

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 45/2009 OF 30TH OCTOBER, 2009

BETWEEN

MAN DIESEL SE.....APPLICANT

AND

**KENYA ELECTRICITY
GENERATING CO. LTDPROCURING ENTITY**

Review against the decision of the Tender Committee of the Kenya Electricity Generating Co. Ltd, Procuring Entity dated the 16th October, 2009 in the matter of Tender to Engineer, Procure and Construct Contract for Kipevu III Thermal

BOARD MEMBERS

| | | |
|----------------------|---|----------|
| Mr. P. M. Gachoka | - | Chairman |
| Mr. Joshua W. Wambua | - | Member |
| Mr. Akich Okola | - | Member |
| Ms. Natasha Mutai | - | Member |
| Mrs. Loise Ruhui | - | Member |

IN ATTENDANCE

| | | |
|------------------|---|-----------------|
| Mr. C. R. Amoth | - | Board Secretary |
| Mr. P. M. Wangai | - | Secretariat |
| Ms. Kerina Rota | - | Secretariat |

PRESENT BY INVITATION

Applicant - Man Diesel SE

- Mr. Joseph Munyithya - Advocate, Joseph Munyithya & Co.
Advocates
- Ms. Susane S. Bach - Managing Director
- Mr. Petri Vehkakoski - Manager, Power Development

Procuring Entity - Kenya Electricity Generating Co. Ltd

- Mr. Kiragu Kimani - Advocate, Hamilton Harrison &
Mathews Advocates
- Ms. Noella Lubano - Advocate, Hamilton Harrison &
Mathews Advocates
- Ms. Cindy Oraro - Advocate, Hamilton Harrison &
Mathews Advocates
- Ms. Muchi Kirimi - Advocate, Hamilton Harrison &
Mathews Advocates
- Ms. Rebecca Miano - Company Secretary
- Mr. Dennis Onwonga - Legal Manager
- Mr. Simon Ngure - Regulatory Affairs Director
- Mr. John Mudany - Finance and Commercial Director
- Mr. Patrick Kimemia - Supply Chain Manager
- Mr. Richard Nderitu - Operations Director
- Mr. Simon Kirui - Senior Projects Engineer
- Mr. David Kagiri - Projects Execution Manager

- Mr. Albert Mugo - Business Development & Strategy
Director
- Mr. Mike Njeru - Corporate Affairs Director
- Mr. Dan Roberts - Engineer
- Mr. Justus Muthungu - Chief Engineer Thermal

INTERESTED CANDIDATES

- Mr. E. J. Kronemaw - Business Development Manager,
Wartsila Finland Oy
- Mr. E. J. Dormaar - Credit Manager, Wartsila Finland Oy
- Mr. A. Langhorn - Business Development Manager,
Burmeister & Wain Scandinavian
Contractor A/S
- Mr. P. Kragh-Hansen - Business Development Manager,
Burmeister & Wain Scandinavian
Contractor A/S

BOARD'S DECISION

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

BACKGROUND OF AWARD

This tender was first advertised by the Procuring Entity on 16th June, 2009. The initial closing/opening date of the tender was 21st August, 2009 before it was extended to 4th September, 2009. Out of the twenty three bidders who bought bid documents, the following bidders submitted their bids before the deadline for submission of tenders. These were as follows:

| | BIDDER'S NAME | QUOTED PRICE (Euro) | BID BOND (YES/NO) | REMARKS |
|----|---|----------------------------|---|-----------------------|
| 1. | Burmeister & Wain Scandinavian Contractor A/S | 90,645,000 | Yes | Exclusive of Taxes |
| 2. | Man Diesel SE | 89,700,000 | (By swift message) not in Bank letterhead. | Exclusive of Taxes |
| 3. | Unatrac International | 95,600,000 | Yes | |
| 4. | Wartsila OY | 77,700,000 | Yes | |

Evaluation

This was conducted jointly by the Procuring Entity and the consultants. It was done in three stages namely preliminary stage to determine eligibility of tenders, technical evaluation and commercial evaluation stages in that order.

Tender Eligibility

Tenders were required to provide evidence of their eligibility pursuant to Clause 2.1, Part B of the Tender Instructions to demonstrate their eligibility.

This was based on the following criteria:

- a) Completion of five thermal plants of over 50 MW each within the last ten years.
- b) Successful completion of two projects of similar complexity in Africa in the last five years.
- c) Certification of ISO 9001 or be able to show that existing quality control systems are equal to this standard.
- d) Annual turnover of more than \$200 million per year.
- e) Evidence to meet technical criteria for engine selection as provided for under Section 7.1.2 of the tender document.
- f) Evidence of capability and adequacy of resources to carry out the contract.

The bids submitted by the Applicant and Unatrac were found non-responsive for failing to comply with the eligibility requirements. Among the reasons for being non-responsive were its failure to submit tender security in the form prescribed by Clause 13.1 and 13.2 of the Tender Instruction in that it was not in the letter head of the bank; part of the instructions were in German and not in the English language as prescribed. In addition, the Swift instructions were not accompanied with a guarantee from a local bank. Nevertheless the evaluation committee

included the bids submitted by the Applicant and Unatrac International Ltd in the technical evaluation for comparative purposes.

Technical Evaluation

The technical evaluation was conducted to determine the responsiveness of the tenders to the specifications set out in the tender document. It was based on the following technical requirements:

- (a) Overall completeness and compliance with the Technical Specifications and Drawings; deviations which are declared and not declared; suitability of the facilities offered in relation to the environmental and climatic conditions prevailing at the site; and quality, function and operation of any process control concept included in the bid.
- (b) Achievement of specified performance criteria by the facilities.
- (c) Type, quantity and long-term availability of mandatory and recommended spare parts and maintenance services.
- (d) Project organization to execute the works and experience and qualification of key staff.
- (e) Alternative technical solutions, where permitted, were evaluated in similar manner.

The engines were required to be: -

- Capable of running on HFO

- Capable of conversion to run on natural gas in the future.
- Turbo-charged, charge-air cooled four-stroke compression ignition and heavy-duty type.
- The total continuous power of the generating in the range of 110-122MW measured at the outgoing HV feeder terminals.
- Unit sizes of at least 15 MW
- Manufacturer's existing range of proven design and ample operating experience under conditions and environment
- Provision of evidence to prove that the engines offered are capable of performing the duty specified and with a minimum of routine/periodic maintenance.

The bids submitted by Wartsila Finland Oy and Burmeister & Wain Scandinavian Contractor A/S were found substantially responsive. Hence they qualified for commercial evaluation.

Commercial Evaluation

This was carried out by evaluating the base price with respect to heat rate, project delivery period and plant capacity. The main criteria and correspondence adjustments were:

1. Heat rate: the tender heat rate is adjusted by evaluating it against the lowest heat rate provided and adjusting its difference by \$100,000 per kJ/kWh.
2. Programme: \$230/kW/year for each month, or part of, greater than (or less than) 12 months
3. Installed capacity: The actual tender price per kW is adjusted to levelise all the tenders at 120 MW

4. Deviations: declared or non-declared and any omissions of plant or equipment.

After the price comparison of bids after adjustments, Wartsila Finland Oy emerged the lowest evaluated bidder and was recommended for the award of the tender at its tender sum of € 77, 700, 001.00 which is equivalent to Kshs. 8, 529, 385, 520.00 at Exchange rate of 1 Euro = Kshs. 109, 7733.

In its meeting held on 12th October, 2009, the Tender Committee concurred with the recommendation of the evaluation committee and awarded the tender to Wartsila Finland Oy

Letters of notification of award to the successful and unsuccessful bidders are dated 18th and 26th October, 2009.

THE REVIEW

This Request for Review was lodged by Man Diesel SE on 30th October, 2009 against the decision of the Tender Committee of the Kenya Electricity Generating Co. Ltd, Procuring Entity dated 16th October, 2009 in matter of tender for Engineer, Procure and Construct Contract for Kipevu III Thermal Power Plant. The Applicant was represented by Mr. Joseph Munyithya while the Procuring Entity was represented by Mr. Kiragu Kimani, both Advocates.

The Applicant has raised ten grounds of appeal and urged the Board to order that:

- (a) The decision of the Procuring Entity to award the tender to WARTSILA BV be nullified;
- (b) Debar any guilty party from participating in future tenders.
- (c) Order the Procuring Entity to pay costs of this Application.

The Board has listened carefully to the submissions by the parties and considered all the documents before it and decides as follows.

GROUND NO. 1 - Breach of Clause 10.6 of the Tender Documents

The Applicant submitted that the clause was ambiguous in that, whereas by its sub-section (a), bidders were required to quote fixed prices, sub-section (b) of the same clause, on the other hand, provided, *"Prices quoted by bidders shall be subject to adjustment during performance of the contract to reflect changes in the cost elements..."* It argued that the effect of sub-clause (b) was to take away that which is given by sub-clause (a) and could lead to abuse by the Procuring Entity.

In response, the Procuring Entity submitted that Clause 10.6 of the tender document was clear and was understood by all bidders. It stated that in any event Clause 10.6 referred to the prices as "specified in the Bid Data Sheet," and, accordingly, the clause had to be read together with the Bid Data Sheet. It further stated that indeed, paragraph 10.6(a) of the Data Sheet had nullified the option for bidders to quote a Fixed Price or Adjustable Price. Hence all the bidders submitted their bids in the form of a Fixed Price. The Procuring Entity argued the Applicant should have sought

clarification pursuant to Clause 6 of the tender document if it felt that Clause 10.6 was ambiguous.

The Board has carefully considered the submissions of the parties and the documents that were presented before it.

The Board notes that Clause 10.6 of the Tender Documents provides two alternatives to bidders which are contradictory. This had the potential to render comparative evaluation of the prices quoted difficult, if not impossible. However, this contradiction was cured by the Bid Data Sheet which amended the Instructions to Bidders by stating that the "Prices shall be fixed." Further, the tender documents provided that in case of contradiction between Instructions to Bidders and the Bid Data Sheet, the later shall prevail. The Board finds that as a result of this amendment all the bidders, including the Applicant, quoted fixed prices.

Accordingly, this ground of appeal fails.

GROUND 2, 3 and 4: Breach of Sections 66, 66(3) (b) and 71(d)

These grounds have been consolidated as they raise similar issues regarding the evaluation and award of the tender.

The Applicant submitted that the evaluation criterion set out in clause 26.1(d) of the Tender Document offends the mandatory provisions of Section 66 of the Public Procurement and Disposal Act, 2005 (hereinafter the Act) the clause in question provides that:-

“The Employer will carry out a detailed evaluation of the bids previously determined to be substantially responsive....taking into account the following factors:

(a).....

(b).....

(c).....

(d)Any other factors, if any, listed in the Bid Data Sheet, or that the Employer deems necessary or prudent to take into consideration.”

The Applicant argued that this was not an objective and quantifiable criterion as provided in Section 66(3) of the Act as it could be used by the Procuring Entity to chose and use any undisclosed criteria to evaluate the bids. It submitted that the wording of the clause left it to the Procuring Entity to use its prudence in deciding which other factors it should use to evaluate bids, and that since one cannot quantify prudence, the Procuring Entity could abuse the provision by using any criteria it deemed fit, with impunity. It argued that the offending clause in the Tender Documents constituted a privilege which the Procuring Entity had acquired under the Tender Documents, and not by virtue of the Act or the Regulations. Its use had the potential to erode the objectives of the Act as set out in Section 2 of the Act.

It further submitted that Clause 26 (1) (d) offended the provisions of section 71 (d) of the Act by giving the Procuring Entity such a wide latitude

that is not a standard procedure or criteria in international standards or standards used in international trade.

In response, the Procuring Entity submitted that the evaluation was carried out strictly in accordance with the criteria set out in the tender documents. It argued that whereas clause 26. 1(d) allowed it to consider any other factors in conducting evaluation; it had not resorted to this provision and had, instead, carried out evaluation solely on the basis of the other criteria which are specified in the tender documents. In support of its argument in this regard, the Procuring Entity cited the case of *Vestergaard Fradsen SA v. The Procurement and Supply Management Consortium/Ministry of Health [Application Number 40/2007]*, in which the Board found that although certain Clauses in the tender documents did not conform to the Act, these clauses had not been used by the Procuring Entity in carrying out evaluation and, therefore, there was no breach of the Act.

The Procuring Entity further cited the case of *Delf Systems Limited v. Stima Sacco Society Limited [Application No. 46 of 2005]* in support of its contention that it had not invoked clause 26.1 (d). It pointed out that in that case the Board had ruled that because the act alleged to have been in violation of the Act had not formed part of the criteria used in evaluating the tender in question; there was no breach of the Act.

As to breach of Section 71(d) of the Act, the Procuring Entity submitted there was no such breach.

The Board notes the provisions of section 66(3) of the Act which states as follows:

“The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-

(a) The criteria must, to the extent possible, be objective and quantifiable.”

The argument advanced by the Applicant is that clause 26.1 (d) of the tender documents is in breach of this section insofar as it gives the Procuring Entity wide latitude to use criteria other than those disclosed in subsections (a), (b) and (c), which are objective, in evaluating the tenders. The question for determination by the Board on this ground is whether the clause in question is objective and quantifiable within the meaning of Section 66(3) (a) of the Act. The procurement system in Kenya is anchored on the objectives and principles set out in section 2 of the Act. One of these objectives is transparency. The term is not defined in the definition section of the Act. However, its meaning is made clear by a series of measures that Procuring Entities are required to take in the procurement function as ways of manifesting transparency. These measures include full pre disclosure of the criteria of evaluating tenders to all bidders so that when they enter the arena of competition, they will do so on an even playing field.

Evaluation is everything in a fair and just procurement system. The intention of Section 66 of the Act is thus to enjoin Procuring Entities to set

out in the tender documents procedures and criteria to be used in evaluating bidders and to use only those criteria in evaluating the bids, in order to avoid judging bidders by different yardsticks. Section 66(2) of the Act is clear as to this intention. It provides that:-

“The evaluation and comparison shall be done using procedures and criteria set out in the tender documents and no other criteria shall be used.”

In order to even the playing field further in the interest of transparency, the Act further requires Procuring Entities not only to disclose the criteria of evaluation, but also to make these criteria objective and quantifiable. Section 66 (3) (a) of the Act is thus designed to ensure that no criteria shall, to the extent possible, be clouded with ambiguity so as to permit manipulation of the evaluation process by procurement officials.

Having carefully considered the wording of Clause 26.1(d), the Board is of the view that the clause offends section 66(3) (b). However, the Board notes that in the evaluation of the bids, the Procuring Entity did not use this offending provision.

Accordingly, notwithstanding this defect in the Tender documents, the Board finds that there was no breach of section 66 of the Act.

As to breach of section 71(d) of the Act the Board finds that the section deals with standards to be used in specification of technical requirements,

and not the criteria to be used in evaluating the bids. Accordingly, the section does not apply to the issue in dispute.

These grounds of appeal therefore fail.

GROUND No. 5 AND 7: BREACH OF SECTION 31 OF THE ACT

The Applicant submitted that clause 2.2(f) required a bidder to provide details of any litigation or arbitration proceedings in which the tenderer is involved. It averred that Successful bidder was the subject of a number of law suits in Finland which touched upon some past procurement in Kenya. It invited the Board to carry out investigations to verify this claim.

As to any suits against the Successful Bidder, the Procuring Entity stated that it was not aware of any such actions and termed the claim by the Applicant as mere speculations.

The Board notes that the tender documents required bidders to submit details of litigation. In compliance with this requirement the Successful bidder submitted a statement dated August 31st, 2009 in which it states that it was not involved in any litigation or arbitration. The Board further notes that the claim by the Applicant that the Successful bidder had pending litigation against it is not backed by any facts. In any event it is not the function of the Board to investigate claims made by parties.

Accordingly this ground of appeal fails.

GROUND 6: BREACH OF SECTION 66 AND REGULATION 46

The Applicant submitted that the Procuring Entity breached Regulation 46 by failing to evaluate the tenders within 30 days. It stated that the tenders were opened/closed on September 4th, 2009, and evaluation carried out between September 9th and 18th. It further pointed out that thereafter, between 12th and 16th October, the Procuring Entity sought clarifications from bidders. It argued that the decision by the Procuring Entity to seek clarifications from bidders after the evaluation was supposed to have been completed was an illegal procedure as that put the evaluation beyond the statutory period of thirty days. In its view the evaluation period ended on the 3rd or 4th of October, counting from the date of the opening of the tenders, which was on September 4th. It submitted that the effect of this decision was that the mandatory evaluation period was extended as clarifications were being sought, which is an illegality in terms of Regulation 46. In support of this contention the Applicant cited Regulation 46, which states that:-

“A procuring entity shall, for purposes of section 66 of the Act, evaluate the tenders within a period of thirty days after the opening of the tender.”

In response, the Procuring Entity stated that due to the magnitude and nature of the tender it was considered prudent to seek clarifications from bidders in accordance with the provisions of section 62(1) of the Act which states that **“The procuring Entity may request a clarification of a tender to assist in the evaluation and comparison of the tenders.”** It further stated

that the clarifications were sought between September 21st and October 3rd, 2009. It argued that the clarifications sought were minor in nature and did not affect the substance of the tender. It further argued that, in any event, the bidders submitted responses to the clarifications by 2nd October, 2009, which was within the tender evaluation period. It further submitted that even if the evaluations were done outside the thirty days period this alone should not be a ground for nullification of the entire process.

The Board notes that the language of this Regulation is mandatory. The Board had occasion to deal with the meaning of this Regulation in the case of **De La Rue International Ltd. v. Kenya Revenue Authority [Application No. 68/2007]**. In that case the Board stated at page 12, that **"This regulation is worded in mandatory terms and therefore it must be complied with without deviation."** Further, the Board notes that in High Court in **Republic versus the Public Procurement Administrative Review Board and the Kenya Revenue Authority [Miscellaneous Application No. 540 of 2008]**, Nyamu, J stated at page 24 that **"It is clear to the court that the provision is worded in mandatory terms..."** when dealing with the said Regulation.

The Board further notes that according to the Minutes of the Tender Evaluation Committee, the evaluation was completed on the 17th September, 2009 and its recommendations for award sent to the Tender Committee. The Tender Committee met on 12th October 2009, and made the award to the Successful Bidder. It is not clear as to what kinds of clarifications were sought and why this was necessary long after the

evaluation had been completed. There was neither oral evidence given during the hearing nor explanation on the face of the report by the evaluation committee to shed light on this matter. In the absence of such evidence, the Board has no choice but rely only on the report of the evaluation committee to speak for it. The record shows that the evaluation was completed on 17th September, 2009. In the circumstance the Board finds that the evaluation was done within the statutory period of thirty days as per Regulation 46.

Accordingly, this ground of appeal fails.

GROUND 7A AND 7B:

The Applicant did not argue the issues raised in grounds 7A of the Request for Review and therefore the Board need not comment on it.

GROUND 8:

The Applicant abandoned this ground at the hearing.

GROUND 9: Breach of Regulation 52(2)

The Applicant submitted that it had submitted the required bid bond to the Applicant in compliance with clause 13 of the tender documents, and further that by the Procuring Entity failing to evaluate its bid, it had been prejudiced. It referred to clause 13.3 of the tender document which states that:

“The bid security shall, at the Bidder’s option, be in the form of a bank guarantee from a reputable bank selected by the Bidder and

located in any eligible country, a certified cheque , a letter of credit or the format of bank guarantee shall be in accordance with the form of bid security included in the bidding documents..."

It stated that the bid security, which was dated 28th August 2009, was in the form of a swift transmission and was addressed to the Procuring Entity. It argued that the Procuring Entity erred in rejecting its bid security on the ground that it was not issued by a local bank as the tender documents did not require this. It submitted that clause 13.2 of the tender document merely required that the guarantee be issued "through" a local bank and not "by" a local bank, and that since Barclays Bank of Kenya had transmitted the guarantee issued by a German bank, this requirement had been met. The Applicant further submitted that the document issued by the bank also qualified as a credit note, and thus met the requirement of clause 13.3 of the tender document.

On the claim that it had suffered prejudice, the Applicant stated that its bid was the fairest and that had it not been disqualified on the ground that its bid was non-responsive for want of a valid bid security, it would have been able to convince the Procuring Entity of this fact.

The Applicant further submitted on this ground that clause 7.6.1.2 required that the method of fuel and trace heating "shall be electrical, including suction heaters on HFO tanks." It argued that it was the only bidder which complied with this requirement and therefore, awarding the tender to the

Successful bidder, who did not comply with this requirement, was a breach of section 31.

In response, the Procuring Entity submitted that it had carried out evaluation of the tenders in accordance with clause 26 of the tender documents and found the Applicant non-compliant with the provisions of this clause. In particular, it argued that the Applicant's bid had been found to be non-compliant by reason of the fact that it failed to provide a tender security in the required format as set out in clause 13.2 of the tender document, which states that:-

"The tender surety shall be issued by a bank located in the Republic of Kenya, or a foreign bank through a corresponding bank located in the Republic of Kenya."

It further argued that clause 13.3 of the tender documents made it clear that the format of the bank guarantee had to be "...in accordance with the form of bid security included in the bidding documents..." and that other formats, while permitted were subject to prior approval of the Employer. It stated that such approval had not been given to the Applicant to use the format which it elected. The Procuring Entity submitted that in any event the swift message was not addressed to the Procuring Entity but rather to Barclays Bank; was not on the headed paper of the issuing bank and; is not signed; as required by Appendix B of the Instruction to Bidders. It pointed out that the Successful Bidder, in contrast, used a foreign bank, but had fulfilled the requirement in that the guaranteeing bank used its headed

paper; was signed and; was addressed to the Procuring Entity, thereby complying with clause 13.3.

The Procuring Entity further submitted that, whereas the tender documents required the bidders to provide, among other things, 132kv GIS substation and associated interconnection works, as well as pumps, piping valves and trace heating, the Applicant had totally omitted to include these components from its bid. It argued that the substation was a key component to the functionality of the plant, and therefore, omitting them rendered the Applicant's bid non-responsive. The Procuring Entity further argued that as regards electrical heating, the clause on which the Applicant relied in this regard provided an option for "...exhaust gas boilers to be installed to provide steam for heating, "which was the system that the successful bidder, as well the three other bidders, had quoted for in their bids.

The Board notes that by clause 13.2 of the Instructions to Tenderers required the tenderers to obtain tender security from local banks or foreign bank through a corresponding bank located in Kenya. It was observed by the tender opening committee that the Applicant submitted a swift instruction from a Germany bank instructing a local bank to issue a guarantee. According to the Procuring Entity, no guarantee was issued by the local bank thus rendering its security invalid.

The Board has perused the copy of the Applicant's tender security and note that the Applicant had attached a letter from a German Bank which seems

to be written in the German language. The letter was not in the bank's letter head as required by the Tender Security form; was addressed to Barclays Bank of Kenya and not to the Procuring Entity and; was not signed. The letter forwards a swift message to Barclays which contains wordings that appear to suggest that the issuing bank is offering security for the bid by the Applicant. The Board further notes that that Barclays Bank forwarded the letter and the swift message to the Procuring Entity authenticating the contents of the swift message, but with a disclaimer to the effect that **"without any engagement or responsibility on our part."**

The Board finds that the letter from the German bank and the swift message did not comply with the Instructions to Tenderers, and was therefore rightly rejected by the Procuring Entity.

The Board further notes that the tender documents required bidders to include the construction of a sub-station and other associated structures in their bids. The Board finds that the Applicant failed to include in its bid the construction of a substation. In the circumstance, the claim by the Applicant that it met all the conditions under the Act and the tender documents is not sustainable and the Procuring Entity was, therefore, justified in finding the Applicant non-responsive.

Accordingly, this ground of appeal fails.

OBSERVATIONS BY THE BOARD

Despite declaring the Applicant's tender non-responsive and recommending its rejection, the evaluation committee went ahead and