

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 66/2012 OF 6<sup>TH</sup> DECEMBER, 2012**

**BETWEEN**

**FLEET TRACKING SOLUTIONS AFRICA LTD.....APPLICANT**

**AND**

**KENYA ROADS BOARD.....PROCURING ENTITY**

Review against the decision of the Tender Committee of the KENYA ROADS BOARD dated 30<sup>th</sup> October, 2012 in the matter of Tender No: KRB/627/2012-2013 for Supply, Installation Testing and Commissioning of Light Portable Weigh-In Motion Vehicles Weighbridges.

**BOARD MEMBERS PRESENT**

- |                       |   |          |
|-----------------------|---|----------|
| 1. Mr.P.M Gachoka     | - | Chairman |
| 2. Mr.Sospeter Kioko  | - | Member   |
| 3. Mrs. Loise Ruhiu   | - | Member   |
| 4. Amb. Charles Amira | - | Member   |
| 5. Ms Judith Guserwa  | - | Member   |

## **IN ATTENDANCE**

1. Philemon Chemoiywo - Holding brief for the Secretary
2. Shelmith Miano - Secretariat

## **PRESENT BY INVITATION:**

### **PROCURING ENTITY - KENYA ROADS BOARD**

1. Prof. Albert Muma - Advocate
2. Charles Agwara - Advocate
3. George Waithaka - Procurement Officer

### **APPLICANT- FLEET TRACKING SOLUTION**

1. Joseph Songok - Advocate Fleet Tracking Solution
2. Arun Kumar Acharya - Managing Director FT Solution

### **INTERESTED PARTY AVERY EAST AFRICA LIMITED**

1. Clive Mshweshwe - Advocate
2. Nicholas Kithinji - Commercial Manager
3. John Kibuchi - Sales Manager

## **BOARD'S DECISION**

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

## **BACKGROUND**

Kenya Roads Board (KRB) intended to procure 4 sets of weigh-in-motion mobile weighbridge equipment with wireless technology, complete with laptop computer, printer and batteries, to enable monitoring of axle load compliance by heavy goods vehicles plying the road network in Kenya. To avoid traffic congestion, the equipment shall be capable of weighing axle's up to 20tons at speeds of 6kph (i.e. Weigh-In Motion System). Measured load shall be wirelessly transmitted to a laptop to be displayed on the screen. Weigh pads shall be powered by batteries.

KRB officers or its agents will use the mobile weighbridge equipment to carry out weekly visits to random sites covering the entire road network. A temporary weighbridge station shall be established at these sites where all heavy goods vehicles plying the road shall be weighed. All weighing information shall be captured on a laptop computer through wireless technology for further analysis and preparation of reports on the current levels of overloading.

In case a vehicle's axle weight exceeds the legal limit, the equipment will raise specific alerts to enable the operator to quickly identify overloaded vehicles for necessary further action while compliant vehicles shall be issued with a weighing ticket and allowed to proceed with their journey.

## **Advertisement**

The tender was advertised in the Daily Nation and The Standard newspapers on 16<sup>th</sup> and 17<sup>th</sup> August, 2012. Nine (9) firms bought the Tender Document.

## **Tender opening/Closing**

The tenders which were submitted in one envelope system were opened in the presence of bidders or their representatives in Kenya Roads Board (KRB) Boardroom on the submission date on 10<sup>th</sup> September, 2012 at 12.00 noon. Six (6) firms submitted their bids. The firms were:

1. M/s Esoca Agencies
2. M/s Servo Balans Africa Ltd
3. M/s Avery East Africa ltd
4. M/s Fleet Tracking Solutions Africa Ltd
5. M/s Scales and Software (K) Ltd
6. M/s Equip Agencies Ltd

The prices quoted by each of the six (6) bidders were read out during the opening. As indicated in the tender documents, correctness of the tender sum would be confirmed during the evaluation of bids. It was also confirmed that all bidders submitted bid security which were also read out during the opening. The adequacy of the tender security would also be confirmed during the evaluation. The bidders expressed satisfaction with the opening process

## EVALUATION

The evaluation was carried out by an evaluation Committee of six members under the chairmanship of Eng. Margaret Ogai ,Manager Contracts.

The Procurement Officer Mr. G. N. Waithaka was consulted during the development of the evaluation criteria, during moderation and report writing. It was also noted that Mr. Juma and Margaret, who are member and alternate member of the tender committee respectively, will not participate in any deliberations in the tender committee meeting leading to award/rejection of the tender.

Before commencement of the evaluation, all the evaluators declared that they had no direct or indirect interest in the tender in accordance to requirements in the Procurement Act and Regulations.

As per the instructions in the tender documents, the evaluation was conducted in 4 stages namely:

1. Stage 1- Preliminary responsive examination
2. Stage 2- conformity to technical specifications
3. Stage 3- Technical evaluation
4. Stage 4 - Financial evaluation

## STAGE 1 - PRELIMINARY RESPONSIVE EXAMINATION

Prior to detailed evaluation of the tenders, each bid was subjected to a closer examination to check the degree of compliance with mandatory requirements as set out in the tender documents and to ascertain whether the tender was substantially responsive to those requirements. As indicated in the tender documents bids that did not comply to those requirements shall be rejected at this juncture. This examination included the items as tabulated below:-

Table 1 Responsiveness examination

Item	Mandatory requirements
A	Bidders must submit a tax compliance certificate from KRA or any other equivalent body in case of foreign bidders.
B	The Bidder must be registered under the relevant law. Proof of incorporation and registration to be indicated by attaching a copy of the certificate.
C	Bidders must submit manufacturers license
D	The tender must remain valid for 120 days after the submission date.
E	Bidders shall furnish a tender security which shall remain valid for thirty (30) days beyond the validity of tender. The tender security shall be equal to one (1%) per cent of the tender price

The evaluation committee agreed that all the conditions would be considered mandatory but with some minor variations as below:

Table 2

Item	Mandatory requirements
A	A copy of tax compliance certificate should be attached. After deliberations it was agreed that the certificate must be valid as at 16 <sup>th</sup> August, 2012 the date of advertisement of the tender. Any firm that has not submitted one, would be given upto 13 <sup>th</sup> September, 2012 5.00 pm to submit the certificate to KRB offices, failure to which their proposal shall be rejected.
B	The Bidder should be registered under the relevant law. Proof of incorporation and registration to be indicated. Any firm that has not submitted one, would be given upto 13 <sup>th</sup> September 2012 5.00 pm to submit the certificate to KRB offices, failure to which their proposal shall be rejected.
C	Bidders must submit manufacturer's license. The authenticity may be confirmed from the manufacturer.
D	The quotations must remain valid for 120 days after the submission/closing date. If the bid validity is not explicitly stated in the proposal, it will be assumed to be 120 days.
E	Bidders to furnish tender security equal to 1% of the tender price or more.

Any firm that did not meet any of the above requirements was considered non responsive and their tender rejected at that stage. Outcome of Preliminary Evaluation was as summarized in table 3 below:

**Table 3 : Results of Preliminary Evaluation**

Item	Mandatory requirements	AVERY EA	EQUIP AGENCIES	FLEET TRACKING	SERVO BALANS	SCALES & SOFTWARE	ESOCA
		YES/NO	YES/NO	YES/NO	YES/NO	YES/NO	YES/NO
A	Bidders must submit a copy of tax compliance certificate from Kenya Revenue Authority <sup>1</sup> or any other equivalent body in the case of foreign bidders.	YES	YES	YES	YES	YES	YES
B	Must be registered under the relevant law. Proof of registration and incorporation to be indicated by attaching a copy of the certificate.	YES	YES	YES	YES	YES	YES
C	Bidders must submit manufacturers license	YES	YES	YES	YES	NO	YES
D	The quotations must remain valid for 120 days from the date of submission of tender <sup>2</sup>	YES	YES	YES	YES	YES	YES
E	Bidders shall furnish a tender security equal to one (1%) per cent of the tendered price which shall remain valid for thirty (30) days beyond the validity of tender	YES	YES	YES	NO	YES	NO
	RESPONSIVE	YES	YES	YES	NO	NO	NO



3.1 The results of the preliminary examination are as follows:

Out of the six (6) firms, three (3) firms were found non responsive to the above requirements. They are as follows:

1. M/s Esoca Agencies tender security expires on 12<sup>th</sup> January 2013, which is less than the validity period of 150 days as indicated in the tender documents.
2. M/s Servo Balans Africa Ltd submitted a tender security of Kshs 80,192 which is less than 1% of the tender price as required. The tendered price inclusive of 16% VAT is Kshs. 9,302,225.60 hence the tender security should have been Kshs. 93,022.00

Various ambiguities were noted in this proposal; the firm submitted two manufacturers' authorization letters namely from M/s AWM of UK and M/s Cardinal EU Warehouse of UK. Both letters were dated 15<sup>th</sup> July, 2008 and signed by the same person. There was also a letter indicating that the parent company is called Servo Berkel of Holland.

3. M/s Scales and Software (K) ltd did not submit manufacturer's authorization license. In addition the tender security was less than 1% of the tendered price. The tender security was Kshs120,000 instead of Kshs 139,524 and was to expire on 9<sup>th</sup> December, 2012 which is less than 150 days.

## **STAGE 2 - CONFORMITY TO SPECIFICATIONS**

This evaluation was done as group work with the aim of ascertaining that the firms that passed the preliminary check in stage 1 conformed to the technical specifications given in the tender documents.

The evaluation committee classified the requirements as mandatory, major and minor. Bidders who did not conform to the mandatory and major specifications were considered non responsive and would not be evaluated further. The evaluation committee would seek clarifications where deemed necessary.

After the evaluation two (2) firms were found to have conformed to the specifications. The firms were as below:

1. M/s Avery East Africa
2. M/s Fleet Tracking Solutions Africa

M/s Equip Agencies bid was rejected at this juncture because they did not meet some of the mandatory and major requirements which included verification of dimensions of the weighing pads, inadequate laptop and software specifications among others.

## **STAGE - 3 TECHNICAL EVALUATIONS**

In accordance with the tender documents, firms that passed stage 2 of the group evaluation were subjected to a technical evaluation to determine

whether the firms had the capacity to deliver. Only firms that scored at least 70% and above in this stage qualified for the final stage of the financial evaluation. Those that got less than 70% were disqualified. The technical evaluation was based on a broad criterion as indicated in the tender documents and a sub criterion as agreed by the evaluation committee. Example of Evaluation for one of the Evaluators

**SCORES SHEET**

**APPENDIX A-2**

**EVALUATOR: KOSGEY**

**AVERY FLEET**

		Weight	score	score
<b>1</b>	<b>Criteria (i)- Company profile (15 Points max)</b>			
1.1	age (=>5years = 5 pts, 4 yrs = 3 pts, 3 yrs = 2 pts, 2 yrs = 1 pts,<2 years = 0 pts)	5	5	5
1.2	Size (Staff complement =>15 staff=2pts, 14-12 = 1.5pts, 11-6 staff = 1 pts, <6 =0pts )	2	2	2
1.3	Directors (>= 50% Kenyan owned = 2 pnts, Non-Kenyan=0)	2	2	2
1.4	Location (branch office in Kenya = 2 pts, none=0 pnts )	2	2	2
1.5	Firm's average turnover over last two years (>75million=4pts, 74-50 million=2 points and below 50million=0pts)	4	4	0
	<b>Total</b>	<b>15</b>	<b>15</b>	<b>11</b>
<b>2</b>	<b>Criteria (ii)- General and specific experience (20 points max)</b>			
2.1	General experience in supply of equipments (5 No. clients in general equipments) each supply 1 pnt to a max. of 5 pnts	5	5	5
2.2	specific experience in supply, installation, testing and commissioning of weighbridges (5 no. reference @ 1 points)	5	5	0
2.3	Letters of recommendations on the specific experiences (5 No. letters, 2 points each)	10	6	0
	<b>Total</b>	<b>20</b>	<b>16</b>	<b>5</b>
<b>3</b>	<b>Criteria (iii)- Firm's delivery and lead time schedule (15 points max)</b>			
3.1	equipment available Ex-stock= 15pts,<=6 weeks=15pts, 7-10weeks =10 pts, 11-12weeks= 5 pts, >12 weeks= 0pts)	15	10	15
	<b>Total</b>	<b>15</b>	<b>10</b>	<b>15</b>
<b>4</b>	<b>Criteria (iv)- Firm's after sales support and maintenance (15 points max)</b>			
4.1	Availability of spares locally (1 No. outlet= 4 pts, No outlet=0pts)	4	4	0
4.2	Availability of workshop (owned or leased)=2 pts, if no workshop = 0 pts	2	2	0
4.3	Trained equipment maintenance personnel (2 No. trained engineers/technicians= 2 pnts, None 0 point)	2	2	2

4.4	Warranty terms and period ( $\geq 1$ yrs=1pt, $<1$ yrs=0pts)	1	1	1
4.5	Economic Lifecycle of equipment ( $\geq 3$ yrs=2 pts, $<3$ yrs=0pts)	2	2	2
4.6	Operating and maintenance costs during economic life of equipment ( $<2$ mil for 4 No. WB for 3 years = 1 pts, $> 2$ mil=0 pts)	1	1	0
4.7	Usage of the equipment in Kenya and in the world (list of users of equipment, $>10$ No. = 3 pts, 9-5 = 2 points and $< 5=0$ pnt)	3	3	3
	<b>Total</b>	<b>15</b>	<b>15</b>	<b>8</b>
<b>5</b>	<b>Criteria (v) Local Agent</b>	<b>20</b>		
5.1	Name and contact address of the agent-( Available= 5 pts, Not available=0 pts)	5	5	5
5.2	Physical address	5	5	
5.3	Evidence of appointment as local agent	10	10	10
	<b>Total</b>	<b>20</b>	<b>20</b>	<b>20</b>
<b>6</b>	<b>Criteria (vi)- Letter of credit from reputable bank (5 points max)</b>			
6.1	Availability of letter of credit (Not more than 6 months old =5pts, else =0pts)	5	0	0
	<b>Total</b>	<b>5</b>	<b>0</b>	<b>0</b>
<b>7</b>	<b>Criteria (vii)- Firm's after sales training to users (10 points max)</b>			
7.1	The bidder should provide Training curriculum (course contents)	6	1	6
7.2	The bidder to provide a detailed training schedule for users	3	1	1
7.3	Training manuals	1	0	1
	<b>Total</b>	<b>10</b>	<b>2</b>	<b>8</b>
	<b>GRAND TOTAL</b>	<b>100</b>	<b>78</b>	<b>67</b>

The results of Technical evaluation are summarized for all the Evaluators in table 4 below:

Table: Summary of Technical Evaluation results

Evaluator	Avery East Africa	Fleet Tracking solutions Africa
Evaluator 1	82	64
Evaluator 2	74	68
Evaluator 3	78	67
Evaluator 4	78	66

Evaluator 5	80	70
Evaluator 6	77	69
Average %	78	67

As indicated in the table above only one (1) firm namely M/s Avery East Africa, scored at least 70% in the technical evaluation and was therefore qualified for financial evaluation. The bid of M/s Fleet Solutions Africa was disqualified at this stage since it did not attain the pass mark of 70% . The main issues on the firm's capacity noted were:

1. The firm had a low turnover.
2. Their main business line appeared to be transport/ fleet management solutions and not supply of weighbridges. The bidder did not submit evidence of specific experience in weighbridge supplies or maintenance.
3. The firm did not demonstrate capacity to offer after sales support services and maintenance since it did not provide evidence that it has established workshops

## FINANCIAL EVALUATION

The financial evaluation considered taxes, checking computational errors, terms of payment and any variations in the tendered price. Final results are contained in table 4 below:

Table 4: Summary of costs-M/s Avery East Africa Ltd

Description	Qty	Country of origin/ model	Unit price (Kshs)	Total price (Kshs)
Light portable weigh-in motion vehicle weighbridge inclusive of accessories	No 4	United Kingdom - Cheklode Freeweigh	2,894,225.88	11,576,903.52
Batteries	8		138,300.00	1,106,400.00
Laptop computer and accessories	4		155,000.00	620,000.00
Software for weighing data processing	4		310,000.00	1,240,000.00
Printer and accessories	4		26,000.00	104,000.00
User training if any			-	-
Subtotal				14,647,303.52
16% VAT				2,343,568.56
Grand total				16,990,872.08

### RECOMMENDATIONS

As indicated in the tender documents the tender shall be awarded to the bidder that scored at least 70% in the technical evaluation and has the lowest evaluated tender price.

In view of above it is recommended that the tender for supply, installation, testing and commissioning of Light portable weigh-in motion vehicle

weighbridges be awarded to the lowest evaluated tenderer M/s Avery East Africa Ltd at the total cost of Kshs16,990,872.08 inclusive of 16% VAT.

The estimated cost of the project is Kshs18, 000,000 and it is confirmed that funds are available.

### **THE TENDER COMMITTEE DECISION**

The Kenya Roads Board tender committee at its 50th regular meeting held on 30<sup>th</sup> October, 2012 deliberated on Evaluation committee recommendation and approved the tender for supply, installation, testing and commissioning of four Light portable weigh-in motion vehicle weighbridges be awarded to the lowest evaluated tenderer M/s Avery East Africa Ltd at aotal cost of Kshs16,990,872.08 inclusive of 16% VAT. Funds are available.

### **THE REVIEW**

The Request for Review was lodged by M/s Fleet Tracking Solutions Africa Ltd on 6<sup>th</sup> December, 2012 in the matter of Tender for Supply, Installation Testing and Commissioning of Light Portable Weigh-In Motion Vehicles Weighbridges – Tender No: KRB/627/2012-2013

The Applicant was represented Mr Joseph Songok, Advocate ,Procuring Entity was represented by Prof. Albert Muma, Advocate and the Interested Candidates was represented by Mr. Clive Mshweshwe, Advocate.

The Applicant requested the Board for the following orders:-

- a) *The decision of the Respondent communicated vide the letter dated 23<sup>rd</sup> November 2012 to award tender number KRB/PO/32.21/Vol.III/A(59) for supply the supply, installation, testing and commissioning of light portable weigh-in motion vehicle weighbridges to M/s. Avery East Africa Limited be nullified, pursuant to the powers vested upon the Board by Section 98(a) of the Act;*
- b) *The Board, pursuant to the powers vested upon it by Section 98(c) of the Act, declare that, in accordance with the Tender Document and the law, the Applicant's score, in technical evaluation Stage 3, is determined to be above 70% (either 72% or 70.5%) thereby qualifying its bid as responsive enough to proceed to the final stage (Stage 4) of financial evaluation and to the eventual award of this Tender as per the Award Criteria.*
- c) *The Board, pursuant to the powers vested upon it by Section 98(c) of the Act, do substitute the award to M/s. Avery East Africa Limited (who submitted a non responsive bid), with an award to the Applicant (who did indeed submit a responsive bid).*
- d) *In the alternative to the prayers (b) and (c) above, the Respondent be directed to, pursuant to the powers vested upon the Board by Section 98(b) of the Act, award the Tender to the Applicant in adherence with, the law, the Tender requirements and the relevant procurement procedures.*



e) *The Respondent be directed to, pursuant to the powers vested upon the Board by Section 98(b) of the Act, enter into Contract with the Applicant in terms of its tender price and the General Conditions of Contract, stipulated in Section III of the Tender Document as required and or anticipated by it, the Act and the Regulations;*

f) *In the alternative to the prayer (d) and (e) above, the Respondent be directed to, pursuant to the powers vested upon the Board by Section 98(b) of the Act, re-evaluate the Tender in strict compliance with the Public Procurement and Disposal Act of 2005, the Public Procurement and Disposal Regulations 2006 and the Tender Document.*

g) *Pursuant to powers vested upon the Board by Section 98(d) of the Act, The Applicant be fully and unconditionally awarded the costs of, and incidental to this Request for Review, against the Respondent.*

h) *Such other and or any direction as this Honorable Board may deem just and expedient to grant in the given circumstances.*

The Applicant raised eleven grounds of review which the Board deals with as follows:

**Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10&11: Breach of Section 66(1)(2)(3), 29(4), 60(5) and 64 (1) (2)(b)(3) of the Public Procurement and Disposal Act, 2005 (herein after referred "the Act") and Regulations 47(2), 41(4), 48**

**(1),49(1),50(3),53(2) of the Public Procurement and Disposal Regulations, 2006 (herein after "the Regulations")**

The above grounds have been consolidated as they raise similar issues on the evaluation process of the tender.

The Applicant submitted that the Procuring Entity had unfairly evaluated its bid leading to its unfair disqualification and subsequent award of the tender to a non-responsive bidder. The thrust of the entire application was premised under 3 main parameters as outlined here under:-

**a) Award of tender to a non responsive bidder in breach of Regulations 41, 42, 47 and 48 and Clauses 2.22.4, 5, 2.24, 2.24.1 and 2.14.5 of the tender documents.**

The Applicant submitted as follows:-

1. That the awarded Bidder had not provided a tender security covering the validity period and in the format provided for by the Tender Documents. It submitted that the Successful Bidder had provided for a bid security which expires on 2<sup>nd</sup> February, 2013, when the requirements of the tender documents were such that the tender security should have remained valid up to 6<sup>th</sup> February, 2013.

2. In support of its arguments, it relied on an earlier Board's decision in Application number 14/2008 between Avery (EA) Ltd vs. Kenya Power and Lighting Company where the Board annulled a tender for reasons that the Successful Bidder had provided an invalid tender security.

The Applicant argued that, on this ground alone, the Procuring Entity ought to have rejected the Successful Bidder's bid at the Preliminary Evaluation stage for being non responsive in accordance with the law and the Tender Document.

**B. Unlawful denial of Marks through a flawed evaluation process.**

1. That, despite having conformed to the detailed technical specifications of the equipment, the Procuring Entity had skewed the evaluation process and awarded it a total of 67 marks while the requirement to proceed to financial evaluation was set at 70 marks. It submitted that it was unfairly and unlawfully denied some marks in order to marginally prevent it from being evaluated as the lowest evaluated tender therefore denying it the chance of being awarded the tender.
2. That the Procuring Entity, in breach of Sections 45(3) of the Act and Regulation 66(2) had refused to respond to several written requests to provide a summary of the evaluation and comparison of tenders.
3. That despite having provided a catalogue as required by Criteria 12 of the tender document, the Procuring Entity had failed to evaluate and award marks on that parameter which led it to scoring marginally below the 70 marks threshold.
4. That the Procuring Entity, in its summary of the parameters attributable to low marks score, had omitted to show the evaluation on the Catalogue

therefore confirming point No.3 above. The Applicant submitted that there was inappropriate grading on marks during the evaluation process.

**C. Non objective Criteria that is poorly expressed (Letter of Credit)**

1. That the Procuring Entity had breached Section 66 (3) of the Act using criteria which was not objective. It submitted that the requirement for a letter of credit could not be met at the time of tender submission. The Applicant further submitted that a letter of credit can only be obtained after award of contract.

2. That the said Criterion was allocated 5 marks and that even though both the Applicant and the Successful bidder had scored zero on this parameter, the said criteria was non objective and ambiguous.

3. That the said criteria had lowered its chances of meeting the set 70% pass mark and that once the Procuring Entity had noted the ambiguity on this requirement, it ought to have pro-rated the marking scheme to evaluate out of 95 marks as opposed to 100 marks. It submitted that this would have meant that it scored above the threshold of 70 marks and therefore its bid would have proceeded to the financial evaluation stage.

In conclusion, the Applicant submitted that it was prejudiced by the skewed evaluation and that it stood to suffer loss and damage if the award to the Successful Bidder was not annulled. In support of its application on the issue of suffering loss and damage, it referred the Board to its previous decisions in Application No's 6 of 2006 And 10/11 of 2007.

It urged the Board to find merit in its case and grant its prayers as prayed.

In response the Procuring Entity denied ever breaching the cited Sections of the Act, the Regulations and the Tender Document. It averred that in preparing and processing the Tender Document, it strictly complied with its tender document and all the relevant provisions of the Act and the Regulations.

The Procuring Entity submitted that the Applicant was not properly before the Board because it had not demonstrated loss or damage it would incur due to a breach of a duty imposed on the Procuring Entity by the Act as required by Section 93 of the Act.

With regard to the Applicants' grounds for review, the Procuring Entity submitted as follows:-

**a) Award of tender to a non responsive bidder in breach of Regulations 41,42,47 and 48 and clauses 2.22.4,5,2.24,2.24.1 and 2.14.5 of the tender documents.**

The Procuring Entity submitted that the Applicant had not shown how the award to the winning bidder has caused it loss or damage. It stated that since the Applicant bid failed to score the required minimum mark of 70%, its bid was rejected procedurally. It therefore submitted that, under Section

93 of the Act the Applicant lacks locus to make an application for review on this ground.

Further, the Procuring Entity submitted as follows:-

1. That the Tender Security by the Successful Bidder was clear and explicit in that it covered a period of 151 days and that in issuing the tender security; the bank had counted the validity of the bid security to run for a total of 151 days with effect from 10<sup>th</sup> September 2012.
2. That although the tender security erroneously indicated that it would expire on 2/2/2013, a proper count of 151 days meant that the validity of the tender security would expire on 7/2/2013.
3. That the above discrepancy on the validity of the tender security was a mere oversight on the part of the bank. It submitted that since the same was an error which could be corrected without changing the substance of the tender, the Procuring Entity had treated it as a minor oversight curable under Section 64 (2) (b) of the Act.
4. That, contrary to the allegations by the Applicant that it had sought explanations on the validity of tender security from the bank, the Procuring Entity submitted that it had not sought any clarification and or explanation from either the bank or the Successful Bidder on the matter.
5. That the case cited by the Applicant in its Application M/s. Avery East Africa Limited vs. Kenya Power cannot hold in this case since the tender security in the referred case did not cover the validity period required as is the case in the instant proceedings. In any case, it submitted that in this

case, both parties had qualified for the technical evaluation unlike in the cited case.

6. That in any case, the Applicant cannot benefit on account of issues of Tender security of the Successful Bidder as this did not in any way prejudice it.

### **B. Unlawful denial of Marks through a flawed evaluation process**

On the above allegation by the Applicant, the Procuring Entity submitted as follows:-

1. That the arguments by the Applicant amount to carrying out an evaluation which, under the Act or Regulations, is not within the mandate of the tenderers.
2. That the Procuring Entity had fully complied with the provisions of Section 66(2) of the Act in that it had prepared a tender document which provided the evaluation criteria to be used and even the allocation of marks for each parameter.
3. That having failed to achieve the pass mark score of 70marks, the Applicants bid was lawfully and procedurally disqualified from proceeding for further evaluation as stipulated in the tender document.
4. That contrary to the Claims by the Applicant, the Applicant's low marks were attributable to the following:-
  - a) Low turnover
  - b) No letters of recommendations related to weighing equipments.

- c) No evidence of Specific experience
- d) No letter of credit and
- e) No evidence of established workshops.

5. That with regard to the evaluation on annual turnover, the same was derived from the expectations that tenderers were expected to provide their company profiles from where the turnover ought to have been included. It contended that there was therefore no introduction of a new criterion as alleged by the Applicant.

### **C. Non objective Criteria that is poorly expressed (Letter of credit)**

With regard to the above parameter, the Procuring Entity submitted as follows:-

1. That the Applicant did not provide a letter of credit as required under parameter 6 of the tender document. *A written commitment on the issuance of a letter of credit* as provided by the Applicant did not meet the requirements of the bid.
2. That if the Applicant felt that there was an ambiguity on the requirement for a letter of credit, the procedure for seeking and providing clarifications was well set out in the tender documents and the Applicant did not take advantage of it.
3. That indeed, both the Applicant and the winning bidder failed to earn any marks under this criterion.



4. That to award the Applicant an extra 5 marks or to grade the bids out of 95 marks as sought by the Applicant in paragraph 27 of the Request for Review would be tantamount to changing the criteria after the fact which would be a blatant breach of Section 66(2) of the Act.
5. That the fact that the Successful Bidder scored 0 (zero) marks on this parameter is a clear indication that the Procuring Entity could not be guilty of bias or conflict of interest. It averred that the winning bidder had no undue advantage over the Applicant and there is no evidence whatsoever to support the allegation that the tender was varied to favour the winning bidder. It stated that it indeed complied with the objective of Section 2 of the Act which obligated it *inter alia* promote competition and ensure that competitors are treated equally.

Finally, The Procuring Entity submitted that it had evaluated all the proposals in accordance with the provisions of the tender and in a fair and transparent manner. It stated that the Applicant's bid failed to score the minimum technical score of 70 marks and its proposal was rejected as required under Sections 63 and 66 of the Act. It submitted that it had endeavoured to ensure that the procurement process is fair, transparent and accountable.

It urged the Board to exercise its rights under Section 95 of the Act and dismiss the Request for Review for being frivolous, vexatious and lacking

in merit the same having been made with the sole purpose of delaying the procurement process.

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

The issues which arise and which require the interpretation and subsequent determination by the Board is basically:-

1. Whether the Applicant's bid was fairly evaluated in line with the requirement of Tender Document, the Act and Regulations.

Before reaching a conclusion on this matter, it is important that the Board addresses the three main fundamental grounds of contestation as argued by the Applicant.

The Board, having perused the Tender Documents and in particular the following relevant documents:-;

- a) The blank tender document,
- b) The evaluation report,
- c) The tender committee minutes and
- d) The original tender documents submitted by the bidders who participated.

On the issue of whether the tender was awarded to a non responsive bidder who had submitted an invalid tender security, the Board notes the following undisputed facts:-

1. That the Successful Bidder had submitted a bid security which clearly stated that it was valid for 151 days with effect from 10<sup>th</sup> September 2012 (which was the tender opening/closing date).
2. That indeed the correct position, counting from the tender opening date which was on 10<sup>th</sup> September 2012, the bid security ought to have remained valid up to 7/2/2013 and not 2/2/2013 as indicated in the Successful Bidder's bid security.

However, the Board notes that indeed the above omission on the part of the issuing bank was a minor deviation as the bank had undertaken to be bound by the terms of the bid security for a period of 151 days from the tender opening date. The Board therefore holds that the Procuring entity was right in treating the anomaly as a minor deviation curable by Section 62 of the Act and therefore nothing turns on this point.

With regard to the issue of unlawful denial of marks, the Board has noted that, the evaluation was fairly done by the Procuring Entity except in one area touching on the requirement of bidders to submit a letter of credit. This in the Board's view is the turning point in this matter. The Board has noted that indeed neither the Successful Bidder nor the Applicant submitted the letter of credit as expected by the Procuring Entity. This is a clear indication that there was ambiguity on this requirement. The Board is alive to the fact that in the normal course of business, letter of credit is indeed issued by the bank to the buyer to guarantee payment to the supplier of either goods or services. In this case, the scenario is exactly the

opposite. Indeed perhaps what the Procuring Entity would have asked is evidence on line of credit from a bank to demonstrate financial ability by a bidder to service the tender if awarded.

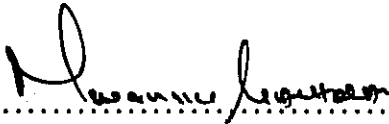
With regard to the argument by the Procuring Entity that the Applicant ought to have sought clarification on this, the Board holds that indeed the onus to produce a clear tender document devoid of ambiguity lies with the Procuring Entity. Further, the Board also notes that the Procuring Entity is also obligated to issue addendums to clarify any ambiguity in its tender document if same is discovered before tender closing date.

It is also clear to the Board that, in the instant case, the requirement of Letter of Credit was, ambiguous given that many tenderers did not clearly understand what the Procuring Entity was looking for. Given that the Procuring Entity did not issue any addendum and or seek clarification from the bidders on the matter, the benefit of such an oversight cannot be used to prejudice a bidder's position. If the Procuring Entity was to act logically and fairly on this particular case, it ought to have dropped the scoring on this parameter and evaluate the bids out of possible total marks of 95 marks in which case, the Applicant would have scored above the set threshold of 70% and hence proceed to the financial evaluation.

In the circumstances, and taking all the foregoing into consideration, the Application for review succeeds. The Board orders, pursuant to Section 98 of the Act, that:-

1. The award of the tender to the Successful Bidder be and is hereby annulled.
2. That the Procuring Entity re- evaluates the bids in accordance with the Act, the Regulations and the Tender Document. The Board further direct the Procuring Entity to drop the requirement of the letter of credit during re-evaluation to award out of total possible 95 marks and pro-rate the marks.
3. The re- evaluation is done within the tender validity period.
4. There are no orders as to costs. Each party to bear its own costs.

Dated at Nairobi on this 7th day of January, 2013.



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CHAIRMAN  
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