



REPUBLIC OF KENYA
THE PETITION COMMITTEE
PETITION No. 1 of 2014

HEBEI CONSTRUCTION INVESTMENT GROUP AND LIKETH
INVESTMENT KENYA LTD. (HCIG CONSORTIUM)..... PETITIONER

-AND-

MINISTRY OF ENERGY AND PETROLEUM.....1ST RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF ENERGY AND
PETROLEUM..... 2ND RESPONDENT
THE HON. ATTORNEY GENERAL.....3RD RESPONDENT
GULF ENERGY, CENTUM INVESTMENT CO. LTD.,
SICHUAN NO. 3 ELECTRIC POWER CONSTRUCTION
CO.LTD (GULF ENERGY CONSORTIUM).....4TH RESPONDENT
PRINCIPAL SECRETARY, THE NATIONAL TREASURY.....5TH RESPONDENT

BEFORE

KIHARA MURUTHI	- CHAIRPERSON
CHARITY MUYA-NGARUIYA	- MEMBER
PAUL KAREKEZI	- MEMBER
JACKLINE KIMETO	- MEMBER

Dr *K.M* *6*

DECISION

Introduction

1. This is the Petition of HCIG Consortium (hereinafter "**the Petitioner**") comprising of Hebei Construction Company Investment Group, Energy, Investment Company Limited and Liketh Investment Kenya Limited, filed with the **Petition Committee** (hereinafter "**the Committee**") on the 9th day of September 2014.
2. All the Respondents filed responses and were represented by counsel. The Interested Party though served did not participate in these proceedings.
3. The facts relating to this Petition are that the **Ministry of Energy and Petroleum** (hereinafter "**the MoEP**"), the 1st Respondent, invited submissions of **Expression of Interest** (hereinafter "**Eoi**") through local dailies on 28th September 2013 in respect of the design, financing, procurement, supply, construction, testing commissioning, operation and maintenance of a 900 – 1000 MW coal fired power plant to be located at Lamu, being **Tender No. MOEP/RFP/15/2013 – 2014** (hereinafter "**the Project**")
4. In response to this invitation, twenty-six entities expressed their interest. After their evaluation, ten entities were shortlisted to submit Technical and Financial Proposals. Of these ten, only three submitted proposals and two submitted

letters of regret. However, prior to the submission of Proposals the 4th Respondent applied and received approval from the 1st and 2nd respondent to reconstitute its consortium.

5. After the evaluation of the Technical Proposals, three entities including the Petitioner and the 4th Respondent were qualified to proceed to the financial opening and evaluation. Following completion of evaluation of the Financial Proposals, the 4th Respondent was declared the Successful Bidder. The Petitioner being unsuccessful felt aggrieved and therefore filed this Petition.
6. Subsequently the Petitioner filed a case in the High Court being **Constitutional Petition No 465 of 2014** seeking, among others, constitutional reliefs and conservatory orders in the form of an interim injunction restraining the Respondents from conducting, facilitating, approving, ratifying, endorsing or in any manner participating in negotiating, signing, executing or concluding a **Power Purchase Agreement** (hereinafter "**PPA**") between the 4th Respondent and the **Kenya Power and Lighting Company** (hereinafter "**KPLC**").
7. The High Court delivered its ruling on the 20th day of November 2014 in which the High Court granted the said interim injunction pending the hearing and final determination of this instant Petition.

The Petitioner's Case

8. In this instant Petition, the Petitioner complains that the 1st and 2nd Respondents shortlisted a consortium of companies comprising Cennergi Pty, Tata Power, Exxaro Resources Limited and Gulf Energy and yet there was also a sole bid by Tata Power. By shortlisting the two entities, the Petitioner feels that the 1st and 2nd Respondents acted unfairly, inequitably, without transparency and thereby hindered competition to the detriment of the Petitioner and the Kenyan public.
9. The Petitioner further complains that by shortlisting the above companies and yet Cennergi Pty Limited is 50/50 joint venture company between Tata Power and Exxaro Resources limited, the 1st and 2nd Respondents breached the provisions of the law to the detriment of the Petitioner. The Petitioner is of the view that the bids by the two entities ought to have been disqualified and their members ought to have been debarred from further participation in the bidding process.
10. The Petitioner also complains that the 1st and 2nd Respondents were biased by allowing the reconstitution of the 4th Respondent to include Centum Investment Company Ltd. Centum was a member of a consortium, which had failed to be shortlisted at the Eol stage.
11. The Petitioner is also apprehensive that he is likely to suffer immense loss due to heavy investment expended whilst pursuing this tender, should the 4th Respondent proceed to

execute a PPA with KPLC. The amount expended has not been disclosed in the pleadings.

12. In view of the above allegations, the Petitioner has sought several orders: -

a. **Prayer No. 6.1:** *That pending the hearing and determination of this petition/complaint an order do issue staying any contemplated approval, ratification, negotiation, execution or signing of the PPA between KPLC or any other institution mandated to sign the agreement with the 4th Respondent.*

b. **Prayer No. 6.2:** *A declaration that the Petitioner's bid was irregularly, and unprocedurally and unlawfully rejected.*

c. **Prayer No 6.3:** *A declaration that the entities referred to as Cennergi Pty, Tata Power, Exxaro Resources limited and Gulf Energy were either by themselves or in a consortium disqualified from taking part in the tendering for the project.*

d. **Prayer No 6.4:** *That the decision to award the tender for the design, financing, procurement, supply, construction, testing, commissioning, operation and maintenance of a 960 MW coal fired power plant to be located at Lamu, Lamu County in the Republic of Kenya on a Build Own and Operate arrangement - Tender No.*

MOEP/RFP/15/2013 – 2014, the Project, to the 4th Respondent to be quashed and/or annulled.

- e. **Prayer No. 6.5:** That the Committee herein do order a re-evaluation process of the financial bids for the tender for the design, financing, procurement, supply, construction, testing, commissioning, operation and maintenance of a 960 MW coal fired power plant to be located at Lamu, Lamu County in the Republic of Kenya on a Build, Own and Operate arrangement – Tender No. MOEP/RFP/15/2013 – 2014 and that the re-evaluation excludes the entities referred to as Cennergi Pty, Tata Power, Exxaro Resources Limited and Gulf Energy Limited which in the first instance, either by themselves or in a consortium, ought to have been disqualified from taking part in the tendering for the Project.
- f. **Prayer No. 6.6:** That the Respondents be condemned to pay the costs of this Petition/Application; and
- g. **Prayer No. 6.7:** Any other relief this Committee may deem just and fit to grant.
13. In response to the Petition, all the Respondents filed their replying affidavits. All parties subsequently also filed written submissions in support of their cases. The Petitioner and Respondents mutually agreed that this Petition should be decided on the basis of the pleadings and documentary evidence annexed to their respective pleadings.

1st and 2nd Respondent Reply

14. The 1st and 2nd Respondents replied through the affidavit of **Joseph K Njoroge**, the Principal Secretary in the MoEP. Mr Njoroge has stated that after the advertisement of the invitation for Eols, a total of twenty-six submissions were received by MoEP. After the preliminary evaluation, of the twenty-six submissions, seven were found to be non-compliant. According to him, the Petitioner was among the remaining nineteen who were subsequently subjected to the detailed evaluation.

15. After the detailed evaluation, only nine submissions met the requirements of the Eol. Mr. Njoroge depones that the Petitioner was not among these nine submissions that met the requirements of the Eol, but as a result of a subsequent re-evaluation the Contracting Authority ordered to be done to all Eol's that failed qualification in the first instance, the Petitioner was re-evaluated and met the requirements of the Eol, bringing the number of shortlisted entities to ten. These entities were notified on 17th December 2013 that they had been shortlisted for participation in the Request for Proposal (RfP) stage.

16. Mr Njoroge depones that on 13th January 2014, his Ministry submitted the RfP, the Project Concept Note and the Feasibility Study to the PPP Unit review and recommendation for approval by the PPP Committee. That the approval was granted on 22nd January 2014. According to him it was

subsequent to such approval that the governing law of this tender changed from the **Public Procurement and Disposal Act** (hereinafter "**the PPDA**") to **Public Private Partnership Act** (hereinafter "**the PPPA**"). He further states that the change in the law was necessitated by the need to comply with the directives of the PPP Committee in its approval of the feasibility study report, which required prominence be given to the PPPA in the RfP document.

17. Mr Njoroge avers that on 27th January 2014, the MoEP issued an RfP to the ten shortlisted parties. On 25th February 2014 the 4th Respondent wrote a letter to the MoEP seeking approval to reconstitute its consortium pursuant to Section 46(7) of the PPPA. In view of the request by the 4th Respondent, Mr Njoroge depones that he sought legal advice from the Office of the Attorney General and the PPP Unit. According to him, these two Government Agencies advised him that the reconstitution of the consortium was well within the law.

18. Mr Njoroge has stated that, after the said advice, he wrote to the 4th Respondent requesting details of the substituting members so as to subject the reconstituted consortium to a re-evaluation, by the same Pre-qualification Committee that undertook the initial evaluation, to ascertain or otherwise their eligibility to submit Technical and Financial Proposals. He swears that the reconstituted consortium was found to continue to meet the eligibility requirements and was therefore allowed to proceed to the RfP stage.

19. The 2nd Respondent further states that by the deadline for submission of RfPs on 23rd April 2014, three shortlisted entities, including the Petitioner, submitted Technical and Financial Proposals and another two submitted letters of regret citing time constraints. He has further stated that on even date all the five entities were present during the tender opening, wherein the names and members of each consortium were read out openly. After the evaluation of Technical Proposals, all three submissions were found compliant and qualified to proceed to Financial Proposal evaluation.
20. Mr Njoroge has stated in his affidavit that the Financial Proposals were opened on 22nd May 2014 and the prices submitted by the three bidders were read out and reduced into a record of the said meeting, whereupon all present bidders appended their signatures. He further states that during the evaluation of Financial Proposals, bidders were required by the 1st Respondent to clarify certain aspects of their bids.
21. With respect to the Petitioner, the 1st Respondent noted a discrepancy as pertains to the quoted **Reference Fuel Charge Rate** (hereinafter "**the FCRr**") of US\$ 0.0299/kWh and the FCRr of US\$0.0155 derived using the **Specific Fuel Consumption** (hereinafter "**the SFC**") of 0.310 kg/kWh stated in the bid and the **Specified Fuel Price** (hereinafter "**the SFP**") of US\$50/tonne.

22. The 1st Respondent avers that despite seeking further clarifications from the Petitioner in this regard, the Petitioner failed to offer a plausible explanation of the FCRr price in his Financial Proposal and therefore rendering the price of the bid indeterminate. The 1st Respondent therefore proceeded with the evaluation after which the Successful Bidder, being the 4th Respondent, and the other bidders were informed about the outcome of the evaluation through letters dated 29th August 2014 sent through post.
23. In view of the above the 1st and 2nd Respondents are of the view that the Petitioner's complaint has no merit and ought to be dismissed.

3rd Respondent's Reply

24. The 3rd Respondent in its Replying Affidavit has made a sworn statement in opposition to the Petition through the Solicitor General, **Mr. Njee Muturi**. He accepts the jurisdiction of the Petition Committee in so far as the Petition at hand is concerned.
25. The 3rd Respondent in making the observation on the rules of construction of provisions of the Constitution, is of the view that such must be done in a purposive rather than a pedantic manner and that the Constitution does not envisage an approach to competition as an end in itself but rather for the underlying purpose of public good and provision of value for money in the procurement of goods and services.

26. The 3rd Respondent is of the view that the main thrust of the Petition is actually a challenge of certain aspects of the procurement process as opposed to the capacity and cost of the successful bidders bid.
27. In alleging privilege of communication between the office of the 3rd Respondent and client ministries, the 3rd Respondent argues that the right to access of information is only restricted to citizens as opposed entities such as the Petitioner. That notwithstanding, the Respondent notes that the request by the Petitioner for information was not genuine as it was made on the Friday preceding filing of the Petition on Monday 8th September 2014 and therefore could not have been required for the purpose of instituting the present Petition.
28. With regard to the reconstitution of the 4th Respondent, the 3rd Respondent joins issue with the 1st and 2nd Respondents herein by confirming that the legal regime for the procurement process changed from the Public Procurement and Disposal Act to the Public Private Partnership Act.
29. The 3rd Respondent avers that in its opinion to the 1st Respondent, it advised that both section 46 (6) and Section 46(7) as read together allowed the reconstitution of consortia by allowing the withdrawal and replacement of members of the consortia with a view to meeting the

established criteria and thereby ensuring compliance of bidders.

30. The 3rd Respondent has submitted that the Petitioner's allegation that its right to be heard and access to justice have been hindered by the absence of regulations of the Petition Committee lacks merit as no evidence has been presented to support this allegation.
31. In view of the foregoing, the 3rd Respondent believes that the Petitioner has not made out a case for issuance of the orders sought.

4th Respondent's Reply

32. On its part the 4th Respondent, through the affidavit of **FRANCIS NJOGU**, the Chief Executive Officer of Gulf Energy, has concurred with the averments of the 1st and 2nd Respondents in all aspects.
33. He reiterated the 1st and 2nd Respondents' view that the legal regime was clarified to be the PPPA after approval by the PPP Committee pursuant to Section 35 of the PPPA. He further reiterated that it was lawful for the 1st Respondent to allow the reconstitution of the 4th Respondent.
34. The 4th Respondent amplified the 1st Respondent's position that the energy cost in the Petitioner's Financial Proposal could not be calculated due to the discrepancy in the said

proposal resulting in uncertainty of SFC rendering the price indeterminate.

35. Mr Njogu is also of the view that the Petitioner had breached the provisions of Section 67(4) of the PPPA and by extension his complaint was time barred.

5th Respondent's Reply

36. The 5th Respondent in opposing the Petition through the Replying Affidavit of **Dr. Kamau Thugge**, the Principal Secretary at the National Treasury, argues that the Petitioner has not disclosed a cause of action against his office beyond the functional responsibilities of the position as he has not been involved in the tendering process for project. Instead, the 5th respondent insists that the management of the procurement of PPP projects such as the Lamu Coal Fired Power Project is the responsibility of the contracting authorities which in this instance is the 1st Respondent to this Petition.
37. The 5th Respondent explains further that Section 4(1) of the PPPA establishes the PPP Committee comprising of six Principal Secretaries and four professionals from the private sector. The Director of the PPP Unit is the Secretary of the PPP Committee. The PPP Committee is chaired by the Principal Secretary responsible for finance and whose functions is to align all projects with national priorities, to approve project proposals submitted by contracting authorities, examine and approve feasibility studies

conducted by contracting authorities amongst other expressly stated functions as prescribed under sections 24,35,37,49, 52, 54 and 58 of the PPPA.

38. The 5th Respondent avers that his first contact with the Lamu Coal Power Project took place on the 22nd of January, 2014 when he chaired a session of the PPP Committee, whose agenda amongst other was the consideration and approval of the feasibility study of the project which study was approved in accordance with adduced Minutes of the meeting.

39. The 5th Respondent avers that in a further meeting of the 4th of June, 2014 the PPP Committee was informed of certain changes to the membership of one of the Consortia participating in the Project and in subsequent meetings of the PPP Committee at the behest and instance of the MoEP, approved the Tender and Evaluation Report on the 30th of July, 2014 as communicated in its letter to the MoEP of 1st August, 2014. An extract of the minutes of these meeting have been presented detailing the PPP Committee's series of deliberations and decisions in their exhibits marked as "KT-4".

40. On the basis of his affidavit therefore, the 5th Respondent is of the belief that he has acted in good faith, conscientiously and has never engaged in this project outside of the context of the PPP Committee as its chair and further joins

issue with the 1st and 2nd Respondent in declaring the procurement process as free, fair and competitive.

Issues to be Determined

41. This Committee has carefully considered the pleadings, the submissions of the parties, case law and documents placed before it and has isolated the following issues which have emerged therefrom: -

- a. **Issue No 1:** *whether the Public Procurement and Disposal Act, 2005 (hereinafter "the PPDA") or the PPPA was applicable to the Expression of Interest Process.*
- b. **Issue No. 2:** *whether or not disqualification under Section 46(4) of the PPPA, is applicable to shortlisting under Section 40(1) of the PPPA.*
- c. **Issue No. 3:** *Is the "Gulf Energy Consortium" a stranger in the bidding process?*
- d. **Issue No. 4:** *Do the provisions of Section 67(4) of the PPPA render this petition statutorily time barred?*
- e. **Issue No. 5:** *Was the procurement process indiscriminate and unfair?*
- f. **Issue No 6:** *Was the disqualification of the Petitioner's Bid on the basis of its Financial Proposal justified?*

42. We shall now address the issues enumerated above whilst taking into consideration the PPPA, the RfP and decided case law.
43. ***Issue No. 1 – whether the Public Procurement and Disposal Act, 2005 (hereinafter “the PPDA”) or the PPPA was applicable to the Expression of Interest Process?***
44. The PPPA was assented to on 14th January 2013. The commencement date of the Act is 8th February 2013. Section 78 of PPPA amended Section 92 of the PPDA by deleting the word “concessioneing” in subsection (1) and deleting Subsection (2)(a), which stated:
- “Concessioneing means a procurement that encourages the mobilisation of private sector resources for the purpose of public financing, construction, operation and maintenance of development projects, and may include build own and operate, build own operate and transfer, build operate and transfer or similar types of procurement procedures.....”.*
45. It is noted that Section 73 of the PPPA revoked all regulations in force before the commencement of the PPPA applicable to Public Private Partnerships.
46. Indeed Section 2 (1)(b) of the PPPA defines a PPP as follows:

" *Public Private Partnership* means an arrangement between a contracting authority and a private party under which a private party –

- (a) *undertakes to perform a public function or provide a service on behalf of the contracting authority;*
- (b) *receives a benefit for performing a public function by way of –*
 - i. compensation from a public fund;*
 - ii. charges or fees collected by the private party from users or consumers of a service provided to them;*
 - iii. a combination of such compensation and such charges or fees; and*
- (c) *is generally liable for risks arising from the performance of the function in accordance with the terms of the project agreement."*

47. The invitation for EoIs that was advertised clearly sets the objectives as follows:

"1. The Government, through the MoEP, is seeking private investors to develop the 900 – 1000MW Lamu Coal Fired Power Plant, under an independent power producer framework.

2. The MOEP now invites private investors with experience in coal fired power plants to express interest in developing the power plant and sell power to KPLC under a contractual arrangement of a PPA (Power Purchase Agreement) framework.

3. The development will be based on a BOO (Build Own and Operate) or BOOT (Build Own Operate and Transfer;

whereby transfer will be done after full amortization of the capital investment) framework."

48. The Committee takes note that nowhere in the published Eol advertisement notice do the words "*public Procurement and Disposal Act*" appear, nor do the words "*Public Private Partnership*". Nonetheless the above objectives clearly place the project, the subject of this dispute, within the clear definition of a public private partnership under the PPPA. The contention therefore by the Respondents that the PPDA was the applicable legal regime when the Eol was advertised is untenable. The above provisions of the PPPA leave no doubt as to the applicable law relating to the Project as of 28th of February 2013 and places it squarely within the ambit of the PPPA.

49. This committee agrees with the Petitioner's argument that the provisions of the PPPA were the applicable legal regime within which the invitation for Eols was made by the 1st Respondent.

50. Having established that applicable legal regime governing the entire Project from the onset, it is evident from the submissions that the contracting authority procured the approval under Section 35(4) of the PPPA late. The Committee is however of the view that this deviation is not fatal when consideration is given to one of the principal objectives of the PPPA, which is to ensure that a contracting

authority does not commit the government to a PPP contract, which may not be in the interest of the public.

51. The Committee is of the view that powers are often conferred on administrative agencies like the PPP Committee or the Unit by Parliament subject to statutory requirements. A question, which usually arises is whether parliament intended that the validity of a decision would be conditional on strict compliance with each and every statutory requirement.
52. There are basically two situations when this question can arise. It is possible that this situation can arise at a preliminary stage of the decision-making process, in proceedings to prevent a decision being made. If the court or tribunal proceedings are commenced before any substantive decision is made, it is likely that the court or tribunal would rule that compliance with the necessary statutory condition was essential and make an appropriate declaratory or injunctive order to enforce compliance with the statutory requirement.
53. The second situation arises where a party may challenge administrative proceedings to invalidate a decision on the basis that a preliminary statutory step was not observed. If the issue is raised after considerable time and resources have been expended, it is not certain that the court or tribunal would declare that the final decision was tainted by the earlier defect. This distinction is drawn in the notable

cases of **Project Blue Sky Inc. v Australian Broadcasting Authority (1998) 194 CLR 355** (hereinafter "Project Blue Sky") and **Australian Broadcasting Corporation v Redmore Pty Ltd (1989) 166 CLR 456** (hereinafter "Redmore"), noting that compliance with statutory requirements is necessary, yet breach will not necessarily result in the invalidity of a resulting decision.

54. It is self-evident and also appears from other decisions on comparable regulations that, in the procurement context, the need for speed in raising complaints and dealing with them is vital, since the whole process of procurement is otherwise rendered uncertain and hopelessly disrupted. The need for a rapid and effective review and enforcement is predicated on the need for prompt complaint. Without prompt complaint and review, a tendering process may progress or even be completed, with alteration of positions by other bidders, as well as the procuring entity.
55. The procurement process generally entails a number of sieves/huddles and a bidder and indeed the procuring entity must be certain that once a phase of the procurement process is concluded, the parties to the procurement ought to have certainty of progression to the next stage without disruption.
56. This Committee is also guided by the decision in the case of **Bray Head (Ascot) Ltd v Berkshire County Council (1964) 2QB 303**, where it was held that in the majority of cases whether

the requirement is categorized as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation, the tribunal's task will be to do what is just in all the circumstances.

57. In a nutshell, the Committee is of the view that the Petitioner and indeed all other shortlisted entities were not prejudiced by the delayed application for approval by the contracting authority. The Committee further finds that in any event, by the time bidders were invited to collect RfP documents in January 2014, all requisite approvals applying to the project up to that stage of inviting bids had been sought and obtained from the PPP Committee.
58. ***Issue No. 2 – whether or not disqualification under Section 46(4) of the PPPA is applicable to shortlisting under Section 40(1) of PPPA.***
59. The Petitioner maintains that the 1st Respondent erred in shortlisting the consortium comprising Tata Power, Cennergi Pty, Exxaro Resources Limited and Gulf Energy and the entity referred to Tata Power Company Limited on its own and thereby acting contrary to the provisions of Sections 46(4) and (5) of the PPPA.

60. The Petitioner's assertion is that Tata Power Limited, Cennergi Pty and Exxaro Resources Limited are related companies and thus participation of any of these entities in separate bids would be contrary to Section 46(4) of the PPPA.
-
61. A reading of the act discloses a two-stage solicitation of proposals process. The first stage entails (i) invitation to submit expressions of interest, (ii) their evaluation, and (iii) preparation of a shortlist of applicants qualified to submit proposals. The second stage involves (i) invitation to submit technical and financial proposals, (ii) their evaluation, and (iii) determination of the Successful Bidder. The first process falls under the ambit Sections 37, 38, 39 and 40 of the PPPA whilst the second process falls under the ambit of Sections 41, 42, 43, 44, 46, 47, 48 and 49 of the PPPA.
62. The Committee is of the view that processes of shortlisting and disqualification of applications under the first stage are clearly distinct from those applying to the bid evaluation under the second stage.
63. In the first stage, provisions for disqualification of application are found in Section 40(2) of the PPPA, whilst those of the second stage are under Section 46(4) of the PPPA.
64. The conditions for disqualification under Section 40(2) of the PPPA are as follows:

- (a) Submit false, inaccurate or incomplete information in relation to his or its qualification;
- (b) Colludes, connives or is involved in any corrupt or dishonest practice;
- (c) Fails to meet eligibility criteria; or
- (d) Contravenes the provisions of this act or any other written law in order to have unfair advantage over other bidders in the award of the tender.

65. On the other hand, the conditions for disqualification under Section 46(4) of the PPPA are as follows:

- a. Failure to submit a bid as the consortium which was shortlisted;*
- b. Failure to submit proof that each member of the consortium had consented to join and participate in the bid;*
- c. Where a consortium submits a bid directly or indirectly or through another consortium or company which submits a bid and in the case of a company, if that person owns a majority of shares or has control over its management;*
- d. Where a member of the consortium withdraws, except as provided in Section 46(7) of the PPPA.*

66. In the light of the provisions enumerated above, it is abundantly clear that the Petitioner's contention that Section 46(4) of PPPA applies to shortlisting under Section 40(1) of the PPPA is misplaced.

67. Having reviewed documents adduced by the Petitioner's counsel by way of legal authorities, this Committee is of the view that the same are summaries of various case laws, which were not appended thereto, and therefore not considered.
-
68. ***Issue No. 3 – Is the “Gulf Energy Consortium” a stranger in the bidding process?***
69. In its Petition, the Petitioner avers that the 1st Respondent erred by allowing the “Gulf Energy Consortium” to take part in the Request for Proposal (RfP) process.
70. The Petitioner argues that Gulf Energy Consortium was not among the shortlisted consortia under Section 40(1) of the PPPA, following the evaluation of EoIs and therefore is a stranger to the RfP process under Section 44 of the PPPA.
71. The Petitioner maintains that the reconstitution of the consortium comprising Cennergi Pty, Tata Power, Exxaro Resources limited and Gulf Energy to a consortium comprising Gulf Energy Limited, Sichuan No.3 Electric Power Construction Company Limited (SEPCC3), Sichuan Electric Power Design and Consultancy Company Limited (SEDC), Centrum Investment Company Limited and CHD Power Plant Operation Company Limited (CHD) created a new entity, which did not participate in the EoI process and should not therefore have been allowed to take part in the RfP process under Section 44 of the PPPA.

72. This issue falls under the ambit of Sections 46(6) and (7) of the PPPA, which state:

"(6) A contracting authority may, where a member of a consortium withdraws from the consortium, disqualify that consortium from participating in the bidding process or review the terms and conditions of a project agreement entered into with the consortium.

"(7) The provisions of subsection (6) shall not apply where the consortium replaces the member who withdraws with another party so as to ensure that the consortium remains eligible throughout the tender and implementation process except for construction and design criteria at the later stage of the project."

73. The provisions cited above clearly allow the withdrawal and replacement of members of a consortium, shortlisted under Section 40(1), provided the replacements are such that the reconstituted consortium remains eligible to bid. The Committee therefore finds that the Petitioner's contention that the replacement of consortium membership is not permitted under the PPPA is a misappropriation of the law and consequently misplaced.

74. It is not in dispute that the 1st Respondent sought and obtained guidance of the Attorney General's Office and the PPP Unit of the reconstitution of the 4th Respondent. It is

also not in dispute that the 1st Respondent reconvened the Prequalification Committee, established under the provisions of Section 39 of PPPA, to evaluate the reconstituted consortium in order to assess its eligibility. It is also not in contention that the evaluation found the reconstituted consortium compliant.

75. In view of the foregoing, the Committee holds and finds that the reconstituted consortium is in fact not a stranger in the RfP process as alleged by the Petitioner having participated at the EoI Stage as a member of a consortium that was evaluated as having satisfied the qualification requirements of the Contracting Authority and the Committee is satisfied with the explanations as to how the 4th Respondent retained eligibility within the provisions of Section 46(7) of the PPPA, despite the withdrawal and replacement of its members.
76. ***Issue No 4 – Do the provisions of Section 67(4) of the PPPA render this petition statutorily time barred?***
77. Section 67(4) of the PPPA states that where a petition is based on an administrative decision of the Committee, the Unit or the Contracting Authority, such petition for a review of the decision shall be made within 15 days from the date of the decision in the prescribed form.
78. From the available documentary evidence, the Petitioner has admitted being aware about the reconstitution of the 4th Respondent on 23rd April 2014. In light of the provision of

Section 67(4) on limitation of time requiring an aggrieved party to file a petition within 15 days, in this instance this did not happen until 9th September 2014.

79. The Petitioner in paragraph 3.2.27 of his submissions dated 19th December 2014 and filed on even date, does not dispute the fact that time had lapsed by the time he filed the Petition. He however, defends his action of filing the Petition out of time by stating that this Committee was not in existence before the expiry of the period of limitation.
80. This Committee is persuaded by the decision in the case of **Vania Investment Pool Ltd v Capital Markets Authority and Others (Civil Appeal No 92 of 2014)**, which held that an aggrieved party can move to the High Court for specific orders in the event of the absence of the tribunal mandated by law to hear the dispute. Indeed the Petitioner did move to the High Court on 18 September 2014 alleging violation of constitutional rights, which mirrored reliefs sought in this petition.
81. We further note that in spite of the fact that the Petition Committee was gazetted on 4th July 2014, this Petition was not filed until 67 days later. Hence begging the question as to why the Petitioner did not agitate his action soon after the Petition Committee was in place.
82. The Petitioner further argues that in any event, the illegalities contained in the purported reconstitution comprise part of

the decision of awarding the tender to the 4th Respondent on 1st September 2014, and therefore the Petitioner was within time when he filed this instant Petition on 9th September 2014.

83. With respect we do not agree with the Petitioner on this assertion. A reading of Section 67(4) of the PPPA makes it abundantly clear that the decisions referred therein are not a final act of awarding the tender but the occurrence of a specific action by the PPP Committee, the Unit or the Contracting Authority. Indeed the act of awarding a tender is not a single event but a series of administrative decisions culminating in a final award.

84. We are inclined to agree with the holding of the Public Procurement Administrative Review Board in **App. No. 55 of 2009, Voith Hydro GmbH & Co. v Kenya Electricity Generating Co. Ltd** where the Board held that there would be uncertainty in the procurement process if the discretion to lodge a complaint were left open. The Board stated that the procurement process is regimented on a regime that requires actions to be performed within certain deadlines. The Petitioner has not given a plausible reason for failing to agitate his complaint within the time stipulated by the law.

85. ***Issue No. 5 – Was the procurement process indiscriminate and unfair?***

86. In its Petition, the Petitioner cites several constitutional rights that it alleges to have been violated by the 1st and 2nd Respondents. Having reviewed the grounds relied up, this Committee is of the view that the instances of alleged violation are a result of a misguided interpretation of the provisions of the PPPA and the procedures for solicitation of proposals.
87. The Petitioner contends that by the 1st and 2nd Respondents shortlisting the consortium of companies of comprising of Cennergi Pty, Tata Power, Exxaro and Gulf Energy and also Tata Power on its own the said Respondents acted unlawfully, to the detriment of the Petitioner, as the two entities ought to have been disqualified. He therefore avers that the actions of the 1st and 2nd respondent were discriminatory.
88. Whilst disqualification at EoI stage is provided for under Section 40(2) of the PPPA, this section stipulates the conditions under which a contracting authority can disqualify an EoI submission. The provisions of this section do not prohibit the submission and/or shortlisting of related parties.
89. The Petitioner further alleges bias because in his view once a consortium is not shortlisted, a member of that consortium should be debarred from further participation in the tendering process.

90. With respect, the Committee does not agree with the Petitioner. There is nothing in the PPPA that forbids a member of an unsuccessful consortium at Eol stage from replacing a member, who withdraws from a consortium, under the provisions of Section 46(7) of the PPPA.
91. The Petition has further alleged that it was treated unfairly because the 1st and 2nd Respondents failed to communicate to him that they had received a requested by the 4th Respondent to reconstitute its consortium, as required under Section 41(3) of the PPPA.
92. It is the view of the Committee that the Petitioner has misunderstood the provisions of Section 41(3) of the PPPA, which states:
"Any enquiry made by a bidder and response issued by a contracting authority in relation to a bid shall be communicated to all shortlisted bidders".
93. The request by the 4th Respondent to reconstitute its consortium was clearly not an enquiry under Section 41(3) of the PPPA, but a request under Section 46(7) of the PPPA, which does not require a contracting authority to inform all other shortlisted bidders. Be that as it may, it is not disputed that the 1st Respondent uploaded updated information on its website on 5 May 2014, which information included the reconstitution of the consortium of the 4th Respondent.

94. **Issue No. 6 – Was the disqualification of the Petitioner's Bid on the basis of its Financial Proposal justified?**

95. A determination of this issue revolves around the standard formula on price proposals as provided in the control RFP document in Clause 2.1.15.9 (d), which is elaborated below as follows:

"For purpose of evaluating the Bids, the Reference Fuel Charge Rate shall be defined as follows:

$$FCRr = \frac{SFC \times FP}{1000}$$

Where:

FCRr = Reference Fuel Charge Rate (expressed in US\$/kwh)

SFC = Specific Fuel Consumption of the plant at sight conditions (expressed in Kg/KWh), on a lower calorific value and Net Electrical Output basis.

FP = Fuel Price (expressed in US\$/Metric Tonne (MT)), deemed to be US\$ 50/MT FOB South Africa."

Bidders were required to state the FCRr and SFC in their bids. The Fuel (coal) Price of US\$50 per tonne as well as a lower calorific value of 21,000KJ/kg was specified by the 1st Respondent in the RfP. It was necessary to fix these two parameters for the purpose of comparing financial bids on the same basis.

The SFC determines the efficiency of the plant as it directly relates to the amount of fuel required to produce one kWh of energy. Hence the lower SFC, the lower the amount of

fuel required to produce one kWh of energy and by extension the lower the cost of electricity passed onto the consumer.

96. The 1st Respondent avers that at the conclusion of the technical evaluation, three bidders were qualified. The Petitioner was among the three bidders who were qualified to proceed to the financial proposal opening and evaluation stage.
97. Financial proposals were opened on 22nd May 2014 and the financial proposal prices were read out in presence of the bidders. Thereafter the 1st Respondent embarked on their evaluation.
98. The 1st Respondent states that during the financial evaluation, a discrepancy was noted in the financial proposal submitted by the Petitioner, which necessitated requests for clarification on three occasions. The discrepancy noted related to the Reference Fuel Charge (FCRr) of US\$ 0.0299/kWh and the Specific Fuel Consumption (SFC) of 0.310 kg/kWh.
99. The 1st Respondent avers that by using a fuel price the US\$ 50/tonne specified in Addendum No 2 to the RfP and the SFC of 0.310 kg/kWh, a FCRr of US\$0.0155/kWh is obtained compared to USD\$ 0.0299/kWh shown in the Petitioner's financial proposal. A clarification was therefore sought from the Petitioner on 23 May 2014.

100. The 1st Respondent states that the Petitioner confirmed on 27th May 2014 that the correct FCRR to be US\$ 0.0155/kWh, thus confirming the SFC of 0.310 kg/kWh.
101. The 1st Respondent avers that the response of the Petitioner to the first clarification was unsatisfactory necessitating further clarification on 28 May 2014 requiring the Petitioner to explain the basis of FCRR of US\$0.0299/kWh in relation to the SFC of 0.310 kg/kWh and the formula specified in clause 2.1.15.9 (d) of the Instruction to Bidders. The 2nd Respondent has stated that the Petitioner explained, in his letter of 3rd June 2014 that it used a base fuel price of US\$94.465 per metric tonne instead of US\$50 per metric tonne specified in Addendum No.2 of the RfP, thus further confirming the SFC of 0.310 kg/kWh.
102. The 1st Respondent has stated that this response by the Petitioner necessitated a further clarification, which was communicated on 11th June 2014. This clarification concerned the discrepancy between the Heat Rate of 7845.9KJ/kWh, stated in the Technical Proposal, and the Heat Rate of 6510KJ/kWh derived for the specified coal of a caloric value of 21,000KJ/kg and the tendered SFC of 0.310 kg/kWh.
103. The Petitioner in his response of 12th June 2014 to the third clarification, reconfirmed the tendered SFC of 0.310 kg/kWh.

104. However, the evidence tendered by the 2nd Respondent includes a letter of the Petitioner dated 27th June 2014 containing an unsolicited clarification, in which the Petitioner alleged that the tendered SFC was a typographical error and should have read 0.4310 kg/kWh instead of 0.310 kg/kWh.

105. The Committee has reviewed the evidence tendered by the Petitioner and the 1st Respondent in this regard, in particular the relationship between the Heat Rate and SFC, as set out in the 1st Respondent's letter of 11th June 2014. The Committee is of the view that the contention by the Petitioner that the "correct" SFC is 0.4310 kg/kWh is untenable for the following reasons:

- (a) *The Petitioner on three occasions reconfirmed his tendered SFC figure of 0.310 kg/kWh, including offering supporting computations;*
- (b) *The Petitioner has not provided any plausible arguments to explain why he offered supporting computation to justify the "erroneous" SFC figure of 0.310kg/kWh;*
- (c) *Mr Martin Kinoti in his affidavit sworn on 25th November 2014, has demonstrated that using the alleged "corrected" SFC of 0.4310kg/kWh, a FCRR of US\$ 0.02155/kWh is derived instead of the US\$ 0.0299/kWh offered in the Petitioner's Financial Proposal. If indeed it were a case of a typing error, using the "corrected" SFC should have resulted in the FCRR stated in the Petitioner's Financial Proposal; i.e. US\$ 0.0299/kWh. Assuming the "corrected" SFC of 0.4310 kg/kWh is*

accepted, this would in effect be allowing the Petitioner to vary its Financial Proposal, which by extension would contravene the provisions of Clause 2.1.13.3 of the Instructions to Bidders; and

(d) The relationship between the Heat Rate and SFC, established by the 1st Respondent in his letter of 11th June 2014, which is not contested, leads to the conclusion that the SFC, that could be derived on the basis of the Heat Rate stated by the Petitioner, is different from what the Petitioner is now proposing of 0.4310 kg/kWh. It can therefore not be a typing error.

106. In view of the inability of the Petitioner to explain the conflicting aspects of its Financial Proposal, the Committee is inclined to agree with the Respondents that the Petitioner's Financial Proposal is indeterminate.

107. Despite the Petitioner failing to plead that the 1st Respondent failed to invoke Clause 2.1.13.5 of the Instruction to Bidders, to rectify an apparent error in his Financial Proposal, he raised this issue in his written submissions dated 19 December 2014 and filed on even date. The Committee is alive to the fact that parties are bound by their pleadings.

108. Be that as it may, and in view of our findings hereinabove as regards the contention that the Petitioner had made a typing error, the Committee finds and holds that there was no obvious error to be corrected by the 1st Respondent.

Orders


In consideration of the issues determined above, the Committee hereby makes the following orders: -

- (a) *No orders are issued in respect of prayer no. 6.1 of the Petition as the same have already been adjudicated and determined by the High Court.*
- (b) *A declaration as sought in prayer 6.2 of the Petition is hereby denied.*
- (c) *A declaration as sought in prayer 6.3 is hereby denied.*
- (d) *The prayer to quash and annul the award of Tender No. MOEP/RFP/15/2013 – 2014, to the 4th Respondent is hereby rejected.*
- (e) *The request by the Petitioner for a re-evaluation of the financial bids for Tender No. MOEP/RFP/15/2013 – 2014 is disallowed.*
- (f) *That the Petitioner be and is hereby condemned to pay the costs of this Petition.*

DATED and DELIVERED at NAIROBI this 13th day of January 2015


CHARITY MUYA-NGARUIYA
Member


PAUL KAREKEZI
Member

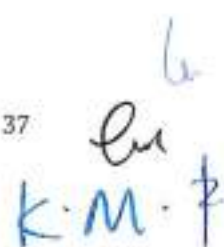

JACKLINE KIMETO
Member


KIHARA MURUTHI
Chairperson



Delivered in the presence of: -

For the Petitioner:	John Thongori
For the 1 st Respondent:	Mohamed Nyaoga Georgiadis Khaseke
For the 2 nd Respondent :	Mohamed Nyaoga Georgiadis Khaseke
For the 3 rd Respondent:	Eric Obura h/b for Mr E. Bitta


K.M. P.

For the 4th Respondent:

Kiragu Kimani

Mukite Musangi

Walter Amoko

Irene Kashindi

For the 5th Respondent:

Eric Obura h/b for Mr E. Bitta

For the Interested Party:

N/A.

Qu
K-M