

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 128/2021 OF 22ND OCTOBER 2021
BETWEEN

TSAVO OILFIELD SERVICES LIMITED APPLICANT

VERSUS

**THE ACCOUNTING OFFICER,
KENYA ELECTRICITY
GENERATING COMPANY LTD RESPONDENT**

ROYA INVESTMENT LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Electricity Generating Company Ltd in relation to Tender No. KGN-GDD-131-2021 for Supply of Measurement While Drilling Tools for Geothermal Development Division (Includes Workshop Kit and Training).

BOARD MEMBERS

- | | |
|-----------------------|-------------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Njeri Onyango | -Vice Chairperson |
| 3. Dr. Joseph Gitari | -Member |

The Procuring Entity received a total of eight (8) tenders by the tender submission deadline of 22nd June 2021 at 10:00 hrs. The tenders were opened shortly thereafter by a tender opening committee in the presence of tenderers' representatives and the following tenderers were recorded as having submitted their respective tenders:

- 1. Lee Construction Limited**
- 2. Tsavo Oilfield Services Limited**
- 3. Tidesync Limited**
- 4. Pristim Supplies Limited**
- 5. Future Link Limited**
- 6. Hosca Solution Limited**
- 7. Metal Equipment Co Ltd**
- 8. Roya Investment Limited**

Evaluation of Tenders

The Procuring Entity's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") disqualified three (3) tenders because they had not been uploaded to a "**C-Folder**" in the SRM Portal system through a link 'Technical RFX response'. Thereafter, the Evaluation Committee evaluated tenders in the following stages: -

- i. Mandatory ;
- ii. Technical Evaluation; and
- iii. Financial Evaluation.

Forty-Nine Thousand Three Hundred and Seventy-Five) CFR Djibouti port, exclusive of taxes and equivalent to Kshs 48,487,562.50 (Kenya Shillings Forty-Eight Million Four Hundred and Eighty-Seven Thousand Five Hundred and Sixty-Two and Fifty Cents).

Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party at its tender price of USD 449,375 (United States Dollars Four Hundred and Forty-Nine Thousand Three Hundred and Seventy-Five) CFR Djibouti port, exclusive of taxes. Further, the Evaluation Committee recommended approval of an additional provision of approximately Kshs. 4,848,756.25 (Kenya Shillings Four Million Eight Hundred and Forty-Eight Thousand Seven Hundred and Fifty-Six and Twent- Five Cents) to cater for anticipated landed costs (Duties, Taxes and levies, Customs clearance and local transportation to ODDEG site).

Professional Opinion

In a Professional Opinion dated 28th August 2021, the Procuring Entity's Supply Chain Director one, Mr. Philip Yego, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee recommending the Interested Party for award of the subject tender and the allocation of additional funds for clearance, handling, local transportation and related logistics while noting that the ODDEG shipment

- Geothermal Development Division (includes Workshop Kit & Training) be annulled and set aside;**
- c. A declaration that the Procuring Entity failed to evaluate the Applicant's bid at the Financial Evaluation stage in accordance with the criteria and procedures provided in the Tender Document in accordance with section 80(2) and 82 of the Act read together the Regulation 77 of Regulations;**
 - d. The Respondent be directed to order the Evaluation Committee to re-admit the Applicant's bid at the Financial Evaluation stage and to carry out a re-evaluation of the Applicant's bid at the Financial Evaluation stage noting to observe and apply the criteria in the Tender Document in accordance with section 80(2) and 82 of the Act read together with Regulation 77 of the Regulations;**
 - e. Further to prayer (d) above, the Board in exercise of its discretion, to direct the Respondent to conclude the subject procurement process including the making of an award to the lowest evaluated bidder in accordance with section 86(1) (a) of the Act read together with section 80(2) and 82 of the Act within a specified time period;**
 - f. The Respondent be compelled to pay to the Applicant the costs arising from/ and incidental to this Application; and**
 - g. The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review..**

Applicant's Case

The Applicant avers that it is a tenderer within the meaning of section 167(1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter the "Act"), having submitted a tender at the date of closing of the subject tender and that it stands to suffer loss or damage since its tender has the lowest quote and therefore, legitimately stands a good chance of being a successful tenderer if evaluation of tenders is undertaken in accordance with the Tender Document and in compliance with the Act.

It is the Applicant's averment that the Respondent ignored the import of section 80 of the Act as read together with Regulation 77 of the Public Procurement and Asset Disposal Regulations (hereinafter "Regulations 2020") for disqualifying its tender on allegation of arithmetic error. Further, that the Procuring Entity failed to acknowledge the import of section 82 of the Act which provides for a tender sum as submitted and read out during tender opening to be absolute and final and not to be subjected to any correction, adjustment, or amendment in anyway by any person or entity.

The Applicant avers that the Procuring Entity acted in breach of section 3 of the Act for (i) failure to promote competition while ensuring all tenderers are treated fairly (ii) awarding the subject tender to a tenderer who does not qualify for award of the tender and who offers less commercial benefit going against the principle of maximization of value for money and which decision would lead to loss of public funds (iii) awarding the tender to a tenderer who

On the other hand, the Respondent contends that from the onset, the Applicant's Application is devoid of merit as it falls short of section 167(1) of the Act.

The Respondent avers that it received a total of eight (8) tenders at tender opening and that it evaluated the tenders in strict compliance with Clause 2.24 of the Tender Document and sections 79, 80(1), (2), 82 of the Act and Regulation 74 of Regulation 2020. It is the Respondents contention that the Applicant's tender was successfully evaluated at the mandatory requirements and technical stage of evaluation, but was disqualified at the financial evaluation stage on account of arithmetic error caused by a duplication of freight value of USD2,400 captured in schedule A and at the summary of price schedules of the Applicant's tender and which duplication amounted to an arithmetic error. In the Respondent's view such an arithmetic error is categorized, by Regulation 74(2) of Regulations 2020, as a material/major deviation which leads to disqualification of the Applicant's tender allowing the Evaluation Committee to award the subject tender to Roya Investment Limited.

It is the Respondents contention that the Procuring Entity complied with all provisions of the Act particularly section 3 and Article 227(1) the Constitution and that the Applicant's instant Request for Review lacks merit, is an abuse of the Board's process and should be dismissed with costs.

On the issue framed for determination, the Applicant avers that it learnt of its tender's disqualification at the financial evaluation stage vide a Letter of Regret dated 13th October 2020 on account of arithmetic error which disqualification according to the Applicant was contrary to Sections 80, 82 of the Act read with Regulation 77 of Regulations 2020 because the amount submitted by it in its form of tender is absolute and final and not subject to correction, adjustment or amendment in any way by any person.

On the other hand, the Respondent contends that the Applicant's financial tender and especially the Applicant's price, had an element of arithmetic error resulting to its tender sum being USD414,240.01 and not USD416,240.01 as submitted by the Applicant in its form of tender and that in accordance with Regulation 74(2) of Regulations 2020 such arithmetic error is a major deviation which led to the disqualification of the Applicant's tender

The Board has perused the Letter of Regret addressed to the Applicant by Mr. Philip Yego dated 13th October 2021 and notes the same reads *inter alia* as follows:

"We refer to the above tender, referenced KGN-GDD-131-2021 opened on 22nd June, 2021 and wish to advise that your firm was not successful due to the following reason(s):-

to the Interested Party at the Interested Party's quoted price of USD 449,375.00 which price was higher than that of the Applicant's tender sum of USD416,240.01.

Section 80(2) of the Act is instructive on how an evaluation committee should carry out evaluation and comparison of tenders and provides as follows:

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

The Board has carefully studied the blank tender document for the subject tender issued by the Respondent (hereinafter the 'Tender Document') to establish the criteria provided for evaluation at the Financial Evaluation stage. Stage 3: Financial Evaluation of Clause 2.24 Evaluation Criteria of the Appendix To Instructions To Tenderers at page 21 of the Tender Document reads as follows:

"STAGE 3. FINANCIAL EVALUATION

- ***Financial Evaluation shall involve checking completeness of financial bids***

The Board notes Clause 2.9 Tender Forms of Section II Instructions To Tenderers at page 9 of the Tender Document provides that;

"2.9.1 The tenderer shall complete the Tender Form and the appropriate Price Schedule furnished in the tender documents, indicating the goods to be supplied, a brief description of the goods, their country of origin, quantity and prices."

Schedule A: MWD Tools, Repair, Service and Maintenance Accessories of Section VII. Price Schedule For Goods is a form at page 39 of the Tender Document which provides as follows;

<i>ITEM</i>	<i>DESCRIPTION</i>	<i>UNIT</i>	<i>QTY</i>	<i>UNIT PRICE</i>	<i>TOTAL COST</i>
<i>1</i>					
<i>2</i>					
<i>3</i>					
<i>4</i>					
<i>5</i>					
<i>Total Cost FOB</i>					
<i>Discount% if any</i>					
<i>Sea Freight Charges to Djibouti Port, Djibouti</i>					
<i>Other Charges (if any)</i>					
<i>Total Cost & Freight (CFR) Djibouti Port</i>					

Clause 8.1 Form of Tender of Section VIII. Standard Forms is a form provided at page of 41 of the Tender Document.

Further Clause 2.10, Tender Prices of Section II Instructions To Tenderers at page 7 and 8 of the Tender Document provides as follows;

"2.10.1 The tender shall indicate on the appropriate Price Schedule the unit prices and total tender price of the goods it proposes to supply under the contract

2.10.2 Prices indicated on the price schedules shall be based on Cost & Freight (CFR) to Mombasa Port with freight charges shown separately. KenGen will meet the freight insurance

2.10.3 Prices quoted by the tenderer shall be fixed during the Tender's performance of the contract and not subject to variation on any account. A tender submitted with an adjustable price quotation will be treated as non-responsive and will be rejected, pursuant to paragraph 2.22.

2.10.4....."

Schedule A: MWD Tools, Repair, Service and Maintenance Accessories

ITEM	DESCRIPTION	UNIT	QTY	UNIT PRICE (USD)	TOTAL COST (USD)
1	5" OD Universal Bottom Hole Orientation (Male shoe) sub; UBHO with 6 5/8" API REG Box and 5/8" API REG Pin connections. Shall be suited with SRG and Boreback (Suitable for MWD)	Piece	2	\$ 5,089.50	\$ 10,179.00
2	30ft 5" OD NMDC (with bore ideal for the probe) with 6 5/8" API REG Box - Pin connections. Shall be suited with SRG and Boreback.	Piece	2	\$ 28,665.00	\$ 57,330.00
3	Complete probe assembly minus batteries	Piece	2	\$ 135,988.28	\$ 271,976.56
4	High Temp Batteries (135 deg C and above)	Piece	4	\$ 2,778.75	\$ 11,115.00
5	Complete set of Workshop Equipment, Repair & service kit suitable for field maintenance. Tool string test kit shall be included	Set	1	\$ 35,967.45	\$ 35,967.45
Total Cost FOB					\$ 386,568.01
Discount (%) if any					
Sea Freight Charges to Djibouti Port, Djibouti					\$ 2,400.00
Other Charges (if any)					
Total Cost & Freight (CFR) Djibouti Port					\$ 388,968.01
Country of Origin					USA
Name of manufacturer					NOV Inc
Currency of Tender					USD
Delivery period to Djibouti (in months after issue of LC)					4 Months

Indeed, the Applicant transferred the exact said total tender price of USD416,640.01 to its Form of Tender which is at page 12 of its original tender.

It is important to note quoting the charges of sea freight to Djibouti Port, Djibouti of USD2,400 is not a miscalculation on unit price or quantity, subtotal and total price bid price because a miscalculation is defined as a calculation that has not been done correctly, or the act of calculating something wrongly, to be considered an error that is a major deviation affecting the substance of a tender leading to disqualification of a tender as non-responsive under Regulation 74(2) of Regulation 2020.

Regulation 74(2) of Regulation 2020 provides as follows: -

"Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive."

On the other hand Section 79(2)(b) of the Act provides as follows:

"A responsive tender shall not be affected by-

(a)

Assurance) Regulations, 2016.”

Given that subsidiary legislation should not be inconsistent with provisions of an Act, when such an inconsistency arises, provisions of the Act supersede. In this instance, Regulation 74 (2) of Regulations 2020 states that any errors should lead to disqualification of a tender yet, the said Regulations should only apply to the extent of section 79 (2) (b) of the Act which allows errors or oversights can be corrected without affecting the substance of a tender to be declared responsive. There is therefore an inconsistency, and thus section 79 (2) (b) of the Act must prevail.

The Board is also mindful of section 82 of the Act which states that: - “The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity”

The Board has established certain errors or oversights can be corrected without affecting the substance of a tender. That notwithstanding, the tender sum remains the same and cannot be corrected even if errors or oversights (which are not necessarily arithmetic errors in a tender) may be identified or corrected pursuant to section 79 (2) (b) of the Act. This explains why a tenderer is bound by its tender sum hence ought to be prepared to implement a tender at its tender sum

However, the board notes section 82 of the Act prohibits an correction, adjustment or amendment of the tender sum and provides as follows:

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity"

The import of section 82 of the Act read together section 79(2)(b) of the Act and Regulation 74(2) of Regulations 2021 is clear that even where errors arising from a miscalculation of unit price, quantity, subtotal and total bid price have been detected and a correction is made that does not in any way affect the substance of the tender, such correction is still prohibited if it results to correction, adjustment or amendment of the tender sum. Simply put, any correction to an error arising from a miscalculation of unit price, quantity, subtotal and total bid price by any person that leads to the tender sum varying from what was presented in the Form of Tender is prohibited.

The Board has carefully studied the Evaluation Report signed by all the members of the Evaluation Committee on 22nd July 2021 and which, evaluation report, was submitted to the Board by the Respondent as part of confidential documents notes that, the Evaluation Committee disqualified the Applicant's tender at the Financial Evaluation stage on account of an error in

It is worth noting, that the Board has consistently held in previous decisions that the tender sum is absolute and final and cannot be changed.

In ***PPARB Application No. 38 of 2019, Alfatech Contractors Limited vs. Kenya National Highways Authority***, the Board concurred with its decision in ***PPARB Application No. 42 of 2017, Surestep Systems and Solutions Limited vs. Industrial and Commercial Development Corporation*** where the Board stated the importance and primacy of the form of tender in any tender process as follows: -

"The Board holds that the form of tender is the document which the offer is communicated to specified employer. It is the offer that the procuring entity would consider and either accept or reject. The Board finds that the form of tender is a very vital document which communicates every essential information based on which a contract is created.

The provision of section 82 of the Act, is couched in mandatory terms and leaves no room for any other interpretation. The tender sum for the successful bidder as read out and as recorded at the tender opening was Kshs. 34,166,398.13/- and was not subject to any variation whatsoever pursuant to the prohibition contained in section 82 of the Act."

the Tender Document. However, the same Tender Document, provides for financial evaluation to be conducted in accordance with Regulation 77(1) of Regulations 2020 and for the award of the subject tender to be made to the lowest evaluated tenderer.

Regulation 77 of Regulations 2020 provides as follows:-

" (1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form;

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2) (a) of the Act;

(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;

(d) applying any margin of preference indicated in the tender document.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act."

that upon correction, its tender sum is revised downwards, lower than the initial lowest bidder and be awarded the tender based on the corrected figure” as was previously held in PPARB Application No. 24 of 2021, Milcon’s Limited V The Accounting Officer, The Sports, Arts and Social Development Fund.

In the circumstances, the provisions of section 82 of the Act and Regulation 77 of Regulations 2020 prevail over the provisions of the Tender Document that provide for disqualification of tender due to errors arising from miscalculation of unit price, quantity, subtotal and total bid price. In the subject tender what the Evaluation Committee ought to have done at the financial evaluation stage is determine the evaluated price of each tender that made it to the financial evaluation stage in accordance with Regulation 77 (2) of Regulations 2020 and thereafter rank the tenders according to their evaluated price to determine the successful tender in accordance with Regulation 77(3) of Regulations 2020 which in this case would be the tender with the lowest evaluated price without attempting to correct any errors or determining what the tender sum of each tender ought to have been different from what was presented in each tender’s Form of Tender.

Accordingly, we find the Evaluation Committee did not evaluate the Applicant’s tender in accordance with the criteria set out in Stage 3: Financial Evaluation of Clause 2.24 Evaluation Criteria of the Appendix To Instructions To Tenderers of the Tender Document as read together with Clause 2.9 and 2.10 of Section II of the Instructions to Tenderers of the Tender Document

- 2. The Letters of Regret addressed to all unsuccessful tenderers including the Applicant dated 13th October 2021 with respect to Tender No. KGN-GDD-131-2021 for Supply of Measurement While Drilling Tools for Geothermal Development Division (Includes Workshop Kit and Training), be and are hereby nullified and set aside.**

- 3. The Respondent is hereby ordered to direct the Evaluation Committee to re-admit the Applicant's tender at the Financial Evaluation Stage and conduct a re-evaluation of the Applicant's tender at the Financial Evaluation Stage together with all other tenders that made it to the Financial Evaluation stage in accordance with the provisions of the Tender Document the Act, Regulations 2020 and the Constitution while taking into consideration the Board's findings in this Request for Review.**

- 4. Further to Order No. 3 above, the Respondent is hereby directed to proceed with the procurement process to its logical conclusion including the making of an award to the tenderer who has submitted a tender with the lowest evaluated price within fourteen (14) days from the date of this decision.**