



REPORT

OF THE

INVESTIGATION ON THE DECISION

OF THE

ELECTRICITY REGULATORY AUTHORITY

ON THE NOTIFICATION OF AWARD OF LICENCE

FOR THE

50 MW THERMAL GENERATION PLANT

TO

JACOBSEN ELEKTRO AS

INSPECTORATE OF GOVERNMENT
KAMPALA
JULY 2006

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Subject please quote No.



THE REPUBLIC OF UGANDA

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P.O. Box 1682,
Kampala, Uganda

TS.49.2006

11th July 2006

His Excellency, General Y. K. Museveni
The President of The Republic of Uganda
Kampala

**PROCUREMENT OF 50 MW THERMAL GENERATION POWER
PLANT AT MUTUNDWE IN KAMPALA BY THE ELECTRICITY
REGULATORY AUTHORITY**

Your Excellency, this Office carried out an investigation into the procurement of 50 MW Thermal Generation Power Plant at Mutundwe in Kampala following the receipt of a complaint from one of the bidders who participated in the bidding process alleging that the process was unfair and untransparent.

The detailed Report on the investigation together with the Executive Summary and an Appendix is forwarded herewith. The salient features of the Report are as follows: -

- (i) ERA grossly misconceived and misinterpreted the PP & DPA Act that the process of issuing a license under the Electricity Act was not a procurement within the meaning of Section 3 of the PP & DPA Act and therefore it was not subject to the PP & DPA Act and Regulations;
- (ii) ERA failed to adhere to the statutory time limit prescribed by Sections 30 (1) and 30 (3) of the Electricity Act in causing the Notice of the Intended Applications to be published in the Gazette and Newspaper. In the case of one bidder, African Power Initiatives, ERA published the Notices outside the prescribed 30-day maximum statutory time limit while in the case of the other bidder, Electro-Maxx, ERA failed to adhere to the prescribed 30-day minimum statutory time limit for calling for comments from directly interested parties and affected public agencies;
- (iii) ERA disregarded the statutory time limit prescribed by the provisions of Section 31 (1) of the Electricity Act for issuing of Permits.

ERA issued Permits to African Power Initiatives and Jacobsen outside the prescribed 30-day maximum statutory time limit within which the Permits were required to be issued. In the case Electro-Maxx, ERA issued the Permit prematurely before the deadline for receipt of comments from directly interested parties and affected public agencies had expired;

- (iv) ERA purported to invite other intending developers alongside "directly affected parties" and "affected public agencies" under Section 30 (3) of the Electricity Act in the Notices published in the Gazette and National Newspaper for the Intended Applications from African Power Initiatives and Jacobsen. The Electricity Act provided for a separate modality through which intended developers could be invited;
- (v) ERA neglected and failed to cause the operationalisation of Section 119 of the Electricity Act under which ERA was empowered to put in place regulations with procedures to invite applications for any licenses under the Electricity Act in a fair, open and competitive process.

ERA had therefore been processing Applications for licenses without procedures and although Section 32 of the Electricity Act also obliged ERA to use the PP & DPA Act, ERA did not do so;

- (vi) ERA failed to ensure that the application of license submitted to ERA by African Power Initiatives, Jacobsen and Electro-Maxx included the results of Environment Impact Assessments as required by Section 33 (1) of the Electricity Act.

ERA, in fact, on 16th January 2006, wrote to the Applicants illegally granting a 3-month waiver on submission of results of Environment Impact Assessments since such submission was a mandatory requirement under Section 33 (1) of the Electricity Act and ERA did not possess the power to waive the requirement;

- (vii) ERA failed to cause the notices of the application of license submitted by African Power Initiatives, Jacobsen and Electro-Maxx to be published in the Gazette and a National Newspaper as required by Section 35 (1) of the Electricity Act. This rendered the applications of license submitted incurably defective, irregular and incompetent in law;

- (viii) ERA did not plan the procurement of the license jointly with Ministry of Energy, PP & DPA Authority, UEGCL and UETCL for the procurement to be effective.

Consequently, ERA did not undertake the procurement of the license jointly with UEGCL and UETCL despite the fact that the Generation Plant would be transferred to UEGCL at the end of the BOT period and the successful bidder would negotiate a Power Purchase Agreement with UETCL;

- (ix) ERA usurped the role of UEGCL and UETCL by purporting to conduct procurement for the Thermal Power Plant on behalf of UEGCL and for electrical power on behalf of UETCL. UEGCL and UETCL were distinct Procuring & Disposing Entities within the meaning of Section 3 of the PP & DPA Act.

ERA did not have powers to undertake procurement for UEGCL and UETCL and neither did UEGCL and UETCL delegate their procurement and disposal functions to ERA in accordance with Section 39 of the PP & DPA Act and Regulations 75, 76, 77 and 78 of the PP & DPA Regulations;

- (x) The members of Evaluation Committee which purported to evaluate the bids for the Application of licenses were not recommended by the Procurement & Disposal Unit and also approved by the Contracts Committee of ERA as required by Section 37 of PP & DPA Act and Regulation 169 (2) of PP & DPA Regulations;

- (xi) Jacobsen attempted to alter the terms against which it submitted its by indicating that it would transfer the Thermal Plant to GoU after completing the installation and that GoU would be the borrower for the loan of 49.63M Euros from Standard Chartered Bank (London).

The attempt by Jacobsen was contrary to Section 72 of the PP & DPA Act and Regulations 177 (1) and 177 (2) of the PP & DPA Regulations, which prohibit the alteration of the substance of a bid after the close of submission of bids;

- (xii) Ministry of Energy also shifted the location of the 50 MW Thermal Generation Plant from Mutundwa to Namanve despite the fact the particulars submitted for processing the Applications, as required by Sections 29 and 30 of the Electricity Act, were specific to Mutundwa;

- (xiii) ERA, Jacobsen and Ministry of Energy engaged in soliciting for a Grant of 3.4M Euros on behalf of GoU, in connection with the bid without the explicit approval and order from the Minister for Finance.

This was contrary to Sections 20 and 30 of the Public Finance & Accountability Act, which prohibit such action without the explicit prior approval and order of the Minister for Finance.

In addition, Jacobsen was not a "public officer" within the meaning of Section 30 of the Public Finance & Accountability Act and therefore did not possess the authority or the capacity to canvas for the Grant on behalf of GoU;

- (xiv) Hon. Dr. Ezra Suruma, Minister of Finance, Planning & Economic Development failed to point out to Hon. Syda Bbumba, former Minister for Energy & Mineral Development and ERA that purporting to solicit for financial support on behalf of GoU without his explicit approval and requisite order was contrary to Sections 20 and 30 of the Public Finance & Accountability Act. He failed to advise them accordingly.

Hon. Dr. Suruma also instructed Hon. Mwesigwa-Rukutana to hold the portfolio of Minister of Finance, Planning & Economic Development while he was out of the country and in doing so he contravened provisions of Articles 113 (3) and 114 (4) of the Constitution. Under Articles 113 (3) and 114 (4) only His Excellency the President possesses the power to assign responsible to Cabinet Ministers and Ministers.

- (xv) Hon. Mwesigwa-Rukutana, former Minister for Finance (General Duties), on 15th March 2006, while unconstitutionally holding the portfolio for Minister of Finance, Planning and Economic Development, wrote to the Royal Norwegian Embassy in Kampala to formally request for the Grant of 3.4M Euros on behalf of GoU.

This was contrary to Sections 20 and 30 of the Public Finance & Accountability Act since the Minister of Finance, Planning & Economic Development, had not given Hon. Mwesigwa-Rukutana the explicit approval and requisite order allowing him to request for the Grant on behalf of GoU.

Your, Excellency, it is very evident that the process was characterized with fundamental illegalities and irregularities stemming from gross

misconception, misdirection and misinterpretation and total disregard of relevant provisions of the Constitution, PP & DPA Act, Electricity Act and Public Finance & Accountability.

Consequently, this Office concluded that the entire bidding process was unfair, lacked any transparency and defeated the principles of objectivity and competitiveness through which value for money could be achieved and made appropriate recommendations, which include the following: -.

- (i) The notice of intended award of a license to Jacobsen should be withdrawn and rescinded immediately. The entire procurement process for the license to develop a 50MW Thermal Generation Plant on BOT basis should be commenced *de novo* (afresh) in accordance with the Electricity Act, PP & DPA Act and PP & DPA Regulations.

The new process should be conducted jointly with ERA, Ministry of Energy, UETCL and UEGCL, in accordance with the Electricity Act, PP & DPA Act and PP & DPA Regulations;

- (ii) The numerous illegalities and irregularities as highlighted in the main Report was clear evidence of negligence and incompetence on the part of members of ERA and they should be held squarely responsible for this state of affairs.

The Minister for Energy, in accordance with Section 8 (3) of the Electricity Act, should notify members of ERA to show cause why they should not vacate their Offices with a view to their removal for behaving in a manner unbecoming of their Office, when they conducted affairs of ERA with negligence and incompetence;

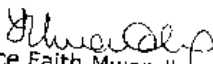
- (iii) ERA Chief Executive Officer, Eng. Dr. F. Sebbowa was responsible for the day-to-day management of ERA and ERA should immediately terminate his services for mismanagement and incompetence. Mr. J. Kwesigabo, ERA Secretary/Legal Counsel, should also take responsibility and he should also be removed from office since he failed to give proper legal advice;

- (iv) The Minister of Finance, Planning & Economic Development should internalize the provisions of the Constitution and Public Finance & Accountability Act to facilitate his effective carrying out of his functions at his level and whenever the Minister is in doubt, he should seek advice from Hon. Attorney General, and

- (v) The Permanent Secretary, Mr. Kabagambe-Kaliisa acted negligently and without exercising diligence by referring the proposed alteration of terms by Jacobson to the Permanent Secretary/Secretary to the Treasury for advice. He should have rejected the proposal outright and the fact that he did not do so is reasonable ground to infer that he was acting in bad faith.

His Excellency as the Appointing Authority for the Permanent Secretary, Mr. Kabagambe-Kaliisa, should ask him to show cause why he should not be subjected to severe disciplinary action.

By copy of this letter and a copy of the Report, the Hon. Minister for Energy & Mineral Development, is directed to ensure that the recommendations therein, are implement without any delay.


Justice Faith Mwendha
INSPECTOR GENERAL OF GOVERNMENT

Encl

c.c. Hon. Minister for Finance, Planning & Economic Development
Kampala

Hon. Minister for Energy & Mineral Development
Kampala

Hon. Minister for Ethics & Integrity
Kampala

The Permanent Secretary
Hon. Minister for Energy & Mineral Development
Kampala

The Chairperson
Electricity Regulatory Authority
Kampala

The Chief Executive Officer
Electricity Regulatory Authority
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EXECUTIVE SUMMARY

IG received a complaint from Electro-Maxx one of the bidders who submitted a bid for the license to develop a 50MW Thermal Generation Plant on BOT basis at Mutundwe. The complaint was against the notice of intended award of the license to Jacobsen on grounds that the entire process was unfair and untransparent since evaluation of the bids was flawed and this disadvantaged Electro-Maxx and African Power Initiatives, the other bidder who submitted a bid.

The Investigation established the process through which ERA arrived at the decision to issue the notice of intended award of the license to Jacobsen was characterized with fundamental illegalities and irregularities. These stemmed from gross misconception, misdirection and misinterpretation and total disregard of relevant provisions of the Constitution, PP & DPA Act, Electricity Act and Public Finance & Accountability Act. The illegalities and irregularities are highlighted in detail in the main Report and include: -

- (i) ERA grossly misconceived and misinterpreted the PP & DPA Act that the process of issuing a license under the Electricity Act was not a procurement within the meaning of Section 3 of the PP & DPA Act and therefore it was not subject to the PP & DPA Act and Regulations;
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