

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO.28/ 2013 OF 29<sup>TH</sup> AUGUST, 2013**

**BETWEEN**

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

**AND**

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

Review against the decision of the Tender Committee of Kenya Power and Lighting and Co. Ltd dated 30<sup>th</sup> July, 2013 in the matter of Tender No. KP1/9AA-2/PT/104/12/13 for the Supply of Material Handling Equipments (MHES) and Mobile Weigh Bridges.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	- Chairman
Mr. Akich Okola	- Member
Ms. Judith Guserwa	- Member
Amb. Charles Amira	- Member
Eng. Christine Ogut	- Member
Mr. Sospeter Kioko	- Member
Mrs. Loise Ruhiu	- Member
Mr. Joshua Willy Wambua	- Member

## **IN ATTENDANCE**

Ms. Pauline Opiyo - Secretary  
Ms. Shelmith Miano - Secretariat

## **PRESENT BY INVITATION:**

### **Applicant - M/s Fleet Tracking Solutions Ltd**

Mr. Collins Akenga - Advocate

### **Procuring Entity - Kenya Power & Lighting Co. Ltd**

Mr. George Eshuchi - Advocate  
Mr. Owiti Awuor - Senior Legal Officer  
Ms. Emily Kirui - Advocate  
Ms. Beryl Zoramia - Advocate

### **Interested Parties**

Mr. Jomo Nyaribo - Advocate, Avery East Africa Ltd  
Mr. John Kibuchi - Sales Representative, Avery East Africa Ltd  
Mr. Johnstone Mulang' - Sales Representative, Papyrus (A) Ltd  
Mr. David Wachira - CFAO, Papyrus (A) Ltd.  
Mr. Bonface Mulinge - Clerk, Suburban Agencies

## **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 OF AWARD**

### **Invitation for Bids**

The Notice for Tender No. KP1/9AA-2/PT/104/12-13 was advertised in the Standard Newspaper on 12<sup>th</sup> March, 2013 and also placed on the Procuring Entity's Website.

### **Closing/Opening**

Tender closing/opening was on 10<sup>th</sup> April, 2013. The tenders received and opened were as tabulated below:

Table 1: Tender Opening

No.	Name of Firm	Item Description	Unit Price	Bid Bond amount	Bank	No. of Copies
1	Papyrus Africa Ltd	Portable Vehicle Axle Weighbridge	1,900,000	No bid bond submitted		3
2	Suburban Africa Agencies	Platform Trolley with removable mesh sides	Kshs 309,723.50	Kshs 1,200,000	Barclays	3
		Navigator mobile warehouse Ladder, 14 step	Kshs 785,965.00			

		Mobile ladder with winch operated load lifting table - 14 step	Kshs 1,362,117.00			
		Automatic cable and wire length measuring and cutting machine	-			
		Portable Vehicle Axle Weighbridge	Kshs 3,651,942.50			
3	Highlife Construction Ltd	Platform Trolley with removable mesh sides	GBP 550			
		Navigator mobile warehouse Ladder, 14 step	AUD 2,350.00			
		Mobile ladder with winch operated load lifting table - 14 step	AUD, 4,600.00	Kshs 165,000	Oriental Bank	3
		Automatic cable and wire length measuring and cutting machine	Euro 2,008.00			
		Portable Vehicle Axle Weighbridge	USD 6,900			

4	Fleet Tracking Solutions	Portable Vehicle Axle Weighbridge	Kshs 3,050,000	Kshs 176, 900	Prime Bank	3
5	Achelis Material Handling Ltd	Platform Trolley with removable mesh sides	Euro 8,910.00	Euro 5,500	CBA	3
		Navigator mobile warehouse Ladder, 14 step	Euro 36,810.00			
		Mobile ladder with winch operated load lifting table - 14 step	Euro 100,620.00			
		Automatic cable and wire length measuring and cutting machine	Euro107,100.00			
		Portable Vehicle Axle Weighbridge	Euro 176,300.00			
6	Avery E. A. Ltd	Portable Vehicle Axle Weighbridge	Kshs 3,810,886.48	Kshs 225,000.00	Chase Bank	

## EVALUATION

Evaluation of the tenders was conducted in three stages namely;  
Preliminary Evaluation, Technical Evaluation and Financial Evaluation.

**PRELIMINARY EVALUATION FOR TENDER FOR SUPPLY OF MATERIAL HANDLING  
EQUIPMENTS - TENDER NO. KP1/9AA-2/ST/128/11-12**

No.	KPLC Requirement	Fleet Tracking Solution Africa Ltd.	Suburban Agencies	Highlife Construction & Supplies	Achelis Material Handling Ltd.	Avery E. A. Ltd.	Papyrus Africa Ltd.
6.1.1	Submission of Tender Security, checking its validity, whether original, sufficient, issued by a local bank and strictly in format required	Ok.	Ok.	Bid bond amount was not sufficient	Ok.	Ok	Non submission
6.1.2	Submission of Declaration forms duly completed and signed.	Ok.	Ok.	Ok	Ok.	Ok	Ok
6.1.3	Submission and considering tender form duly completed and signed.	Ok.	Ok.	Ok	Incomplete		Ok
6.1.4	Submission of company registration certificate	Ok.	Ok.	Ok	Ok.	Ok	Ok

	submission of PIN certificate	Ok.	Ok.	Ok	Ok.	Ok	Ok
	Submission of Valid Tax compliance Certificate	Ok.	Ok.	Ok	Ok.	Ok	Ok
6.1.5	Tender validity for 90 days	Ok.	Ok.	Ok	Not indicated	Ok	Ok
6.1.6	Submission of number of sets - Original	Ok.	Ok.	Ok	Ok.		Ok
	Copy 1	Ok.	Ok.	Ok	Ok.		Ok
	Copy 2	Ok.	Ok.	Ok	Ok.		Ok
6.1.7	Submission of confidential Business questionnaire fully filled and stamped.	Ok.	Ok.	Ok	Ok.		Ok
6.1.8	Submission of Manufacturer's valid ISO 9001 for goods from outside Kenya	Ok.	Ok.	Ok	Non submission	Ok	Non submission
	Valid KEBs Diamond Mark Certificate for goods manufactured in Kenya						

6.1.9	Submission of catalogues and /or brochures and/or Manufacturer's drawings	Provided for weigh bridge only	Ok.	Provided for everything except for wire cutter was wrong catalogue	Ok.	For weigh bridge only	Ok
	Submission of Guaranteed Technical Particulars	Ok.	Ok.	Ok	Ok.	Ok	Ok
6.1.10	Records of unsatisfactory	None	None	None	None	None	None
<b>Recommendations</b>		<b>Recommend for Weigh Bridge Only</b>	<b>Recommended</b>	<b>Not Recommended</b>	<b>Not Recommended</b>	<b>Recommended</b>	<b>Not Recommended</b>

**TECHNICAL EVALUATION FOR TENDER FOR SUPPLY OF MATERIAL HANDLING EQUIPMENTS & WEIGH BRIDGES TENDER NO. KP1/9AA-2/PT/104/12-13**

**Part I - Technical Evaluation - Submission of Documents**

NO.	KPLC REQUIREMENT	FLEET TRACKING SOLUTION AFRICA LTD.	SUBURBAN AGENCIES	AVERY E. A. LTD.
6.2.1.1	Submission of relevant valid ISO 9001 certificate	Ok	Ok	Ok
6.2.1.3	Submission of Type tests certificates and their reports from designated bodies	Ok	Ok	Ok



6.2.i.4	Submission of accreditation certificate for the testing body to ISO/IEC/17025	Ok	Ok	Ok
	Submission of manufacturer's authorization	Ok	Ok	Ok
6.2.1.5	Submission of catalogues and or brochures and or manufacturer's drawings	Ok	Ok	Ok
		<b>Recommended</b>	<b>Recommended</b>	<b>Recommended</b>

### Part II - Detailed Technical Evaluation Items 1, 2, 3 and 4

	Item Description	Fleet Tracking Solution Africa Ltd.	Suburban Agencies	Avery E. A Ltd.
1	Platform Trolley with Removable Mesh Sides	No Quote	Ok.	No Quote
2	Navigator Mobile Warehouse Ladder, 14 step	No Quote	Ok.	No Quote
3	Mobile Ladder with Winch Operated Load Lifting table - 14 step	No Quote	Ok.	No Quote
4	Automatic Cable & Wire Length Measuring & Cutting Machine	No Quote	No Quote	No Quote
			<b>Recommended for Items 1,2,3</b>	

**TECHNICAL EVALUATION FOR MOBILE WEIGH  
BRIDGES - TENDER NO. KP1/9AA-2/104/12-13**

Clauses	Description	KP Req'ment	Avery E.A	Surburban	FTS
4.2.3.1 (g)		(Specify type)	Ok	<b>Separate - Non-Compliant</b>	<b>No, Non-Compliant</b>
4.2.3.2 (a)	Weighing load scale length, approx.Min	1000mm	925mm	700mm	1168mm
4.2.5 (a) iv	Display screen, min	15" screen	Ok	<b>None</b>	Ok
4.2.5 (e)			15.6" Screen	15.6" Screen	<b>12.1" Screen</b>
4.2.5 (f)	RAM	4 GB	4GB	4GB	<b>2GB - Non-Compliant</b>
4.2.7 (b)	Print product type	Dot matrix, 9-pin	Thermal	No Indicated	Thermal Dot Printing
4.2.7 ©	Maximum media size	10.12 x 22 inches	Ok	A4	Continuous Roll 80mm Width
4.2.8 (a)	Printer paper size.	A4	Ok	A4	80mm Wide
4.2.11.2 (a)	Levelling mats/pads width, aapprox. Min	1000mm	750mm	700mm	800mm
			<b>Responsive</b>	<b>Not Responsive</b>	<b>Not Responsive</b>

**PRICE****COMPARISON**

Item Description	<b>Fleet Tracking Solution Africa Ltd.</b>	<b>Suburban Agencies</b>	<b>Avery E. A Ltd.</b>
Platform Trolley with Removable Mesh Sides	<b>NO QUOTE</b>	<b>KSHS. 309,723.50</b>	<b>NO QUOTE</b>
Navigator Mobile Warehouse Ladder, 14 step	<b>NO QUOTE</b>	<b>KSHS. 785,,956</b>	<b>NO QUOTE</b>
Mobile Ladder with Winch Operated Load Lifting table - 14 step	<b>NO QUOTE</b>	<b>KSHS. 1,362,117.00</b>	<b>NO QUOTE</b>
Automatic Cable & Wire Length Measuring & Cutting Machine	<b>NO QUOTE</b>	<b>NO QUOTE</b>	<b>NO QUOTE</b>
Portable vehicle Axle Weighbridge	<b>NOT COMPLIANT</b>	<b>NOT COMPLIANT</b>	<b>KSHS. 3,810,886.48</b>

## TENDER COMMITTEE DECISION

The Kenya Power and Lighting Co. Tender Committee at its meeting held on 26<sup>th</sup> July, 2013 approved award of Tender No. KP1/9AA-2/PT/104/12-13 for Supply of Material Handling Equipment and Mobile Weigh Bridges as follows:

<b>1) M/s. Suburban Agencies Ltd</b>				
No.	Description	Quantity	Unit Price in Kshs VAT Inclusive	Total Price in Kshs VAT Inclusive
1	Platform Trolley with Removable Mesh Sides	10	309,723.50	3,097,235.00
2	Navigator Mobile Warehouse Ladder, 14 step	10	785,965.00	7,859,650.00
3	Mobile Ladder with Winch Operated Load Lifting table - 14 step	10	1,362,117.00	13,621,170.00
<b>Total cost in Kshs VAT Inclusive</b>				<b>24,578,055.00</b>
<b>2) M/s Avery E.A. Ltd</b>				
	Portable Vehicle Axle Weighbridge	1	4,420,628.31	<b>4,420,628.31</b>

The Tender Committee required that quantities of items 3 & 4 to be purchased be reduce to ten (10) and one (1) respectively.

The Successful Bidders and the Unsuccessful Bidders were notified of the tender outcome via letters dated 30<sup>th</sup> July, 2013.

## THE REVIEW

The Applicant, M/s Fleet Tracking Solutions Ltd lodged this Request for Review on 29<sup>th</sup> August, 2013 against the decision of the Tender Committee of Kenya Power and Lighting Co. Ltd in the matter of **Tender No. KP1/9AA-2/PT/104/12/13** for Supply of Material Handling Equipments and Mobile Weigh Bridges.

The Applicant was represented by Mr. Akengo Collins, Advocate while the Procuring Entity was represented by Mr. Owiti Awuor, Senior Legal Officer. Interested Parties present were Papyrus (A) Ltd represented by Mr. Johnstone Mulang', Sales representative, Suburban Agencies represented by Mr. Bonface Mulinge, Clerk and Avery (E. A.) Ltd represented by Mr. Jomo Nyaribo, Advocate

The Applicant requests the Board for orders that:

- (a) The decision of the Respondent to award the Tender No. KP1/9AA-2/PT/104/12/13 for the Supply of Material Handling Equipments (MHES) and Mobile Weigh Bridges - to M/s Suburban Agencies Ltd. and M/s Avery (East Africa) Ltd. respectively be nullified, pursuant to the powers bestowed upon the Review Board by the provisions of **Section 98 (a) of the Act.**

(b) The Review Board direct that:

i) with reference to **Section 102(1) of the Act**, the Director General of the Procurement Oversight Authority investigate and/or to cause to be investigated the procurement proceedings to determine any breaches of the Act, the Regulations and/or the Tender Document, the role (if any) of the Awarded Bidder in the delay and the award itself and thereon take appropriate action as stipulated by Law.

ii) the Director General of the Public Procurement Oversight Authority investigate the procurement proceedings to determine the actual reasons behind the delay in the tender process, the person(s) responsible, the motive behind and the costs incurred and thereby take decisive and/or appropriate action.

(c) The Review Board and/or the Respondent be directed to disqualify the Awarded Bidder from the Tender process if confirmed to have been involved in and/or found to be party to have been involved in and/or found to be party to any breaches and/or delay and/or having had unduly influenced the irregular award to itself by way of either inducement, collusion, corruption, fraudulent and/or any other unlawful practices.

- (d) The Review Board in its considered wisdom and pursuant to **subsection (b) of Section 98 of the Act** do direct the Respondent to be directed to give notice of extension of the tender validity period to the Applicant and all other bidders who bought and returned the tender documents within time and request the tenders to extend the period of validity of their tender securities accordingly.
- (e) Further, the Review Board do direct the Respondent to re-evaluate the tenders submitted by the Applicant and the other bidders in strict adherence with the Law, the Tender requirements and the relevant procurement procedures, and if the circumstances so dictate, as per the outcome of this Request for Review.
- (f) In the alternative and without prejudice to the foregoing, the Review Board do, pursuant to **Sections 98(a) and 98(b) of the Act** respectively, annul the procurement proceedings in their entirety and do hereby direct the Respondent to re-tender, using the same requirements and specifications, by inviting all the bidders including the Applicant, who bought and returned the tender documents within time, however with the exclusion of the Awarded Bidder, if determined to have been involved in any breaches and/or acts/omissions of either inducement, collusion, corruption, fraudulent and/or any other unlawful practices; and the tender documents be issued at no costs to the Applicant and the other bidders.

(g) The Review Board, pursuant to the powers vested upon it by **Section 98(d) of the Act**, do order that the Applicant be fully and unconditionally awarded the costs of and/or incidental thereto to this Request for Review against the Respondent, especially if it is found that there were external appliances to oust the operation of the Act in the fair and transparent process.

(h) Any such and/or any other direction(s) and/or order(s) that in the wisdom of the Review Board be deemed just and expedient to grant in the given circumstances and in the interest of justice.

### **PRELIMINARY OBJECTION**

At the commencement of the hearing, the Board noted that the Procuring Entity had filed a Preliminary Objection dated 3<sup>rd</sup> September 2013 in the following terms:

- (1) **THAT** the Public Procurement Administrative Review Board (*hereinafter referred to as the "Board"*) lacks jurisdiction to hear and determine this Request.



(2) **THAT** the Procuring Entity stated as follows:-

- i) This was a multiple item tender combined in one tender document. This means that there were five different items that were to be quoted separately; had distinct and different specifications and were to be awarded independently of each other.
- ii) In essence the tender document could be broken down into five (5) different tenders but was combined for ease of administration and saving of costs.

(3) **THAT** the Procuring Entity added that following the contents of No. 2 above, the Applicant participated in only one item in the tender i.e. Portable Weighbridges. Consequently, there ought to be no Request for Review as far as the other four items are concerned i.e. Platform Trolley with Removable Mesh Sides, Navigator Mobile Warehouse Ladder, Mobile Ladder with Winch Operated Load Lifting Table - 14 Step and Automatic Cable & Wire Length Measuring & Cutting Machine.

(4) **THAT** the Applicant is not a candidate within the meaning of Section 93 of the Public Procurement and Disposal Act, 2005 read together with Public Procurement and Disposal Regulations, 2006 as far as the four items mentioned in paragraph 3 above are concerned.

(5) **THAT** entire Request for Review is filed out of time.

(6) **THAT** the entire Request for Review is time barred.

The Procuring Entity Submitted as follows:

(1) The Request for Review was filed on 29<sup>th</sup> August, 2013. It stated that the Applicant had admitted in paragraph 34 of the statement in support of the Request for Review that it received the letter of notification on 19<sup>th</sup> August, 2013. It argued that in view of the clear and unequivocal admission, time for purposes of filing the Request for Review started running on that date and therefore the last day for filing the Request was on 27<sup>th</sup> August, 2013.

It stated that in view of the clear admission by the Applicant, it was not necessary for the Board to deal with the issue of when and how the letter of notification was dispatched since even taking the date that the Applicant had indicated that it received the letter of notification, that is 19<sup>th</sup> August, 2013, the Request for Review was still out of time.

(2) Upon expiry of the appeal window, the Procuring Entity proceeded to sign a contract with the Successful Bidder in accordance with Section 68 of the Act and therefore the Board has no jurisdiction to deal with the Request for Review.

(3) Since the Request had been filed out of time, the Board has no jurisdiction to deal with any other issues regarding the tender since the Request for Review was not properly before the Board.

On its part, the Applicant stated as follows:

- (1) It conceded that the Request for Review was filed on 29<sup>th</sup> August, 2013, which was outside the stipulated seven (7) days as per Legal Notice 106 of 18<sup>th</sup> June, 2013. It urged the Board to take into the account that the amendment was effected through a subsidiary amendment and therefore it urged the Board to treat the issue as a mere technicality and to hear the Request for Review on merit.
- (2) It stated that the Request for Review raised serious issues and, in the interest of justice, it appealed to the Board to hear the Request for Review on merits.

An Interested Party, Avery Kenya Limited, associated itself with the submissions of the Procuring Entity and urged the Board to dismiss the Request for Review.

In regard to the Preliminary Issues raised in paragraphs two, three and four, it was agreed by the consent of the Parties that this was a multiple item tender comprising five items which had been grouped into two categories. The Applicant conceded that it participated in only one item of the tender, that is, Portable Weighbridges and consequently it was only a candidate in regard to that item of the tender. The Procuring Entity on its part conceded that the Applicant was a candidate in regard to the item it tendered for i.e. Portable Weighbridges and therefore the Board has jurisdiction in respect of that tender item.

Consequently the Board directed that the Request for Review was confined to the item on Portable Weighbridges and that the other four items could not form part of the Request for Review in that the bidders who participated in the tender for the other items were not parties to the Request for Review and further, in view of the fact that the Applicant was not a candidate for the other items within the meaning of Section 3 of the Public Procurement and Disposal Act, 2005.

In regard to issues raised in paragraph 5 and 6 of the Request for Review, the Board notes as follows;

(1) In paragraph 34 of the statement in support of the Request for Review, the Applicant states as follows:

*"THAT I am informed by our Advocates on record, which information I verily believe to be true that it is **trite law** that notification is only deemed to have been made a written letter of notification is received by a bidder. Hence, for the purpose of this Request for Review, the date of notification shall be deemed to be **Monday, 19<sup>th</sup> August, 2013** when the Applicant collected the said Letter of Regret from its Post Office Box in Eldoret."*

(2) The Board notes that Regulations 73 (2) (c) (ii) of the Public Procurement and Disposal Regulations, 2006 was amended by Legal Notice number 106 of 18<sup>th</sup> June 2013 and the appeal window was reduced from a period of fourteen (14) days to seven (7) days from the date of notification.

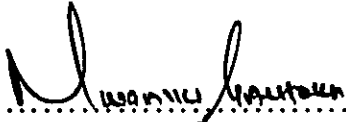
(3) The Board further notes that in view of the clear admission by the Applicant that it received the letter of notification on 19<sup>th</sup> August, 2013, time for purposes of the appeal window started running on 20<sup>th</sup> August, 2013 and therefore the last day for filing the Request for Review was 27<sup>th</sup> August, 2013.

(4) It is not disputed that this Request for Review was filed on 29<sup>th</sup> August, 2013, two (2) days after the close of the appeal window.

In view of the foregoing, this Request for Review was filed out of time, and therefore the Board has no jurisdiction to deal with the matter. Accordingly, the Request for Review fails and is hereby dismissed with no orders as to cost.

Accordingly, the procurement process may proceed.


**Dated at Nairobi on this 11<sup>th</sup> day of September, 2013.**



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**CHAIRMAN**

**PPARB**



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**SECRETARY**

**PPARB**

