REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 4 OF 2007 OF 24th JANUARY, 2007

BETWEEN

AREVA T & DSA AND
VISCA CORPORATION AS AREVA
TD-VISCAS CONSORTIUM...APPLICANTS

AND

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

Appeal against decision of the Tender Committee of the Kenya Power & Lighting Company Ltd (Procuring Entity) dated 12th January, 2007 in the matter of Tender No. KPLC/ESRP/023/05 for Replacement/Upgrade and expansion of the SCADA/EMS System

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Paul M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr Joshua Wambua	-	Member
Eng. Daniel W. Njora	-	Member

IN ATTENDANCE

Mr C. R. Amoth	-	Holding brief for Secretary
Ms. P. Ouma	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.40/2007

Applicant, Areva TD-Viscas Consortium

Mr. Peter Gachuhi	-	Advocate, Kaplan & Stratton
Mr. Mahat Somane	-	Legal Asst. Kaplan & Stratton

Mr. Marc Laney	-	Vice-President
Mr. Pascal Picat	-	Tender Segment Manager
Mr. Shamir Padia	-	CSD - Kenya

Procuring Entity, Kenya Power & Lighting Co. Ltd

Mr. Kiragu Kimani	-	Advocate, Hamilton Harrison & Mathews Advocates
Ms Michi Kirimi	-	Advocate, Hamilton Harrison & Mathews Advocates
Mr. Timothy Muchiri	-	Lawyer, Hamilton Harrison & Mathews Advocates
Mr. Robert Mahenia	-	Advocate, KPLC
Mr. Stanley Muturi	-	Project Leader - ESRP
Mr. Samuel Ndirangu	-	Telecommunications Manager,
Mr. George Ngugi	-	Engineer, ESRP
Mr. Andolo Ambas	-	Chief Engineer, KPLC
Ms Mary Kihara	-	Chief Supplies Officer, KPLC
Ms Evalyn Wafula	-	Consultant, Gamma

Interested Candidates

Mr. David Mwaura	-	Advocate, Mboya & Wangong'u for ABB
Mr. John Pilling	-	Vice President, ABB Sweden
Mr. Trevor Tajtaarp	-	Technical Specialist, ABB Kenya
Mr. Paul Ogunde	-	Advocate, Walker Kontos Advocate for Siemens Ltd
Mr. J.J. Ackermann	-	Regional Director, Siemens Ltd

BOARD'S DECISION

Upon hearing the parties and examining the documents submitted before it the Board hereby decides as follows.

BACKGROUND

Tender Advertisement/Pre-qualification

The initiation of several projects related to power enhancement was prompted by the fact that the Government had received credits from various development partners including International Development Association (IDA), Agence Francaise de Development (AFD), the Nordic Development Fund (NDF) and the European Investment Bank (EIB) towards the cost of the Energy Sector Recovery Project.

The SCADA/EMS project was funded by a credit from EIB whose objective was to improve network reliability, expand capacity, reduce network losses and improve operational efficiency within KPLC.

The Pre-qualification notice for this tender was published in the Daily Nation and the Official Journal of the European Community (OJEC) on 16th January, 2006 and closed on 17th March, 2006. Out of 12 firms that responded, 4 were pre-qualified for the bidding and the tender documents were sent to them on 29th May, 2006. Tenders were opened on 18th August, 2006 for the following bidders that responded.

a) ABB Power Technologies AB – Sweden (ABB)
b) Areva T & D – Viscas Corporartion – France(Areva)
c) Siemens Aktiengesellchaft – Germany (Siemens)
d) SNC Lavalin ECS Inc – Canada (SNC)

The prices quoted by the bidders were as follows:-

No.	Firm	Amount Quoted
1.	Areva – Discount letter 5.2% on Schedule 1 & 2 and 7.78% US$ part of Schedule 1.	Euros8,416,122 US$8,244,887 Kshs.142,930,483
2.	Siemens	Euros15,914,660 Kshs.178,890,000
3.	SNC – Lavalin – Discounts US$221,000	CAN$8,541,713 Kshs.52,562,335 US$15,966,374 CHF1,419,499
4.	ABB – Kshs. Reduced to 338,576,000 as per discount letter	SEK46,227,000 Euros6,244,000 CHF2,983,100 Kshs.564,014,000

EVALUATION

The evaluation was carried out by a team of consultants namely, Fichtner GmbH & Co. KG appointed by the Procuring Entity with agreement of the funding agencies, together with some employees of the Procuring Entity.

The evaluation of the tender was carried out in 6 steps as follows:-

Step 1

This involved determination of substantial responsiveness to confirm whether the required documents were provided. All the four bids were found responsive.

Step 2

This involved a check on arithmetical errors and technical responsiveness

The responsiveness of the bids was determined in accordance with the Instruction to Bidders.

Bids were examined for completeness, computational errors and responsiveness to the technical requirements of the Tender Documents.

For determination of technical responsiveness the Evaluation Team checked the bids on completeness and content of:-

- The descriptions furnished with the bid
- Price schedules furnished with the bid
- Additional information as required in the Tender Documents
- Answers to the questionnaire provided in Tender Documents
- Technical data sheets required in Tender Documents
- Table of conformance required in Tender Documents

Two bidders, Areva and SNC, were found to be technically non-responsive and were therefore disqualified from the next stages of the evaluation. For the Applicant, the main items found to be non compliance were:

i) Network load monitor
ii) MW and Mvar Integration
iii) Main Application server

The bid submitted by SNC Lavalin was found to be non compliant with respect to the data dissemination, control sequences and outage scheduler.

Step 3: Bid Clarification

Bid clarifications were sought from the remaining bidders, namely, ABB and Siemens, through inquiries and clarification letters sent to them on 11th and 12th August, 2006 respectively, and their respective responses were received on time.

Decision on the radio portion

During the evaluation, it was found that none of the bidders fully met the expectations of the voice and data integration frequency optimization. The evaluation committee, taking into consideration the limited availability of frequency pairs from the CCK, resolved not to consider the radio portions of all the bids for further evaluation. Since the radio portion was only a small part of the overall project (about 8%) and their bid price difference for the two bidders for this portion was less than 1%, it was further resolved to make a provision for a sum based on the average price of the two technically responsive bidders.

The scope for this part would therefore, be clarified during contract clarifications with the successful bidder.

3.0 Detailed Technical Evaluations

Detailed technical evaluation was carried out for the two bidders, ABB and Siemens.

3.1 General

3.1.1 Overall System and Project setup

The Network Manager of ABB and Sinaut Spectrum of Siemens were well known products developed especially for supervision of HV transmission networks.

Both systems were used for national and regional network control and supervision by many customers world wide as documented in the reference lists given by both bidders. Both bidders were also developers/manufacturers of the SCADA/EMS system as well as suppliers of the offered RTUs and Telecommunications Equipment.

Both SCADA systems are standard products of the two reputed manufacturers which should ensure that Network Manager and Sinuat Spectrum would be further developed and maintained by the companies ensuring smooth software maintenance (adding of new functions and capacity) and continuity (release follows-up).

3.1.2 Performance Parameters

The overall performance of both systems (combined hard and software, SCADA/EMS) would meet KPLC's requirements as defined in the tender specification and was clearly documented and guaranteed by the bidders in their offers.

Under System Functional Guarantees, ABB confirmed the minimum performance figures for the availability as specified in the tender, whereas Siemens exceeded the requirement by guaranteeing an availability of up to 99.90% for the complete system.

3.1.3 Project Organization, Time and Manning Schedule

Both bidders had provided time and manning schedules as required in the Instructions to Bidders. Both bidders also confirmed the guaranteed time for completion of 27 months (including availability test), as well as the required completion times for the requested milestones. Both bidders considered similar manpower (85 at peak times) for execution of the works of installation of development system (after 6.5 month), which is required for execution of these works.

3.1.4 Technical Evaluation – Training

Both bidders offered comprehensive training programs to be conducted in Kenya and abroad, giving training objectives, basic content and descriptions of the individual training courses. However, the scope offered for training (number, duration of courses and number of participants) differed. A comparison of the scope of training offered showed that Siemens offered the number of training man-days equal to the number specified, while ABB offered a lesser number of training man-days.

However, the training details would be discussed with the successful bidder during contract clarification, as provided for in the tender.

3.1.5 Concept for Back-up NCC in case of NCC outage

From the bidders' responses to the questionnaires submitted, during step 3 "Bid Clarifications", it was found that the two bidders offered different solutions for the realization of the required Back-Up concept for NCC.

ABB
Redundant coupling of the RTUs would be realized with the "multicast functionality" at the front ends of the respective NCC/RCC only. As a consequence all information of the RTUs related to the NCC as well as all information of the RTUs related to RCC Costal (Back-Up NCC) would be unavailable in case of front ends outage.

ABB did not provide clear information about common Database Management and Database Maintenance utilities concerning Back-Up Concept.

SIEMENS
Siemens offered a standard software solution for realization of the required Back-Up concept using a multi-site configuration. This solution provided the functionality that each of the RCCs would be able to act as Back-Up for NCC, even each of the RCCs would be able to act as a Back-Up for each of the remaining RCCs.

This functionality exceeded the requirements of the KPLC Project. Furthermore the multi site capability provided a Common Database Management and Database maintenance utility for all of the NCC/RCC Systems.

Siemens furnished a list with reference projects for the offered multi site concept.

3.2 SCADA/EMS System Functions

The Technical Evaluation for this sub-item was based on the "Table of Conformance" furnished with the respective bids, as well as based on the software description included in the bids. Results were detailed in the "Evaluation and Rating of Table of Conformance".

Overall Results were as follows:-

ABB

The offered SCADA/EMS software fulfilled the functional requirements as specified. There were some items which had been indicated by ABB to be "partial complaint", but they would not lead to restrictions in functionality of the software system.

SIEMENS

The Sinaut Spectrum software package offered by Siemens fulfilled the requirements of the specification. All items had been indicated to be "compliant" to the specifications with only few minor exceptions. The offer was the most complete one with clear and comprehensive software descriptions provided.

3.3. Master-station Hard and Software

Both bidders offered open architecture hardware configurations with powerful processors and UNIX/Linux operating systems.

ABB

Offered a powerful overall hardware configuration applying HP Proliant PC with Intel X3 processors. Dedicated servers were proposed for the SCADA application functions (redundant configuration), and the power application functions. The hardware configuration is homogenous as only HP hardware is offered with the exception of the Front – end servers. The servers are interconnected by a 10/100 Base T redundant/LAN realized by fast Ethernet switches.

SIEMENS AG

Offered a powerful overall hardware configuration using dedicated 64 bit Risk processors with SUN servers for the SCADA application functions (RTC in redundant configuration), for the redundant Front – End processors (TCI), the operator work stations and general purpose consoles and for the power application functions. The configuration was homogeneous as only SUN Micro system servers and workstations were used. This also applied for the data acquisition subsystem.

The remaining equipment offered by ABB and Siemens was mostly identical, e.g. printers, TFT displays etc. Siemens offered high end Barco DLT rear projection systems. ABB initially offered the same systems as an option, but during evaluation, price adjustment was done thus the evaluated solution would be identical with those offered by Siemens.

3.3 RTUs and Adaptation Works at Outstation

Both bidders complied with the tender specifications.

ABB
ABB offered new RTUs, and extends/reuses existing RTUs as specified in the tender specifications. New RTUs to be supplied would be of ABB RTU 560 type, which were their latest generation and were successfully in service in various systems world wide.

SIEMENS
Siemens did not offer extension/reuse of some existing RTUs as specified in the tender, but opted to supply all new RTUs. All RTU's would be of SAT 1703 type, which was their latest generation of RTU's and has references in high voltage applications world wide. SAT was a company of VAT Tech, which was consolidated with Siemens.

The supply of all new RTUs had the following advantages:-

- All RTUs in the system would be of the same type.
- Homogeneous transmissions protocols using standard protocols IEC 101 and 104, with no proprietary protocols.
- New life cycle for all RTUs in the system.

Adaptation Works

The evaluation showed that ABB and Siemens offered interface equipment (Transducers) of the same supplier (Tilquist) with identical measurement accuracy.

There were only marginal differences concerning the rest of interface equipment.

Siemens furnished a detailed table with quantities of the offered adaptation material and works. This would ease a possible future discussion concerning excess/reduction of material and works due to site surveys. ABB, on the other hand indicated that a comprehensive list could only be produced after actual site survey.

3.4 Telecommunication System

Both bidders offered SDH terminal equipment for use with telecommunication system based on Optic Ground Wire (OPGW). Furthermore, both bidders also offered digital power line carrier equipment where new PLC links were to be installed. For the Optic Ground Wire (OPGW) cables, both bidders confirmed that they would supply cables with the mechanical strength required for the different span length of the existing transmission lines.

As far as the technical requirements were concerned, both offers generally complied with the technical specification.

The SDH equipment offered by Siemens was part of a new system family and not yet type tested. Type tests were available for the predecessor equipment of the same family only. This meant that there are no field experience references for the actual terminals offered.

As mentioned at step 3, the solutions for the Radio Communication offered by the bidders, had not been considered in the technical evaluation and provisional sums were instead used for evaluation purposes.

Live line installation of Optic Ground Wire (OPGW)

The bidders were asked to quote for live line installation of Optic Ground Wire (OPGW) in the provisional price sheets.

Siemens did not quote for some selected OPGW links to be installed under live line conditions. They stated that live line installation of the links would not be possible because of clearance reasons, determined by the respective transmission line towers design.

Live Line Installation of OPGW was indispensable for selected lines indicated below, as it would be difficult to shut down these crucial lines.

Masinga	-	Kiganjo
Kiganjo	-	Nanyuki
Lessos	-	Muhoroni
Muhoroni	-	Kisumu
Muhoroni	-	Chemosit
Naivasha	-	Lanet
Lanet	-	Lessos
Lessos	-	Musaga
Dandora	-	Embakassi
Juja	-	Rabai: Sections Juja – Koboko and Rabai – Voi

Other sections could be done under de-energized line condition.

As requested in the tender specification, ABB, AREVA and SNC Lavalin offered possible Live Line installation of OPGW on all the lines, while only Siemens stated that they would not be able to carry out live line installation on most of the lines.

ABB re-confirmed in writing (as of Bid Clarifications) that they would be able to install all OPGW links under live conditions.

3.5 NCC and RCC Facilities

Both bidders complied in general with the required scope. The scope offered by ABB was not clear in the initial bid but was confirmed by ABB during Bid Clarification in accordance with the tender requirements.

As a consequence of the decision made during site visits, Diesel Generators had to be situated outdoors in the case of RCC Kiganjo and RCC Rabai.

Both bidders restricted protection class for their offered generators. During bid clarifications, Siemens confirmed their generator will be suitable for outdoor installation whereas ABB recommended that generators use additional housing (e.g. a container).

Highlights of the two bids

ABB
Live Line Installation for all OPGW links was possible. Diesel Generators offered was not suitable for out door installation. The bidder proposed to have the generator in an enclosure such as a container.

SIEMENS
Advanced solution for Back-Up of NCC in case of outage, with common database maintenance, any of the RCC scan to act as Back-Up for NCC homogeneous standard Telecommunication Protocols IEC 101 and 104 and no proprietary protocols.

Supply of new RTU equipment for all outstations (life cycle, 2 years of defects liability period).

Live Line Installation for some of the OPGW links deemed not possible due to clearance reasons.

Offered SDH equipment not yet type tested. The firm proposed to assign all the installation works to Siemens Kenya, which contradicts the General Conditions of Contract (GCC 43) provided in the tender documents.

4. Commercial Comments

4.1 Technical Deviations

Technical deviations relevant to the offered scope of supply and affecting the bid prices are dealt with in step 2 and 3.

4.2 Financial/Commercial Comments

Both bidders included commercial comments in their offer.

None of the bidders' commercial comments were rated as crucial during evaluation and therefore they were considered to be a subject of contract clarification with the successful bidder.

5. Financial Evaluations

The bid prices including discounts as read out during public bid opening are shown in the following table.

No.	Firm	Amount Quoted
1.	Areva	Euros 8,461,122 US$ 8, 244,887 Kshs. 142,930,483
2.	Siemens	Euros 15,914,660 Kshs.178,890,000
3.	SNC-Lavalin	CAN$ 8,541,713 Kshs.52,562,335 US$ 15,966,374 CHF 1,419,499
4.	ABB	SEK 46,227,000 Euros 6,244,000 CHF 2,983,100 Kshs. 564,014,000

5.1 Determination of Correct Tender Prices

As in evaluation step 2 it was found that correction of tender prices was necessary due to significant arithmetical errors detected in the bid of Areva.

The table below gives the corrected prices with corrections and unconditional discounts

Tenderer (a)	**Read out Prices**		**Discounts**		**Corrections**	**Omitted IDF (2.75 %)**	**Corrected Bid Prices**	**Corrected/ Discounted Bid Prices in Kshs.**
	Currency (b)	Amount (c)	Amount (d)	Bid Price (e)=(c)-(d)	Comput a-tional error (f)	(g)	(h)=(e)+(f)+(g)	
ABB	EURO	6,244,000		6,244,000			6,244,000	
	SEK	46,227,000		46,227,000			46,227,000	
	CHF	2,983,100		2,983,100			2,983,100	
	KES	564,014,000	225,438,000	338,576,000			338,576,000	1,567,959,990.78
AREVA	EURO	8,416,122	437,638.34	7,978,484	400,000	225,122	8,603,605.70	
	USD	8,244,887		7,603,435	676,085	242,397	8,521,916.45	
	KES	142,930,483		142,930,483			142,930,483	1,577,313,285.27
SIEMENS	EURO	15,914,660		15,914,660			15,914,660	
	KES	178,899,000		178,899,000			178,899,000	1,666,342,556.64
SNC	CAD	8,541,713		8,541,713			8,541,713	
	CHF	1,419,499		1,419,499			1,419,499	
	USD	15,966,374		15,966,374			15,966,374	
	KES	52,562,335	221,000.00	52,562,335			52,562,335	1,849,277.88

5.2 Determination of Evaluated Tender Price

5.2.1 Provisional Sums for Radio Portion

As mentioned in Chapter 2.6, it was resolved not to evaluate the radio portions offered by the two bidders, but to make a provision for a sum equal to the average price of the two technically responsive bidders. The provisional sum was used in the financial evaluation.

The equivalent prices for the Radio Portion as in the bids' Price Schedules were as follows:

ABB - KES 127,735,291
Siemens - KES 130,978,804

Provisional Sum = Average of both prices = KES 129,357,048

5.2.2 Price Adjustment for Omissions

During evaluation step 2 the following omissions were detected in the ABB bid:

Rear projection system for NCC and RCC Nairobi specified in the Tender. Only front projection was included in the ABB scope, rear projection was quoted as an option.

ABB confirmed the quoted optional prices to be applied for rear projection solution compliant to specifications.

ABB bid price was therefore adjusted by adding the quoted prices of the two sets of the offered video wall units.

5.3 Result of Financial evaluation

Taking into account the corrections, omissions and price adjustments described above, the outcome of the financial evaluation of responsive bidders was as tabulated below.

Item	Description	ABB	Siemens
1.	Corrected/discounted tender price (KES).	1,567,990.78	166,342.64
2.	Price adjustment for rear projection system (NCC & RCC)	61,893,554.00	
3.	Radio system	(127,735,291.00)	(130,978,804.00)
4.	Provisional sum for Radio	129,357,047.50	129,357,047.50
5.	**Total Evaluation Price**	**1,631,475,301**	**1,664,720,800**
	Ranking	**1**	**2**

5.4 Provisional and Optional Items Prices

It was proposed to install OPGW on most of the lines under live-line conditions. This would remove the need to have major regions of the country subjected to long durations of shut down. In the Tender, bidders were required to quote provisional sums for OPGW live-line installation. As stated in the preceding evaluation sections, ABB confirmed the possibility of live-line installation on all line sections, while Siemens quoted for only 388 km out of 1281 km, stating that it was not possible to do the rest under live-line conditions.

Under options, bidders were required to quote for:-

1. Additional RTUs (inclusive of station adaptation works, 48VDC power supply, transmission equipment and ready for use with SCADA/EMS) for selected substations. Both bidders gave offers as required.

2. Additional fibre optic network links plus the associated SHD terminal equipment.

3. Fibre optic connection solution to major KPLC offices ("last mile"). ABB offered a microwave radio solution while Siemens quoted for underground fibre cable.

A comparison of costs of the items by the two bidders was as follows.

	Provisional and Optional Items	**Siemens (Kshs)**	**ABB (Kshs)**
1.	Total for selected additional RTU's	37,966,248	28,704,834
2.	Additional optional FO links = associated SDH terminal	130,506,798	11,425,672
3.	Total for last mile (KPLC offices)	45,089,725	30,110,971
4.	Total for additional live line installation	3,805,446	74,741,983

As already noted, Siemens quoted live line for only 388 km out of 1281 km.

5.5 CONCLUSION

The overall outcome of the tender evaluation found that ABB was the lowest Evaluated Bidder.

Due to system operation limitations, Live Line Installation of OPGW was indispensable for selected line, as it would not be possible to shut down these crucial lines, (to avoid supply interruptions to whole regions of the country, and affecting large numbers of consumers).

6. RECOMMENDATION

The evaluation team recommended the award of the contract to ABB for being the lowest evaluated bidder at their quoted price as follows.

Item	Description	Amount
1	Bid Price	SEK 46,227,000
		Euro 6,244,000
		CHF 2,983,100
		KES 338,576,000
2	Adjustment for rear projection	KES 61,893,554
3	Optional items brought into main bid	KES 249,983,460

This is equivalent to KES 1,879,837,005.00.

Furthermore, due to the importance of live line installation, the evaluation team recommended that a penalty clause be included to cover any non-performance of live line installation of OPGW as part of the contract.

The estimated project cost was to be inclusive of the recommended spares and project contingency of five percent of the total contract price as summarized below:-

Item	Description	Cost in Kshs.
1	Bid price	1,567,959,991
2	Adjustment for rear projection	61,893,554
3	Optional items brought into bid (RTU and Fibre for last mile)	96,206,233
	Sub-total	**1,879,837,005**
4	Recommended Spares	44,287,661
5	Contingency 5%	96,206,233
	Grand Total	**2,020,330,899**

THE TENDER COMMITTEE AWARD

The Corporation Tender Committee in its meeting of 14th November, 2006 approved the award of the tender for the SCADA/EMS upgrade project to M/s ABB Power Technologies Limited, the lowest evaluated bidder subject to "No objection" from the financier in accordance with the guidelines for procurement governing the funding.

The Applicant, being unsuccessful, lodged its grievance with the Donors concerning the evaluation in accordance with the tender requirements. It is noted that the Donors had given their "No objection" to the various stages of the tender process as required in the tender. They also gave their "No objection" with regard to the award after considering the grievance of the Applicant.

THE APPEAL

This Appeal was lodged by Areva TD-Viscas on 24th January, 2007 against the decision of the tender committee of Kenya Power & Lighting Company Ltd, the Procuring Entity, dated 12th January, 2007 in the matter of tender No.KPLC/ESRP/023/05 for Replacement/Upgrade and Expansion of the SCADA/EMS System.

The tender was conducted under the Exchequer and Audit Public Procurement Regulations in force at the time.

The Appeal first came up for hearing on 24th February, 2007. On that day a preliminary issue on jurisdiction was raised based on Regulation 5 of the 2001 Regulations. Upon hearing the same, the Board found that it had no jurisdiction and dismissed the Appeal.

The Applicant then moved to the High Court for judicial review. In its judgment dated 5th April, 2007 in Misc Application No.193 of 2007, the High Court quashed the Board's decision dismissing the Applicant's appeal, and ordered the Board to hear the appeal on merits.

Accordingly, the appeal was heard again by the Board on 2nd, 11th and 20th July, 2007.

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

GROUNDS 1 AND 2

The Applicant stated it had been pre-qualified by the Procuring Entity for the tender. It submitted that its tender documents contained the stipulated technical specifications, tender security and all other documents that were required.

In response, the Procuring Entity submitted that the object of pre-qualification was to select companies that had the capacity to undertake the job. The pre-qualification was intended to cover the bidding companies and not the project. Therefore, pre-qualification requirements were different from those of the invitation to bidders for the project, the subject matter of this tender.

The Board has noted that these are not grounds of Appeal but mere statements on the overall tendering process. Further, there was no breach of the Regulations cited. Accordingly, the Board holds that as these are statements on the tender process, not raising any grievance, it need not comment on them.

GROUND 3

The Applicant submitted that its price was the lowest at tender opening. It stated that it had given a price discount on several items which the Procuring Entity failed to take into account.

In response, the Procuring Entity stated that the Applicant's price had arithmetical errors which led to the correction of its price. It argued that the price having changed on account of the arithmetical errors, it was not clear whether the discount applied to the original tender price or the corrected price. The Procuring Entity further argued that that would have been unfair to the other bidders if the discount was applied on the corrected prices.

In addition, the Procuring Entity argued that the Applicant in its bid had declared that it had not included the software licenses. This was a Turnkey Project and therefore bidders had to include and cost every component of the project to avoid hidden costs arising after the award of the tender. Therefore, the Applicant's tender could not be said to be the lowest priced.

The Board has noted that the Applicant's price was the lowest at tender opening as per the following table set out in the tender opening report.

No.	Firm	Amount Quoted	Converted into KES
1.	Areva – Discount letter 5.2% on Schedule 1 & 2 and 7.78% US$ part of Schedule 1.	Euros 8,416,122 US$ 8,244,887 Kshs.142,930,483	786,606,951.4 609,764,634.4 142,930,483.0 1,539,312,068.4
2.	Siemens	Euros 15,914,660 Kshs.178,890,000	1,666,342,556.64
3.	SNC – Lavalin – Discounts US$221,000	CAN$ 8,541,713 Kshs. 52,562,335 US$ 15,966,374 CHF 1,419,499	1,849,824,277.18
4.	ABB – Kshs. Reduced to 338,576,000 as per discount letter	SEK 46,227,000 Euros 6,244,000 CHF 2,983,100 Kshs.564,014,000	1,567,959,990.78

However, the price quoted by the Applicant had arithmetical errors. Upon correction of the errors the prices quoted by the bidders were as follows:-

No.	Firm	Amount Quoted
1.	Areva	1,577,313,285.27
2.	Siemens	1,666,342,556.64
3.	SNC-Lavalin	1,849,824,277.18
4.	ABB	1,567,959,990.78

It is clear that upon correction of errors the Applicant's bid price was not the lowest. Further, the Applicant had by a letter dated 16TH August, 2006 offered a discount on a few selected items.

The Board perused the Applicant's said letter which states as follows:-

> "We, the undersigned .... have the pleasure to grant to KPLC a splendid discount to be applied on the prices submitted herewith in response to the aforementioned invitation for tenders.
>
> 5.2% on the total Euros part of schedules 1&2
> 7.78% on the US Dollars part of schedule 1, on items VI.I.I.I up to VI.I.I 23 and on items 3.2. and 3.3....."

The Board notes that it is not clear whether the Euros discount was to apply to only schedule 1 and 2 or also to schedules 1a, 1b and 2a and 2b. At the hearing, and also in the Memorandum of Appeal the Applicant failed to demonstrate how its price would have been the lowest if the discount was taken into account.

The Board further noted that the Instructions to Bidders required that the total summary of the tender prices be given at schedules 1 and 2. The discount should therefore have been translated into the summary total. In this particular instance the Applicant did not indicate it on the summary page. Instead, the Applicant quoted the discount on a separate sheet and stated that the discount was on selected items. It was not clear how the discount was to be applied. Accordingly, the Board is not satisfied that there was sufficient clarity to invoke the discount. In any event, after perusal by the Board of the Technical Evaluation Report, it was clear that the Applicant was not disqualified on grounds of price. It was disqualified for being technically non-responsive. Further, the Board has noted that the Applicant omitted to quote for the software licences which would have affected its tender price.

In addition, this ground was a statement not alleging the breach of the Regulations which is contrary to Regulations 40(1) and 42(2).

Accordingly, this ground fails.

GROUND NO. 4

This was a statement that the European Investment Bank and World Bank Procurement guidelines applied to the tender in addition to the Exchequer and Audit (Public Procurement) Regulations, 2001.

This issue was addressed in the High Court in High Court Misc. Application No.193 of 2007 and it was not argued by the parties during the re-hearing ordered by the Court. Therefore, since the issue was disposed off by the Court the Board need not comment on it.

GROUND NO. 5

The Applicant alleged that by notifying it that its tender was unsuccessful, the Procuring Entity breached its obligations under the EIB and World Bank Guidelines and the Public Procurement Regulations, 2001.

Again, this was a mere statement and the Applicant did not demonstrate the breach of the Guildelines and the Regulation.

This ground also fails.

GROUNDS NO. 6 AND 7

The Applicant submitted that the European Investment Bank (EIB) and World Bank (WB) procurement guidelines applied to the tender in addition to Public Procurement Regulations, 2001. It alleged that the Procuring Entity breached Regulation 24(2)(j) of the Exchequer and Audit (Public Procurement) Regulations, 2001 and Article 3.6.10 of the EIB guidelines by failing to include in the tender documents the criteria for evaluation of tenders.

It submitted that in the absence of such criteria, the evaluation lacked critical information to the bidders, and in particular the Applicants, on identification of essential or critical sub components (like telecommunications infrastructure and OPGW), and price quantification for each component of the tender.

In response, the Procuring Entity denied any breach of Regulation 24(2)(j) and EIB Article 3.6.10. It submitted that the evaluation criterion was provided under Clauses 22, 23, 24 and 25 of the Instruction to Bidders (ITB).

The Procuring Entity further pointed out that whilst Clause 6 of the ITB allowed bidders to seek clarification on unclear issues prior to the closing of the tender, the Applicant sought clarification on other issues. No questions were raised nor any clarification sought by the Applicant on the evaluation criteria. It contended that the applicant ought to have sought clarification on any matters that it felt were paramount to its bid.

The Board examined the tender documents submitted by the Procuring Entity and noted that Clauses 22, 23, 24 and 25 of the Instruction to Bidders contained the criteria for evaluation of tenders. These included preliminary examination on completeness, computational errors, sureties and proper signing of documents. Bidders who were considered non responsive were to be disqualified. The evaluation was also to include rates of conversion of currencies used by the tenderers into a single currency among other parameters all as stated in the tender document. Tenders found to be responsive were to proceed to technical and commercial evaluation stages as set out under Clauses 24 and 25 of the Instructions to the Bidders.

Article 3.6.10 of the EIB Guidelines indicated the parameters that the Procuring Entity was to use to arrive at the most advantageous award. These included either the lowest price of the compliant and the technically responsive tender; or the most economically advantageous tender. This information was contained in the tender document.

The Applicant has not demonstrated that both Regulation 24 and Article 3.6.10 of the EIB Guidelines were breached since the evaluation criteria was properly stipulated in the Tender Document, and applied during evaluation.

Accordingly, these grounds fail.

GROUNDS 8 AND 9

The Applicant submitted that the Procuring Entity breached Regulation 30(7) by using a criteria that was not set out in the Tender Documents. In the alternative, it argued that the Procuring Entity having pre-qualified the Applicant applied a flawed evaluation process in breach of Regulation 30(7).

The Applicant further submitted that the bidders were not treated equally in the evaluation. It highlighted the issue of Radio Communication and stated that it was a mandatory requirement. However, during evaluation, the Procuring Entity noted that the successful candidate and Siemens had not offered an acceptable solution for Radio Communication portion. The Procuring Entity proceeded to remove this part of the project from further evaluation. The Applicant argued that the Radio Communication portion was a key and essential component of the project. According to the Applicant, both OPGW and Radio Communication were key activities to the tender, and could not be treated as minor informalities the non-conformity of which could be waived under clause 22.3 of the Tender document.

The Applicant further argued that the Procuring Entity should have invoked Regulation 30(6) (c) and declared the tenders of the successful candidate and Siemens as non-responsive.

Finally, the Applicant submitted that a provisional sum for Radio Communication was incorporated during evaluation. It stated that the Procuring Entity took the average price given by two bidders and treated it as a provisional sum. The Applicant submitted that this kind of evaluation lacked objectivity and was in breach of Regulations 24(2)(j), 30 (7) and 30(8).

In response, the Procuring Entity denied that it breached Regulations 30(7). It stated that it did not use a criteria not stipulated in the tender document.

It further submitted that the Applicant had not demonstrated that the Procuring Entity used a criteria that was not set out in the tender documents.

The Procuring Entity further argued that no provisional sum was introduced, but rather, it averaged the tender prices that had been actually quoted by the two bidders on the Radio portion and included it as a sum in the tender. It submitted that there was no clause in the tender document that made the radio portion a mandatory component of the tender. In addition, the Procuring Entity submitted that the issue of the radio portion was dealt with at step 4 of the evaluation whereas the Applicant had failed at step 2 of the evaluation and had already been disqualified.

Finally, the Procuring Entity submitted that the Appeal, as argued, was at variance with what was contained in the Memorandum of Appeal. Instead, the Applicant had attempted to punch holes in the summary evaluation report that it had been given pursuant to Regulation 10(2).

The Board has already observed that the Tender Documents provided criteria for evaluation that covered the following aspects:

(a) Preliminary examination of bids to determine their completeness.

(b) Correction of arithmetical errors.

(c) Waiver of minor informality, non conformity or irregularity that do not constitute material deviation.

(d) Determination of Responsiveness and rejection of non-responsive bids.

(e) Conversion into single currency.

(f) Technical evaluation to consider overall completeness and compliance with the technical specifications and drawings, suitability of the facilities offered in relation to the environment and climate, among others.

(g) Achievement of specified performance criteria by the facilities.

(h) Type, quantity and long term availability of mandatory spares and maintenance services.

(i) Any other factors listed in the Bid Data Sheet or that the employer deems necessary or prudent to take into consideration.

(j) Evaluation of alternatives, if provided.

(k) Financial evaluation which was to include the cost of quantifiable deviations and omissions from the contractual and commercial conditions and technical specifications among others; compliance with time schedules, projected operating and maintenance costs, functional guarantees of facilities offered, extra costs of work, services, provisional sums and any other relevant factors listed in the Bid Data Sheet.

These, and various other specifications in the very bulky and voluminous tenders, were the parameters that the Procuring Entity used in the evaluation of the tenders. However, the Board has also noted, as argued by the Applicant, that the Procuring Entity removed the Radio Communication portion at step 4 of the evaluation. At that stage, it was noted that the successful candidate and Siemens had not met the requirements of the Tender documents in respect of;

- Voice and data integration
- Frequency optimization, taking into consideration the limited availability of frequency pairs from the Regulator, Communications Commission of Kenya (CCK).

The Procuring Entity therefore resolved not to consider the radio portion of all the bids for further evaluation. The Procuring Entity stated in the evaluation report that Radio portion was only a small part of the overall project (about 8%) and the price difference between the two bidders for this portion was less than 1%. It thus resolved to make an allowance based on the average price of the two technically responsive bidders.

As already noted, the Applicant was disqualified from further evaluation at step 2 of evaluation process. The Radio portion was being evaluated at step 4. Therefore, the actions that were taken after step 2 did not affect the Applicant as it was already out of the race. What is critical to the Applicant is the reason for its disqualification at step 2. It is only with respect to that stage of evaluation that one can tell whether the Applicant was treated fairly or otherwise, and thus whether it would have continued in the race.

In addition, the action of the Procuring Entity of making an allowance of an equal provisional sum in both of the remaining tenders using the average of their quotes, allowed it to evaluate the competing tenders on a like-for-like basis. In the circumstances, this was not inappropriate.

Accordingly, these grounds of Appeal have no merit and also fail.

GROUNDS NO. 10 and 11

The Applicant alleged that the evaluation was not conducted in a fair and transparent manner contrary to Regulation 4 of the Public Procurement Regulations, 2001 and Article 3.3.2 of the EIB procurement guidelines. Further, the Procuring Entity failed to promote and accept the most economical and efficient tender for the project by rejecting the Applicant's tender which had the lowest bid price.

The Procuring Entity submitted that there was no breach of Regulation 4. It argued that the evaluation was conducted fairly by a team comprising members of staff from the Procuring Entity and the Consultant M/s Fitchner of Germany.

The Procuring Entity further submitted that the Applicant's tender was disqualified for being technically non-responsive and therefore it could not have been in a position to be the most economical and efficient bidder as alleged. It contended that Regulation 4 could not have been breached by rejection of such a tender.

The Board has observed that the evaluation was based on the parameters stated in the voluminous tender documents and the Procuring Entity awarded the tender to the lowest evaluated bidder. The Applicant was technically non-responsive at stage two of the evaluation and its price was not the lowest after correction of arithmetical errors. The rejection of its non-responsive technical bid did not amount to a breach of Regulation 4, whose objects is to promote economy, transparency and efficiency in public procurement. During the tendering process, the Procuring Entity conducted a detailed evaluation of all the four bids at various stages before arriving at the most advantageous bid.

On the alleged breach of Article 3.3.2 of the EIB procurement Guidelines, the Board noted that the Article did not relate to the evaluation of tenders but to international procurement procedures namely open, restricted and negotiated procedures.

Accordingly, these grounds fail.

GROUNDS 12 AND 13

The grounds have been consolidated as they raise a similar complaint of breach of Regulation 14.

The Applicant's complaint was that the Procuring Entity by specifying use of a trade mark, "UNIX", in the technical specifications without providing for an equivalent, was in breach of Regulations 14(3) and (4). It further submitted that the Procuring Entity treated "Posix" as an operating system whereas "Posix" is a standard. By doing so, the Procuring Entity was in breach of Regulation 14(1).

The Applicant further submitted that the Procuring Entity's failure to include the words "or an equivalent" in the tender documents was contrary to the requirements of Regulation 14(4). It added that it had provided windows based operating system which was an equivalent or a more superior system.

The Applicant submitted to the Board, extracts from the internet of the Wikipedia and Unix websites to demonstrate that UNIX was a trade mark that was duly registered.

In response, the Procuring Entity submitted that UNIX was not a trademark within the meaning of Kenyan law.

The Procuring Entity stated that it held a pre-bid meeting where questions were raised. The issue of "UNIX/Posix" was not raised at all. Further, the Procuring Entity made site visits and, again, the issue of "UNIX/Posix" was not raised. It stated that, it had received One Hundred and Eighty Two questions for tender clarification but none of them were on the issue of "UNIX/Posix".

The Procuring Entity, further submitted that 'UNIX' can be used in several ways. If it was intended to be used as a trade mark the prefix 'TM' was to be added for it to read 'UNIX (TM)'. If the prefix 'TM' was not added to the word 'UNIX', the word was read as being used in a generic way as a standard, and not as a trade mark. Thus the Applicant's failure to question the use of UNIX meant that the bidders regarded it as a standard.

In addition, it submitted that 'Posix' was not an operating system and was used as a standard. It stated that the Applicant had not demonstrated that there would have been a better way of describing the Procuring Entity's requirement. The Procuring Entity also submitted extracts from the internet to demonstrate that 'UNIX/Posix' was not used in the tender document as a trade mark.

The Procuring Entity further submitted that the Applicant had stated that it could offer an alternative SCADA/EMS system based on a UNIX/LINUX operating system. However, the Applicant failed to give the scope and price of such system, and in the absence of such information, the Procuring Entity was unable to evaluate the alternative.

Finally, the Procuring Entity stated that Regulation 14(1) requires that tender documents should have a correct and complete description of the subject matter of the tender. It further stated that the tender documents achieved this objective as all the three top bidders were within 2% of each other in terms of price for a turnkey project of such a large magnitude. This was evidence that there was a complete description of the project.

The Board has carefully considered the issue. The Board has noted that the Technical specification Section VI, Clause 4.1.4 of the tender document is the alleged offending specification. The said Clause provides as follows:-

> "The main Application servers (main system) shall be implemented according to the full hot-standby redundancy concept and shall be equipped with sufficient hard disc capacity and main memory to hold the complete real time data base and to perform basic data analysis, verification, filter and calculation functions like topology analysis, etc. Redundancy for the hard discs shall be provided by using RAID technology or equivalent alternative solutions. The main system shall also provide full server capabilities including fast backup and restore functions.
>
> In order to optimize process LAN and overall performance, all application programs which build-up the real-time database shall also be implemented on the main system. Consequently, the redundant Main Application

> Server shall form part of the general application. The main application servers shall be equipped with DVD RW drives or magnetic tapes.
>
> If required from point of view of performance, additional application servers shall be installed, e.g. for historical data storage and recovery and statistical functions and/or for extended real time application such as network security assessment and energy management functions, providing all high level information to the operator consoles. A spare server may be provided and connected to the dual LAN configuration to substitute any failed server in the configuration if so required to fulfill the availability requirement as described in Chapter 1 of this specification.
>
> The main Application servers shall have a 64 bit structure and shall be equipped with a real-time operating system according UNIX/Posix standards.
>
> Each main system shall be interconnected to both process LANs. The redundancy shall be independent for each server and shall provide the server with internal data back-up features and automatic monitoring for switchover analysis and switchover execution". (underlining ours)

On this ground, the question that arises for determination is whether the specification 'UNIX/ Posix' as used in the tender document referred to a trade mark in breach of Regulation 14(4).

The object of the prohibition of the use of trade marks in Regulation 14, is to ensure clarity of tender specifications, yet encourage competition and dissuade procurements premised on specific brands, which would encourage monopolistic tendencies in procurement.

In their respective submissions on this issue, both parties used extracts from the website to support their arguments. The Board has perused the documents submitted.

It was clear from the document marked Vol 9 submitted by the Applicant that what is being defined in that document was 'UNIX®'. It was stated that 'UNIX®' was a registered mark of the Open Group. At page 1 of 4 in the same document 'Posix' is defined as:-

> "Posix or Portable Operating System Interface for "UNIX" is a collective name of a family of related standards specified by the IEEE to define the application programming interface (API) for software compatible with variants of the UNIX operating system".

The Board has also noted that the same document states:

"............... there has been a tendency toward the 'Single UNIX specification' standard which is open, accepts input from any one and is freely available on the internet. Beginning in 1998 a joint working group, the Austria Group began to develop a combined standard that would be known as the single 'UNIX' specification Version 3(2). Although used mainly for UNIX systems, the Posix standard can apply to any operating system'.

The Board having read that extract from the Applicant's documents, is inclined to accept the arguments of the Procuring Entity that the use of the words "UNIX/Posix" in the tender documents did not refer to a trade mark in terms prohibited by Regulation 14(4).

The Board has also noted that, as indicated in the technical evaluation report, the Applicant had stated in its bid that it would be possible for them to offer an alternative - SCADA/EMS system based on a UNIX/LINUX operating system platform. As the Applicant did not give any further details on scope and price the Procuring Entity could not evaluate the alternative.

As already observed the Procuring Entity had stipulated in clear terms the specification of the system that it wished to install. The Applicant did not raise any issue on the use of the words "UNIX/Posix" at the pre-bid meeting, or during the site visit or by way of clarification. This indicated that the Applicant must have understood that the said words were being used, as is generally accepted in the industry, as a standard and not as a trade mark. Indeed, that was why the Applicant stated it could offer an alternative SCADA/EMS system based on a UNIX/LINUX operating system.

As the technical specifications were clear, the argument by the Applicant that the Procuring Entity breached Regulation 14 cannot be sustained. The Board has also noted that the tender prices of the two technically responsive bidders were within 2% of each other in a tender of such a large magnitude. This was indicative of the fact that the tenders had been very competitive. It showed that the specifications were well understood by the bidders.

Accordingly, these grounds also fail.

Taking all the above into consideration, the Appeal fails and is hereby dismissed. The procurement process may proceed.

DATED at NAIROBI this 22nd day of AUGUST, 2007

.... **Chairman**

.... **Secretary**