



REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 38/2015 OF 22nd JULY, 2015

BETWEEN

**OJSC POWER MACHINES LIMITED,
TRANSCENTURY LIMITED,
AND CIVICON LIMITED.....Applicant**

AND

**KENYA ELECTRICITY GENERATING
COMPANY LIMITED (KENGEN).....Procuring Entity**

A Review against the decision of Kenya Electricity Generating Company Limited in the matter of Tender No. KGN-GRD-09-2015 for the request for proposals (RFP) for leasing of 50MW wellheads geothermal power generation units at Olkaria geothermal field on build, lease, operate and maintain basis.

BOARD MEMBERS PRESENT

- 1. Paul Gicheru - Chairman
- 2. Peter Ondieki - Member
- 3. Nelson Orgut - Member
- 4. Hussein Were - Member

IN ATTENDANCE

- 1. Mr. Stanley Miheso - Secretariat
- 2. Ms. Shelmith Miano - Secretariat



PRESENT BY INVITATION

**Applicant - OJSC POWER MACHINES LIMITED, TRANSCENTURY LIMITED,
AND CIVICON LIMITED**

- | | |
|------------------|----------------|
| 1. Kevin Mogeni | - Advocate |
| 2. Purity Makori | - Advocate |
| 3. Alex Ashioyi | - Advocate |
| 4. Allan Munyua | - Transcentury |

Procuring Entity - KENYA ELECTRICITY GENERATING COMPANY LIMITED

- | | |
|-------------------|---------------------------|
| 1. Kiragu Kimani | - Advocate |
| 2. Beatrice Koske | - Assistant Legal Manager |
| 3. George Omminde | - Chief Legal Officer |
| 4. Peter Chege | - Project Extension |
| 5. Rono Kibet | - Project Engineer |
| 6. Victor Rapando | - Legal Assistant |
| 7. Mahamud Khalif | - Pupil |

Interested Parties

- | | |
|------------------------|---|
| 1. George Drammen | - Advocate, Masika |
| 2. Muganda Innocent | - Advocate |
| 3. Nazima Malik | - Advocate, |
| 4. Sergey Livinskiy | - Power Machines |
| 5. Ilia Cherednichenko | - Power Machines |
| 6. Stephen Mwangi | - Technical Rentco |
| 7. S. Makina | - B. D. Manager, Ormat |
| 8. Dickens Seroney | - Project Engineer QPEA |
| 9. Roba Abkul | - Operations Manager Dikus Transporters Ltd |

BOARD'S DECISION

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

BACKGROUND OF AWARD

KenGen is seeking companies or consortiums to lease Wellheads Power Generation Units on a build, operate and maintain basis. This project is envisaged to utilize geothermal wells that cannot be connected to the conventional power plants due to low pressure (below 5 Bara) and wells outside the conventional power plant perimeter.

The Procuring Entity is looking for a leasing firm (individual or consortium) to lease a minimum of 50MW Wellheads units and operate and maintain the equipment for a period of 15 years in Olkaria at the lowest rental fee. The Procuring Entity expects to achieve the following objectives from the leasing agreement;

- i. Generate Additional MW to meet the 5000+ 40-Month Challenge
- ii. Generate revenue and profit from the difference in the cost of leasing and the revenue from the electricity generated from the leased wellheads at the Feed-In-Tariff of 8.8US Cents per KWh.
- iii. The Procuring Entity will from this revenue recoup the cost of drilling the geothermal well.

A 15 Year Operating lease was justified because there would be minimal financial input from KenGen and it will not appear in KenGen's balance sheet thus not affect its loan covenants.

The contracted capacity has to be in place and be fully operational within Fourteen (14) months from the date of contract signing. Prospective Geothermal Wellhead lessor either as individual firms or consortia, were required to be fully experienced or have the necessary financial, technical and human resources to implement the project within the stipulated time.

The selected lessor will enter into a Master Lease Agreement (MLA) with the Procuring Entity (KenGen). The Procuring Entity will develop and supply steam to the Provider who will generate electricity from the steam via the leased wellhead generators. The steam will be delivered by the KenGen at the Power Plant Boundary at the interface between the Procuring Entity and the Provider. To this effect a Steam Supply Agreement (SSA) will be signed with the successful lessor.

Power Evacuation facilities and connection to the national grid was to be implemented by the successful lessor. The successful lessor will facilitate the connection and termination of the generated power to the existing high voltage substations within the greater Olkaria for evacuation through the existing transmission lines.

KenGen will enter into Power Purchase Agreement(s) (PPA) with Kenya Power and Lighting Company Limited (Kenya Power) for the generated power.

The Procuring Entity will enter into a Master Lease agreement and an operation and maintenance contract with the successful lessor.

The KenGen Tender Committee through its minute vide KTC(PPD, ACT 2005)/286/10-2014 approved the EOI that shortlisted the following firms as shown in the table below;

Table: Shortlisted firms

No.	Firm	Country
1	Transcentury Ltd, Power Machines & Civicon Ltd	Russia and Kenya

2	Green Energy Group, Verkis, Maralal & Trans Africa Co. Ltd	Norway, Iceland and Kenya
3	Ormat International, Inc	USA
4	Geothermal Development Associates	USA
5	Marubeni Corporation	Japan
6	RentCo East Africa Ltd, LanTech & Toshiba	Kenya
7	Quantum Power East Africa BV, Group Five, Fuji Electric & Power Engineers	USA, Japan, SA and Kenya

THE REQUEST FOR PROPOSAL

The Request for Proposal (RFP) was sent out to the shortlisted firms on the 4th February 2015 with a closing date of 20th April 2015. The bid submission date was extended to 20th May 2015 vide Addendum Number 2 which was sent out to all bidders. All bidders acknowledged receipt.

There was a mandatory site visit and pre bid conference held on the 23rd February 2015. Representatives from all the invited firms attended.

Submission of RFP

Of the seven (7) shortlisted firms, two (2) firms; Marubeni Corporation and Green Energy Group, Verkis, Maralal & Trans Africa Co. Ltd did not submit their proposals. The remaining five (5) firms submitted their proposals by the closing date of 20th May 2015.

TENDER PROCESSING (BID EVALUATION)

The evaluation was based on the criteria stipulated in Clause 5.4 of the Request for Proposal.

Evaluation Results

The evaluation results are as per the Tables below;

Preliminary & Mandatory Requirements (Responsiveness) - Results

Criteria	Geothermal Development Association (GDA)	The consortium of Transcentury, Power Machines OJSC & Civicon	Ormat International Inc.	The consortium of RentCo East Africa, LanTech Africa & Toshiba Corp	Quantum Power East Africa
Validity of the proposal	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed
Domestic Participation	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed
Bid Certification Form	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed
Bid characteristic	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed
Acceptance of terms and conditions	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed
Permits and approvals scheduling	Confirmed	Confirmed	Confirmed	Confirmed	Confirmed

Technical Evaluation Results table

Criteria	Geothermal Development Association (GDA)	The consortium of Transcentury, Power Machines OJSC & Civicon	Ormat International Inc.	The consortium of RentCo East Africa, LanTech Africa & Toshiba Corp	Quantum Power East Africa
Bidder's Technical Capability	Single Flash & ORC (Exergy or Turboden)	Binary Technology (Power Machines OJSC)	ORMAT Energy Converter (ORC) (ORMAT)	Condensing Turbine Technology (Toshiba Corporation)	Single Flash Steam Cycle Turbine (M+M)
Compliance with Project Implementation	For consortium Bids, submission of signed Consortium agreement or joint venture agreement between consortium members	Yes	N/A	Yes	N/A
	Ability and commitment to achieve full plant commercial operation 14 months from the MLA signing date. The MLA is	Yes	Yes	Yes	Yes

Criteria	Geothermal Development Association (GDA)	The consortium of Transcentury, Power Machines OJSC & Civicon	Ormat International Inc.	The consortium of RentCo East Africa, Lantech Africa & Toshiba Corp	Quantum Power East Africa
	expected to be signed by the Employer and Lessor				
Output	53.47	50.549	46.23	58.42	25.93
Availability Factor	95%	95%	98%	99%	95%
Estimated Life of the facility	>25 Years	40 Years	25 Years	> 30 Years	25 Years
Evacuation plan	Yes	Yes	Yes	Yes	Yes
O&M Proposals	Yes	Yes	Yes	Yes	Yes
TECHNICAL COMPLIANCE	QUALIFIED	QUALIFIED	NOT QUALIFIED	QUALIFIED	NOT QUALIFIED

Detailed Computation of Wellhead Capacity (MW)

Well No.	Geothermal Development Association (GDA)			The consortium of Transcentury, Power Machines OJSC & Civicon			Ormat International Inc.			The consortium of RentCo East Africa, Lantech Africa & Toshiba Corp			Quantum Power East Africa		
	Gr oss	Aux	Net	Gr oss	Aux	Net	Gr oss	Aux	Net	Gr oss	Aux	Net	Gr oss	Aux	Net
OW-6V	5.03	0.74	4.29	2.8	0.361	2.439	3.72	0.49	3.23	4.44	0.375	4.065	4	0.24	3.76
OW-99A	1.65	0.26	1.39	1.8	0.222	1.578	1.52	0.2	1.32	1.56	0.175	1.385			0
OW-707	3.41	0.49	2.92	2.1	0.28	1.82	3.46	0.48	2.98	3.74	0.175	3.565			0
OW-724	2.82	0.4	2.42	3.9	0.444	3.456	2.92	0.41	2.51	3.29	0.175	3.115	5.2	0.31	4.89

	Geothermal Development Association (GDA)			The consortium of Transcentury, Power Machines OJSC & Civicon			Ormat International Inc.			The consortium of RentCo East Africa, Lantech Africa & Toshiba Corp				Quantum Power East Africa			
OW-7S1A	2.91	0.43	2.48	2.1	0.278	1.822	2.15	0.28	1.87	2.65	0.175	2.475					
OW-802				23.3	1.851	21.449				12.33	0.625	11.705	8	0.5	7.5		
OW-802A							23	2.9	20.1	9.24	0.625	8.615	10.4	0.62	9.78		
OW-802B	34.53	4.32	30.21	1.77	0.222	1.548				3.01	0.175	2.835					
OW-804				10.1	0.989	9.111	10.44	1.35	9.09	6.64	0.375	6.265					
OW-804B										4.98	0.375	4.605					
OW-805C	2.68	0.39	2.29	2.2	0.303	1.897	1.31	0.17	1.14	4.61	0.375	4.235					
OW-903	2.69	0.39	2.3	2.1	0.278	1.822	1.44	0.17	1.27	2.13	0.175	1.955					
OW-905A	2.27	0.33	1.94	1.8	0.232	1.568	1.32	0.16	1.16	1.83	0.175	1.655					
OW-907B	3.7	0.47	3.23	2.8	0.761	2.039	1.78	0.22	1.56	2.12	0.175	1.945					
TOTAL (MW)	61.69	8.22	53.47	56.77	6.221	50.549	53.06	6.83	46.23	62.57	4.15	58.42	27.6	1.67	25.93		

The following two (2) firms; Ormat International Inc. and Quantum Power East Africa failed to meet the minimum technical requirements as per the RFP.

a) Ormat International Inc

Ormat International Inc gave a guaranteed output of 46.23MW which was less than the guaranteed 50MW stipulated in the RFP. This made them technically non-compliant.

b) Quantum Power East Africa

Quantum Power East Africa made a fatal deviation from the provisions of the RFP. They removed the 7 wells out of the 14 wells alleging that they are not economically viable.

This deviation was material and made them technically non-compliant.

Recommendation

Based on the foregoing evaluation and in line with the Evaluation Tables above, the following 3 firms were recommended to proceed to the next stage of financial evaluation having satisfied the requirements for technical compliance.

Table: Recommended Firms

No.		Net Output
1	RentCo East Africa Ltd, LanTech & Toshiba	58.42 MW
2	Geothermal Development Associates	53.47 MW
3	TransCentury Ltd, Power Machines & Civicon Ltd	50.55 MW

The KenGen Tender Committee vide Minute KTC(PPD,ACT 2005)/864/06-2015 dated 11thJune, 2015 granted approval for the opening of the financial proposals of the three firms.

FINANCIAL EVALUATION

Opening of the Financial Proposals

The financial proposals for the firms which passed the technical evaluation stage were opened on the 15th June, 2015 and their Monthly Rental Fees and Amortized Monthly Connection Fees were announced.

The following is the summary of bid costs as they were read out during the opening of the financial proposals:

Table: Bid Prices summary as read out during opening of Financial Proposals

No.	Firm	Net Output	Monthly Rental Fee (USD)	Amortized Connection Cost (USD)	Total Cost (USD)
1	RentCo East Africa Ltd, LanTech & Toshiba	58.42 MW	2,771,170.66	47,574.27	2,818,744.93
2	Geothermal Development Associates	53.47 MW	2,628,610.00	12,373,158 **	2,697,349.77
3	TransCentury Ltd, Power Machines & Civicon Ltd	50.55 MW	2,323,563.00	107,715.00	2,431,278.00

*** The Connection Cost read out for Geothermal Development Associates was for the 15 Year duration and not amortized as a monthly connection cost as guided by the RFP.*

Financial Evaluation Criteria

Clause 5.5 of the RFP details the evaluation criteria to be used. The criteria examines the following;

- i. That the proposals are complete,
- ii. The proposals have been properly signed,
- iii. All annexes that are required by the RFP are furnished, and
- iv. The Proposals are responsive.

The committee examined and confirmed that all the financial proposals complied with the above requirements.

Table: Preliminary Financial Evaluation

	Criteria	Geothermal Development Association (GDA)	The consortium of TransCentury, Power Machines OJSC & Civicon	M/s RentCo East Africa, LanTech Africa & Toshiba Corp
1	Price Schedules	Confirmed	Confirmed	Confirmed
2	Financing Plan	Confirmed	Confirmed	Confirmed
3	Cost Breakdown	Confirmed	Confirmed	Confirmed
4	Buyout Provisions	Confirmed	Confirmed	Confirmed

Combined Technical and Financial Evaluation

It was observed that the net output used in the financial proposal by the bidders was the one that had been submitted in their technical proposals. This did not tally with the net output as evaluated at the technical stage. The committee used the evaluated net output for each bidder to carry out the financial evaluation as captured in the table below.

Table: Net output (MW)

Firm	Net Output (MW) as submitted	Net output (MW) as evaluated
RentCo East Africa Ltd, LanTech & Toshiba	58.44	58.42
Geothermal Development Associates	53.50	53.47
TransCentury Ltd, Power Machines & Civicon Ltd	51.00	50.55

It was noted that the consortium of TransCentury Ltd, Power Machines & Civicon Ltd proposed a tariff rate of USD 0.065 and indicated that they used a capacity factor of 96%. However on evaluation, the committee established that this tariff rate could only be realized by using a capacity factor of 98%.

As provided by the RFP (Section 12.0, Vol II - Bidders' response package), the committee used a capacity factor of 96% for evaluation of all the proposals. By so doing the evaluated tariff rate for the consortium of TransCentury Ltd, Power Machines & Civicon Ltd was USD 0.069 and

not the USD 0.065 in their submission.

It was also noted that Geothermal Development Associates in their proposal gave a lump-sum figure of USD 12,373,158 for connection costs and not amortized as required by the RFP. The committee amortized this costs for the 15-year duration of the lease to establish a figure comparable to what the other bidders had offered. This amortized figure was then used in the financial evaluation.

The Table below shows the comparison of the capacity factor, output MW and the respective costs for each of the bidders. A cost benefit analysis was carried out using the above parameters to arrive at the lowest evaluated bidder with the highest gain to KenGen.

Table: Combined Technical & Financial Evaluation

Parameters	Geothermal Development Associates	TransCentury Ltd, Power Machines & Civicon Ltd	RentCo East Africa Ltd, LanTech & Toshiba
Guaranteed Output MW	53.47	50.55	58.42
Capacity Factor (%)	96%	96%	96%
Monthly Rental Equipment Cost (USD)	2,628,610.00	2,323,563.00	2,771,170.66
Amortized Monthly Connection Cost	68,739.77	107,715.00	47,574.27
Total Monthly Cost	2,697,349.77	2,431,278.00	2,818,744.93
Bidder's Evaluated Tariff Rate per KWh	0.072	0.069	0.069
KenGen Balance KWh (USD)	0.016	0.019	0.019
Projected KenGen Monthly Gain (USD)	600,166.52	686,099.05	785,273.25

Based on the above evaluation the bidders were ranked on the basis of the Projected KenGen Monthly Gain (USD) as per the Table below;

Table: Ranking of Combined Technical & Financial Evaluation

	Bidder	Projected KenGen Monthly Revenue	Rank
I	RentCo East Africa Ltd, LanTech & Toshiba	USD. 785,273.25	1

	Bidder	Projected KenGen Monthly Revenue	Rank
II	TransCentury Ltd, Power Machines & Civicon Ltd	USD. 686,099.05	2
III	Geothermal Development Associates	USD. 600,166.52	3

Conclusion and Recommendations

Based on the evaluation, M/s RentCo East Africa Ltd, LanTech & Toshiba emerged as the highest ranked firm amongst the three bidders evaluated as per the RFP.

It was therefore recommended that:

- i. KenGen issues a letter of intent (LOI) and invite the consortium of M/s RentCo East Africa Ltd, LanTech & Toshiba to undertake a detailed pre-contract negotiation on their proposal of leasing 58.42MW guaranteed output wellhead generators at their total monthly rental fee of USD 2,818,744.93 (Two Million, Eight Hundred and Eighteen Thousands, Seven Hundred and Forty Four and Ninety Three Cents)
- ii. Further financial analysis and modelling be done as part of financial due diligence to ascertain the viability of the project as per the bidder's proposal. The due diligence should incorporate KenGen costs and risks.

THE REQUEST FOR REVIEW

The Request for Review was lodged by the Consortium of OJSC Power Machines Limited, Trancentury Limited and Civicon Limited on 22nd July, 2015 in the matter of the Request for Proposals (RFP) for Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease, Operate and Maintain Basis.

The Applicant sought for the following orders:

1. **The Honourable Board do review the tender procedure.**
 2. **The Honburable Board do annul the Procuring Entity's decision contained in its letter dated 16th July 2015.**
 3. **The Honourable Board do award the Tender to the Applicant being the lowest responsive bidder.**
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4. **IN THE ALTERNATIVE: The Honourable Board do issue directions to the Procuring Entity with respect to the fair and objective evaluation of the submitted bids, in particular the Applicant's bid, in accordance with the RFP evaluation criteria.**

The Board wishes to observe at this early stage of this decision that when the Applicant's Request for Review was initially lodged, it was lodged without a supporting statement, a defect which Counsel for the Procuring Entity took up in paragraphs 78 and 79 of the Procuring Entity's Memorandum of response dated 28th July, 2015. When this Request for Review however first came up for hearing on 10/8/2015, Counsel for the Applicant sought leave to file a statement in support of the Request for Review and there being no objection from any of the advocates who appeared at the time, the Board allowed the Applicant to file and rely on the statement in support of the Applicant's Request for Review dated 7th August, 2015 signed by Mr. Allan Munyua.

The Board also granted the Applicant leave to rely on the reply to the Procuring Entity's Response to the Request for Review dated 7th August, 2015 and which was filed on 7th August, 2015. The Board additionally granted leave both to the Procuring Entity and all the Interested Parties

to file any responses to the Applicant's reply to the Procuring Entity's response to the Request for Review if they found it necessary to do so.

On its part, the Procuring Entity filed a response dated 28th July, 2015 and a further response to the Request for Review dated 13th August, 2015 in opposition to the Applicant's Request for Review.

The successful bidder (hereinafter referred to as the 1st Interested Party) on the other hand filed a response to the Request for Review dated 4th August, 2015 on the basis of which it opposed the Request for Review.

In addition to the 1st Interested Party, two other interested parties namely M/s Ormat International INC (hereinafter referred as the second interested party) and M/s OPEA (hereinafter referred to as the third interested party) appeared at the hearing of the Request for Review.

All the parties present except the 3rd Interested Party filed submissions in support and or in opposition to the respective positions taken by them which the advocates appearing for the parties highlighted when this matter came up for hearing on 14th August, 2015.

During the hearing of the Request for Review, the Applicant was represented by Mr. Kevin Mogeni, M/s Purity Makori and Mr. Alex Ashioya Advocates though the arguments on behalf of the Applicant were led by Mr. Mogeni.

The Procuring Entity was represented by Mr. Kiragu Kimani Advocate while the 1st Interested Party was represented by Mr. Mugunda innocent and Mr. George Drammen Advocates both of who addressed the Board on different aspects at the hearing of the Request for Review.

M/s Nazima Malik advocate appeared on behalf of the 2nd Interested Party while Mr. Dickens Seroney appeared on behalf of the 3rd Interested Party.

The Board will therefore proceed to consider the parties respective cases as contained in the documents lodged before it and as stated in the written and the oral submissions made before it.

THE PARTIES RESPECTIVE CASES

Mr. Kevin Mogeni who presented arguments on behalf of the Applicant started off his submissions by stating that the Procurement process which was the subject matter of this Request for Review was guided by the Provisions of Sections 2 and 82(1) of the Public Procurement and Disposal Act and Article 227 of the Constitution and contented on the basis of the letter of notification appearing at page 17 of the Request for Review that the Applicant had been wrongly declared as having been unsuccessful. He stated that contrary to what had been stated in the said letter, the Applicant was the bidder which had offered the lowest bid price of all the bidders who had participated in this tender.

The Applicant while relying on grounds 1(e), (g), (h) and (k) of the Request for Review and on the tables appearing as tables A, B, C and D

in the Request for Review Counsel for the Applicant submitted that Clause 4.9 of the tender document provided that the bidder with the lowest tariff would score the highest financial score and that the results that were read out at the financial bid opening meeting held on 15th June, 2015 indicated that the Applicant had offered the lowest bid price, this being comprised of the lease cost and the monthly grid connection costs.

According to the Applicant and as set out in the Request for Review, the following financial proposals were read out at the said meeting.

Table A: Total Cost per Bidder as read out at Financial Bid Opening					
50MW	Wellhead		US\$	US\$	US\$
Leasing					
Bidder		Net MW	Monthly Rental	Monthly Connection Cost	Total Cost
Rentco + Lantech + Toshiba		58.42	2,771,171	47,574	2,818,745
GDA		53.47	2,628,610	12,373	2,640,983
TCL + Power Machines + Civicon		50.55	2,323,561	107,714	2,431,275

While referring to the Provisions of Volume II Section 11.2.1 at page 26 and 27 of the tender document, namely the items headed as:-

- i) Wellhead Equipment Price (facility costs) and**
- ii) Interconnection facilities costs**

the Applicant stated that a further analysis of the financial bids showed that the Applicant's bid offered the lowest total cost per MW which

according to its calculation and which was set out under table B of the Request for Review worked out as follows:-

Table B: Total Costs per Net MW						
50MW Wellhead Leasing	US\$	US\$	US\$	US\$	US\$	US\$
Bidder	Net MW	Monthly Rental	Monthly Connection Cost	Total Cost	Total Cost per net MW (Total Cost/Net MW)	
Rentco + Lantech + Toshiba	58.42	2,771,171	47,574	2,818,745	48,250	
GDA	53.47	2,628,610	12,373	2,640,983	49,392	
TCL + Power Machines + Civicon	50.55	2,323,561	107,714	2,431,275	48,096	

It was the Applicant's further case based on the Provisions of Clause 4.9 at page 29 of the Request for Review that its bid price was the lowest on this measure and hence it ought to have scored the highest financial score which it tabulated as follows under table C of the Request for Review:-

Table C: Total Cost per Net MW (Power Equipment Only)						
50MW Wellhead Leasing	US\$	US\$	US\$	US\$	US\$	US\$
Bidder	Net MW	Monthly Rental	Monthly Connection Cost	Total Cost	Total cost per net MW (Total Cost/Net MW)	Wellhead Equipment only per net MW (Monthly Rental/Net MW)
Rentco+ Lantech + Toshiba	58.42	2,771,171	47,574	2,818,745	48,250	47,435
GDA	53.47	2,628,610	12,373	2,640,983	49,392	49,160
TCL + Power Machines + Civicon	50.55	2,323,561	107,714	2,431,275	48,096	45,966

The Applicant further stated in its Request for Review that the Applicant had offered a guaranteed availability factor of 95% but the Procuring Entity was however, bound to the criteria stipulated in the Request for Proposal to apply a project availability factor of 96%, the Applicant stated that supposing that all the other bidders were evaluated on a project capacity of 96%, the Applicant's bid price would still be the lowest, both in terms of the total cost per KWH as well as for the Wellhead Equipment costs per KWH as shown in table D which was set out in the Request for Review and which was worked out as follows by the Applicant:-

Table D: Total Cost Per Net MW (Assuming % Availability Factor)					
Bidder	Net MW	Assumed Guaranteed Availability	Total KWH per year at 8,760 hours per year (Net MW x 1000 x (8760 hours x Guaranteed Availability))	Total Cost in US\$/K WH	Wellhead Equipment cost only in US\$/KWH
Rentco + Lantech+ Toshiba	58.42	96%	491,288,832	0.06885	0.06769
GDA	53.47	96%	449,661,312	0.07048	0.07015
TCL + Power Machines + Civicon	50.55	96%	425,105,280	0.06863	0.06559

Mr. Mogeni learned Counsel for the Applicant therefore submitted on the basis of the calculations set out above and Clause 4.9 of the tender document and particularly based on the first sentence in paragraph 2 of the said clause that the bidder with the lowest tariff will score the highest financial score. He therefore stated that based on the above results, the Applicant had the lowest evaluated price and should have been considered the highest responsive bidder.

Turning to the issue of the Procuring Entity's contention that the tender was meant to achieve a commercial objective of generating revenue, Counsel for the Applicant submitted that the tender document had clearly set out the evaluation criteria to be applied in this tender at pages 47 - 49 of the tender document. It was the applicant's case that the ~~evaluation criteria set out by the Procuring Entity did not state that it's~~ interest in this tender was commercial and the Procuring Entity had thus introduced an extraneous criteria not set out in the tender document when it based it's decision to award the tender to the tenderer who guaranteed the Procuring Entity the highest revenue.

Counsel for the Applicant alternatively argued that even if that criteria was to be applied, the Applicant would still have emerged the successful bidder since in it's financial proposal, the Applicant had guaranteed the Procuring Entity a guaranteed monthly revenue of USD 822,038 as opposed to the successful bidders evaluated guarantee of USD784,039.84.

Turning to the requirement on the megawatt output, Counsel for the Applicant while referring the Board to pages 18, 21 (Clause 1.1), 23, 24, 28 (paragraph 2.1) and page 49 (Clause 4.83) of the tender document, the Applicant stated that the total megawatt output that the Procuring Entity had set was 50 megawatt and that it was never intended that the highest output was the criteria for a bidder to move forward or be awarded the tender. He referred the Board to the Clauses which have already been set out above and submitted that the Procuring Entity had placed the minimum at 50 megawatts and so long as a bidder had

obtained that minimum threshold, the Procuring Entity was under an obligation to declare the bidder with the lowest tariff as the bidder with the highest financial score and as the winner of the tender.

Turning to the Procuring Entity's memorandum of response, Counsel for the Applicant while referring to the contents of paragraphs 51, 52, 53 and 54 of the Procuring Entity's initial memorandum of response dated 28th July, 2015 submitted that whereas the Applicant had offered a monthly rental fee of USD 2,323,561 which was the lowest monthly rental fee, the Procuring Entity had in the last column of the table at paragraph 52 introduced the aspect of the revenue to be generated from the bidders which he submitted was not part of the evaluation criteria for this tender. He however stated that even if the issue of the revenue was to be taken into account, the sum of USD. 686,099.05 which had been assigned to the Applicant by the Procuring Entity was not the correct figure and the correct revenue figure ought to have been the sum of USD. 822,038 which would still be the highest revenue offer of all the three bidders that proceeded to the financial evaluation stage.

Counsel for the Applicant therefore urged the Board to allow the Request for Review and grant the Applicant the reliefs sought in the Request for Review.

M/s Nazimia Malik who appeared in this Request for Review on behalf of the second interested party associated herself with the submissions made by Counsel for the Applicant except for the prayer that the Board award's the Applicant the tender which was the subject matter of the

Request for Review. She urged the Board to make any orders which would benefit the purposes of Section 2 of the Act and ensure that the purpose is served. She stated that of relevance was the Provision in the Act that categorically states that the purpose of the Act is to maximize economy and efficiency, to provide integrity and fairness of the bidding procedures and to increase public confidence in the Procurement procedures. Counsel for the second interested party further submitted that where the above statutory procedures cannot be met or the tendering process falls short of any one of these requirements, then the entire process must be repeated in order to meet that very categorical statutory requirement.

While conceding that the second interested party had not filed its own independent Request for Review, Counsel for the second interested party nonetheless stated that where the tender document was not clear her understanding of the law was that nothing stops the Board from taking this fact into consideration in order to determine whether there was deficiency. She stated that whereas her client did not have an independent Request for Review, the second interested party having been invited to participate in the proceedings before the Board under the Provisions of the Act, it was entitled to point out at the hearing stage any shortcomings in the process if it felt it would assist the Board to enable it make a decision on whether the objectives set out under Section 2 of the Act had been met.

In its submissions dated 13th August, 2015 and filed with the Board on the same day, the 2nd Interested Party faulted the tender document used

in this Procurement process in several respects and urged the Board to order for a re-tender but when asked whether the Board could grant to the second interested party a relief not sought in the Request for Review, Counsel for the second interested party submitted that the Board was vested with wide powers by the Act which included the power to investigate the entire procurement process to determine whether indeed the process was within the requirements of the Act and that the Board had the power and the mandate to order a re-tender if the circumstances of the case warranted it even if that prayer had not been specifically pleaded. Counsel for second interested party did not however cite any authority to support that proposition.

Counsel for the second interested party concluded her submissions by stating that the technical and the financial criteria set out in the tender document was so intertwined and one could no separate one from the other. She therefore urged the Board not to shut out her client on the basis of a tender document which was on the face of it unclear and defective.

Mr. Dickens Seroney who appeared on behalf of the third interested party supported the Applicant's Request for Review but stated that he did not wish to submit anything more than that.

Mr. Kiragu Kimani who appeared on behalf of the Procuring Entity opposed the Applicant's Request for Review and urged the Board to reject the same. Mr. Kimani relied on the Procuring Entity's memorandum of Response, the further memorandum of response, the

Request for Proposals document and on the two sets of submissions filed by the Procuring Entity in opposition to the Applicant's Request for Review.

Counsel for the Applicant began his submissions by giving a background of the project and stated that at the moment, there is a ~~power deficit which would last for at least between 15-20 years unless~~ drastic steps were taken to generate power. Counsel for the Procuring Entity informed the Board that for many years, the Country had been relying on electricity generated from hydro water which is dependant on rainfall and which is therefore unpredictable and unreliable. He further stated that the Procuring Entity however recognized that there is great potential for a more predicable power source generated through geothermal and that geothermal represents one of the greatest opportunity to match supply with demand.

Counsel for the Procuring Entity submitted that it is against the above background that the Procuring Entity sought to achieve the above objective through the project in question and by making use of the redundant wells to generate power and also recoup the cost incurred in sinking these wells and additionally try to generate revenue.

Counsel for the Procuring Entity stated that these 3 objectives were clearly set out in Clause 1 at page 6 of the Request for proposals and at the handwritten page 41 of the Request for Proposal. He therefore submitted based on the above Provisions in the tender document that all bidders were made aware of what the Procuring Entity sought to

achieve. He further stated that the same objectives were explained at the site meeting held on 23rd February, 2015 where all the bidders were represented.

Turning to the Request for Review filed by the Applicant, Counsel for the Procuring Entity submitted that the Applicant's Request for Review as originally presented raised only one ground of review which was that the Applicant was the lowest evaluated bidder based on the strength of the figures that were read out or noted at the tender opening. Counsel for the Procuring Entity however submitted that although the Applicant had a single line of attack in the formal Request for Review as filed, what Counsel for the Applicant had instead presented was a three (3) pronged attack without any amendment to the Request for Review which was solely premised on the contention that the Applicant was the lowest evaluated bidder. The two additional grounds which were not pleaded in the Request for Review and which in the Procuring Entity's advocate's view Counsel for the Applicant sought to introduce during his submissions were namely:-

- (i) That there was a change of the evaluation criteria from the lowest cost to the one that represented the best commercial return to the Procuring Entity and;
- (ii) That no scores were assigned at each stage of evaluation.

On the issue of the additional two grounds, Mr. Kimani submitted that the function of a Request for Review is the same as that of a statement of claim in a civil action which is meant to define what the dispute is and a party cannot be allowed to change or recreate its case as it moves on.

Counsel for the Applicant therefore urged the Board to reject the two additional grounds on the basis that they were not pleaded.

On the main thrust of the Applicant's Request for Review, namely that it was the bidder with the lowest evaluated cost, Counsel for the Procuring Entity stated that a party could not read portions of a Request for Proposal and ask the Board to treat them in isolation.

He instead submitted that the Board should read the entire document. Counsel for the Procuring Entity stated that the Request for Proposals was divided into several sections and that Counsel for the Applicant had not referred the Board to any Clause in the evaluation Section, namely Clause 5 which explicitly stated that cost and cost alone would be the sole criteria for determining who was the lowest bidder. Mr. Kimani submitted that contrary to what Counsel for the Applicant had stated, Section 82(1) of the Act requires a Procuring Entity to examine the proposals received in accordance with the Request for Proposals.

On the issue of the evaluation criteria, Counsel for the Procuring Entity submitted that Clause 5 of the tender document clearly set out the evaluation and the award criteria for the Request for Proposal namely that the bidder with the highest availability factor and output megawatts at the lowest cost would be the successful lessor.

Counsel for the Procuring Entity however submitted that all the arguments made by the Applicant had been based on the foundation that the Applicant submitted the lowest leasing cost. He stated that the

Applicant did not however factor in the two other limbs of the evaluation criteria, namely, the availability factor and the output in megawatts.

The Procuring Entity in its two responses and the submissions filed before the Board stated that contrary to the Applicant's assertion, it had evaluated the Applicant's tender taking into account the highest availability factor and output in megawatts at the lowest cost together with the Revenue that the Procuring Entity was going to gain in order to determine the successful proposal for the purposes of the award of the tender which was the subject matter of the Request for Proposal.

Based on the above evaluation, the Procuring Entity submitted that whereas the Applicant had offered a leasing fee of USD 2,323,561 when this figure was subjected to evaluation, the sum increased by 2 USD to the sum of USD 2,323,563 due to an arithmetical error. The Procuring Entity also stated that whereas the Applicant had quoted a guaranteed output of 51 MW, when this figure was subjected to evaluation it resulted into a net guaranteed output figure of 50.55 MW.

The Procuring Entity consequently submitted that upon the correction of the above errors, the availability factor, the output factor, the leasing cost and the eventual revenue that would accrue to the Procuring Entity would work out as follows:-

	Parameters	Geothermal Development Associates	Tran Century Ltd, Power Machines & Civicon Ltd	Rentco Africa Lantech & Toshiba	East Ltd, &
1.	Guaranteed output MW	53.47	50.55	58.42	
2.	Bidder's stated Availability Factor	95%	95%	99%	
3.	Capacity Factor (%)	96%	96%	96%	
4.	Monthly Rental Equipment cost (USD)	2,628,610.00	2,323,563.00	2,771,170.66	
5.	Amortized Monthly Connection cost.	68,739,77	107,715.00	47,574.27	
6.	Total monthly cost.	2,697,349.77	2,431,278.00	2,818,744.93	
7.	Bidder's Evaluated Tariff Rate per KWH	0.07198	0.06863	0.06885	
8.	KenGen balance KWH (USD)	0.016	0.019	0.019	
9.	Projected KenGen monthly gain (USD)	600,099.05	686,099.05	785,273.25	

Counsel for the Procuring Entity submitted that based on the above evaluation, the Procuring Entity stood to gain a revenue of USD 785,273.25 from the 1st Interested Party as opposed to a revenue of USD 686,099.05 from the Applicant while the difference in the net guaranteed power output between the 1st Interested Party and the Applicant was 7.42 MW in favour of the 1st Interested Party.

Counsel for the Procuring Entity therefore submitted that if it accepted the Applicant's tender, then it would have to obtain the 7.42 MW from expensive thermal power which would translate to a daily cost of USD 37,610.50 which was equivalent to Kshs. 114,398,592 and at an annual cost of USD 13,727,831.04 which would be equivalent to the sum of Kshs. 1,372,783,104.

While responding to the contents of paragraph 19 of the Applicant's response to the Procuring Entity's response dated 7th August, 2015 where the Applicant stated that it had offered an annual Revenue of USD 9,864,461 and a monthly revenue of USD 822,028, Counsel for the Procuring Entity denied this contention and reiterated that the projected monthly revenue offered by the Applicant in its bid was the sum of USD 686,099.05 and not the sum of USD 822,038 as claimed. Counsel for the Procuring Entity urged the Board to look at the Applicant's financial proposal to confirm that the Applicant had not guaranteed the alleged annual or monthly revenue.

Mr. Kimani submitted on the basis of all the forgoing that the object of Public Procurement was to encourage competition and to get the best possible outcome for the Procuring Entity and the public who are the consumers of electricity and that the country would loose a considerable amount of money if the Applicant's proposal was accepted since it would lead to a deficit of 7.42 megawatts that would cost the public a sum of Kshs. 1.36 Billion yearly to generate thereby defeating the objectives of procurement as set out in Article 227 of the Constitution and Section 2 of the Act.

Turning to M/s Malik's submissions, Counsel for the Procuring Entity submitted that the second interested party had not filed an independent Request for Review seeking the relief of a re-tender and stated that at any rate such a Request for Review would be barred by limitation under the Provisions Regulations 73 of the Public Procurement and Disposal Regulations 2006 as amended. He concluded his submissions by stating

that the Review Board as a creature of statute could only determine disputes placed before it in accordance with the Provisions of Section 93 of the Act and Regulation 73 of the Regulations.

He therefore urged the Board to dismiss the Applicant's Request for Review with costs.

Mr. Muganda innocent and Mr. George Drammen who appeared in this on behalf of the the Interested Party associated themselves with the submissions made by Counsel for the Procuring Entity and urged the Board to dismiss the Applicant's Request for Review with costs.

Counsel for the first interested party relied on the documents submitted before the Board in response to the Request for Review, the submissions filed and the filed authorities.

Mr. Muganda submitted on behalf of the first interested party that the Applicant had not tendered any evidence to support any of the grounds they sought to rely upon and all that Counsel for the Applicant had done was to take the Board through an interpretation of the meaning attached to the words the lowest evaluated cost. He further submitted that the Applicant had not challenged the results or the findings by the Procuring Entity particularly on the criteria and the outcome of the entire evaluation process as set out in the Procuring entity's responses and the submissions made by Mr. Kimani.

Counsel for the first interested party additionally submitted that the object of Article 227 of the Constitution and Section 2 of the Act not only requires the Procurement process to be fair, equitable, transparent and competitive but it also requires that the said process should be cost effective. He stated that in order for a procurement process to be cost effective, it must result in monetary value and the production of optimum economic results.

He further submitted that the objectives of the Request for Proposal in this instance were clear and unambiguous and they were generally to generate additional revenue and profit from the difference in cost and that Clauses in the Request for Proposals should not be read in isolation. He stated that when all the factors were taken into consideration, the proposal by the first interested party consortium conferred the highest economic benefit to the Procuring Entity as compared to that proposed by the Applicant and that it would therefore be contrary to the Provisions of Section 2 of the Act and Article 227 of the Constitution if the subject tender was to be awarded to the Applicant.

Counsel for the first interested party further submitted that the Applicant had not challenged the choice of method or the legality of any of the criteria set out in the tender document and all bidders in this tender had willfully participated in the process without protest and among other things participated in site visits.

Mr. Muganda while relying on the case of **H. Young & Company (EA) Limited -vs- East Africa Portland Cement Company 383 Ltd (2008 -**

2010) PPLR. Pages 1- 15 stated that the mere allegation that the Applicant had submitted the lowest price was not the only factor that ought to have been considered in awarding the tender. Counsel submitted that the process of evaluation entailed a comparison of several pertinent factors and that it was not right for the Applicant to look at the leasing fee alone and say that it had won the tender.

Counsel for the first Interested Party therefore submitted that based on a consideration of the totality of the evaluation criteria and all the factors that the tender document required to be taken into consideration, the first Interested Party had rightly been declared as the successful bidder in the process.

Turning to the applicable law, Mr. Muganda submitted on behalf of the first Interested Party that the procurement method used in this tender was that of a Request for Proposals and not an open tender and therefore the applicable Provisions of the law were those of Section 82 and not Section 66 of the Act.

Mr. George Drammen who also addressed the Board on behalf of the first Interested Party referred the Board to the contents of page 4 of the Applicants Request for Review and particularly to paragraph (h) of ground 1 of the Request for Review and stated that the implication by the Applicant in the said paragraph that the connection cost would not be included in the tariff was not correct. He stated that Clause 5.1 of the Request for Proposals stipulated that a bidder was deemed to be compliant and would proceed to the 2nd stage if the bidder proposed the

highest output in megawatts and the lowest leasing rental and the monthly connection cost and as such the connection cost was included in the tariff.

Both Mr. Muganda and Mr. Drammen concluded their submissions by urging the Board to dismiss the Applicant's Request for Review with costs.

In a brief reply to the submissions made by Counsel for the Procuring Entity and the first Interested Party consortium, Mr. Mogeni Learned Counsel for the Applicant conceded that there was a typographical error of 2 dollars. He however submitted that the sum comprised of the connection cost. He however reiterated that the Applicant offered the lowest monthly rental fees even after the correction of the said error.

On the issue of the amount guaranteed to the Procuring Entity, Counsel for the Applicant submitted that based on the financial proposal which the Applicant had submitted to the Procuring Entity, the Applicant guaranteed an annual revenue of 9,864,461 USD which was the highest amount guaranteed in terms of revenue to the Procuring Entity.

On the issue of scoring, Counsel for the Applicant reiterated that the bidder with the lowest tariff would score the highest financial score.

Counsel for the Applicant therefore reiterated the Applicant's prayer that the Applicant's application be allowed.

THE BOARD'S DECISION

The Board has considered the Request for Review, the statement in support of the same which was signed by Mr. Allan Munyua on 7th August, 2017, the Response to the Request for Review dated 28th July, 2015 and filed by the Procuring Entity on the same day, the reply to the Procuring Entity's response to the Request for Review filed by the Applicant on 7th August, 2015, the Procuring Entity's further response to the Request for Review dated 13th August, 2015 and the 1st Interested Party's response to the Request for Review dated 4th August, 2015 and which was filed with the Board on 5th August, 2015.

The Board has also looked at the original Request for Proposals, the evaluation reports and all the other documents submitted to it by the Procuring Entity pursuant to the Provisions of Regulation 74(3) of the Public Procurement and Disposal Regulations.

The Board has also considered the written submissions filed by the parties and the oral submissions made during the hearing of the Request for Review.

The Board has framed the following issues for determination based on the documents and the submissions placed before it by the parties.

- (i) *What was the Applicant's case as set out in its Request for Review dated 21st July, 2015 and whether the Board can grant any relief at the instance of an interested party who has not lodged a Request for Review before it.*
- (ii) *Grounds 1 and 2: Whether the Procuring Entity breached the Provisions of Section 64, 66(2), 66(4) and 82 (1) and (2) of the Public Procurement and Disposal Act 2005 by failing to evaluate*

the Applicants bid in accordance with the criteria and the requirements set out in the Request for Proposals.

- (iii) *Grounds 3: Arising from issue no. 2 above, whether or not the Procuring Entity acted contrary to the Provisions of Article 227 of the Constitution and Sections 2 and 27 of the Public Procurement and Disposal Act 2005 by failing to comply with the Provisions of the Constitution and the Act or by otherwise failing to promote competition, integrity, transparency and fairness of the Public Procurement Procedures.*
- (iv) *Who should pay the costs of this Request for Review.*

ISSUE NO. 1

What was the Applicant's case as set out in its Request for Review dated 21st July, 2015 and whether the Board can grant any relief at the instance of an interested party who has not lodged a Request for Review before it.

On the first issue framed for determination, the Board finds that during the course of the Request for Review, Counsel for the Procuring Entity opposed the Applicant's Request for Review on among other grounds that whereas the Applicant's Request for Review was solely based on one ground, namely that the Applicant ought to have been awarded the tender because it had given the lowest evaluated price, Counsel for the Applicant during the course of his submissions argued two additional grounds which were not contained in the original Request for Review namely:-

- (i) *That there was a change of the evaluation criteria from the lowest cost to the one that represented the best commercial return to the Procuring Entity.*

(ii) *That no scores were assigned at each stage of evaluation.*

In addition to the above objection, the Board also finds that during the hearing of Request for review, M/s Nazima Malik who appeared before the Board on behalf of the second interested party set out a number of what her client considered to be defects in the tender document. The defects were listed at paragraphs 2 to 30 of the second Interested Party's submissions dated 13th August, 2015. Upon setting out the alleged defects in the tender document, the second Interested Party sought for the following relief at paragraph 34 of the Request for Review which M/s Malik reiterated in her oral submissions before the Board.

34: Ormat submits that the only course of action is to annul the tender and order a fresh tendering process for the entire project and not just a re-evaluation of the financial bids".

Both Counsel for the Procuring Entity and the first Interested Party opposed the line of submissions taken by Counsel the second Interested Party on the ground that the second Interested Party had not filed a Request for Review and that in the absence of a Request for Review setting out the specific grounds and the reliefs sought, Counsel for the second Interested Party could not be granted the relief of a re-tender. Counsel for the Procuring Entity additionally submitted that having been served with a notification informing it of the outcome of it's tender allowing the second Interested Party to argue and grant it relief on the basis of the grounds set out in the written submissions would amount to entertaining a Request for Review outside the statutory period of Seven

(7) days provided for under Regulation 73 of the Regulations which sets out the manner for the filing of a Request for Review.

M/s Malik's in a brief response to the above line of argument and which argument the Board has already set out above stated that the Board had wide powers under the Provisions of the Act to investigate the entire procurement process to determine whether indeed the process was within the requirements of the Act and if not, the Board has the power and the mandate to order for a re-tender even at the instance of an interested party.

The Board has examined the Request for Review and the submissions filed by Counsel for the second Interested Party in view of the above objections and finds it prudent to determine what is the scope of the Applicant's Request for Review and whether the prayer sought by the second Interested Party can be granted in order to save time.

The Board has perused the Request for Review and more particularly paragraphs 1 and 2 thereof and finds that the Applicant's Request for Review was largely if not entirely based on the ground that the Applicant was the lowest evaluated bidder having offered the lowest bid price, the lowest monthly lease cost and the lowest monthly grid connection cost. This was specifically stated to be the Applicant's case in the last sentence of paragraph 1 and in paragraphs 1(d), 1(e), 1(g), 1(h), 1(i) and 1(k) and all the other sub-grounds. The tables which have been reproduced as tables A, B, C, and D contained calculations which were meant to support the view that the Applicant was the lowest evaluated

bidder for the purposes of this tender and that the Procuring Entity therefore ought to have awarded the tender to it.

This finding by the Board is further fortified by prayer (c) of the Applicant's Request for Review where the Applicant specifically sought that the Board awards the Tender to the Applicant being the lowest responsive bidder.

The Board notes from the Request for Review filed before it that the Applicant did not however state in any of the paragraphs in the Request for Review that no scores were assigned at each stage of evaluation as a basis for seeking to annul the award nor was there any specific ground or an allegation that the Procuring Entity had changed the evaluation criteria from the lowest cost to the one that represented the best commercial return to the Procuring Entity.

The only instance where the issue of breach of the criteria was raised was under ground 2 of the Request for Review which the Applicant stated arose from the issues arising from the foregoing paragraph 1 and the issue raised was that the Procuring Entity failed to evaluate the Applicant's bid in accordance with the criteria and the requirements set out in the Request for Proposal and in prayer (d) where the Applicant urged the Board to issue directions to the Procuring Entity with respect to the fair and objective evaluation of the submitted bids, in particular the Applicant's bid in accordance with the Request for Proposals evaluation criteria.

The Board therefore finds that the issue of the Procuring Entity not assigning scores for both the technical and financial proposals was not pleaded but on the issue of the change of criteria, the Board finds that ground 2 and prayer (d) of the Request for Review touched on the broad issue of evaluation and the evaluation criteria and will therefore consider whether the Procuring Entity evaluated the Applicant's bid in accordance with the criteria and the requirements set out in the Request for Proposal.

Turning to the grounds listed and the prayers sought by the second Interested Party, the Board finds that although Counsel for the second Interested party confirmed before the Board that her client had been served with a letter of notification that its tender was unsuccessful, the second interested party did not file its own independent Request for Review setting out the grounds upon which it sought to have the entire procurement process nullified and an order for a re-tender made.

The Board additionally finds that the position set out in the second interested party's statement and the submissions dated 13th August, 2015 was diametrically opposed to the Applicant's case as pleaded in that whereas the Applicant did not challenge the validity of the Request for Proposals document, the bulk of the second Interested party's submissions went into demonstrating the various defects which the second interested party saw in the tender document and thus the prayer for nullification and re-tender under paragraph 34 of the second Interested Party's submissions.

On the objection taken against the 2nd interested party's grounds and the prayer for a re-tender, the Board finds and holds that the only way that a party can lodge any complaint and seek any relief before the Board is through the filing of a Request for Review. Such a Request for Review must be filed within the period of Seven (7) days specified under the Provisions of Regulation 73 of the Public Procurement and Disposal Regulations..

In the cases of **Republic -vs- The Public Procurement and Administrative Review Board & Another Exparte Nelson Korir & 3 others (2013) eKLR** and in the case of **Transcend Media Group Limited -vs- Kenya Airports Authority (PPRB) Appl. No. 6 of 2014** the High Court and the Board respectively held that an applicant who was alleging a breach under Regulation 73 ought to file a Request for Review within Seven (7) days upon receipt of a notification giving rise to the breach and for the further proposition that Regulation 73 and Section 93 of the Act allow a party to come before the Board even when the tender process is still ongoing.

In the case of **Auto Terminal Japan Limited -vs- The Kenya Bureau of Standards (PPARB No. 59 of 2014)**, the Board held that it could only entertain and grant relief to a party based on the grounds set out in the Request for Review.

Finally in the case of **Republic -vs - The Public Procurement Administrative Review Board & Another Ex-parte Gibb Africa Limited & Another (2012) eKLR** the High Court held that a party who went ahead to submit it's bid in a Procurement process which was

founded on a flawed tender document could not upon failing to attain the minimum technical marks raise the issue of such irregularities at the end of the process.

In view of all the above findings and the decisions referred to above, the Board makes the following findings on the first issue framed for determination:-

- (i) Though Counsel for the Applicant raised the issue of the absence of scores for the technical and financial proposals, this ground was not raised in the Request for Review and the Board cannot therefore consider and determine the same.
- (ii) The issue of whether the Procuring Entity changed the evaluation criteria falls within the general issue of whether the Procuring Entity failed to evaluate the Applicant's bid in accordance with the criteria and the requirements set out in the Request for Proposal and the Board will therefore consider it under issue no. 2 as framed.
- (iii) The grounds set out by the second interested party in its submissions challenging the validity of the tender document and the prayer for a re-tender sought cannot be entertained and or be granted in the absence of an independent Request for Review and on the further ground that the Applicant did not seek for the relief of a re-tender in its Request for Review.

ISSUE NO. 2

Grounds 1 and 2: Whether the Procuring Entity breached the Provisions of Section 64, 66(2), 66(4) and 82 (1) and (2) of the Public Procurement and Disposal Act 2005 by failing to evaluate the Applicant's bid in

accordance with the criteria and the requirements set out in the Request for Proposals.

The Board has already set out the respective parties arguments on the second issue framed for consideration and which arose from grounds 1 and 2 of the Applicant's Request for Review. In a nutshell, it was the Applicant's case before the Board that the Applicant's bid was the lowest evaluated bid and that under the Provisions of the tender document and more particularly under Clause 4.9 of the said document, the Procuring Entity ought to have awarded the Applicant the tender since the Applicant was the bidder with the lowest tariff and was therefore entitled to be determined as the bidder with the highest financial score. The Applicant as the Board has already stated in this decision thereafter proceeded to demonstrate through the tabulations appearing in tables A, B, C and D how it had arrived at the conclusion that it was the lowest evaluated bidder.

The Procuring Entity and the first Interested Party opposed this line of the Applicant's submissions and stated that the basis for the Applicant's Request for Review and the prayer that it be declared as the successful bidder in this tender were based on the wrong premise, namely that it was the lowest evaluated bidder. Both the Procuring Entity and the first Interested Party submitted that the lowest monthly rental fee offered by a bidder was not the only consideration that went into determining what the successful proposal would be for the purposes of this tender. The Procuring Entity instead submitted that there were several other components that went into the determination of who the successful bidder would be for the purposes of this tender.

The Board has considered the submissions made by the parties regarding this issue and which have been set out in detail in preceding parts of the Board's decision. The Board has also examined the entire Request for Proposals document which was produced by the Applicant as annexure number "OTC 3" and which runs from pages 18 to 224 of Applicant's Request for Review. The Board notes that at volume 1 appearing at page 20 of the Request for Review, the Request for Proposals set out a table of contents that provided for a total of 6 items. Item number 5.0 appearing from pages 47 to 49 of the Request for Review which contained the Request for Proposals provided for the evaluation criteria that was to be applied for the purposes of determining who the successful bidder would be for the purposes of this Procurement.

Clause 5.5 of the Request for proposals which the Board considers relevant to the determination of the issue under consideration and which the Board wishes to reproduce provides as follows in material part:-

"All proposals that have passed technical evaluation will have their proposed output MW and availability factors compared with the monthly lease rentals. The bidder with the highest availability factor and output MW at the lowest costs will be the successful lessor".

It is clear from a plain reading of the Provisions of the above clause that the Procuring Entity had to therefore take into account the following

factors in determining who the successful lessor would be for the purposes of the Request for Proposals:-

- a) The highest availability factor.
- b) The highest output in megawatts; and
- c) The lowest costs.

The Board has examined the financial proposal submitted by the Applicant and the first interested Party and finds that the Applicant proposed a monthly rental lease fee of USD 2,323,561.00 which when subjected to evaluation and a correction of error resulted into the sum of USD 2,325,563.00 while the first interested party gave a proposed rental lease fee of USD 2,771,170. It is obvious from the above figures that on the issue of the monthly rental lease fee offered by the two bidders, the Applicant offered the lowest monthly rental lease fee, a fact that the Procuring Entity admitted in paragraph 44 of it's submissions dated 10th August, 2015.

But as the Board has already found above based on the Provisions of the tender document, two other factors, namely, the highest availability factor and the highest output expressed in megawatt had to be considered by the Procuring Entity while evaluating the tender the subject matter of this Request for Review.

The Board has considered the detailed evaluation report dated 5/6/2015 and which was submitted to the Board by the Procuring Entity and finds that upon the conclusion of the evaluation exercise and the correction of errors, the Procuring Entity's tender evaluation committee determined

that the first interested party proposed a net output of 58.42 MW as opposed to the proposal of 50.55 megawatts proposed by the Applicant. This fact was admitted by the applicant and runs through tables A to D of the calculation appearing at pages 3, 4, 5 and 6 of the Request for Review and which the Board has already reproduced while setting out the submissions made by the parties in this matter. A calculation of the two megawatt output proposals therefore shows that there was a difference in output which the Tender evaluation committee assessed at 7.42 MW between the power output in megawatts proposed by the Applicant and the first interested party.

The Procuring Entity stated in paragraph 19 of its' further response to the Request for Review, a view that the Board accepts since it was not contested that if the Applicant was awarded this tender then the Procuring Entity would have to obtain the power deficit from thermal power which would translate to a daily cost of USD 37,610.50 which is equivalent to the sum of Kshs. 3,761,049.60 leading up to a monthly cost of USD 1,143,985.92 which is an equivalent of Kshs. 114,398,592.00 and an annual cost of USD 13,727,831.04 which would amount to an equivalent of Kshs. 1,372,783,104. The Board notes that the Applicant did not dispute how the Procuring Entity arrived at the above tabulation and the Board therefore reiterates that the issue remained uncontested. The Board finds that the cost difference arising from the proposed output in megawatts would amount to a loss of a colossal amount of public money and would go against public interest and the principles of promoting economy and the other principles set out in Article 227 of the

Constitution and in Section 2 of the Public Procurement and Disposal Act (2005).

Turning to the third aspect, namely, the highest availability factor, the Board has perused the Request for Proposals submitted to the Procuring Entity by the Applicant and the first interested party and finds that ~~whereas the applicant offered an availability factor of 96%, the~~ successful bidder on the other hand offered an availability factor of 99%.

The Board however finds that under the criteria set out in the tender document, the Procuring Entity had stated that it would apply a project capacity factor of 96% to evaluate the project's financial viability as given in the Bidders financial performance. The Board therefore finds that the capacity factor of 96% was not only part of the parameters set out in the tender document but it was accepted across Board as demonstrated by the Applicant in table D of the Request for Review where it applied the criteria.

The Board further finds that upon taking all the above factors into consideration, Procuring entity's tender evaluation committee tabulated the revenue that was to accrue to the bidders based on the above parameters and determined that the first interested party would generate and guarantee the Procuring Entity a monthly revenue of USD 785,273.25 as opposed to the Applicant's proposed revenue of USD 686,099.05.

On the issue of the monthly revenue, Counsel for the Applicant disputed that the Applicant had offered the Procuring Entity a monthly rental revenue of USD 686,099.05 and instead stated that it had offered the Procuring Entity a guaranteed revenue of USD.822,038 and a total guaranteed annual revenue of USD.9,864,461. Counsel for the Procuring Entity however opposed these figures and urged the Board to peruse the Applicant's financial proposal in order to determine whether the said assertion was accurate.

The Board has perused the Applicant's financial proposal and particularly page 6 of the said proposal and notes that under the heading, the proposed geothermal power plant lease/rental costs, the Applicant stated that the plant lease/rental cost assumed the following factors:-

- An implied tariff of USD 0.065/KWH resulting in a net tariff to Kengen of USD 0.023 KWH and an annual revenue of USD 9.86 Million.

The Board however notes that there was no breakdown of how that figure was arrived at and there was no mention of the guaranteed revenue of USD.822,038 in the financial proposal. The Board further wishes to add that what was submitted to the Procuring Entity was a financial proposal which was subject to evaluation through the application of the relevant criteria in order to arrive at the proper evaluated monthly revenue based on the applicable parameters.

The Board has severally stated in its various decisions such as the case of Auto Terminal Japan Limited vs= The Kenya Bureau of Standards [PPARB No. 59 of 2014] that it is the province of the tender evaluation

committee to evaluate tenders and to weigh the strength of each bidder based on the criteria set out in the tender document.

The Board takes the further position that it would be reluctant to interfere with an evaluation carried out by an evaluation committee unless it is shown that the said evaluation was not carried out in accordance with the criteria set out in the tender document or that there are fundamental and glaring defects in the evaluation report. The Applicant in this Request for Review did not however demonstrate any of the foregoing matters.

The last point which the Board wishes to make on the Applicant's assertion is that whereas the issue of the alleged revenue that was guaranteed to the Procuring Entity, namely the monthly sum of USD. 822,038 was raised during the submissions, the same was not alluded to in any paragraph of the Request for Review. The issue was therefore not pleaded and in fact seemed to contradict the Applicant's earlier submission that revenue/the commercial component was not part of the relevant evaluation criteria for the purposes of this procurement.

Based on the above factors the Board therefore accepts the Procuring Entity' submission based on evaluation that the Applicant guaranteed the Procuring Entity a monthly revenue of USD 686,099.05 and not USD 822,038 as contended by the Applicant.

The Board has considered the financial evaluation report and the report dated 24/6/2015 which contains the Technical and the Financial report

and finds that the figures on revenue were derived from several components which were worked out to the minute detail.

During the course of his submissions before the Board, Counsel for the Applicant submitted that the Procuring Entity had introduced an extraneous evaluation criteria in this tender by considering and evaluating the revenue/the commercial aspects of this tender. Counsel for the Procuring Entity and the first interested party however submitted that this was an intergral part of the tender document and referred the Board to various Sections of the Request for Proposals where this aspect was captured.

The Board has perused the entire tender document and more particularly Clause 1.0 appearing at Section 11 and finds that the tender document clearly set out three objectives which the Request for Proposals sought to achieve namely:-

- (i) Generate additional MW to meet the 5000 + 40 month challenge.
- (ii) Generate revenue and profit from the difference in the cost of leasing and the revenue from the electricity generated from the lease wellheads at the feed-in tariff of 8.8 USD cents per KWHr.
- (iii) The employer will from this revenue recoup the cost of drilling the geothermal well.

This Revenue and Profit objective is repeated in various parts of the Request for Proposals and the Board does not therefore wish to belabour the point by going through each specific reference save to state that contrary to the submissions made by Counsel for the Applicant, the

issue of revenue generation was an intergral part of the Request for Proposals and the submission that it was not is not therefore correct.

The final issue that the Board wishes to consider under this issue was the Applicant's submission that the evaluation criteria for the megawatt output was 50 megawatts and that it was never stated nor intended that the highest output was the criteria. As already stated in the summary of the parties submissions, Counsel for the applicant referred the Board to pages 21, 23, 24, 28 and 49 of the Request for Review containing the Request for Proposals in support of this argument.

The Board has perused the Provisions of the tender document and finds that the requirement of at least 50 megawatts was the minimum requirement to enable a bidder to proceed to the next level of evaluation. It was confirmed both in the evaluation reports and in the documents filed before the Board that the second interested party was infact disqualified from proceeding to the next level of evaluation because it did not meet the stated minimum requirement of atleast proposing a power output of 50 megawatts.

The argument by Counsel for the Applicant infact contradicts the evaluation criteria set out under Clause 5.5 of the tender document that made the highest proposed output in megawatts one of the factors to be taken into account in determining who the successful bidder would be for the purposes of this tender. The Board finally notes that whereas the Applicant stated that a minimum of 50 megawatts was sufficient for the purposes of this tender, the Applicant itself offered a proposed output of

51 megawatts which upon the computation of the arithmetic error was corrected to 50.55. The Board is therefore at a loss as to why the Applicant proposed a power output of over 50 megawatts if the threshold for the purposes of this tender in its view was only 50 megawatts.

In view of the above findings, the Applicant's consolidated grounds 1 and 2 of the Request for Review as set out under issue no. 2 therefore fail and are hereby dismissed.

ISSUE NO. 3

Grounds 3: Arising from issue no. 2 above, whether or not the Procuring Entity acted contrary to the Provisions of Article 227 of the Constitution and Sections 2 and 27 of the Public Procurement and Disposal Act 2005 by failing to comply with the Provisions of the Constitution and the Act or by otherwise failing to promote competition, integrity, transparency and fairness of the Public Procurement Procedures.

As the Board has previously held an applicant has to establish that the Procuring Entity has breached the Provisions of the Constitution, the Act or the Regulations before it can succeed in demonstrating that the Procuring Entity acted in breach of any of the Provisions of the Constitution, the Act and the Regulations.

The Applicant in grounds 1 and 2 of the Request for Review urged the Board to find and hold that the Procuring Entity had acted in breach of

the Provisions of Sections 64, 66(2) and (4) and 82 (1), (2) and (5) of the Public Procurement and Disposal Act 2005.

It was however common ground in this Request for Review that the method used in this Procurement was that of a request for proposals and not an open tender. The Board has severally held as demonstrated by the case of **Landor Associates =vs= Kenya Power and Lighting Company Ltd (2008 - 201) 481** that the Provisions of Section 66 of the Act are only applicable to open tenders and not to a Request for Proposals. The Board is therefore unable to find that there was a breach of the said Section of the Act on the basis of the above decision and the Act itself.

The Board further holds on the basis of it's findings under the foregoing issues that the Applicant did not demonstrate any breach of the Provisions of the Constitution, the Act, the Regulations and or the Request for Proposals in it's Request for Review and in it's submissions before the Board.

Based on the above findings, the Board therefore finds that the grounds of the Applicant's Request for Review as set out under issue no. 3 also fail and are accordingly also dismissed.

Before making it's final orders on this Request for Review, the Board wishes to observe that the Applicant's Request for Review was largely premised on the ground that the Applicant was the lowest evaluated bidder and therefore ought to have been awarded the tender the subject

matter of this Request for Review. This view seems to have been formed from the Applicant's apparent failure to consider the tender document in its entirety and more particularly the Provisions of Clause 5.5 of the tender document which set out the evaluation criteria and the parameters that would go into determining who the successful bidder would be for the purposes of this tender.

As the Board has previously stated, the Board is and will always welcome and hear Requests for Review by aggrieved bidders but wishes to add that a bidder seeking to present a Request for Review before the Board must ensure that the Request for Review is *prima-facie* well founded. The Board is afraid that this was not the case in this Request for Review.

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the provisions of Section 98 of the Public Procurement and Disposal Act 2005, the Board makes the following orders on this Request for Review:-

- a) The Request for Review dated 21st July, 2015 and filed with the Board on 22nd July, 2015 is hereby dismissed.
- b) The Procuring Entity is therefore at liberty to proceed with the Procurement process herein to its logical conclusion in accordance with the law.

c) As costs follow the event and in the absence of any compelling reason to the contrary, the Board orders that the Applicant will pay the costs of this Request for Review to the Procuring Entity and the first Interested Party and that the said costs will be agreed upon failing which the said costs shall be taxed.

d) Since the second and third Interested Parties supported the Applicant's Request for Review, the Board orders that the second and the third Interested Parties will bear their own costs of this Request for Review.

Dated at Nairobi on this 21st day of August, 2015


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CHAIRMAN
PPARB


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SECRETARY
PPARB