

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 8/2008 OF 13TH FEBRUARY, 2008

BETWEEN

JYOTI STRUCTURES LIMITED.....APPLICANT

AND

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

Appeal against the decision of Kenya Power & Lighting Company Limited, the Procuring Entity, in the matter of Tender No. Tender No. KPLC/PT/ET/OLKARIA II/02/07 was for Olkaria II 220KV Substation Extension and Modification Project.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J.W. Wambua	-	Member
Amb. C.M. Amira	-	Member
Mrs. L.G. Ruhiu	-	Member
Mr. Akich Okola	-	Member
Eng. C.A Ogut	-	Member
Ms. N. Mutai	-	Member
Mr. S. K. Munguti	-	Member
Ms. J.A. Guserwa	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 8/2008

Applicant, Jyoti Structures Limited

Mr. S. T. Wanjohi - Advocate, Theuri Wanjohi & Company
Advocates

Procuring Entity, Kenya Power and Lighting Company Limited

Mr. Kiragu Kimani - Advocate, Hamilton Harrison & Mathews
Advocates

Ms. Michi Kirimi - Advocate, Hamilton Harrison & Mathews
Advocates

Ms. Noella Libano - Lawyer

Mr. Robert Mahenia - Advocate

Interested Candidate

Mr. H. Nandakumar - General Manager, National Contracting
Company Limited

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 OF AWARD

This was an open tender advertised in the local dailies on 19th June, 2007. The Tender No. KPLC/PT/ET/OLKARIA II/02/07 was for Olkaria II 220KV Substation Extension and Modification Project.

The tender closing/opening date was 31st July, 2007. However, the same was extended to 21st August, 2007. Three (3) firms returned their duly completed bids. The tender was opened on the due date and attracted the following bidders: -

1. National Contracting Company Limited; (NCC)
2. Vinci Energies; (VINCI)
3. Jyoti Structures Limited (JYOTI)

THE EVALUATION

The above bidders were examined based on the following requirements: -

1. Submission of Bid Bond of at least 2% of quoted;
2. Completion of price schedules;
3. Bid validity period of 120 days;
4. Submission of completed technical, eligibility & qualification schedules;
5. Substantial responsiveness;
6. Deviations not allowed; and
7. Time of completion not exceeding 12 months from commencement date.

Based on the above, all the bidders passed and proceeded to technical evaluation.

The bidders were examined on the technical details of the equipments offered among others.

The three bidders passed the technical evaluation and proceeded to the financial evaluation.

The Committee recommended ranked the firms from 1 to 3 in the order of NCC, JYOTI and VINCI respectively.

In its meeting held on 24th January, 2008, the Tender Committee adjudicated and awarded the tender to National Contracting Company of Saudi Arabia at their quoted total cost of USD 1, 828, 404.00 exclusive of VAT. (Kshs. 121, 684, 308.69 at exchange rate of 1 USD = Kshs. 66.552.

THE APPEAL

This appeal was lodged on 13th February, 2008 by Jyoti Structures Limited against the decision of the Tender Committee of Kenya Power and Lighting Company Limited in the matter of Tender No. KPLC/PT/ET/OLKARIA II/02/07 for Olkaria II 220KV Substation Extension and Modification Project.

The Applicant requests the Board for orders that:-

1. The 'successful' tender herein be declared to have been unresponsive for failure to comply with the mandatory requirements of the tender documents.
2. The Procuring Entity's decision to accept the 'successful' tender herein be annulled.
3. The decision of the Procuring Entity be substituted with a decision to award the tender to the Applicant.
4. The Procuring Entity do pay the Applicant's Costs of these proceedings.

The Applicant was represented by Mr. S. T. Wanjohi, Advocate while the Procuring Entity was represented by Mr. Kiragu Kimani, Advocate.

The Applicant in its Request for Review has raised 3 grounds of appeal.

GROUND 1, 2 AND 3 – BREACH OF SECTION 66(2) OF THE ACT AND REGULATION 47

These grounds of Appeal have been consolidated since they raise similar complaints on breach of Section 66 (2) of the Act, Regulation 47 and clause 13 of the Instructions to Bidders.

The Applicant stated that clause 13(2) of the Instructions to Bidders (ITB) required a bidder to furnish, as part its bid, a bid security as stipulated in the bid data sheet. It further stated that clause 13.2 of the Instructions to Bidders required a bidder to issue a bid security either in the form of a letter of credit or a bank guarantee from a reputable banking institution located in any eligible country. It submitted that clause 13.2 of the Instructions to Bidders provided that if the bank issuing the security bond was located outside the Purchaser's country, such a bank had to have a correspondent financial institution located in the Purchaser's country, to make it enforceable.

The Applicant further submitted that the successful bidder provided a security bond issued by a bank known as Banque Saudi Fransi located in

Saudi Arabia. It stated that the bank did not have a correspondent financial institution locally as per the tender requirements. Therefore, the successful bidder was not responsive for failure to comply with a mandatory requirement of the Tender Document.

The Applicant argued that Regulation 47(1) provides that upon opening of the tenders, the Evaluation Committee should first conduct a preliminary evaluation to determine whether the tender had complied with the various requirements set out in the Regulations. It stated that Regulation 47(1) (b) required the Procuring Entity to determine whether the bidders had provided security in the required form, amount and validity period at the preliminary stage.

The Applicant stated that since the successful bidder did not submit a tender security from a bank with a local correspondent bank, that bid should have been rejected at the preliminary evaluation stage, as provided in Regulation 47(2). It further submitted that if the successful tenderer's bid had been rejected at the preliminary evaluation stage, the Applicant's tender price would have been the lowest. It stated that since the Applicant had passed the technical evaluation stage, its tender would have been the lowest evaluated.

In addition, the Applicant submitted that the Procuring Entity did not follow the criteria set out in the Tender Documents. It stated that the Procuring Entity failed to use the criterion on bid security as set out in clause 13.2 of the Instructions to Bidders. Therefore, the Procuring Entity breached Section 66(2) of the Act.

The Applicant further argued that though Section 57 of the Act on tender security is framed in discretionary terms, the requirement to provide a tender security became mandatory once such requirement was put in the tender document.

Finally, the Applicant submitted that the award was done outside the tender validity period taking the 90 days validity period from 21st August, 2007. Counsel further argued that Section 61 of the Act required that the request for extension should be done during the tender validity period. It stated that no extension was done within the tender validity period.

In response, the Procuring Entity stated that it did not breach Section 66(2) and Regulation 47(1) (b) as alleged by the Applicant. It stated that its

evaluation of the tender was guided by the objectives of the Act as set out in Section 2.

The Procuring Entity stated that all bidders qualified at Preliminary Evaluation. At that stage, it noted that the successful bidder had issued an international bid security from Banque Saudi Fransi located in Saudi Arabia. The Procuring Entity considered the bid security to conform with the format set out in the ITB and that it considered it to be acceptable.

The Procuring Entity further submitted that the successful bidder had already confirmed it would obtain a performance bond from a local bank. Further, the successful bidder had subsequently confirmed that Banque Saudi Fransi had a local correspondent bank in Kenya known as Bank of Africa Limited.

In addition, the Procuring Entity stated that though the successful tenderer's bid security was issued by a bank in the Republic of Saudi Arabia, that security bid was enforceable. It stated that Regulation 47 only required the Procuring Entity to confirm that the tender security was in the required form. It further stated that the tender security issued by the successful tenderer complied with the required format.

The Procuring Entity urged the Board to apply a purposive approach in resolving the issue on tender security. It urged the Board to note the objectives of the requirement of the tender security. These objectives were:-

- (a) To discourage a bidder from withdrawing its bid after it has submitted it to the procuring entity.
- (b) To discourage a successful bidder from refusing to sign a contract with the procuring entity and;
- (c) To discourage a bidder from failing to provide a performance bond after it has been awarded a contract.

The Procuring Entity stated that the Applicant had not shown or illustrated the happening or the threat of happening of any of the above stated events. It further stated that the Procuring Entity stood to suffer substantial loss and penalty fees if this tender was annulled. It stated that it was not in public interest to have the award of the tender nullified.

The Procuring Entity further submitted that the failure by the successful bidder to issue a tender security from a bank with a correspondent Bank in Kenya was a minor deviation excusable under Section 64(2). It stated that such a deviation could not affect the responsiveness of the tender of the successful bidder.

Finally, the Procuring Entity submitted that the tender validity period was 120 days and the extension was done within the tender validity period.

The Board has carefully considered the parties' submissions and examined the documents presented before it. The first issue for determination is on the tender security.

The Board has noted that clauses 13(1) and (2) of the ITB provide as follows:-

"13(1)The bidder shall furnish, as part of its bid, a bid security in the amount stipulated in the Bid Data Sheet in the currency of the Employer's country, or in the equivalent amount in a freely convertible currency.

13(2) The bid security shall, at the Bidder's option, be in the form of either a, letter of credit or a bank guarantee from a reputable banking institution, or selected by the Bidder and located in any eligible country. If the institution issuing the board is located outside the purchaser's country, it shall have a correspondent financial institution located in the Purchaser's country to make it enforceable. The format of the bank guarantee shall be in accordance with the form of bid security included in the bidding documents; other formats may be permitted, subject to the prior approval of the Employer. Bid security shall remain valid for a period of twenty-eight (28) days beyond the original bid validity period, and beyond any extension subsequently requested under ITB Sub-Clause 14.2."

The Board has noted that the successful bidder submitted a bid bond issued by Banque Saudi Fransi located in Saudi Arabia. There was no evidence in the Tender Documents of the successful candidate that the said Bank had a local correspondent bank. That fact was conceded by the Procuring Entity in its submissions and in paragraph 38 of its response filed on 25th February, 2008.

The Board has further noted that on the 21st February, 2008, the successful tenderer wrote to the Procuring Entity and stated as follows:-

“..... We hereby confirm to provide the performance security in the form of Bank guarantee issued through a local bank in Kenya acceptable to the employer.”

Further on 22nd February, 2008 the Bank of Africa Kenya Ltd wrote a letter to the Procuring Entity which in part read as follows:-

“..... we enclose herewith an authenticated message received from Banque Saudi Fransi (Eastern Region) Alkhonar SA on behalf of National Co. Ltd for your adoption without any engagement, commitment or responsibility on our part.”

It is to be noted that though this letter was written on 22nd February, 2008, the tender opening had been done on 21st August, 2007. The letter by Bank of Africa Kenya Ltd was written after the award of the tender. In any event, Bank of Africa Kenya Ltd clearly stated that the letter was being issued without any engagement, commitment or responsibility on its part.

The Board has further noted that on 6th August, 2007, one of the bidders, Vince Energies of France sought a clarification in writing on Clause 13.2 of the ITB on tender security. On the same day 6th August, 2007, the Procuring Entity responded as follows:-

“Bidders to follow clause 13.2 of the Instructions to Bidders (Section II of Volume 1), which states that, if the institution issuing the bid security is located outside the purchasers country, then it shall have a correspondent financial institution located in the purchaser's country, in order to make it enforceable.”

The Board has further noted that the requirement for tender security was that the bid security was to be issued by a reputable bank in Kenya. Alternatively, if the tender security was issued by a foreign bank, such a bank should have a local correspondent financial institution.

It is therefore apparent that the Applicant's tender was not accompanied by a valid bid bond at the time of tender opening. The tender by the successful

bidder could thus not have been properly accepted for technical and financial evaluations. It should have been rejected at the preliminary stage in accordance with Regulation 47 (2).

The Board has noted that Section 64(2) of the Act states that minor deviations that do not materially depart from the requirements set out in the Tender documents do not affect the responsiveness of a tender. However, failure to provide a bid bond in accordance with the requirements of clause 13.2 of the ITB was not a minor deviation as argued by the Procuring Entity. Although, Section 57 of the Act on tender security is framed in discretionary terms, once the Procuring Entity includes that requirement in the instructions to bidders, it becomes mandatory. In this case, the Procuring Entity had required tenderers to submit bids accompanied by tender security in accordance clause 13.2 of ITB. The Procuring Entity had to comply with Section 66(2) of the Act. The essence of evaluation is to compare the bids by the various tenders on "a like with like basis". It is not otherwise possible to evaluate bids fairly if the criterion set is not applied equally on all the bidders.

The Board has noted that in Application No. 28 of 2007, between Dong M Electrical Industrial Co. Ltd, the Applicant and Kenya Power and Lightning Co. Ltd, the Procuring Entity declared the Applicant in that Appeal, non-responsive. The reason for failure was that the Applicant failed to comply with a clause which was similar to clause 13.2 of the ITB document of this instant matter. The Board held that the tender was properly disqualified for being non-responsive.

Accordingly, these grounds of Appeal succeed.

Finally, the Board noted that the tender validity period was 120 days. The Board further noted that the Applicant responded to a letter from the Procuring Entity regarding extension of its bid. The letter read as follows:-

"Ref: Your letter via Ref: No. KPLC/PT/ET/OLKARIA II/02/07/PKM/enm dated 18.12.2007.

Dear Sir,

We reference to the above, we hereby extend the validity of our offer for 60 days as from 22nd December, 2007.

Further, we have already approached to our Bank for extension of bid bond which will be submitted shortly.

All other terms and conditions of our offer shall remain unaltered. Thanking you and assuring of our best at all times."

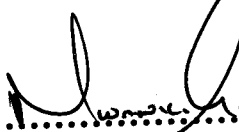
The Board holds that the Applicant acknowledged the extension of tender validity period in writing. Therefore, the tender was within the tender validity period. Finally, the Board wishes to observe that this issue was raised during the hearing and was not a ground in the Request for Review.

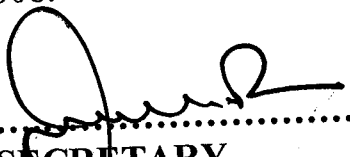
On the argument by the Procuring Entity that this tender should not be nullified on public interest, the Board holds that it is the Procuring Entity's duty to ensure that it follows the provisions of the Act, Regulations and requirements of the Tender documents. In Application No. 22 of 2007, Lantech Versus Ministry of Finance, the Board stated as follows:-

"It is not lost on the Board that this is a tender of great significance to the country. However, it is important for the Procuring Entity to handle such a tender with the care and attention that it deserves including strict adherence to the Regulations. The Board wrestled with this issue and decided that it is more important in the long term public interest and for future good governance and propriety in public procurement that critical legally established procedures are adhered to. A bad precedent on an important procurement could well lead to a backsliding in adherence to procedures in procurements of lesser importance. Early prevention of a malady is better than attempting to cure it later."

Taking into consideration all the above matters, the Appeal succeeds. The award of tender is hereby nullified. In view of the importance of the tender and in public interest, the Procuring Entity may re-tender using the restricted procurement method.

Dated at Nairobi on this 11th day of March, 2008.


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CHAIRMAN
PPARB


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SECRETARY
PPARB