

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 11/2011 OF 25<sup>th</sup> MARCH, 2011**

**BETWEEN**

**HARVEY ENGINEERING LIMITED.....APPLICANT**

**AND**

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

Review against the decision of the Tender Committee of Kenya Power & Lighting Company Ltd. dated 14<sup>th</sup> March, 2011 in the matter of Tender No. KPLC1/6D/PT/D/18/10 for Supply, Installation and Commissioning of 500kVA Enclosed Generators at Marsabit and Wajir Power Stations.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Eng. C. A. Ogut	-	Member
Ms. Judith Guserwa	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Secretary
Mrs. Pamela Ouma	-	Secretariat
Ms. Maurine Namadi	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Harvey Engineering Limited**

- Mr. Moses Muchoki - Advocate  
Mr. Joseph Muigai - Managing Director

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

- Mr. Owiti Awuor - Legal Officer  
Mr. Joseph Atwoli - Legal Assistant  
Ms. Emily Kirui - Legal Assistant  
Mr. Henry Kapsowe - Assistant Engineer  
Mr. Mbugua Mbuthia - Graduate Technician

### **Interested Candidates**

- Mr. Timothy Jimel - Technical, Socabelec East Africa Ltd  
Mr. Alex Mbuka - Technical, Socabelec East Africa Ltd  
Mr. Eric Ogundo - Administration Assistant

## **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 OF AWARD**

### **Advertisement**

The tender for supply, Installation and Commissioning of 500KVA Enclosed Generators at Marsabit and Wajir Power Stations was advertised in the Daily Nation Newspaper of 6<sup>th</sup> January, 2011.

### Pre-Bid Meeting

The bidders were invited for a pre-bid meeting that took place on 14<sup>th</sup> January, 2011. The Procuring Entity clarified on various issues raised by the bidders.

### Closing/Opening:

The bids were close/opened on 3<sup>rd</sup> February, 2011 before the presence of bidder's representatives who chose to attend. Eight bid documents were opened and the bid prices and the Bid Bond provided read out and recorded as listed below:

No.	Bidder	Bid Bond Amount	Bid Bond Bank	Tender Amount
1.	Ryce Engineering	Kshs. 680,000	Commercial Bank of Africa	Kshs. 51,214,560
2.	Car & General Kenya Ltd	Kshs. 992,907	Giro Bank	Kshs. 47,603, 903.20
3.	Unitech Industrial	USD. 15,000	Imperial Bank	USD 639,389
4.	Harvey Engineering Ltd	Kshs. 720,000	Chase Bank	Kshs. 41,380,311.20
5.	Odd-Mac Engineering	Kshs. 1,127,440	AMACO	Kshs. 56,371,980.48
6.	Kenelec Supplies	Kshs. 1,484,800	AMACO	Kshs. 74,240,000
7.	Socabelec EA	Euros 7,500 Kshs. 160,000	Commercial Bank of Africa	Euros 384,056.43 Kshs. 9,229,840.64
8.	Limelight Creations	Kshs. 1, 500,000	Eco Bank	Kshs. 33,887,400

It was noted at the tender opening that M/s Ryce Engineering Ltd had no copy of its bid bond in the copy of the bid documents. In addition, M/s Odd-Mac's tender document did not include a Form of Tender and the submitted copy of its tender document was not the same as its original document.

### **EVALUATION**

The bids were then evaluated in three stages namely, Preliminary, Technical and Financial Evaluation.

## Preliminary Evaluation

The Preliminary Evaluation stage was conducted using criteria as stipulated in Section VI Clause 1 of the tender document. The summary results of the evaluation were as tabulated below:

No.	Evaluation Criteria	Ryce Eng. Ltd	Car & General (K) Ltd	Unitech Industrial	Harvey Eng. Ltd	Odd-Mac Eng. Ltd	KENELEC Supplies	Socabelec East Africa Ltd	Limelight Creations Ltd
1	Number of copies(3 Copies)	YES	YES	YES	YES	NO	YES	YES	YES
2	Copy of payment receipt for the tender document	YES	YES	YES	YES	YES	YES	YES	YES
3	Tender security(Bank Guarantee only)	YES	YES	YES	YES	NO	No	YES	YES
4	Tender security validity (120 days)	120 Days	120 Days	120 Days	120 Days	120 Days	150 Days	120 days	120 Days
5	Tender security Value	Kshs 680,000.00	Kshs 992,907.00	USD 15,000.00	Kshs 720,000.00	Kshs 1,127,440.00	Kshs 1,484,800.00	Euros 7,500; Kshs 160,000.00	Kshs 1,500,000.00
6	Form of tender	YES	YES	YES	YES	YES	YES	YES	YES
7	Tender validity period(90 days)	90 Days	90 Days	120 Days	90 Days		90 Days	90 days	90 Days
8	Declaration Form	NO	YES	YES	YES	YES	YES	YES	YES
9	Confidential Business questionnaire Form	YES	YES	YES	YES	YES	YES	YES	YES
10	Copy of PIN	YES	YES	YES	YES	YES	YES	YES	YES
	Company or Firm's Registration Certificate/ Incorporation	YES	YES	YES	YES	YES	YES	YES	YES
9	Valid Tax Compliance Certificate	YES	YES	YES	YES	YES	YES	YES	YES
10	Names with full contact as well as physical addresses of previous customers of similar completed works and copies of completion certificate in the clients letterhead signed by a senior person in the clients firm	No	No.	YES	No	YES	No.	YES	No
11	Audited Financial Statements. The audited financial statements required must be those that are reported within	YES	YES	YES	YES	YES	YES	YES	YES

	fifteen (15) calendar months of the date of the Tender document.								
13	REMARKS ON COMPLIANCE	Not compliant	Not compliant	Compliant	Not compliant	Not compliant	Not compliant	Compliant	Not Compliant

The Evaluation Committee noted that six bidders namely Ryce Motors, Car & General, Harvey Engineering Ltd, Odd-Mac Engineering Ltd, Kenelec and Limelight Creations limited failed to meet the requirements set out in the tender document and were declared non- responsive at this stage. M/s Ryce Engineering Ltd, Car & General (K) Ltd, Harvey Engineering Ltd and Limelight Creations Ltd were eliminated for not providing proof of jobs of similar nature done while M/s Odd-Mac Engineering Ltd and KENELEC Supplies were eliminated for not providing proof of similar job done and for providing an insurance bond instead of the required Bank Guarantee.

Two firms namely, Unitech Industrial and Socabelec East Africa Ltd were then recommended to proceed to technical evaluation stage.

### **TECHNICAL EVALUATION**

This comprised evaluation on the parameters as stipulated in the tender document Clause 2 of Section VI. The bidders were evaluated on their full compliance to the technical specifications as outlined in Section V of the tender document and provision of catalogues, technical brochures, drawings and technical data. The cut of marks was 70%. The summary results of how the two bidders scored are as tabulated below:

No	DESCRIPTION	PERCENTAGE	Unitech Industrial	Socabelec East Africa Ltd
A	Genset	45	$32/100 \times 45 = 14.4$	$78/100 \times 45 = 35.1$
B	Auxiliaries	40	$10/100 \times 40 = 4$	$90/100 \times 40 = 36$
C	Tools	15	$72/100 \times 15 = 10.8$	$100/100 \times 15 = 15$
<b>TOTAL</b>		<b>100</b>	<b>29.20</b>	<b>86.10</b>

M/s Unitech Industrial Agencies Limited was declared non-responsive at this stage for failing to attain a minimum score of 70%. Socabelec East Africa Limited was then recommended to proceed to the Financial Evaluation stage.

### **FINANCIAL EVALUATION**

The result of the Financial Evaluation was as follows:-

Item	Description	SOCABELEC EAST AFRICA LTD	
		Kshs	Euro
	CURRENCY:		
1	Marsabit Power Station	4,496,830.95	244,325.19
2	Wajir Power Station	3,457,773.05	124,612.01
3	Factory acceptance test for the diesel generators and auxiliary equipment for 2 KPLC engineers (KPLC will pay the air fare for its engineers).	2,500.00	2,500.00
	SUB-TOTAL	7,957,104.00	371,437.20
	VARIABLE VALUE	7,954,604.00	78,870.19
	ADD VAT (Clearly indicate any component that is not subject to VAT if any)	1,272,736.64	12,619.23
	TOTAL COST	9,229,840.64	384,056.43
	Mean CBK Exchange Rate as at 03.02.2011 <i>1 Euro= Kshs 111.8620</i>		42,961,320.37
	<b>GRAND TOTAL INCLUSIVE OF VAT IN KSHS</b>		<b>52,191,161.01</b>

The Evaluation Committee then recommended that the tender for Supply, Installation and Commissioning of 500 kVA Enclosed Diesel Generators at Marsabit and Wajir Power Stations be awarded to Socabelec East Africa Ltd at their price of EUROS 384,056.43 and KSHS 9,229,840.64 Inclusive of VAT.

### **THE TENDER COMMITTEE DECISION**

The Company Tender Committee in its meeting held on 3<sup>rd</sup> March, 2011 deliberated on the recommendations of the Evaluation Committee. The Committee approved the award of the contract for Supply, Installation and Commissioning of three 500 kVA enclosed diesel generators at Marsabit and Wajir Power Stations to M/s Socabelec East Africa Ltd at their quoted price of

Euros 384,056.43 and Kshs. 9,229,840.64 inclusive of VAT. The bidders were notified vide letters dated 14<sup>th</sup> March, 2011.

### **THE REVIEW**

The Request for Review was lodged by M/s Harvey Engineering Limited on 25<sup>th</sup> March, 2011 against the decision of the Tender Committee of Kenya Power & Lighting Company Ltd. dated 14<sup>th</sup> March, 2011 in the matter of Tender No. KPLC1/6D/PT/D/18/10 for Supply, Installation and Commissioning of 500KVA Enclosed Generators at Marsabit and Wajir Power Stations. The Applicant was represented by Mr. Moses Muchoki, Advocate while the Procuring Entity was represented by Mr. Owuor Awiti, Legal Officer. Interested candidates M/s Socabelec East Africa Ltd was represented by Mr. Timothy Jimel while M/s. Odd-Mac Engineering was represented Mr. Erick Ogundo.

The Applicant has raised three grounds of Appeal and urged the Board to make the following orders:

1. ***“THAT the proceedings of the Respondent's procurement and anything done or intended to be done pursuant thereto be annulled in entirety.***
2. ***THAT the Decision of the Respondent awarding the Tender be set aside and in place the successful bidder be substituted with the Applicant.***
3. ***THAT the Respondent pay the costs of this Application.***
4. ***Any other relief that the Board may deem fit to grant in the interest of justice.***

**Ground 1**

The Applicant submitted that the tendering process was discriminatory and unfair as the reasons it was given for the rejection of its tender were incorrect. It stated that the reasons for its disqualification contained in its notification letter dated 14<sup>th</sup> March, 2011 were that there was no evidence of proof of similar completed works and the copies of completion certificates for the same similar works. It referred the Board to Clause 2.8 of the Instruction to Bidders which provided as follows:

*“To be qualified for award of contract, the tenderer shall provide evidence satisfactory to the employer of their eligibility under Sub clause 2.1 above and of their capability and adequacy of resources to effectively carry out the subject contract.*

.....

*(a)Details of experience and past performance of the Tenderer on the works of similar nature within the past five years..... Completion certificates to be attached as prove that work has been carried out to completion.”*

The Applicant stated that it had signed an agreement dated 8<sup>th</sup> July, 2010 with Powertec Generator System Co. Ltd for installation, commissioning and after sales services for generators. It further stated that in the said agreement, it was to buy Generators from Powertec Generator System Co. Ltd who would undertake the installation on its behalf. It argued that it had submitted names of previous customers and completion certificates for works undertaken from Century Epitech Co. Ltd, Ahe Talae Qeshm Co. Ltd and Shenzhen Huipu Electronic Co. Ltd. It stated that the said completion certificates complied with all the requirements of the Tender Document.



The Applicant further argued that pursuant to Clause 2.8 of the Tender Document, there were no provisions for the disqualification of a bidder on grounds of out sourcing from a third party. It stated that it had demonstrated that it had the capacity and ability to undertake the tender and that it had disclosed where it was sourcing its equipment for installation.

In conclusion, it submitted that the Procuring Entity had the opportunity to verify the documents it had submitted but failed to do so.

In response, the Procuring Entity stated that the issues the Board was to address were firstly; what the requirements of the tender document were, whether the Procuring Entity was in breach of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act) Act or its Public Procurement and Disposal Regulations, 2006 (herein after referred to as the Regulations) and what risks and damages the Applicant had incurred.

The Procuring Entity stated that it had complied with all the requirements of the Tender Document, the Act and the Regulations. It stated that the Applicant was represented at the pre-bid meeting held on 14<sup>th</sup> January, 2011 by Ms. Pauline and Mr. Lewis. It averred that during the pre-bid meeting, it was emphasised that all bidders were to comply with the requirements of the bid documents. It stated that in that meeting, it was clarified that the experience required should be of similar nature and that the bidder was to submit the list of jobs done and completion certificates, duly signed by a senior person of the company.

With regard to Clause 2.8 of Instruction to Tenderers, the Procuring Entity submitted that the Applicant was charged with the responsibility of availing the following information in its bid document:

- a) details of past experience of previous clients within the past 5 years*
- b) the past experience should be accompanied by completion certificates relating to it from the past clients*
- c) the completion certificates should be signed by senior (read authorised persons) staff of the previous clients*
- d) key personnel to be involved in administration and execution of the contract*
- e) legal capacity to enter into a contract with the Procuring Entity*
- f) Necessary services, equipment and facilities to provide the goods and service.*

The Procuring Entity submitted that a bidder had to pass Preliminary Evaluation stage before proceeding to the detailed Technical and Financial evaluation stages. It averred that the Applicant failed to adhere to instructions in the Tender Documents and consequently was disqualified at the preliminary evaluation stage.

The Procuring Entity stated that the Applicant's bid contained some documents offering references of previous customers as follows:-

- a) Century Epitech Co. Ltd referring to Century's undated contract with Powertec where the latter offered the former a pair of generator sets. It argued that the generator supplied by Century Epitech Co. Ltd was 50% of the required capacity.
- b) Ahe Talae Qeshm Co. Ltd referring to Ahe's purchase of a Genset from Powertec.

- c) Shenzhen Huipu Electronic Co. Ltd referring to Shenzhen's order and use of a Genset from Powertec Generator System Co. Ltd. It argued that the generator supplied by Shenzhen Huipu Electronic Co. Ltd was less than 50% of the required capacity.

The Procuring Entity stated that the documents provided by the Applicant referred to Powertec Generator System Co. Ltd and not Harvey Engineering Ltd. It further stated that even assuming that the Agreement had any value, it had the following shortcomings;

- a) It was not dated;
- b) It was not clear whether the agreement was between Harvey Engineering Ltd and Powertec Generator System Co. Ltd or Shenzhen Powertec Generator System Co. Ltd;
- c) It had no seal; and
- d) It had no directors listed.

It urged the Board to peruse through the bid document submitted by one of the bidders, Ms. Unitech Industrial, who had a joint venture and ascertain the requirements of a Joint Venture. It stated that whereas the Applicant's Confidential Business Questionnaire confirmed who the bidder was, it did not demonstrate its relationship with Powertec Generator System Co. Ltd. It cited the Board's decision **No. 41/2008 of 26<sup>th</sup> November, 2008 between Swynerton Kwendo Nazoi T/A Lyle and Presscott International and The Kenya Meteorological Department** in which the Board had defined who was a candidate in a tender. It stated that Powertec Generator System Co. Ltd was not a candidate in this tender.

The Board has considered the submissions of the parties and examined the documents presented before it.

The Board notes that the letter dated 14<sup>th</sup> March, 2011 notifying the Applicant that its bid was not successful indicated that the Applicant had not provided proof of similar completed works and copies of completion certificates were not attached to its bid document.

The Board notes that Section 64(1) of the Act provides that a tender is responsive if it conforms to all the mandatory requirements in the tender document. The Board further notes that Regulation 48(1) provide that a Procuring Entity shall reject all tenders which are not responsive in accordance with Section 64 of the Act.

The Board notes that the Applicant was disqualified at the preliminary evaluation stage in accordance with Regulation 47 for failure to provide proof of similar completed works and copies of completion certificates. The Board further notes that the Applicant provided documents from Powertec Generator Company Ltd, Century Epitech Co. Ltd, Ahe Talee Qeshm Co. Ltd and Shenzhen Huipu Electronic Co. Ltd. The Board has examined the tender opening register, the evaluation reports, the original bid documents, the Minutes of the Tender Committee and makes the following findings,

- i. The Applicant's Bid was declared non responsive at the preliminary evaluation for not providing proof of jobs of similar nature done.
- ii. The Agreement between Powertec Generator System Co. Ltd and Harvey Engineering Ltd, dated 8<sup>th</sup> July 2010, is signed by Joseph

Mburu Muigai of Harvey Engineering Ltd and un-named representative of Shenzhen Powertec Generator System Co. Ltd. Therefore it is not clear whether the signed agreement was between Harvey Engineering Ltd and Powertec Generator System Co. Ltd or Shenzhen Powertec Generator System Co Ltd. In any event, the Agreement did not conform with the requirement of the joint venture at clause 2.9 in the Instruction to Tenderers.

- iii. The completion certificates submitted by the Applicant in its bid document do not belong to it but to clients of Powertec Generator System Company Ltd. And as already stated there was no joint venture agreement between the Applicant with that company.

The Board has also examined the Confidential Business Questionnaire Form submitted by the Applicant. The Board notes that part 2(b) on partnership was not filled. The Board has further noted that clause 2.9 of the Instruction to Tenderers on Joint venture provided that tenders submitted by a Joint venture of two or more firms as parties shall comply with the following requirements:

- a) ".....
- b) *one of the partners shall be nominated as being in charge ,and this authorization shall be evidenced by submitting a power of attorney signed by legally authorized signatories of all the parties.*
- c) .....
- d) *All parties of the joint venture shall be liable jointly and severally for execution of the contract in accordance with contract terms, and a relevant statement to this effect shall be included in the authorization mentioned under (b) above*

*as well as in the Form of Tender and Form of Agreement (in case of a successful Tender).*

*e) A copy of the agreement entered into by the joint venture partners shall be submitted with the Tender."*

The Board has noted that the Applicant's tender document had an untitled agreement dated 8<sup>th</sup> July, 2010 between it and Shenzhen Powertec Generator System Co. Ltd to undertake and do business with the Applicant. The Board finds that this agreement document does not meet the requirements of a Joint Venture as set out at Clause 2.9 of the Tender Document. In addition the aforementioned agreement document does not meet the requirements of a Manufacturer's Authorization Form as provided for in the tender document.

In view of the foregoing, it is clear that the Applicant failed to meet the criterion that was clearly set out in the Tender Document and it was therefore properly disqualified at the Preliminary Evaluation stage in accordance with Regulations 47 and 48.

Accordingly this ground of Review fails.

## **Ground 2**

The Applicant submitted that the letter of notification did not state the bidder who was awarded the tender. It further submitted that the notification letter did not conform to the draft notification sample contained in the tender document. It argued that the Procuring Entity being the author of the document should have complied with the said requirement.

The Applicant submitted that at the opening of the tenders, the bidders and their bid bonds were disclosed to bidders. It stated that the Applicant had a right to know who the successful bidder was and that failure to disclose this information was done in bad faith.

In response, the Procuring Entity submitted that Section 67 of the Act sets out the requirements as far as notification of award of contract is concerned. It stated that it had notified the Applicant of the result of its bid and the reasons why it was not successful. With regard to the identity of the Successful Bidder, the Procuring Entity stated that it did not disclose who the Successful Bidder was as this was not a requirement under the Act. It argued that the Applicant had not demonstrated what loss or prejudice it had suffered due to this non-disclosure.

The Board has considered the representations of the parties and examined the documents before it.

The Board has taken note that the Applicant was furnished with a letter of notification dated 14<sup>th</sup> March, 2011. The Board is also alive to the provision of Section 67 of the Act which provides that all persons whose tenders were not successful shall be notified at the same time with the person whose tender was successful. The Board observes that this Section does not require that the notification shall contain the name of the successful bidder.

In the circumstances, this ground of review also fails.

### **Ground 3 - Breach of Section 66(4) of the Act.**

The Applicant submitted that during the tender opening, bid prices were read out to the public and it was among the lowest. It stated that it could not understand why it was not awarded the tender despite providing all the mandatory requirements. Finally, it argued that the tender process was not open and transparent. It urged the Board to allow the request for review and also award it costs.

In response, the Procuring Entity denied that it had breached Section 66(4) of the Act. It submitted that for a bidder to be the lowest evaluated bidder, it had to go through all stages of evaluation, namely the Preliminary Evaluation, Technical Evaluation and Financial Evaluation. It further submitted that the lowest priced bidder at the opening of the bids does not of necessity turn out to be the lowest evaluated bidder. It stated that the Applicant did not merit the award of this tender as it did not pass the Preliminary Evaluation stage.

The Procuring Entity submitted that it had evaluated the bids according to the criteria set out in the bid documents. It further submitted that the Applicant was not entitled to any of the reliefs sought as it had not demonstrated that the Procuring Entity had breached the Act. In conclusion it urged the Board to dismiss the Review with costs.

The Board has considered the representations of the parties and perused the documents presented before it.

The Board has observed that the Applicant was the second lowest priced bidder at the tender opening with a bid price of Kshs. 41,380,311.20. The Board is alive to the requirements of Section 66 of the Act that the evaluation



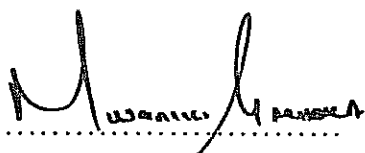
of the tenders is supposed to be done by the Procuring Entity to determine the lowest evaluated bidder. The Board takes cognizance of the fact that the lowest priced bidder does not of necessity turn out to be the lowest evaluated bidder. The Board notes that the Applicant's bid was evaluated and declared non-responsive at the Preliminary Evaluation Stage. The Board has further noted that only one bidder, Ms. Socabelec East Africa Ltd, proceeded to the Financial Evaluation and emerged the lowest evaluated bidder. In this regard, the Board finds that the Applicant was not the lowest evaluated bidder as claimed.

With regard to the issue of costs, the Board has previously ruled that the tendering process is a business risk borne by both parties. Further, in open competitive tendering, there is no guarantee that a particular tender will be accepted and just like any other bidder, the Applicant took a commercial risk when it entered into the tendering process.

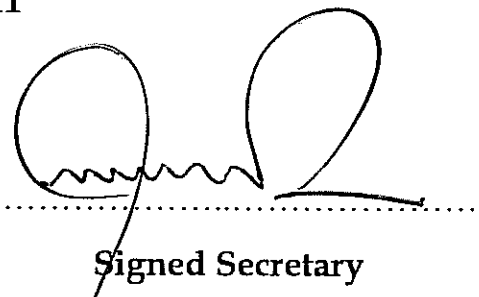
Accordingly this ground of Review also fails.

Taking into consideration all the above matters, this Request for Review fails. The procurement process may continue.

**Dated at Nairobi on this 19<sup>th</sup> day of April, 2011**



**Signed Chairman**



**Signed Secretary**

