in the tender were all locally incorporated in Kenya. It referred to the Tender Notice inviting the Bids which clearly stated

that only local contractors and suppliers were eligible. It stated that the Applicant and the Successful Bidder provided Certificates of Incorporation which showed that both were local companies registered in Kenya. It further stated that the Successful Bidder also submitted a Tax Compliance Certificate, PIN Certificate and the Single Business Permit.

The Procuring Entity argued that there was no foreign firm participating in the tender and therefore it did not breach Clause A 1.7.3(5) of the Tender Document. In addition, it argued that it did not breach section 2 and 31 of the Act as the Tender Document contained all the required information to allow fair competition. It further stated that the tender specifications were clear and that the evaluation was done in accordance with the criteria set out in the Tender Document.

In conclusion, it stated that the Applicant had raised general grounds which did not raise any specific complaint. Further, it argued that it did not breach Regulations 66(2) in that the letter requesting for the reasons why the Applicant failed to be awarded the tender was received on the 20th of September, 2010 and the Request for Review was filed on the 21st of September, 2010. Therefore, it did not have the statutory fourteen days provided by Regulation 66(2) to reply to the Applicant.

On its part, the Successful Bidder, Socabelec E.A. Limited, associated itself with the submissions of the Procuring Entity. It stated that it was a locally incorporated company and not a foreign firm as argued by the Applicant.

The Board has carefully considered the submissions of the parties and the documents that were presented before it.

The Board notes that this Request for Review raises only one issue, that is, whether the Procuring Entity breached Clause A 1.7.3(5) of the Tender Document on preferences between local and foreign firms. The Board notes that Clause A 1.7.3(5) provides as follows:

“While comparing bid prices between local and foreign firms participating in a selection process in financial evaluation of bids, firms incorporated in Kenya where indigenous Kenyans own 51% or more of the share capital shall be allowed a 10% preferential bias in bid prices. However, there shall be no such preference in the technical evaluation of the tenders. Proof of local incorporation and citizenship shall be required before the provisions of this sub-clause are applied. The bidder in the financial bid shall attach details of such proof.”

The Board further notes that the Successful Bidder, Socabelec East Africa Limited was registered on 7th January, 2008 vide Certificate of Incorporation No. C.148960, VAT Registration No. 0179902C and the PIN No. P 051214132M. Although the Directors of the said company are Belgian and Italian, the Board notes that this is a Private Limited Company duly incorporated in Kenya. Consequently, the Board finds that Clause A 1.7.3(5) was only applicable when comparing bids submitted by both foreign and local companies. The said Clause is clear that if there was a local and a foreign firm participating in the tender, the Kenyan company ought to be given a 10% preferential bias in the Bid Price if indigenous Kenyans own 51% or more of the share capital. As the Board has already noted, both the Applicant and the Successful Bidder are local firms duly incorporated under the Company's Act as Private Limited

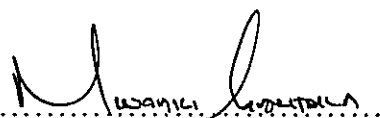
Liability Companies. Therefore the argument that the Applicant should have been given a 10% preferential in its bid price is not correct.

As regards the other issues raised by the Applicant, the Board notes that they are general complaints that do not show the specific duty imposed by the Act and the Regulations on the Procuring Entity that were breached. With regard to the allegation of breach of Regulation 66(2), the Board notes that the letter requesting for the reasons, though dated 16th September, 2010 was delivered to the Procuring Entity on 20th of September, 2010. This Request for Review was filed on 21st September, 2010 and therefore the Procuring Entity had no time to respond to the said letter before the filing of the Request for Review.

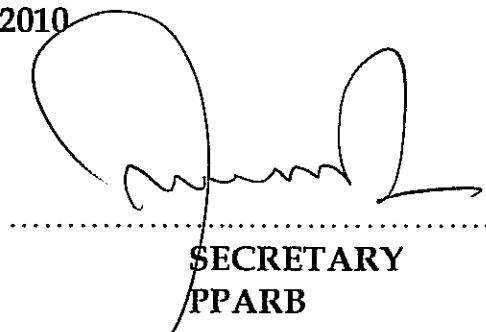
Finally, as regards damages allegedly suffered by the Applicant, the Board holds that tendering costs is a commercial risk that is borne by bidders participating in a tender.

Taking all the above matters into consideration, the Board finds that all the grounds have no merit. Accordingly, the Request for Review is hereby dismissed and the procurement process may proceed.

Dated at Nairobi on this 21st day of October, 2010



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**

