

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 88/2021 OF 24th JUNE 2021

BETWEEN

POWERGEN TECHNOLOGIES LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY TRANSMISSION

COMPANY LIMITED 1ST RESPONDENT

KENYA ELECTRICITY TRANSMISSION

COMPANY LIMITED 2ND RESPONDENT

BURHANI ENGINEERS LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Electricity Transmission Company Limited in respect to Tender No. KETRACO/PT/007/2021 for Procurement of EPC Contractor for the Completion of the Isiolo-Nanyuki 132 kV Transmission Lines.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Alfred Keriolale | -Member |
| 4. Ms. Njeri Onyango | -Member |
| 5. Ms. Isabella Jume, CPA | -Member |

IN ATTENDANCE

Mr. Stanley Miheso

-Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Kenya Electricity Transmission Company Limited (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. KETRACO/PT/007/2021 Procurement of EPC Contractor for the Completion of the Isiolo-Nanyuki 132 kV Transmission Lines (hereinafter referred to as "the subject tender") through an Invitation to Tender Notice published in the Nation Newspaper, the Procuring Entity's Website (www.ketraco.co.ke) and the Public Procurement Information Portal (www.tenders.go.ke) on 16th February 2020.

Pre-Bid Meeting and Site Visit

The Procuring Entity carried out a pre-bid site visit on 8th April 2021 at the Procuring Entity's offices at Block B of Kawi Complex, Popo Lane, off Red Cross Road in South C. A site visit took place on 9th April 2021 along the line from Nanyuki Substation to Isiolo where representatives of prospective tenderers visited the sites with representatives from KETRACO.

Tender Clarification

A number of tenderers sent requested for clarifications on provisions of the Tender Document from the Procuring Entity before the tender submission

deadline of 21st April 2021. The Procuring Entity then prepared responses to these clarifications in two sets of clarification questions.

Tender Submission Deadline and Opening of Tenders

The tender submission deadline was 21st April 2020. The Procuring Entity received a total of six (6) tenders by the tender submission deadline of 21st April 2020. The tenders were opened in the presence of tenderers' representatives by a Tender Opening Committee and recorded as follows: -

Bidder No.	Bidder
1	M/s Elemech Engineering (K) Limited
2	M/s Burhani Engineers Limited
3	M/s Powergen Technologies Limited
4	M/s Polyphase Systems Limited
5	M/s Patronics Services Limited
6	M/s Arm Engineering Company Limited

Evaluation of Tenders

The Evaluation Committee evaluated tenders in the subject tender in the following three stages: -

- i.** Preliminary Examination;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation/Commercial Evaluation

Preliminary Examination

At this stage, the Procuring Entity's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated tenders to ensure they are substantially responsive to the criteria set out in Section I: Instructions to Bidders (ITB), Section II. Bid Data Sheet (BDS) and Section III: Evaluation Qualification Criteria (EQC) at pages 1-15, 1-34,1-35 and 1-44 of the Tender Document. The tenders submitted by the Interested Party and the Applicant were found responsive at the Preliminary Examination stage and proceeded for Technical Evaluation.

Technical Evaluation

The Evaluation Committee evaluated the two tenders against the criteria set out in Section III: Evaluation Qualification Criteria (EQC) at page 1-57 and 1-58 of the Tender Document. Tenders submitted by the Interested Party and the Applicant were found responsive and thus proceeded for Financial Evaluation/ Commercial Evaluation.

Financial Evaluation/ Commercial Evaluation

At this stage, the Evaluation Committee evaluated the two tenders against the Criteria Set out in Section III: Evaluation Qualification Criteria (EQC) at page 1-44 of the Tender Document and Section I: Instructions to Bidders (ITB) at page 1-3- and 1-31 of the Tender Document. The Interested Party's

tender emerged as the lowest evaluated responsive tender at the end of this stage of evaluation.

Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party at its tender price of USD 1,064,147.58 (United States Dollars One Million Sixty-Four Thousand One Hundred and Forty-Seven and Fifty-Eight cents), and KES 101,887,167.56 (Kenya shillings One Hundred and One Million Eight Hundred and Eighty-Seven Thousand One Hundred and Sixty-Seven and Fifty-Six cents) equivalent to an aggregate tender price of Kshs. 216, 934,077.90 after converting the United States Dollars to Kenya Shillings at the rate of USD 1: KSHS 108.11 and having determined to have submitted the lowest evaluated responsive tender.

Professional Opinion

In a professional opinion dated 17th May 2021 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Senior Manager, Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders. He concurred with the Evaluation Committee's recommendation on award of the subject tender, thus approved the recommendation by the Evaluation Committee to award the subject tender to the Interested Party at its tender price of Kshs. 216,934,077.90, having submitted the lowest evaluated responsive tender. The 1st Respondent approved the Professional Opinion on 17th May 2021.

Letters of Notification

In letters dated 14th June 2021 the Procuring Entity notified tenderers of the outcome of the evaluation of their tenders.

REQUEST FOR REVIEW

The Applicant filed a Request for Review dated 23rd June 2021 and filed on 24th June 2021 together with a Statement in Support dated 23rd June 2021 and filed on 24th June 2021 in person seeking the following orders:

- 1. An order that the decision of the Procuring Entity to award Tender No. KETRACO/PT/007/2021 Procurement of EPC Contractor for: The Completion of the Isiolo-Nanyuki 132 kV Transmission Lines to the Interested Party be cancelled/ annulled and set aside;**
- 2. An order for the Respondents/Procuring Entity's Letter of Notification of unsuccessful bid dated 14th June 2021 addressed to the Applicant herein in Respect to Tender No. KETRACO/PT/007/2021 Procurement of EPC Contractor for: The Completion of the Isiolo-Nanyuki 132 kV Transmission Lines be cancelled and set aside;**
- 3. An order for the Board to review all records of the procurement process (particularly the Financial Evaluation) relating to KETRACO/PT/007/2021 Procurement of EPC Contractor for: The Completion of the Isiolo-Nanyuki 132 kV Transmission Lines and substitute the decision of the**

Procuring Entity for the decision of the Review Board and award the Tender to the Applicant since the Applicant's was evaluated at all the stages of evaluation;

4. An order for such other reliefs as the Board may deem just and expedient;

5. An order for the costs of the Request for Review to be awarded to the Applicant.

In response, the Procuring Entity filed a Memorandum of Response dated 2nd July 2021 and filed on even date through the firm of Sagana Biriq & Co. Advocates. The Interested Party filed a Memorandum of Response dated 2nd July 2021 and filed on even date through the firm of D. Chepkemoi & Associates Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed that all requests for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed written submissions dated 7th July 2021 and filed on even date.

BOARD'S DECISION

The Board has considered each of the parties' pleadings, written submissions and confidential documents submitted to the Board by the Procuring Entity pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds that the following issue calls for determination: -

Whether the Interested Party's tender was evaluated at the Financial Evaluation Stage in accordance with the Tender Document as read together with Section 80(2) of the Act.

The Applicant contends that the Interested Party's tender was not evaluated in accordance with a mandatory requirement of the Tender Document that required all tender prices be quoted in Kenya Shillings (hereinafter referred to as "our local currency"). Particularly, it was the Applicant's contention that Clause ITB 17.1 and ITB 18.1 provides as follows-

17.1 Bidders shall quote for the entire plant and services on a single responsibility basis.

18.1 Prices shall be quoted in the following currencies: Kenya Shillings.

The Applicant contends that no part of the Tender Document required tenderers to quote prices in foreign currency of United States Dollar. Instead, in the Applicant's view, prices quoted by tenderers must be in our local currency and this was not open to any other interpretation. Thus, the Applicant contends since the Interested Party quoted prices in two currencies namely, our local currency and United States Dollars, the Interested Party's tender was in breach of the requirements of the Tender Document. Further, it is the Applicant's contention that quotation of tender price in two currencies was geared to circumvent the requirements of Section 82 of the Act that stipulates the tender price as quoted and read out at tender opening is fixed and final. According to the Applicant, the exchange rate of the United States Dollar varies from time to time and thus the Interested Party's tender price is open to manipulation or collusion to inflate the Applicant's tender price due to the varying exchange rate.

The Respondents in their Memorandum of Response contend that the Tender Document contemplated the financial components of tenders would be submitted in multiple currencies and consequently Clause 33 of Section I: Instructions to Bidders at page 1-27 of the Tender Document provided for conversion of a foreign currency to Kenya Shillings. Further, it is the Respondents contention that the price schedules in the Tender Document specifically tables 3 and 4 thereof provided for conversion of prices quoted in foreign currency to Kenya Shillings. Further, it is the Respondents contention that the Applicant never sought any clarification with respect to the price schedules contained in the Tender Document which anticipated and

provided for multi-currency tendering as per Clause 33 of Section I: Instructions to Bidders at page 1-27 of the Tender Document.

The Respondents denied that the requirement to have tender prices quoted in our local currency was a mandatory requirement in the Tender Document. In support of this denial, the Respondents invited the Board to observe that mandatory requirements for the subject tender are spelt out in Clause 11 of Section I: Instructions to Bidders at page 1-14 of the Tender Document.

On its part, the Interested Party contends that the requirements for tender prices to be quoted in our local currency was provided for in Clause 33 of Section I: Instructions to Bidders at page 1-27 of the Tender Document but the same was not a mandatory criterion that would be applied for evaluation of tenders. Further, it is the Interested Party's view that not all Instructions to Bidders form part of the criteria for evaluation and that under Clause 18.2: Instructions to Bidders at page 1-92 of the Tender Document recognizes that tenderers could quote in a different currency at the price schedule 1, which is the only schedule that they quoted in a foreign currency being United State Dollars.

Having considered Parties pleadings and rival arguments therein, the Board studied the Tender Document and noted that Clause 11 of Section I: Instructions to Bidders at page 1-14 of the Tender Document contains mandatory requirements as a criterion to be applied during evaluation of

tenders. In addition, ITB 18.1 of Section II: Bid Data Sheet at page 1-38, schedules 1-7 contained in Section IV: Bidding Forms of the Tender Document provide as follows: -.

Clause 11 of Section I: Instructions to Bidders at page 1-14 of the Tender Document provided for mandatory requirement as follows;

11.1 The Bid submitted by the Bidder shall comprise the following:

(a) Letter of Bid

(b) Completed schedules as required, including Price Schedules, in accordance with ITB 12 and 17;

(c) Bid Security or Bid Securing Declaration, in accordance with ITB 20;

(d) alternative bids, if permissible, in accordance with ITB 13

(e) written confirmation authorizing the signatory of the Bid to commit the Bidder, in accordance with ITB 21.2;

(f) documentary evidence established in accordance with ITB 14.1 that the Plant and Installation Services offered by the Bidder in its bid or in any alternative bid, if permitted, are eligible;

(g) documentary evidence in accordance with ITB 15 establishing the Bidder's eligibility and qualifications to perform the contract if its Bid is accepted;

(h) documentary evidence established in accordance with ITB 16 that the Plant and Installation Services offered by the Bidder conform to the Bidding Document;

(i) in the case of a bid submitted by a JVA, JVA agreement, or letter of intent to enter into a JVA including a draft agreement, indicating at least the parts of the Plant to be executed by the respective partners;

(j) List of subcontractors, in accordance with ITB 16.2; and (k) any other document required in the BDS.

It is worth noting that from the above requirements there is no provision for the type of currency that a tenderer would use when quoting its tender price but only lists down all the mandatory documents required to be considered at the Preliminary Examination before a tender could proceed for Technical Evaluation. The Applicant and the Interested Party met the above mandatory requirements having submitted all the required documents and thus were eligible for Technical and Financial/Commercial evaluation.

The Board notes the following clauses of the Tender Document speak to the currency of the tender price as follows-

Clause 33 of Section I: Instructions to Bidders;

For evaluation and comparison purposes, the currency(ies) of the bid shall be converted into a SINGLE CURRENCY AS SPECIFIED IN THE BDS. (Emphasis added)

Clause 18.1 of Section I: Instructions to Bidders;

The currency(ies) of the bid shall be, as specified in the BDS

Clause 18.2 of Section I: Instructions to Bidders;

Bidders may be required by the employer to justify, to the Employer's satisfaction, their local and foreign currency requirements.

Clause 18.1 of Section II: Bid Data Sheet;

Prices shall be quoted in the following currencies: Kenya Shillings.

The above provisions of the Tender Document envisage a scenario where tenderers may quote their tender prices in foreign currencies, thus the need for conversion of foreign currencies to Kenya Shillings during evaluation and comparison of tenders.

The Board takes note of the fact that Schedule 1-6 of Section IV: Bidding Forms provides standard forms that have tables to be used by tenderers when quoting the prices for different goods. ***Schedule No. 1*** thereof provides for columns where tenderers are required to enter a code representing the country of origin as well as the specific currency. Additionally, tenderers were instructed to ***"create as many columns for unit price and total price as there are currencies."*** Schedule No. 2,3,4 and 5 provided for tenderers to ***"specify the currency in accordance with specifications in Bid Data Sheet under ITB 18.1...."*** which ITB

18.1 provides for the currency(ies) of the tender be as specified in the Bid Data Sheet.

The Board also takes note of the provisions of the Act and Regulations 2020. Section 89 of the Act provides as follows: -

- (a).....
- (b).....
- (c).....
- (d).....
- (e) a tenderer submitting a tender may, in quoting prices or providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used;**
- (f).....
- ...
- (g).....

Regulation 77 and 78 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter "Regulations 2020") provide as follows: -

- 77. (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)
- (b)
- (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)

Regulation 78 of Regulations 2020 provides as follows: -

78. (1) An evaluation report prepared under section 80(4) of the Act shall include— Evaluation report and professional opinion.

- (a)
- (b)
- (c)
- (d).....
- (e)
- (f) the evaluated price of each tender showing the price and any conversion to a common currency, if any;**
- (g)

The above Sections of the Act and Regulations 2020 provide for use by tenderers of foreign currency that is widely used in international trade when

quoting their tender prices and conversion of such foreign currency to our local currency during evaluation and comparison of tenders.

Section 80(2) of the Act 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."

From the Evaluation Report dated 17th May 2021 (hereinafter referred to as the Evaluation Report) which forms part of the confidential documents submitted by the Procuring Entity, the Board notes the Evaluation Committee used the Central Bank of Kenya's exchange rate as at 21st April 2021 which was the date of tender submission deadline and date of tender opening to convert foreign currencies to our local currency as stated in the evaluation report in compliance with Regulation 78(1)(f) of Regulations 2020 as follows:-

N 0	Bidder Name	Curre ncy	Corrected/Disco unted Bid Prices	Excha nge rate	Evaluation Currency Bid price on KES	Total Bid Price in KES
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1	M/s Elemech Engineering (K) Limited	KES	317,009,350.00	1.00	317,009,350.00	317,009,350.00
		USD	-	108.11	00	
2	M/s Burhani Engineers Limited	KES	101,887,167.56	1.00	101,887,167.56	216,934,077.90
		USD	1,064,147.58	108.11	115,046,910.34	
3	M/s Powergen Technologies Limited	KES	217,737,107.76	1.00	217,737,107.76	217,737,107.76
		USD	-	108.11	0.00	
4	M/s Polyphase Systems Limited	KES	130,749,935.92	1.00	130,749,935.92	232,789,114.49
		USD	943,830.17	108.11	102,039,178.57	
5	M/s Patronics	KES	613,188,155.35	1.00	613,188,155.35	613,188,155.35

	Services Limited	USD	-	108.11	0.00	
6	M/s Arm Engineering Company Limited	KES	202,125,019.92	1.00	202,125,019.92	422,423,938.55
		USD	2,037,695.41	108.11	220,298,918.63	

The above table clearly demonstrates that the price submitted in United State Dollars by the Interested Party was converted into Kenya Shillings as per the Bid Data Sheet and the Interested Party was evaluated as the lowest evaluated responsive tender based on the comparison in Kenya Shillings at the tender sum of Kshs 216, 934, 077.90 and this tender sum is not amenable to change as it is fixed and final in accordance with section 82 of the Act.

From the foregoing, the Board finds that the Interested Party's tender was evaluated at the Financial Evaluation stage in accordance with the provisions of the Tender Document read together with Section 80(2) of the Act.

In totality of the foregoing, the Board finds no merit in the Request for Review and proceeds to dismiss the same.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in this Request for Review: -

- 1. The Request for Review dated 23rd June 2021 and filed on 24th June 2021 with respect to Tender KETRACO/PT/007/2021 Procurement of EPC Contractor for the Completion of the Isiolo-Nanyuki 132 kV Transmission Lines, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 14th day of July 2021



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CHAIRPERSON

PPARB



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SECRETARY

PPARB

