

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.28/2007 OF 11<sup>TH</sup> MAY, 2007**

**BETWEEN**

**DONG MI ELECTRIC INDUSTRIAL CO. LTD.....APPLICANT**

**AND**

**KENYA POWER & LIGHTING CO. LTD.....PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Kenya Power & Lighting Co. Ltd (Procuring Entity) of 11<sup>th</sup> May, 2007 in the matter of tender NO. KPLC 1/1C/5/3/94/2006 for Supply and Distribution of Transformers

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. P. M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member

**IN ATTENDANCE**

Mr. C.R. Amoth	-	Holding Brief for Secretary
Mr. P.M. Wangai	-	Secretariat

## **PRESENT BY INVITATION FOR APPLICATION NO.28/2007**

### **Applicant, Dong Mi Electric Ind. Co. Ltd**

- Mr. John W. Njagi - Advocate, Dong Mi  
Mr. Edwin M. Njiru - Advocate, Dong Mi  
Mr. Newton Ndiru - Official, Dong Mi

### **Procuring Entity, Kenya Power & Lighting Co. Ltd**

- Mr. Kiragu Kimani - Advocate, Hamilton Harrison & Mathews, KPLC  
Ms Mueni Kirimi - Advocate, Hamilton Harrison & Mathews, KPLC  
Ms Noella Labaho - Advocate, Hamilton Harrison & Mathews, KPLC  
Mr. Robert Githinji - Advocate, KPLC  
Mr. K. P. Mungai - Senior Engineer, Electrical Workshop KPLC  
Ms. Beatrice Muendo - Asst. Manager/ Legal Service, KPLC  
Ms. Anne Gatukui - Supplies Manager, KPLC

### **Interested Candidates**

- Mr. N.D, Chavda - Technical Manager, IET/Vijai Electrical  
Mr. P.S. Ramesh Babu - Manager, Vijai Electrical Limited  
Mr. M. S. Jaffer - Sales/Marketing, Interecede Ltd  
Mr. B.J.N. Mburu - Advocate,  
Mr. S.P. Tiwari - Marketing Manager, Adra International  
Mr. Dennis Randonji - Official, Savsca India

### **BOARD'S DECISION**

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

## BACKGROUND

This tender was advertised by the Procuring Entity on 1<sup>st</sup> November, 2006. The initial closing/opening date was 20<sup>th</sup> December, 2006 but was extended to 2<sup>nd</sup> February, 2007 when the tender was opened in the presence of the parties' representatives. Twenty tenderers responded to the tender notice before the closing/opening date.

The firms who responded were:-

1. M/s Crompton Greaves Limited
2. M/s China National Aero Technology I & E Corporation
3. M/s Interecede Limited
4. M/s Emirates Transformers & Switchgear Limited
5. M/s Eaglerise Electric & Electronic Co. Limited
6. M/s Tesla Transformers Limited
7. M/s Marsons Electrical Limited
8. M/s Mahashakti Conductors PVT Limited
9. M/s Adra International Limited
10. M/s Doshi & Co. (Electrical) Limited
11. M/s ABB Limited
12. M/s Chian-Sanbian Sci-Tech Co. Limited
13. M/s Ekarat Engineering Public Company Limited
14. M/s Xian Electric Engineering Co. Limited
15. M/s Iran Transfo Co. Limited
16. M/s Svasca Industries India Limited
17. M/s El Sewedy Electric Limited
18. M/s Energy & Communication Limited
19. M/s Dong Mi Electric Ind. Co. Limited
20. M/s Vijai Electrical Limited

## Evaluation

The evaluation of the tenders was carried out in three stages namely:

1. Technical Evaluation
2. Commercial Evaluation

The following bidders were found technically responsive and were therefore recommended for the commercial evaluation:

CODE	ITEM DESCRIPTION	COMPLIANT BIDDERS
453104	15KVA TRANSFORMER S/PHASE 11/250V	1. M/s Dong Mi Electric Ind. Company Limited 2. M/s Iran Transfo Company 3. M/s Vijai Electricals
453116	50KVA TRANSFORMER 3/PHASE 11/433V	1. M/s Dong Mi Electric Ind. Company Limited 2. M/s Vijai Electricals 3. M/s Adra International 4. M/s Iran Transfo Company 5. M/s Mahashakti Conductors Limited 6. M/s Intercede Limited
453119	100KVA TRANSFORMER 3/PHASE 11/433V	1. M/s Dong Mi Electric Ind. Company Limited 2. M/s Vijai Electricals 3. M/s Adra International 4. M/s Iran Transfo Company 5. M/s Mahashakti Conductors Limited 6. M/s Marsons Electricals 7. M/s Svasca Industries Limited 8. M/s Intercede Limited
453121	200KVA TRANSFORMER 3/PHASE 11/433V	1. M/s Dong Mi Electric Ind. Company Limited 2. M/s Adra International 3. M/s Iran Transfo Company 4. M/s Mahashakti Conductors Limited 5. M/s Svasca Industries Limited 6. M/s Vijai Electricals M/s Intercede Limited
		1. M/s Dong Mi Electric Ind. Company Limited

453123	315KVA TRANSFORMER 3/PHASE 11/433V OPEN BUSHING	<ol style="list-style-type: none"> <li>2. M/s Adra International</li> <li>3. M/s Iran Transfo Company</li> <li>4. M/s karat Engineering Public Co.</li> <li>5. M/s Vijai Electricals</li> <li>6. M/s Telsa Transformers Limited</li> <li>7. M/s Marsons Electrical Industries</li> </ol>
453136	630KVA TRANSFORMER 3/PHASE 11/433V	<ol style="list-style-type: none"> <li>1. M/s Dong Mi Electric Ind. Company Limited</li> <li>2. M/s Adra International</li> <li>3. M/s Vijai Electricals</li> <li>4. M/s Telsa Transformers Limited</li> <li>5. M/s Crompton Greaves Limited</li> <li>6. M/s Iran Transfo Company</li> </ol>
453157	50KVA TRANSFORMER 3/PHASE 33/433V	<ol style="list-style-type: none"> <li>1. M/s Dong Mi Electric Ind. Company Limited</li> <li>2. M/s Iran Transfo Company</li> <li>3. M/s Intercede Limited</li> </ol>

#### **FINANCIAL EVALUATION**

The Commercial Evaluation Committee noted that the bid submitted by the Applicant was accompanied by a notification of a bid bond via swift transmission from Exchange Bank through Barclays Bank of Kenya. The Applicant was therefore disqualified despite its tender being the lowest priced in some items.

In its meeting held on 26<sup>th</sup> April, 2007 the Central Tender Committee awarded the tender, and the letters of notification of award to both successful and unsuccessful tenderers were written thereafter.

#### **THE APPEAL**

This Appeal was lodged by Dong Mi Electric Ind. Co. Ltd on 11<sup>th</sup> May, 2007 against the decision of the tender committee of the Kenya Power & Lighting Co. Ltd. The Applicant was represented by Mr. John W. Njagi and Mr. Edwin M. Njiru, both Advocates, while the Procuring Entity was represented by Mr. Kiragu Kimani, Advocate.

The Applicant raised fourteen grounds of appeal, which we deal with as follows: -

**Grounds 1, 2, 3, 4 and 14**

These are not grounds of appeal but mere statements which do not cite any breach of the Regulations, and so the Board will not comment on them.

**Ground 5, 10, 11, 12 and 13**

These grounds of appeal have been consolidated since they raise similar complaints on the breach of Regulation 26 and Clause 5 of Section C of the tender document. The Applicant stated that it received an addendum Ref: KPLC1/1C/5/3/94/2006/pk dated 13<sup>th</sup> December, 2006 from the Procuring Entity containing amendments to the tender document following a clarification sought by one of the candidates. It argued that paragraph 2 of the said addendum, which purported to amend Clause 14.3 of Section C of the tender document, was ambiguous as it failed to spell out clearly the role of the affiliate bank in the issuance of the bid bond.

The Applicant further stated that it sought clarifications on paragraph 6 of the addendum in its letter Ref: DME-20070102/01 dated 9<sup>th</sup> January, 2007 but the Procuring Entity did not respond. This was discriminatory and in breach of Regulations 4 and 11. Further, the requirement that the local bank should be affiliated to a foreign bank in the country of the tenderer was inconsistent with international tendering process as set out under Regulation 38. Due to this ambiguity, the Applicant furnished a bid bond of US\$. 530,000.00 issued by Korea Exchange Bank through Barclays Bank of Kenya. It was therefore wrong for the Procuring Entity to disqualify the Applicant on the premise that its bid bond was invalid thus making its tender non-responsive.

Finally, the Applicant urged the Board to uphold its earlier decisions in Application Nos.38/2006 and 41/2006 in which it had held that

Regulation 27 on the bid bond was breached by the procuring entities. It contended that though the Board may not be bound by its past decisions, the Board must be consistent in its rulings.

In response, the Procuring Entity stated that Clause 14.3 of Section C of the tender document, and the subsequent addendum dated 13<sup>th</sup> December, 2006 were not ambiguous. It argued that the addendum required tenderers to submit a bid bond from a reputable bank in Kenya or from a reputable bank in Kenya with affiliations to a bank in the tenderers' country. This requirement was intended to facilitate foreign tenderers to easily obtain bid bonds from the banks in their respective countries, with affiliations in Kenya. However, the Applicant's bid bond that was submitted at the tender opening on 14<sup>th</sup> February, 2007 was issued by Korea Exchange Bank and was accompanied by a swift message requesting Barclays Bank of Kenya to authenticate the bid bond, which it did but denied any responsibility. The Procuring Entity further stated that the bid bond submitted by the Applicant on 27<sup>th</sup> March, 2007 could not be accepted since it was submitted after the tender had closed on 2<sup>nd</sup> February, 2007. As the Applicant's tender was not accompanied by a valid bid bond, it was disqualified for being non-responsive.

On the allegation that it declined to respond to the Applicant's request for clarification in its letter dated 9<sup>th</sup> January, 2007, the Procuring Entity stated that the information requested for was included in the addendum dated 17<sup>th</sup> January, 2007. This addendum was received by the Applicant.

The Board has carefully considered the parties' arguments on these grounds and noted that the key issue for determination was whether or not Clause 14.3 of Section C of the tender document and the subsequent addendum dated 13<sup>th</sup> December, 2007 were ambiguous or open to different interpretations by different tenderers.

Clause 14.3 provides as follows:

“The tender security shall be denominated in Kenya Shillings or in any other freely convertible currency, and shall be in the form of an on Demand bank guarantee (on the bank’s letter head) issued through a reputable bank in Kenya, in the form provided in the tender documents or other form acceptable to the Procuring Entity and valid for thirty days (30) beyond the validity of the tender. A security in form of a banker’s cheque from a reputable bank in Kenya is acceptable”.

The Board further noted that paragraph 2 of the addendum provides as follows:

“KPLC would accept a Bank guarantee from a reputable bank in Kenya or from a reputable bank in Kenya with affiliations to a Bank in your country”.

The Board notes that the addendum became an integral part of the tender document and should have been complied with by the tenderers. The Applicant submitted a bid bond issued by the Korea Exchange Bank which was accompanied by a swift message from Korea Exchange Bank that read as follows:-

“Please advise the following guarantee to the Kenya Power and Lighting Co. Ltd of Kenya.....”

There then followed the text of the Korea Exchange Bank guarantee. This message was dated 10<sup>th</sup> January, 2007.

Barclays Bank of Kenya then forwarded a message dated 12<sup>th</sup> January, 2007 by way of a letter headed note to the Procuring Entity which read as follows:-



“Attached find a message from Korea Exchange Bank, Seoul .... which we confirm authenticity and advise without any engagement or responsibility on our part.”

The Board notes that the Barclays Bank of Kenya disowned responsibility on the bid bond which came from Korea Exchange Bank. By so disowning the bid bond, Barclays Bank effectively rendered the bond ineffective as a bond issued through a Kenyan Bank.

The question that now arises is how to interpret Clause 14.3 of the tender document and the Addendum Paragraph 2.

Regulation 26 of Exchequer and Audit Act (Public Procurement) Regulations permits modifications to be made to tender documents. In this case, there was a request for clarification of Clause 14.3 of the Instructions to Tender, to which the Procuring Entity issued an addendum.

Under Regulation 26, a Procuring Entity may:-

“.....modify the tender documents by issuing on addendum which shall become an integral part of the Tender documents .....

The Addendum that was issued, mandatorily became an integral part of the tender. It cannot be ignored, as Counsel for the Applicant stated was done by the Applicant.

The addendum was promptly communicated to all bidders as required by Regulation 26, and there is no argument that such communication was not done. The Board, therefore, does not see any ambiguity in how to treat the Addendum or in its content.

Accordingly, the Board finds that the Addendum Paragraph 2 became an integral part of the tender document upon notification

pursuant to Regulation 26. Thus, Instructions to Tenderers Clause 14.3 must be read together with the Addendum Paragraph 2.

The Board's understanding of the requirement for tender security is therefore that the bid security which was required to be issued had to be by a reputable bank in Kenya accepting to be bound by the bid guarantee, even if such guarantee emanated from a correspondent bank abroad.

It is noted that ITT Clause 6 also allowed for clarifications and amendments to the tender document. Thus, the argument by the Applicant that the clarification was ambiguous ought to have been followed up by it seeking further clarification, which the Applicant did not do.

It is therefore apparent that the Applicant's tender was not accompanied by a valid bid bond at the time of the tender opening. The Applicant's tender could thus not have properly been accepted for evaluation since doing so would have defeated the essence of a bid bond. Consequently, the Applicant's tender was non-responsive, and was properly disqualified by the Procuring Entity.

It is further noted that a valid bond dated 26<sup>th</sup> March, 2007 was, subsequently, submitted by Barclays Bank of Kenya for or on behalf of the Applicant. However, as this was after tender opening it was therefore time-barred.

The Board further notes that the two authorities, Application Nos. 38/2006 and 41/2006, cited by the Applicant, do not assist it in this case. In Application No.41/2006 between Kitek (7) Ltd and Moi Teaching and Referral Hospital, the Board found that at the time of tender closing/opening, the bid securities of the Applicant were valid and the placing of Charter House Bank under the statutory management of the Central Bank was beyond the control of the Applicant. In that appeal no issue of ambiguity of the clauses on bid bonds arose and the bond was valid at tender opening. However, in

the present appeal the bid bond of the Applicant was invalid as at the time of the tender closing/opening.

In respect of Application No. 41/2006, there was a clear and incontrovertible contradiction between the Form of Bid that required a 120 day bid validity period and the standard tender security Form that required a 150 day bid validity period. This put the tenderers in a quandary that was not clarified prior to tender closing. In the present case, however clarification was given timeously when requested.

With regard to the Applicant's claim that the Procuring Entity discriminated against it by declining to respond to its letter Ref: DME-20070102/01 dated 9<sup>th</sup> January, 2007 requesting for clarification, the Board finds that the information sought was included in the Addendum dated 17<sup>th</sup> December, 2007. That Addendum was availed at the hearing, and the Applicant confirmed having received such Addendum.

With regard to the Applicant's reference to Regulation 38 and international standards having been breached, the Board notes that the reference in the Regulations to international standards, relates to tender specifications for items which are the subject of the tender. This provision was therefore mis-quoted by the Applicant as it is not relevant to the grounds alleged to have been breached.

Accordingly, these grounds of appeal fail

#### **Grounds 6, 7, 8, 9, and 12**

These grounds of appeal were also consolidated since they raise similar complaints regarding evaluation and award of the tender.

In these grounds, the Applicant alleged that the Procuring Entity breached Regulation 30(7) and (8) and Clauses 23.5 and 23.4 of Section C of the tender document. The Applicant argued that it had tendered the lowest price in some items and should have been

considered in the post-qualification process. By so doing, the Procuring Entity not only breached the post-qualification criterion set out under Clause 25 but also Regulations 30(7) and (8). It further contended that it had successfully supplied the Procuring Entity with all ranges of power and distribution transformers in the past.

In response, the Procuring Entity denied that it breached Regulation 30(7) and (8). It argued that the tenders were evaluated in three stages namely preliminary, technical and commercial evaluation stages as set out in the tender document. The Applicant's tender was found non-responsive since it was not accompanied with a valid bid bond, and was therefore disqualified at the commercial evaluation stage. Subsequently, the Applicant's tender could not have been the lowest evaluated tender regardless of its price.

On the allegation that it failed to consider the Applicant's past performance in arriving at its decision, the Procuring Entity stated that past performance was not a criteria for evaluation and in any case each tender should be treated on their own merits.

Finally, the Procuring Entity stated that the entire process was conducted transparently, fairly and all tenders were treated equally

The Board, having found that the Applicant was properly disqualified for failing to submit a valid bid bond, the Applicant's tender was non-responsive and could not have advanced to the next stage of evaluation. Consequently, the Procuring Entity could not have breached Regulation 30(7) and (8).

Accordingly, these grounds of appeal also fail.

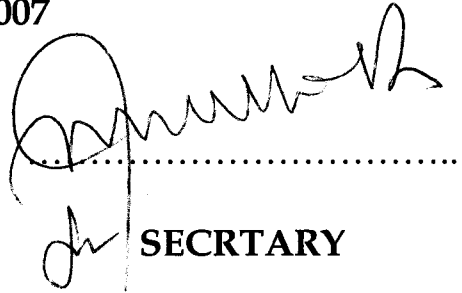
Taking into consideration all the above matters, the appeal fails and the tender process may proceed.

Dated at Nairobi this 31<sup>st</sup> day of May, 2007

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CHAIRMAN

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SECRETARY

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