

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 52/2009 OF 26<sup>th</sup> NOVEMBER, 2009**

**BETWEEN**

**NGM COMPANY LTD.....APPLICANT**

**AND**

**KENYA POWER AND LIGHTING COMPANY LTD.....PROCURING  
ENTITY**

Review against the decision of the Tender Committee of the Kenya Power and Lighting Company Ltd dated the 3<sup>rd</sup> November in the matter of Tender No. KPLC1/6F/LR PROJECTS/4-2009 for Design, Supply & Installation of Lanet - Naivasha 2<sup>nd</sup> 33kV Bays and Lines Concrete Poles

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Akich Okola	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Secretary
Ms. Pamela K. Ouma	-	Secretariat
Ms. Emma Ruturi	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, NGM Company Ltd**

- Mr. Peter M. Gichuru - Advocate, Kiogora Mutai & Co Advocates  
Mr. B. Mantu - Legal Officer

### **Procuring Entity, Kenya Power and Lighting Company Ltd**

- Mr. Kiragu Kimani - Advocate, Hamilton Harrison & Mathews  
Advocates  
Ms. Michi Kirimi - Advocate, Hamilton Harrison & Mathews  
Advocates  
Mr. Hannington Orai - Lawyer, Hamilton Harrison & Mathews  
Advocates  
Mr. James Onsare - Project Engineer  
Mr. Owiti Awuor - Legal Officer  
Mr. F. Kavita - ZAE

### **Interested Candidates**

- Mr. Emmanuel Wetangula - Advocate, Powergen Technologies Ltd  
Ms. Esther Ng'ang'a - Financial Manager, Powergen  
Technologies Ltd  
Mr. Kitan Patel - Patronics Services Ltd

## **BOARD'S DECISION**

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

## **BACKGROUND**

The tender under review was advertised in the daily papers of 3<sup>rd</sup> August, 2009 for the Design, Supply & Installation of Lanet - Naivasha 2<sup>nd</sup> 33kV Bays and Lines Concrete Poles. The tender was scheduled to be opened on 8<sup>th</sup> September 2009 but was postponed to 15<sup>th</sup> September, 2009 and later to 6<sup>th</sup> October, 2009. The Central Bank mean exchange rate for the day of the tender opening was used to convert the currencies for both bid comparison and the Bid bond values. Four firms responded to the Tender and the prices were as follows at the tender opening:

<b>No.</b>	<b>Bidder</b>	<b>Bid Bond Amount</b>	<b>Bid Price in Kshs.</b>
1.	NGM Company Ltd	Madison Insurance - 1.5 million	174,884,033.00
2.	Betterline Co. Ltd & Powergen Technologies	Development Bank of Kenya - 1.5 million	169,036,790.45
3.	Patronics Services Ltd	Imperial Bank	38,832,481.12
4.	Muringa Holding	ABC - 1.5 million	56,734,799.00

## **EVALUATION**

### **Preliminary Evaluation**

The Preliminary Evaluation was conducted based on the criteria stipulated in the Instruction to Bidders (ITB) 22.1. The results were as tabulated:

	Criteria	NGM Company	Betterline & Powergen Technologies	Muringa	Patronics
1)	Tender Security, local Bank	Madison Insurance	Development Bank of Kenya	African Banking Cooperation	Imperial Bank
2)	Tender Security Validity 120 days	ok	ok	ok	ok
3)	Tender Security Sufficiency - 1.5 Million or USD 19,000	ok	ok	ok	ok
4)	Tender Form	ok	ok	ok	ok
5)	Price Schedule (DPP)	ok	ok	ok	ok
6)	Bidders Organisation Profile	ok	ok	ok	ok
7)	ISO 9001:2000 or equivalent quality assurance certification	ok	ok	ok	ok
8)	Proven experience of at least five (5) years main material manufacturer	ok	ok	ok	ok
9)	Completed 100km in wooden poles and 10 km in concrete poles	Not stated nature of poles	ok	ok	ok
10)	Technical Data	ok	ok	ok	ok
11)	Number of bids tendered	1	1	1	2
12)	Audited Financial Statements for the last four years	ok	ok	ok	ok
13)	Comments	Not Recommended	Recommended	Recommended	Not Recommended

Two bidders were not recommended to be evaluated further. The Applicant was non-responsive for not providing a bid security from a local bank while M/s Patronics was non-responsive for participating in a joint venture with Lansen and Turbo in Lot 3. ITB 22.1 (i). This clause stated that bidders were to bid for only one lot and that bidding for two, three or four lots shall lead to the bid being declared non-responsive.

## TECHNICAL EVALUATION

The technical evaluation was carried out in two stages namely responsiveness to technical guarantees and technical parameters evaluation. The determination of responsiveness followed the procedures laid down in ITB Clause 9.3. The cut-off point was 75%.

The summary of the scores was as indicated below:

	<b>BIDDER</b>	<b>SCORE</b>	<b>RECOMMENDATION</b>
1	Betterline Co Ltd and Powergen Technologies	<b>88.5</b>	Recommended for Financial Evaluation
3	Muringa Holding	<b>23.5</b>	Not recommended for Financial Evaluation

It was noted that Muringa Holdings had no technical guarantees for major equipments i.e. Circuit Breakers, Conductors, Relays and Isolators, were given as stipulated in Volume 2, Clause 8.0 and volume 1 ITB22.1 (f)

**Financial Evaluation:-**

A financial analysis was carried out on the compliant bidder as follows:-

<b>PLANT&amp;EQUIPMENT SUPPLIED FROM ABROAD AND KENYA</b>	<b>POWERGEN TECHNOLOGIES</b>	<b>POWERGEN TECHNOLOGIES</b>	<b>POWERGEN TECHNOLOGIES</b>	<b>POWERGEN TECHNOLOGIES TOTAL</b>
<b>CURRENCY OF BID</b>	<b>GBP</b>	<b>US\$</b>	<b>KSHS</b>	
DELIVERED UNIT COST IN CURRENCY OF BID EXCLUSIVE OF VAT	34,761.48	318,196.47	145,721,371.08	
DELIVERED UNIT COST IN CURRENCY OF BID INCLUSIVE OF 16% VAT	40,323.32	369,107.91	169,036,790.45	
EXCHANGE RATE	120.75	75.54		
DELIVERED UNIT COST IN KSHS INCL 16% VAT	4,868,932.01	27,882,522.25		
<b>TOTAL COST IN KSHS INCL VAT</b>	<b>4,868,932.01</b>	<b>27,882,522.25</b>	<b>169,036,790.45</b>	<b>201,788,244.71</b>

The Evaluation Committee then recommended that M/S Betterline Company Ltd and Powergen Technologies the only compliant bidder be awarded the tender for implementation of Lanet Naivasha 2<sup>nd</sup> line and bays as follows:

- a) At the tender price of foreign **BSP40, 323.32 USD369, 107.91** and local **KSh 169,036,790.45** delivered duty paid (DDP).
- b) Expenditure of an amount of **BSP40,323.32 USD369,107.91** and local **KSh 169,036,790.45** delivered duty paid (DDP), equivalent to **total of Ksh 201,788,244.71**
- c) Contingency cost of 10% of project contract price, amounting to an additional **KSh 20,178,824.47**

### **THE TENDER COMMITTEE DECISION**

The Tender Committee in its meeting held on 3<sup>rd</sup> November, 2009 deliberated on the recommendation of the Evaluation Committee and awarded the tender as recommended. Bidders were notified of the decision of the tender Committee vide letters dated 12<sup>th</sup> November, 2009.

### **THE REVIEW**

The Applicant NGM Company Ltd filed the Request for Review on 26<sup>th</sup> November, 2009. The Applicant was represented by Peter M. Gichuru, Advocate while the Procuring Entity was represented by Kiragu Kimani, Advocate.

The prayers of the Applicant were as follows:

1. That NGM Company limited be Re-instated in the tendering process

2. That NGM Company limited be Re-evaluated in the tendering process
3. That all the documentation appertains to technical evaluation and the preliminary evaluation of the tender winner be availed to the applicant. Further, that the minutes leading to award of this tender be availed to the applicant"

The Request for Review is based on the grounds which the Board deal with as follows:

**Ground 1: Breach of Section 57 and Regulation 41.**

The Applicant stated that it tendered for the Design, Supply and Construction of Lanet -Naivasha 2<sup>nd</sup> 33 KV Bays and Lines in Concrete poles as advertised by the Procuring Entity and met all the tender requirements. It submitted that it received a Letter from the Procuring Entity dated 12<sup>th</sup> November 2009, notifying it that its bid was not successful. It stated that through the said letter the Procuring Entity indicated to it that it was unsuccessful because its bid did not fully fulfil the requirements of Clause 25.3 (f) of the Instruction to Bidders (ITB) at the Preliminary Evaluation Stage. It argued that it had provided an acceptable tender security in form of an Insurance bond, in line with Regulation 41.

It submitted that, an insurance bond is an acceptable security, in line with the requirements of the Act and therefore the Procuring Entity ought not to have rejected its bid for such a reason.

The Applicant further stated that after receiving the notification Letter, it wrote a response Letter to the Procuring Entity expressing its surprise on the

outcome of its bid. It argued that clause 25.3 (f) of the ITB provided that bids were to be evaluated on scores as indicated in Bid Data Sheet (BDS) Clause 9.3 (c) and that any bid scoring less than 75 points out of the 100 maximum points would not be considered for further evaluation. It stated that the tender requirement on the tender security was inconsistent with Section 57 of the Act on preparation of tender documents and Regulation 41 (3) which provides for the various forms of securities that a Procuring Entity may receive from the bidders.

It urged the Board to find that its bid was disqualified un-procedurally and that there was a breach of Section 57 of the Act and Regulation 41.

In response, the Procuring Entity stated that the Applicant did not specify the acts violated by the Procuring Entity to justify its allegations contrary to Section 93 (1) of the Act. It further stated that the Applicant submitted a security in the form of a bond from an insurance company contrary to the ITB which required the security to be in the form of a bank guarantee. It further submitted that the Applicant did not submit a bid security that conformed to the form set out in the tender documents.

The Procuring Entity further stated that Regulation 41 (3) did not take away the discretion of a Procuring Entity to determine the form of bid security on tenders. In addition, it stated that Clause 5.2 of the ITB required all tenders to be responsive in all aspects and that the Applicant's bid was properly rejected for being non-responsive as it did not strictly comply with the tender documents. It further stated that Clause 9.3 of the ITB required the tender security to comply with Clause 13 of ITB which required among other things that the bid Security shall at the bidders option be in the form of either a



letter of credit, a bank guarantee from a reputable banking institution or a bond issued by a surety selected by the bidder as located in any country, and that the format of the Bank Guarantee/bond to be in accordance with the forms included in the tender documents. It stated that any other formats could be permitted subject to the prior approval of the Procuring Entity.

Finally, the Procuring Entity stated that any bid that was not accompanied by an acceptable bid security was to be rejected as being non-responsive. It stated that Clause 13 of the ITB was supplemented with the provisions of the BDS, which expressly stated that a tender security was to be valid, authentic, signed and issued by a local bank in Kenya and in the format of the sample Tender Security Form. It argued that the requirement was that the Tender Security was to be in the form of Bank guarantee and this was to be adhered to by all the tenderers.

It concluded that the Tender Security submitted by the Applicant was an insurance bond and was not in the format provided in Section III of the ITB and hence the Applicant's bid was properly disqualified.

The Board has considered the submissions of the parties and the documents submitted.

The Board makes the following observations with regard to the bid security as provided for in the ITB:

- (i) That Clause 13.2 of the ITB stated that the bid security was to be at the bidders' option in form of either a letter of credit, a bank

guarantee from a reputable banking institution or a bond issued by a surety selected by the bidder;

- (ii) That the format of the bank guarantee/bond was to be in accordance with the forms included in the bidding documents.
- (iii) Those other formats could be permitted, subject to the prior approval of the Procuring Entity.

The Board observes that the Applicant opted to use an insurance bond and argued that it was entitled to do so, pursuant to Regulation 41 (3) (c) which states as follows:-

- (3) *The tender security to be provided under section 57 of the Act shall be in any of the following forms only:-***
- a) ... ..***
  - b) ... ..***
  - c) "Such insurance company guarantee as may be approved by the Authority."***

The Board is alive to the fact that The Public Procurement Oversight Authority (PPOA) has issued a list of insurance companies that may be used under this instruction. In this case, the Board notes that the Applicant submitted a bond from Madison Insurance Company which is one of the Insurance Companies approved by PPOA. This notwithstanding, Board finds that the Procuring Entity required bidders to submit the tender security in form of Bank guarantees as stated in Clause 13.2 of the ITB. Bidders could however use other formats provided that they obtained prior approval from

the Procuring Entity. The Board notes that the Applicant did not seek such approval prior to using a different format of the tender security.

The Board further notes that the introduction statements on the BDS states as follows:

***“The following bid- specific data for the plant and equipment to be produced shall amend and or supplement the provisions in the Instructions to Bidders (ITB). Whenever there is a conflict, the provisions herein shall prevail over those in the ITB”***

The Board notes that the Procuring Entity, in the tender document, provided that the BDS overrides Clause 13.2 in case of conflict and that the BDS expressly stated that a tender security had to be valid, authentic, original and issued by a local bank in Kenya and in the format of the sample tender security form.

Turning to the Public Procurement and Disposal Act, 2005, the Board notes the requirements of Section 57 which provides that a tender security may be provided and Regulation 41 which amplifies the provisions of the Act that tender security can be in any of the following forms; Cash; a bank guarantee; or insurance bond. The Board finds that the Act gives Procuring Entity discretion under Section 57 (2) to choose the form and amount of the tender security.

The said Section 57 (2) of the Act states that:

**“The Procuring Entity may determine the form and amount of the tender security, subject to such requirements or limits as may be prescribed.”**

The question for the Board to determine is whether the Applicant’s tender security met the requirements as set out in the ITB and the BDS. The Board notes that among other requirements, the Procuring Entity required bidders to comply with the requirement that their bid securities to be in the format of the sample tender security Form set out at page 148 of the ITB/DBS. As earlier noted the BDS amended the provisions on tender securities as provided under the ITB.

The Board notes that the implication of the requirement was that bidders were only to provide tender securities in the form of a bank guarantee only. It is further noted that Section VII of the ITB provided a sample form and procedure to be followed by bidders. The Applicants bid security is noted to have been in form of a bond from Insurance Company but not a bank guarantee as required by the Procuring Entity. The Board further notes that, it had the following words on its face:

“THE CONDITIONS OF THESE OBLIGATIONS ARE:

- i. If the Bidder withdraws its Bid during the period of bid validity specified by the Bidder on the Bid Form; or*
- ii. If the Bidder, having been notified of the acceptance of its Bid by the Client during the period of bid validity fails or refuses to execute the Contract Form, if required; or fails or refuses to furnish the performance security in accordance with the Instructions to Bidders”*

The Board has had the occasion of dealing with similar issues before. One such case is in the Application No. 38/2006 of 11<sup>th</sup> August 2006, between Leon Insurance Brokers Ltd. vs. City Council of Nairobi, the Procuring Entity. The Board in its decision on page 11 stated as follows:

*“Whereas the Procuring Entity argued that this should be treated as a minor deviation under Regulation 30(5), the Board is not convinced that this should not be the case. Regulation 27(1) is clear that once a Procuring Entity opts to require bidders to provide tender security, then it is mandatory that the tender securities submitted must be within the limits specified.”*

Taking into consideration all the above, the Board finds that the Applicant did not submit a bid security in line with the requirements of the ITB and BDS document. The Board further finds that the Procuring Entity could not treat the deviation on the Format on Tender Security as minor and waive it pursuant Section 64(2) as they were mandatory requirements.

In the circumstances the Board finds that the Applicant’s bid was disqualified properly and hence this ground fails.

### **Ground 2 - Breach of Section 9(c) of the Act and Regulation 30**

The Applicant submitted that the Procuring Entity did not comply with Section 9(c) of the Act. It stated that under Section 9(c) (i) PPOA is required to assist Procuring Entities by preparing standard documents and manuals to be used for procurement purposes. It submitted that such manuals are supposed to facilitate in the procurement process and that the Clauses in the ITB as

used by the Procuring Entity ought to comply with the requirements of such standard documents. It further submitted that the tender documents issued by the Procuring Entity for this tender was not clear in line with the manuals and standard documents issued by the PPOA. It argued that for this reason, the ITB as issued by the Procuring Entity did not therefore promote competition and transparency in line with the requirements of section 2 of the Act. It therefore urged the Board to find that the Procuring Entity breached the Act and the Regulations in this respect.

In response, the Procuring Entity stated that it neither breached the Act nor the Regulations as alleged by the Applicant. It stated that its tender documents were clearly worded and did not create any ambiguity. It submitted that bidders competed in line with the requirements of the ITB and the BDS which were clear to all bidders. It argued that the omission was on the part of the Applicant who did not follow the ITB and BDS requirements on submitting its bid security.

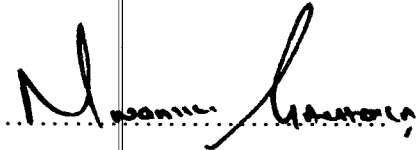
The Board has considered the submission of the parties and perused the documents presented to it. As earlier observed by the Board underground one above, bidders were required to provide the bid security as detailed in the ITB and the BDS. The Board also earlier noted that the Applicant did not follow the instructions of the BDS which amended the provisions on the bid security. The Board finds the Instructions on tender security were clearly set out in the tender documents and there was no ambiguity as argued by the Applicant.

In the circumstances, this ground also fails.

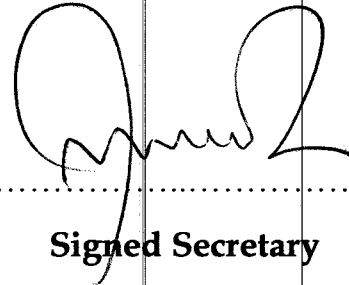
Taking into consideration all the above matters, the Request for Review fails and is hereby dismissed.

The procurement process may proceed.

**Dated at Nairobi on this 18<sup>th</sup> day of December, 2009**

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

**Signed Chairman**

A handwritten signature in black ink, appearing to be 'J. M. M.', written over a horizontal dotted line.

**Signed Secretary**

