

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 3/2010 OF 13TH JANUARY, 2010

BETWEEN

POWER TECHNICS LIMITED..... APPLICANT

AND

THE KENYA POWER AND LIGHTING CO. LTD..... .RESPONDENT

Review against the decision of the Tender Committee of The Kenya Power and Lighting Company Limited, dated 13th January, 2010, in the matter of Tender No. KPLC/6E2/AI for Energy Sector Recovery Project (ESRP) – Contract No.VI, Design, Supply and Installation of Substation and lines (Ruai, Komarock and Kiambu Road) (Additional Credit) Lt 1).

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Akich Okola	-	Member
Mrs. Loise Ruhiu	-	Member
Mr. Sospeter Kioko	-	Member
Eng. Christine Ogut	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Board Secretary
Ms. Kerina Rota	-	Secretariat

PRESENT BY INVITATION:

Procuring Entity, Kenya Power & Lighting Company. Ltd.

Mr. John Katiku	-	Advocate
Mr. Albert Simiyu Murambi	-	Advocate
Ms. Imelda Bore	-	Advocate
Mr. Owiti Awuor	-	Legal Officer
Eng. O. K. Mutwiri	-	Team Leader – ESRD & ASUP
Ms. Mary Kihara	-	Chief Procurement Officer
Mr. Francis Kahumbi	-	Projects Engineer

Applicant, Power Technics Limited

Mr. Greg Karungo	-	Advocate – Walker Kontos
Mr. Naresh Mehta	-	Managing Director
Mr. Cyrus Khalusi	-	Projects Manager

Interested Candidate

Eng. Vincent Komu	-	Easuru Reyroito Etrade Joint Venture
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BOARD'S DECISION

Upon hearing the representations of the parties and interested candidate before the Board on a preliminary point of law and upon considering the information in all documents before it, the Board decides as follows:-

BACKGROUND OF AWARD

The tender was advertised by the Procuring Entity on 8th May, 2009. It was closed/opened on 8th July, 2009. In the advertisement, Clause 2 provides as follows:

"The Government of the Republic of Kenya has received additional credit from the International Development Association Fund towards the cost of Energy Sector Recovery Project. It is intended that part of the proceeds of this credit will be applied to eligible payments under the contract for additional credit package. Bidding will be governed by the World Bank's Eligibility Rules and Procedures" and Clause 8 provided as follows: ***"Bidding will be conducted through the international competitive bidding procedures specified in the World Bank's Guideline. Procurement under IBRD Loans and IDA Credits"***

FINANCING AGREEMENT

There was a Financing Agreement dated May 2008 between the Republic of Kenya (the Recipient) and International Development Association (The Association) which states:

"WHEREAS (A) under an agreement dated August 4, 2004, between the Association and the Recipient ("Development Credit Agreement"), the Association agreed to provide the Recipient with a credit ("Original Credit") in an amount equivalent to fifty five million two hundred thousand Special Drawing Rights (SDR 55,200,000) to assist in financing the Energy Sector

Recovery Project described in Schedule 2 to the Development Credit Agreement.

(B) The Recipient has requested the Association to provide additional financial assistance in support of the Energy Sector Recovery Project by increasing the amount made available under the Development Credit Agreement by an amount in various currencies equivalent to fifty three million Special Drawing Rights (SDR 53,000,000).

(C) The Recipient has obtained from the European Investment Bank (EIB) a loan (the EIB Loan No.23324) in an amount of forty three million Euro (€43,000,000) to assist in financing the Project on the terms and conditions set forth in an agreement (the EIB Loan Agreement), dated December 16, 2004, entered into between the Recipient and EIB

(D) The Recipient has contracted from Agence Francaise de Development (AFD) a loan (the AFD Loan) in an amount of twenty five million Euro (€ 25,000,000) to assist in financing the Project on the terms and conditions set forth in an agreement (the AFD Loan Agreement), dated May 25,2005, entered into between the Recipient and ADF;

(E) The Recipient has contracted from the Nordic Development Fund (NDF) a loan (the NDF Loan) in an amount of ten million Euros (€10,000,000) to assist in financing the Project on the terms and conditions set forth in an agreement (the NDF Loan Agreement), dated October 5, 2004 entered into between the Recipient and NDF;

(F) The Kenya Electricity Generating Company Limited (KenGen) has obtained a loan from EIB (the KenGen EIB Original Loan) in an amount of

forty million eight hundred thousand US Dollars (US\$40,800,000) to assist in financing the Project on the terms and conditions set forth in an agreement (the EIB-KenGen Original Loan Agreement), dated May 31, 2005, and intends to obtain from EIB an additional loan (the EIB-KenGen Additional Loan) in an amount of nine million two hundred thousand US Dollars (US\$ 9,200,000) to assist in financing the Project on the terms and conditions set forth in an agreement (the EIB-KenGen Additional Loan Agreement) to be entered into between EIB and KenGen;

(G) KenGen also intends to obtain a loan from AFD (the ADF-KenGen Loan) in an amount of twenty million Euro (€ 20,000,000) to assist in financing the Project on the terms and conditions set forth in an agreement (the AFD- KenGen Loan Agreement) to be entered into between AFD and KenGen”.

The Procurement Guidelines provided as follows:-

“SCHEDULE 2: PROJECT EXECUTION

Section III: Procurement General

Goods and Works: *All goods and works required for the Project and to be financed out of the proceeds of the Financing shall be procured in accordance with the requirements set forth or referred to in Section I of the Procurement Guidelines, and with the provisions of this Section.”*

TENDERS RECEIVED

The bids were received from the following firms:-

1. Angeline International Ltd, India
2. Consolidated Power Projects, S. A.
3. Areva T&D Ltd, India
4. Eswari Electricals PVT Ltd, India
5. Larsen and Turbo and Patronics Services Ltd, India
6. Sterling and Wilson, India
7. Power Technics Ltd, Kenya
8. Consortium of Easun Reyrolle and Etrade Company, India/Kenya
9. TechnoFab engineering Ltd, India
10. Vinci Energies, France
11. KEC International, India
12. ABB Oy Power Systems, Finland.

EVALUATION

Technical evaluation was conducted and the following firms were qualified to proceed to the Financial Evaluation:-

1. KEC International
2. Angelique International

3. Vinci Energies

Financial Evaluation was conducted and the Evaluation Committee recommended that the contract for Design, Supply and Installation of Substation and Lines (Kiambu road, Komarock and Ruai), Bid number KPLC1/6E/2/A1 for lot 1 be awarded to KEC International Limited for the full scope of work stated in the bidding document.

The Tender Committee concurred with the recommendation of the Evaluation Committee and awarded the Tender to KEC International Limited.

Notification letters to the successful and the unsuccessful bidders are dated 31st December, 2009

THE REVIEW

The Request for Review was lodged by Power Technics Ltd on 13th January, 2010 against the decision of the Tender Committee of the Kenya Power & Lighting Company Limited in the matter of Design, Supply and Installation of substations and lines for Ruai, Komarock and Kiambu Road. The Applicant was represented by Mr. Greg Karungo, Advocate while the Procuring Entity was represented by Mr. John Katiku, Advocate.

PRELIMINARY OBJECTION

At the commencement of the hearing, the Procuring Entity made an application to the Board to argue the preliminary objection which it had filed pursuant to Regulation 77(4). The Preliminary Objection was based on two grounds as follows:

1. “The Honourable Public Procurement Administrative Review Board has no jurisdiction to hear and determine this Application for reasons that:

- i. A contract has been signed arising from the tender which is the subject matter of the appeal herein.**
- ii. Section 6(1) of the Public Procurement and Disposal Act, 2005 is applicable to these proceedings.**

2. This application is incompetent and incurably defective.”

Accordingly, the Board directed pursuant to Regulation 77 (4) that the Preliminary Objection be argued by the Parties.

The Procuring Entity stated that the tender in question related to a procurement financed by a loan between the Government of Kenya and the International Development Association (IDA), which is dated May 8th, 2009. It further stated that the advertisement for the tender dated May 5th, 2009, made it very clear that the bidding would be conducted through the international competitive bidding procedures as specified in the World Bank Guidelines: IBRD Loans and IDA Credits. The Procuring Entity stated that it had attached the Guidelines to the tender document, which the Applicant used in submitting its bid.

It submitted in this regard that, by signing the Letter of Bid, which is dated 8th July, 2009, in which the Applicant states that **“We have examined and have no reservations to the Bidding Document, including the Addenda issued in accordance with Instructions to Bidders (ITB) 8 and Clarifications 1, and 6;”** among other things, the Applicant accepted the terms of the tender document in its entirety, including the provision relating to the application of the World Bank Guidelines to

the procurement. In its view, the Applicant having agreed to be bound by the Bidding Document, and the Procuring Entity having followed the guidelines, the former cannot now complain.

It further argued that, since the funds to be used for this procurement were negotiated between the Government and IDA, insofar as the conditions for their use were in conflict with the provisions of the Act, section 6(1) excludes the procurement from the application of the Act. In support of its argument the Procuring Entity cited the Board's decision in **Application No. 39 of 2009 Intex Construction-Mehta v The Ministry of Roads**, whose facts, according to it, were similar to this case.

In concluding its argument on this ground the Procuring Entity submitted that as the procurement was governed by the World Bank Guidelines, Section 6(1) ousted the jurisdiction of the Board.

Further, the Procuring Entity stated that it had signed the contract arising from the procurement with the winning bidder following the award. It argued that this being the case, the Board had no jurisdiction to deal with the case in light of the provisions of section 93(2)(c) which provides as follows:-

“93 (2) The following matters shall not be subject to the review under

subsection (1)

(a).....

(b)

(c) where a contract is signed in accordance to section 68; and

(d)”

Accordingly, it urged the Board to dismiss the Request for Review.

In response, the Applicant argued that the Act and the Regulations, and not the Guidelines applied to the procurement. In support of this argument it averred that the project was not being fully funded using the loan as the Procuring Entity was required to contribute its own funds amounting to US \$34,000,000. In its view, since the Procuring Entity was a public entity the Act applies to it.

The Applicant further argued that Section III B 2 of Schedule I to the Loan Agreement required that the Procurement Plan specify the circumstances under which certain methods of procurement could be used. Towards this end, the Procurement Plan had been developed by the Procuring Entity which in some respects modified the use of the World Bank Procurement Guidelines, by allowing the use of national procedures, as set out in Annex 8. In the view of the Applicant, these provisions in the Procurement Plan, (which is part of the tender document), brought this procurement within the application of the Act, save only in the manner in which variations have been made by the Project Agreement. It submitted that this being the case, the jurisdiction of the Board had not been ousted and, accordingly, urged the Board to dismiss the preliminary objection.

In addition, the Applicant argued that the provisions of section 93(2)(c) must be read together with section 68(2) of the Act. It submitted that the signing of the contract before elapse of the statutory period of fourteen days specified in section 68(2) was an illegality. Accordingly, it urged the Board to dismiss the preliminary objection on this ground alone to find that it had jurisdiction.

In reply, while conceding the fact that the Project Paper was its Procurement Plan, the Procuring Entity reiterated that the World Bank Procurement Guidelines were to govern the procurement. It further argued that apart from the ten provisions set out in Project Paper at Annex 8, there were many other provisions of the Act which were in conflict with the Guidelines. As an example it pointed to section 68(2) which requires a lapse of fourteen days before a contract could be signed, as opposed to the provision in the Guidelines which permitted a contract to be concluded without such lapse of time.

After carefully considering the submissions of the parties and the documents before it, the Board makes its decision as follows:

The issues in question are whether pursuant to sections 6(1) and 93(2)(c) of the Act the Board has jurisdiction to hear this Request for Review on its merits.

The Procuring Entity has argued that it was clear from the very beginning, as exemplified by the notice announcing the tender, that the whole process would be governed by the World Bank Procurement Guidelines. The Board has examined the notice and notes that those seeking to participate in the tender were put on notice as to which rules were going to govern the process. The notice at item number 8 makes it clear to prospective bidders that:-

“Bidding will be conducted through the international competitive bidding procedures specified in the World Bank Guidelines: Procurement under IBRD Loans and IDA Credits”.

The Board finds that the advertisement inviting bidders put them on notice that World Bank Procurement guidelines and not the Public Procurement and Disposal Act, 2005 was going to apply to this tender. The Applicant has not denied being aware of this information.

The Board has further examined the Financing Agreement and the Bidding Document. It is an undisputed fact that the Applicant responded to this advertisement by picking the tender documents from the Procuring Entity. The Board has also noted that Section III of Schedule 2 of the Agreement states as follows:-

“All goods and works required for the \project and to be financed out of the proceeds of the Financing shall be procured in accordance with the requirements set forth in Section 1 of the Procurement Guidelines, and with the provisions of this Section.”

The Board further observes that the Guidelines referred to in this passage is a document entitled “**Guidelines Procurement Under Loans and IDA Credits**” which was part of the documents made available as part of the tender document, to all bidders, including the Applicant. It is thus clear to the Board that if at the time the Applicant read the tender notice and was not aware of the guidelines applicable to the procurement then it ought to have become aware of them upon obtaining the Bidding Document.

The Board notes that the Bidding Document contains a document entitled "Letter of Bid" which in Kenya's procurement practice is referred to as 'Form of Tender.' This is the letter of commitment to a procuring entity by which a bidder commits itself to the offer which it makes to a procuring entity. In this instance the Applicant committed itself to abiding with the guidelines, among other things, by stating that having examined the document it had **"no reservations, *including the applicable procurement guidelines, (italics ours),* to the Bidding Documents, including Addenda issued in accordance with Instructions to Bidders (ITB) 8 and Clarification 1 and 6;"** The Applicant's letter of bid is dated 8th July 2009 stands in argument with the claim by the Applicant that anything but the Guidelines applied to this procurement. The Board notes that there was no evidence that it took any measures, such as seeking clarification as to whether indeed the procurement law of Kenya might also apply, or any such efforts that might contradict the clear understanding of what was intended.

The Board finds that in the face of this evidence, it is difficult to accept the Applicant's argument that any other regulations, other than those specified in the tender notice, and reinforced by the Bidding Document, were applicable to the procurement in question. To get around the opposing evidence against it, the Applicant has cited provisions in the Project Document in order to try to bring the procurement process within the national Act. In this respect, it has pointed to Section III of Schedule 2 paragraph B 2 of Section III specifies methods of procurement, other than International Competitive Bidding, which may be used for goods and works. These other methods include (a) Limited Bidding; (b) National Competitive Bidding; (3) Shopping; (4) Direct Contracting; (5) Force Account; and (6) Established Private or Commercial Practices which have been found acceptable to the Association.

The Board notes that in respect to National Competitive Bidding, ten areas where the national law, as suitably modified, have been identified as capable of application to a procurement procedure. The Board further holds that variations relate only to National Competitive Bidding.

The Board notes that the tender in question was subject to International Competitive Bidding, and could therefore not be governed by these modified provisions of the Act. This point is made clear by Section III B 1 of the Financing Agreement which states that:-

“Except as otherwise provided in paragraph 2 below, goods and works shall be procured under contracts awarded on the basis of International Competitive Bidding.”

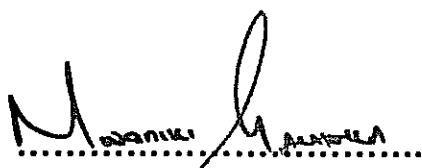
On the basis of the foregoing, the Board finds that the applicable World Bank Guidelines apply to this procurement. It further notes that in light of the fact that the loan is to be applied towards procurement which is to be governed by Guidelines of the lender, there is conflict between the Act and these Guidelines. Accordingly, the World Bank Guidelines take precedence.

The Board finds that the World Bank Guidelines provides that notification shall constitute the formation of a contract. The Board notes that the contract was signed on December 31, 2009, which was the same day of notification of the award, which was in accordance with the Guidelines. Accordingly, Sections 93(2) and 68(2) are not applicable.

In the circumstance, the Board has no jurisdiction to hear this Request for Review and it is accordingly dismissed.

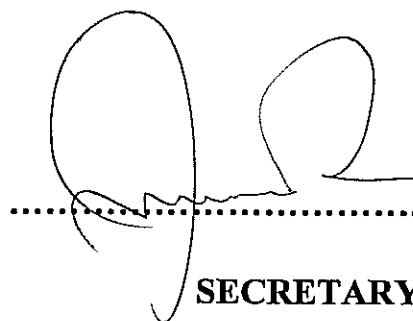
In the result, the Preliminary objection succeeds and the procurement process may continue.

Dated at Nairobi on this 10th day of February, 2010

A handwritten signature in black ink, appearing to read 'M. Mwangi', is written over a horizontal dotted line.

CHAIRMAN

PPARB

A large, stylized handwritten signature in black ink is written over a horizontal dotted line.

SECRETARY

PPARB

