

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION No. 59/2017 OF 29<sup>TH</sup> JUNE, 2017**

**BETWEEN**

**MANTRAD ENTERPRISES LIMITED..... APPLICANT**

**AND**

**KENYA PORTS AUTHORITY.....PROCURING ENTITY**

**AND**

**EAZY SALES & SERVICES (PTY) LIMITED .....INTERESTED PARTY**

Review against the decision of the Kenya Ports Authority in the matter of Tender Number KPA/118/2016-17/CCE for Supply and Commissioning of 1 No. New Self Propelled Boom Manlift.

**BOARD MEMBERS PRESENT**

- |                           |            |
|---------------------------|------------|
| 1. Mr. Paul Gicheru       | - Chairman |
| 2. Mr.Hussein Were        | - Member   |
| 3. Mr. Peter Ondieki, MBS | - Member   |
| 4. Mr. Nelson Orgut       | - Member   |
| 5. Mrs. Rosemary Gituma   | - Member   |

**IN ATTENDANCE**

- |                 |               |
|-----------------|---------------|
| 1. Philip Okumu | - Secretariat |
|-----------------|---------------|

2. Maureen Namadi

- Secretariat

## **PRESENT BY INVITATION**

**Applicant – Mantrad Enterprises Limited**

1. Mr. Alphonse Mbindyo - Advocate, A. M. Mbindyo & Co Adv.

**Procuring Entity – Kenya Ports Authority**

1. Mr. Stephen Kyandih - Advocate, Kenya Ports Authority.

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## **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

### **Invitation to bid**

Tender Number KPA/118/2016-17/CCE for the Supply and Commissioning of 1 No New Self-Propelled Boom Man Lift to Kenya Ports Authority was advertised on 15<sup>th</sup> March 2017 and opened on 18<sup>th</sup> April 2016. A total of five (5 No.) bids from the below listed firms were opened:

1. Mantrad Enterprises Ltd.
2. Eazy Sales and Services PTY
3. Triple Nine Associates.
4. Moha Kenya Ltd.
5. Joe Achelis Ltd.

## TENDER EVALUATION

Tenders were evaluated through three stages namely the preliminary, technical and financial evaluation.

### Preliminary Evaluation

The Evaluation Committee carried out a detailed preliminary evaluation of the bids and checked compliance with the mandatory requirements given under the Appendix to Instructions to Tenderers falling under Clause 2.17.1 of the tender document.

Three tenders were found to be non-responsive at the preliminary evaluation stage. These were the tenders submitted by:-

- a) Triple Nine Associates Ltd.
- b) Moha Kenya Ltd
- c) Joe Achelis Ltd.

The following firms qualified for technical evaluation having complied with all the mandatory requirements at preliminary evaluation stage:

- a) Mantrad Enterprises Ltd.
- b) Eazy Sales and Services PTY

### Detailed Technical Evaluation:-

The evaluation committee applied the marking scheme provided under clause 2.23.4 of the tender document, and the technical specifications provided under Section VI of the tender document.

The table below shows the average scores awarded at the technical evaluation stage.

| Adherence to Technical Specifications (70 Marks)                | PARAMETER  | REQUIREMENT   | MARK SCORED PER FIRM     |                             |  |
|---|--|---|--------------------------|-----------------------------|--|
|   |  |   | Mantrad Enterprises Ltd. | Eazy Sales and Services PTY |  |
| Only bids that meet a score of 60 out of 70 shall be considered | 1. General Description / Rated Performance - 4 marks | Working Height of 55 meters <b>1 mark Mandatory</b>   | 1                        | 1                           |  |
|   |  | Horizontal outreach of 24 meters <b>1 mark Mandatory</b>  | 1                        | 1                           |  |
|   |  | Carrying capacity - 450 Kg <b>1 mark Mandatory</b>  | 1                        | 1                           |  |
|   |  | The equipment shall conform to the following standards or latest version of the same<br>ANSI A92.5, CSA B354.4, EN 280 or AS 1418.10<br>Relevant ISO or equivalent standard is acceptable <b>1 mark Mandatory</b> | 1                        | 1                           |  |
|   | 2. Engine - 7 marks                                  | Diesel Engine - <b>1 mark (Deutz, Volvo or Cummins Engine) Mandatory</b>  | 1                        | 1                           |  |
|   |  | Water cooled - <b>1 mark</b>  | 1                        | 1                           |  |
|   |  | Power Output 70-80 KW - <b>1 mark</b>   | 1                        | 1                           |  |
|   |  | Tier IV compliant - <b>1 mark</b>   | 1                        | 1                           |  |
|   |  | Tropicalized Heavy Duty finned radiator to work in ambient of upto 38 degrees Centigrade - <b>1 mark</b>  | 1                        | 1                           |  |
|   |  | Corrosion resistant exhaust pipe and mufflers - <b>1 mark</b>   | 1                        | 1                           |  |
|   |  | Swinging Engine tray for ease of maintenance - <b>1 mark</b>  | 1                        | 1                           |  |
|   |  |   |                          |                             |  |

|  |  |   |   |
|--|--|---|---|
| <b>3. Platform and Operation Dimensions</b><br><b>15 marks</b> | Platform height 55-60metres <b>1 mark</b>  | 1 | 1 |
|  | Horizontal Outreach 24-27metres <b>1 mark</b>  | 1 | 1 |
|  | Below ground reach 1.25-1.75metres <b>1 mark</b>   | 1 | 1 |
|  | Swing 360° Continuous <b>1 mark</b>  | 1 | 1 |
|  | Platform Capacity - Restricted 450-470kg <b>1 mark</b>   | 1 | 1 |
|  | Platform Capacity - Unrestricted 220-240kg <b>1 mark</b>   | 1 | 1 |
|  | Jib Length 3.9-6.2metres <b>1 mark</b>   | 1 | 1 |
|  | Jib Range Articulation 120°(+75,-45) <b>1 mark</b>   | 1 | 1 |
|  | Turning Radius (Inside) <b>1 mark</b><br>Axles Retracted 7-7.5metres<br>Axles Extended 2-2.5metres         | 1 | 1 |
|  | Turning Radius (Outside) <b>1 mark</b><br>Axles Retracted 9.5-10metres<br>Axles Extended 6.5-7metres       | 1 | 1 |
|  | Platform working lights <b>1 mark</b>  | 1 | 1 |
|  | Hydraulic Platform rotator of up 170°-175° <b>1 mark</b>   | 1 | 1 |
|  | At least 0.9 X 2.4 meters in dimensions with adequate side guards and swing gate (MANDATORY) <b>1 mark</b> | 1 | 1 |
|  | Self-leveling <b>1 mar</b>   | 1 | 1 |
|  | Hydraulic platform rotation <b>1 mark</b>  | 1 | 1 |
|  |  |   |   |

|  |   |   |    |
|--|---|---|----|
| <b>4. Main Frame<br/>- 7 marks</b>                   | Frame of steel construction<br>- <b>1 mark</b>  | 1 | 1  |
|  | Underside protected<br>against corrosion - <b>1 mark</b>  | 1 | 1  |
|  | Reflective markings - <b>1<br/>mark</b>   | 1 | 1  |
|  | Gross weight 26-28 tones -<br><b>1 mark</b>   | 1 | 1  |
|  | Telescopic boom - <b>1 mark</b>   | 1 | 1  |
|  | Travel alarms and rotating<br>beacon -<br><b>1 mark</b>   | 1 | 1  |
|  | Towing Hooks- <b>1 mark</b>   | 1 | 1  |
| <b>5. Axles and<br/>Drive - 5<br/>marks</b>          | 4X4 full time - <b>1 mark</b>   | 1 | 1  |
|  | Drive out Extendable axles-<br><b>1 mark</b>  | 1 | 1  |
|  | Rough terrain foam filled<br>tyres size 445/50D710<br>24ply - <b>1 mark</b>   | 1 | 1  |
|  | Able to attain a drive speed<br>of 4.5km/hr- <b>1 mark</b>  | 1 | 1  |
|  | Ground Bearing pressure<br>8-9kg/cm <sup>2</sup> - <b>1 mark</b>  | 1 | 1  |
| <b>6. Hydraulics<br/>and Safety 4<br/>marks</b>      | All hydraulic cylinders to be<br>fitted with hostile<br>environment kit - <b>1 mark</b>                                   | 1 | 1  |
|  | Safety valves to be installed<br>to ensure the cage does not<br>fall in case of hydraulic<br>hose rapture - <b>1 mark</b> | 1 | 1  |
|  | Safe in winds up to 20<br>M/sec - <b>1 mark</b>   | 1 | 1  |
|  | Safety harnesses for 8<br>technicians/operators to<br>be provided - <b>1 mark</b>   | 1 | 1  |
| <b>7. Accessories<br/>and features-<br/>15 marks</b> | AC Receptacle in Platform<br>- <b>1 mark</b>  | 1 | 1  |
|  | Tilt Light and Alarm - <b>1<br/>mark</b>  | 1 | 1  |
|  | Swing-Out Engine Tray - <b>1<br/>mark</b>   | 1 | 1  |
|  | 12V-DCAuxillary Power - <b>1<br/>mark</b>   | 1 | 1  |
|  |   |   |    |
|  | Hour meter - <b>1 mark</b>  | 1 | 11 |

|  |   |  |   |   |
|--|---|--|---|---|
|  |   | Suitable electronic control ( ADE® or equivalent) System - <b>1 mark</b>                             | 1 | 1 |
|  |   | Selectable Steering Modes- <b>1 mark</b>   | 1 | 1 |
|  |   | Proportional Controls. - <b>1 mark</b>   | 1 | 1 |
|  |   | Gull -Wing Steel Hoods<br>445/50D710 Foam-Filled<br>Rim protector Lug Tread<br>Tires - <b>1 mark</b> | 1 | 1 |
|  |   | Platform Console Machine<br>Status Light Panel* - <b>1 mark</b>                                      | 1 | 1 |
|  |   | Lifting/Tie Down Lugs - <b>1 mark</b>  | 1 | 1 |
|  |   | Engine Distress Warning<br>/Shutdown - <b>1 mark</b>   | 1 | 1 |
|  |   | All Motion Alarm - <b>1 mark</b>   | 1 | 1 |
|  |   | Glow Plugs - <b>1 mark</b>   |   | 1 |
|  |   | LCD Panel at Operator's<br>Platform Control Console - <b>1 mark</b>                                  | 1 | 1 |
|  | <b>8. Instruments and Controls</b><br><b>15 marks</b> | Emergency stop buttons - <b>1mark</b>  | 1 | 1 |
|  |   | Electric Horn - <b>1 mark</b>  | 1 | 1 |
|  |   | Joystick controls - <b>1 mark</b>  | 1 | 1 |
|  |   | Lockable platform control<br>cllovers - <b>1 mark</b>  | 1 | 1 |
|  |   | 1Thumb locker steer - <b>1 mar</b><br><b>mar</b>   | 1 | 1 |
|  |   | 1Engine oil low pressure - <b>1 mark</b>   | 1 | 1 |
|  |   | Engine cooler over<br>temperature/low level - <b>1 mark</b>  | 1 | 1 |
|  |   | Battery not charging - <b>1 mark</b>   | 1 | 1 |
|  |   | Parking Brakes on - <b>1 mark</b>  | 1 | 1 |
|  |   | Engine run time meter - <b>1 mark</b>  | 1 | 1 |
|  |   | Warning for hydraulic oil<br>over temperature - <b>1 mark</b>  | 1 | 1 |
|  |   | Display for height,<br>horizontal outreach and<br>boom angle - <b>1 mark</b>                         | 1 | 1 |
|  |   |  |   |   |

|  |   |   |           |           |
|--|---|---|-----------|-----------|
|  |   | On-board full diagnostic s and engine monitoring display - <b>1 mark</b>  | 1         | 1         |
|  |   | Electronic control system - <b>1 mark</b>   | 1         | 1         |
|  |   | Digital Engine hour counter - <b>1 mark</b>   | 1         | 1         |
|  | <b>9. Other options to be charged separately 3 marks</b>  | On board full diagnostics for the entire truck including the engine monitoring display <b>1 mark</b>                          | 1         | 1         |
|  |   | Separate diagnostic tool (preferably lap top) with all software and hardware for trouble shooting the equipment <b>1 mark</b> | 1         | 1         |
|  |   | Telematics ready connect <b>1 mark</b>  | 1         | 1         |
|  | <b>Total Marks scored out of 75 marks</b>   |   | <b>75</b> | <b>75</b> |
|  | <b>Total marks scored 70</b>  |   | <b>70</b> | <b>70</b> |
| <b>Tenderer's experience (15 marks)</b>              | List of similar contracts for supply of self-propelled articulating boom man lift for the last 3 years<br><b>9 marks (3marks for each year of supply)</b> |   | 9         | 9         |
|  | Contacts of reference clients <b>6 marks (2 marks for each reference)</b>   |   | 0         | 4         |
| <b>Training (5marks)</b>                             | On-site training at the Port of Mombasa at the time of commissioning <b>(2 marks)</b>   |   | 2         | 2         |
|  | Details of training activities <b>(2 marks)</b>   |   | 2         | 2         |
|  | Time table of training activities <b>(1 mark)</b>   |   | 1         | 1         |
| <b>Financial strength of the Tenderer (10 marks)</b> | Tenderer's financial performance based on Certified Audited Accounts for 2013, 2014 and 2015  | Liquidity ratios CA/CL > 2 = <b>4 marks</b>   | 4         | 0         |
|  |   | Gearing ratios not more than 20% = <b>3 marks</b>   | 3         |           |
|  |   | Profitability 10% and above = <b>3 marks</b>  | 3         |           |
| <b>TOTAL MARKS</b>                                   |   |   | <b>94</b> | <b>88</b> |



Both firms met the required pass mark of 75% to qualify for the next stage of evaluation. The Technical Evaluation Committee recommended that M/s Mantrad Enterprises Ltd and M/s Eazy Sales and Services PTY having scored 94% and 88%, respectively, which was above the pass mark of 75%, proceed to financial evaluation.

### Financial Evaluation

The financial bids were opened and the amounts quoted by each firm were read out as stated below:

1. Eazy Sales & Services (PTY) Ltd    USD 732,341.21
2. Mantrad Enterprises Limited        USD 647,428

Bidders were required to submit the following information in their financial proposals:

- i. Form of Tender.
- ii. Schedule of Prices in the format provided.
- iii. Priced list spare-parts to be used for two year's (4,000 hours) preventive maintenance during warranty period as per table 2 section VII
- iv. Priced list of back up spare parts as per table 3 section VII
- v. Priced list of special tools
- vi. Priced List of all spare parts as appearing in the parts manual as per table 1 section VII.
- vii. Cost of deviations from specifications if any
- viii. Optional extras and their CIF cost, if any.

Both bidders submitted all the required information. They were compared for the quoted prices to establish the lowest evaluated bidder as below:

|      |   |      |     | Eazy Sales & Services (PTY) | Mantrad Ltd             |
|------|---|------|-----|-----------------------------|-------------------------|
| Item | Description   | Unit | QTY | Total CFR price (USD)       | Total CFR price (USD)   |
| 1    | Self-Propelled Boom Man Lift                          | EA   | 1   | 465,437.00                  | 430,000.00              |
| 2    | Preventive maintenance parts during warranty          | Lot  | 1   | 9,434.82                    | 16,200.00               |
| 3    | Back-up spares  | Lot  | 1   | 103,636.48                  | 93,829.00               |
| 4    | Training local  | AU   | 1   | 9,500.00                    | 3,000.00                |
| 5    | Training overseas                                     | AU   | 1   | 7,000.00                    | 5,000.00                |
| 6    | Special tools   | Sets | 1   | 1,429.61                    | 1,000.00                |
|      | <b>Total Price</b>                                    |      |     | <b>732,341.21</b>           | <b>647,428.00</b>       |
|      | <b>Delivery Offered -weeks</b>                        |      |     | <b>12-15 WEEKS</b>          | <b>20 WEEKS</b>         |
|      | <b>Country of origin, brand name and model number</b> |      |     | <b>USA, JLG, 1850SJ</b>     | <b>USA, JLG, 1850SJ</b> |

### Recommendation for Award

The tender evaluation committee recommended that the Authority award Tender Number KPA/118/2016-17/CCE for the Supply and Commissioning of a new Self Propelled Boom Man Lift to M/s Mantrad Enterprises Ltd, being the lowest evaluated bidder at their quoted price of USD 647,428 subject to confirmation at the site visit by the tender evaluation committee that the equipment conforms to technical specifications.

### PROFESSIONAL OPINION

The Secretariat observed to the accounting officer as follows:-

“Mantrad Enterprises Ltd in their submission attached a Manufacturers Authorization issued by M/s JLG Industries to M/s

General Navigation and Commerce Co. (GENAVCO) LLC of Dubai, UAE appointed as a sole distributor in the United Arab Emirates who in turn issued a dealer authorization to M/s Mantrad. The Manufacturer's Authorization was valid from 1<sup>st</sup> April 2016 to 30<sup>th</sup> April 2017. The Authorization was therefore not valid and current as at the time of tender and not relevant to this region. The bidder therefore ought to have been disqualified on those two grounds.

The Authorization from JLG to Eazy Sales & Services Pty Ltd was, on the other hand, addressed to KPA and made reference to this particular tender.

M/s JLG have since written and clarified that only M/s Eazy Sales are the duly recognized official agents for their products in this region and are the only firm authorized to participate in the tender".

"Pursuant to section 84 (1) of the Public Procurement and Asset Disposal Act, 2015, the Secretariat, having reviewed the evaluation report, is satisfied that the process has been done as per the provisions of the Public Procurement and Asset Disposal Act, 2015, and consequently recommends award of the tender to M/s Eazy Sales Pty at USD 732,340.91".

"Due to budgetary constraints the Procurement Unit reviewed the bid with the user and upon consultation noted that the procurement could be accommodated within the budget by dropping the Back-up spare and Overseas training since the manufacturer had supplied similar equipment before to KPA and staff underwent factory training. The supplier could be requested to enhance local training before commissioning. The Back-up spares could be awarded on an as and

when need arises basis at the tendered rate under framework contract for three years”.

“The revised bid excluding local duties is therefore USD 485,801.43”.

**Budgetary Provision**

The expenditure had been budgeted in the financial year 2016/2016 at Kshs. 52,000,000.00. The Secretariat recommended as follows:-

- i. Award Tender No. KPA/118/2016-17/IT - Supply and Commissioning of 1 No. New Self-Propelled Boom Man lift to Eazy Sales and Service Pty at a bid price of USD 485,801.43 read United States Dollars Four Hundred Eight-Five Thousand Eight-Hundred and One Forty Three Cents) and a delivery of 12-15 Weeks
- ii. Direct as appropriate”.

The Procuring Entity issued a Letter of Notification of Award to the Successful Bidder dated 16<sup>th</sup> June, 2017 under the terms as recommended by the Head of Procurement Mr. Yobesh Oyaro, in his Professional Opinion.

**THE REQUEST FOR REVIEW**

The Request for Review was lodged by M/s Mantrad Enterprises Ltd on 29<sup>th</sup> June, 2017 in the matter of Tender No. KPA/118/2016-17/CCE for the Supply and Commissioning of 1 Number New Self-Propelled Boom Man Lift to Kenya Ports Authority.

The Applicant sought for the following orders from the Board:-

- a) *That the Respondent’s decision awarding Tender No. KPA/118/2016-17/CCE be set aside and nullified.*

- b) That the Respondent's decision notifying the Applicant that he had not been successful in Tender No. KPA/118/2016-17/CCE -by way of the letter dated 16<sup>th</sup> June 2017 be set aside and nullified.*
- c) That the Board be pleased to review all records of the procurement process (particularly the alleged technical evaluation) relating to Tender No. KPA/118/2016-17/CCE and establish what criteria was used and if not according to the law and tender document, annul the results of such an evaluation and declare the Applicant the Successful Bidder and award the tender to the Applicant towards negotiating and signing a contract with the Applicant as per the tender and Board's decision.*
- d) That the Respondent be ordered to pay the costs of and incidental to these proceedings.*
- e) Such other or further relief as the board may deem just and expedient.*

The Applicant raised nine grounds of review and was represented at the hearing by Mr. Alphonse Mbindyo, Advocate. The Procuring Entity on the other hand was represented by Mr. Stephen Kyandih, Advocate who opposed the application and prayed that the Board dismisses it with costs to the Procuring Entity for lacking merit. Although all the interested parties including the successful bidder were served with a hearing notice, none of them appeared during the hearing of the Request for Review.

### The Applicant's case

The Applicant stated that it submitted a valid bid for the subject tender in line with the Procuring Entity's instructions and that its tender met the minimum score of 75% at the technical evaluation stage and thus qualified to proceed for financial evaluation. It further stated that upon the opening of the financial proposal on 26<sup>th</sup> May, 2017 and having submitted a bid of USD 647,428.00 its bid was the lowest and the most competitive bid and it was therefore qualified to be awarded the tender.

The Applicant however stated that by a letter dated 16<sup>th</sup> June, 2017, the Procuring Entity disqualified the Applicant's bid on account of providing an allegedly defective authorization, an assertion which the Applicant disputed. The Applicant maintained that it met all the mandatory requirements set out in the tender document in line with the provisions of Section 79 of the Public Procurement and Disposal Act, 2015 (hereinafter "the Act"). Counsel for the Applicant further stated that the Procuring Entity used a criteria and/or considerations other than those set out in the tender document in evaluating its tender thereby acting in breach of the mandatory requirements of Sections 3 and 80 of the Act; Regulations 49 and 50; and Clauses 2.4, 2.6, 2.21, 2.22, 2.24, and 2.26(b) (section 11) of the tender document; and Article 227 of the Constitution of Kenya, 2010.

The Applicant additionally submitted that it was clear from clause 2.1.1 of the Appendix to Instructions to Tenderers that the invitation to tender was open to manufacturers/builders or their duly authorized agents. It further submitted that pursuant to clause 2.1.1 of the Tender Document, it provided two letters of authorization dated 1<sup>st</sup> April 2017 and 22<sup>nd</sup> March 2017 in its bid.

It added that the letter dated 1<sup>st</sup> April 2017 was introducing General Navigation and Commerce Company (GENAVCO) based in Dubai as the authorized distributor for JLG Industries (UK) Ltd and that in essence GENAVCO was an agent of JLG. It stated that the letter dated 22<sup>nd</sup> March 2017 was a dealer's authorization which granted the Applicant the authority to submit its bid for the tender. The Applicant further submitted that the actions of an agent bind the principal and that even if there were no express instructions, a principal can ratify actions of an agent and the authority by a recognized agent of the manufacturer was sufficient and was not a ground to disqualify the Applicant.

The Applicant further stated that the letter which was the cause of the Applicant's disqualification was not among the mandatory requirements set out in the Tender Document adding that if at all the authorization letter was defective, the best that could have happened was to have the Applicant lose some marks at the technical evaluation stage.

The Applicant further challenged the manner in which it was disqualified. Counsel for the Applicant took issue with the Procuring Entity's secretariat for giving an opinion to the Accounting Officer of the Procuring Entity on the basis of which the Applicant was disqualified from the procurement process. He submitted that in line with Section 84(1) of the Act, an expert opinion ought to have been prepared and signed by the Head of Procurement to be shared with the Accounting Officer and that the opinion had to be in line with the recommendations of the tender evaluation committee and that where the opinion was at variance with the recommendations of the tender evaluation committee, the matter ought to have been referred back to the tender evaluation committee for reconsideration.

The Applicant further contended that Section 85 of the Act talks about who should recommend the awarding of the contract and that this should be done by the tender evaluation committee and not the Head of the Procurement department. The Applicant urged the Board to go through the evaluation report as submitted by the Procuring Entity and find that what the Procuring Entity did was against the law and thus allow the Request for Review as sought by the Applicant.

#### **The Procuring Entity's response**

The Procuring Entity in response to the Request for Review averred that it invited interested bidders, being manufacturers or their duly authorized agents to submit bids for the impugned tender and that the Applicant was neither a Manufacturer nor a duly Authorized Agent. It further contended that the Applicant submitted, under the Manufacturer's Authorization section at page 18 of its bid document, a letter dated 1<sup>st</sup> April 2016 from JLG Industries (United Kingdom) Limited whose contents indicated that JLG Industries had granted General Navigation and Commerce Co. (GENAVCO) LLC a sole distributorship in the United Arab Emirates for a range of products manufactured by JLG Industries which agreement was to be valid up to 30<sup>th</sup> April 2017.

Counsel for the Procuring Entity further stated that the Applicant was not GENAVCO and thus the Authorization did not qualify to be an authorization to the Applicant as an Agent of the Manufacturer which was against the directive in the tender advertisement and the instructions contained at page 3 clause 1:1 of the tender document and the Appendix to Instructions to Tenderers at clause 2.1.1. He further submitted that in an attempt to sanitize the requirement of confirmation of a duly Authorized Agent, the Applicant



provided in its bid the Local Agency Authorization letter from GENAVCO LLC dated 22<sup>nd</sup> March, 2017 which letter the Procuring Entity did not regard as qualifying as an authorization from a manufacturer. Counsel for the Procuring Entity stated that the Procuring Entity regarded the letter as one given by an agent of the manufacturer granting a dealer authorization to a fellow agent who was the Applicant and that, in any case, by the time the technical evaluation committee's report was being presented on 12<sup>th</sup> May, 2017, the period of that authorization had expired.

Counsel for the Procuring Entity stated that the Tender Evaluation Committee evaluated the Applicant's bid and scored it above the minimum score of 75% and thus the Applicant qualified to proceed for financial evaluation. He however argued that the Tender Evaluation Committee ought to have disqualified the Applicant on the basis that the Applicant had not provided an Agency Authorization letter from a Manufacturer. He further stated that the Procuring Entity Procurement Department was able to pick the error in the procurement process and proceeded to provide an expert opinion and recommended the award of the tender to M/s Eazy Sales and Services (Pty) Limited.

It was the Procuring Entity's further case that the Applicant offered a tender price of USD 647,428.00 which was confirmed at the opening of the financial proposals. Counsel for the Procuring Entity further averred that the Tender Evaluation Committee recommended the award of the tender to the Applicant at their quoted price being the lowest evaluated bidder. However Counsel for the Procuring Entity stated that the Applicant was not the most competitive bidder qualified to perform the contract satisfactorily and added that the

Applicant's bid was not substantially responsive pursuant to the provisions of clauses 2.22 and 2.24 of the Tender Document and Section 79 of the Act.

The Procuring Entity denied that it had used a criteria other than the one set out in the Tender Document while evaluating the tenders and contended that it used the procedure contained in the Tender Document during evaluation of the tender and thus complied with the provisions of Section 80(2) of the Act and that it gave valid reasons for declaring the Applicant's tender as unsuccessful. The Procuring Entity further contended that it applied the criteria set out in the Tender Document during the evaluation of the procurement process by the Secretariat and that had the technical evaluation committee been keen they ought to have arrived at the recommendation that the Secretariat recommended. The Procuring Entity also contended that its action did not prejudice the Applicant and added that the tender proceedings were fair.

In response to a question posed by the Board, Counsel for the Procuring Entity stated that the Procuring Entity relied on the provisions of Section 84(1) of the Act when the Head of the Procurement function of the Procuring Entity issued an expert opinion to the Accounting Officer recommended an award of the tender to M/s Eazy Sales and Services Pty Ltd. Counsel for the Procuring Entity however agreed that there was no dissenting opinion by the members of the tender evaluation committee adding that the decision of the Tender Evaluation Committee was unanimous.

Counsel for the Procuring Entity therefore urged the Board to disallow the Request for Review and allow the Procuring Entity to finalize the tender process herein.

#### **The Applicant's reply to the Procuring Entity's submissions**

Counsel for the Applicant in a short reply to the submissions made by Counsel for the Procuring Entity reiterated that neither the Accounting Officer nor the Head of Procurement of the Procuring Entity has the power to override or substitute the decisions and the recommendations of the Tender Evaluation Committee. He added that if the Head of Procurement was of a contrary opinion from that held by the Tender Evaluation Committee, he ought to have recommended that the matter be returned back to the Tender Evaluation Committee for reconsideration. Mr. Mbindyo contented that it was only the recommendation of the Tender Evaluation Committee which could be enforced by the Accounting Officer and that it was contrary to the provisions of Section 85 of the Act for the Accounting Officer or for the Head of Procurement to purport to change the recommendations of the Tender Evaluation Committee. With regard to the Manufacturer's Authorization, he averred that as at the time the Applicant was submitting its bid, that letter was valid and that the Procuring Entity was wrong in asserting that the letter was not valid on the date when the technical evaluation was done. He therefore urged the Board to allow the Request for Review and grant the orders sought.

#### **THE BOARD'S FINDINGS**

The Board has heard and considered the submissions made for and against the Request for Review and has identified the following issues for determination in this Request for Review:-

- (i) *Whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the evaluation criteria set out in the tender document in regard to the Manufacturer's authorization and thereby breached the provisions of Section 80 (2) of the Act.*
- (ii) *Whether the refusal by the Procuring Entity to award the tender to the Applicant as per the recommendations of the tender evaluation committee amounts to a contravention of the provisions of Sections 84, 85 and 86 of the Act.*

The Board will now proceed to determine the issues framed for determination.

### **ISSUE NO. 1**

*Whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the evaluation criteria set out in the tender document in regard to the Manufacturer's authorization and thereby breached the provisions of Section 80 (2) of the Act.*

The Board finds that it is evident from the facts placed before it and the uncontested submissions made by the parties that the subject tender was advertised on 15<sup>th</sup> March 2017 and closed/opened on 18<sup>th</sup> April 2017 attracting a total of five bidders including the Applicant. The Board further finds that the Tender Evaluation Committee of the Procuring Entity evaluated the tenders submitted to it through three stages of evaluation namely the preliminary, technical and financial evaluation.

The Board additionally finds that the bids which were submitted were subjected to a confirmation that the bidders had complied with the mandatory requirements at the preliminary evaluation stage where three bidders were disqualified for failure to meet the mandatory requirements. Two bidders

namely the Successful Bidder and the Applicant were found to have met all the mandatory requirements and both proceeded to be evaluated at the technical evaluation stage where they scored 88% and 94% respectively. The two bidders having attained the pass mark of 75% therefore qualified for financial evaluation and were hence invited for the opening of their financial proposals on 26<sup>th</sup> May 2017. The two bidders' financial bids were as follows:

1. Eazy Sales & Services (PTY) Ltd (Successful bidder) USD 732,341.21
2. Mantrad Enterprises Limited (Applicant) USD 647,428

The two were found to have provided all the information required in their financial proposals and their prices were hence compared to establish the lowest evaluated bidder. Upon the conclusion of the financial evaluation exercise the firm of M/s Mantrad Enterprises Ltd, the Applicant herein, was determined by the Tender Evaluation Committee to be the lowest evaluated bidder and was recommended for award at its tender price of USD 647,428. The Procuring Entity however notified the Applicant in a letter dated 16<sup>th</sup> June, 2017 that its tender was unsuccessful and that the tender had been awarded to the Successful Bidder, M/s Eazy Sales and Services (Pty) Ltd at a total price of USD 485,801.43.

The Applicant, having been dissatisfied with the decision of the Procuring Entity to award the tender to the Successful bidder filed this Request for Review on 29<sup>th</sup> June 2017.

The first issue which therefore arose for the Board's determination was whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the evaluation criteria set out in the tender document in



It is clear from a reading of the Tender Document that the tender was open to man lift manufacturers/builders or their duly authorized agents. It is also clear that the front runners in the subject tender namely the Successful bidder and the Applicant were both not man lift manufacturers/builders. It therefore goes without saying that whoever was to emerge the winner of the subject tender had to satisfy the requirement of a *duly authorized agent*.

In order to determine the above issue the Board further takes cognizance of the Dealer's Authorization letter dated 22<sup>nd</sup> March 2017 which was signed by one Mahesh Baker, Sales Manager of General Navigation and Commerce Company (GENAVCO) to the Head of Procurement and Supplies, Kenya Ports Authority, which stated as follows:

*"Whereas Genavco L.L.C who are established and reputable authorized sole distributor in the United Arab Emirates for JLG equipment having offices at Zaabeel Road, Karama, Dubai - U.A.E. do hereby authorize Mantrad Enterprises Ltd of Post Office Box Number 44068-00100 Nairobi, Kenya to submit a tender, and subsequently negotiate and sign the contract with you against tender No. KPA/118/2-16-17/CCE for the above goods distributed by us.*

*We hereby extend our full Parts warranty as per the General Conditions of Contract for the goods offered for supply by Mantrad Enterprises Ltd against this invitation for Tenders."*

The agency letter dated 22<sup>nd</sup> March 2017 to the Procuring Entity stated as follows:

*"This is to confirm that Mantrad Enterprises Ltd is our local representative for JLG equipment in Kenya.*

*Mantrad will handle all sales, Training, Maintenance, Repairs and Warranty claims."*

The letter dated 1<sup>st</sup> April 2017 from JLG Industries (UK) Ltd signed by one Ewan MacAngus, Market Development Director To Whom It May Concern stated as follows:

*This is to confirm that General Navigation and Commerce Co (GENAVCO) LLC, with its registered address at P.O. Box 5563, Al Karama, Za'abeel Road, Dubai, UAE and GENAVCO LLC, P.O Box 751, Abu Dhabi - UAE, is appointed by JLG Industries Ltd as our sole distributor in United Arab Emirates for the range of products manufactured by JLG Industries.*

*This agreement is valid till April 30<sup>th</sup> 2017".*

The Board finds that the import of the foregoing cited letters is that the manufacturer of the system being procured was JLG Industries (UK) Ltd and that GENAVCO LLC was the sole distributor of the said system in the United Arab Emirates. GENAVCO LLC on the other hand appointed the Applicant as the local representatives for the JLG equipment in Kenya to handle all sales, training, maintenance, repairs and warranty claims. The Board finds that, through GENAVCO LLC's distributorship, the Applicant herein was appointed as the agent for JLG products in Kenya and was therefore eligible to bid for the tender.



The Board further finds that the Procuring Entity's Tender Evaluation Committee took all the above correspondences into consideration and accepted them. This fact is clear from the evaluation report received and stamped by the Head of Procurement and Supplies on 5<sup>th</sup> June 2017, where the tender evaluation committee after considering all the relevant issues recommended as follows:-

*"The committee therefore recommends that the Authority award Tender Number KPA/118/2016-17/CCE - Supply and Commissioning of New Self Propelled Boom Man Lift to M/s Mantrad Ltd, at their quoted price of USD 647,428 as quoted in the form of tender, being the lowest evaluated bidder..."*

The Board finds that the Evaluation Committee of the Procuring Entity upheld the provisions of Section 80 (2) of the Act in the evaluation of the Applicant's tender on the requirement that the bidder ought to be a manufacturer/builder or their duly authorised agents. Further to the earlier finding by the Board on this issue, the Board further finds that the Tender Evaluation Committee determined that the Applicant was a duly authorized agent of the manufacturer and that is why it did not disqualify the Applicant's tender at any stage of the evaluation process. The Board therefore holds that the Procuring Entity's Tender Evaluation Committee evaluated the Applicant's tender in accordance with the evaluation criteria set out in the tender document. This ground of the Applicant's Request for Review therefore fails and is disallowed.

The Board wishes to clarify that this ground has been disallowed for the simple reason that the source of this dispute was not the Procuring Entity's tender evaluation committee which acted in accordance with the law but the

same arose from the actions of persons other than the tender evaluation committee which made the right recommendation.

## **ISSUE NO. II**

*Whether the refusal by the Procuring Entity to award the tender to the Applicant as per the recommendations of the Tender Evaluation Committee amounts to contravention of the provisions of Sections 84, 85 and 86 of the Act.*

The Board has noted elsewhere in this decision that the Procuring Entity's Tender Evaluation Committee recommended that the Procuring Entity award Tender Number KPA/118/2016-17/CCE - for the Supply and Commissioning of New Self Propelled Boom Man Lift to M/s Mantrad Enterprises Ltd, at their quoted price of USD 647,428 as contained in the form of tender, being the lowest evaluated bidder. The Board further notes that the Head of Procurement of the Procuring Entity in his professional opinion dated 8<sup>th</sup> June 2017 to the accounting officer of the Procuring Entity observed that:-

*"Pursuant to section 84 (1) of the Public Procurement and Asset Disposal Act, 2015, the Secretariat, having reviewed the evaluation report, is satisfied that the process has been done as per the provisions of the Public Procurement and Asset Disposal Act, 2015, and consequently recommends award of the tender to M/s Eazy Sales Pty at USD 732,340.91".*

The recommendation of the Head of Procurement arose from what the Head of Procurement termed as the Manufacturers Authorization to the Applicant not being valid and current as at the time of tender and that it was not relevant to this region. He asserted that the bidder ought to have been disqualified on those two grounds. The Head of Procurement of the Procuring Entity stated in his memo to the Accounting Officer that Mantrad Enterprises Ltd in their

tender submission attached a Manufacturer's Authorization issued by M/s JLG Industries to M/s General Navigation and Commerce Co. (GENAVCO) LLC of Dubai, UAE appointed as a sole distributor in the United Arab Emirates who in turn issued a dealer authorization to M/s Mantrad Enterprises Ltd. He went on to state that the Manufacturer's Authorization was valid from 1<sup>st</sup> April 2016 to 30<sup>th</sup> April 2017. He therefore termed the Authorization as not being valid and current as at the time of tender evaluation. The Head of Procurement went on to review the bid allegedly due to budgetary constraints by dropping the back-up spare and overseas training component of the tender and sought the direction of the Accounting Officer in the following words:-

- i. *Award Tender No. KPA/118/2016-17/IT - Supply and Commissioning of 1No. New Self-Propelled Boom Man lift to Eazy Sales and Service Pty at a bid price of USD 485,801.43 read United States Dollars Four Hundred Eight-Five Thousand Eight-Hundred and One Forty Three Cents) and a delivery of 12-15 Weeks*
- ii. *Direct as appropriate".*

The Board notes that pursuant to the recommendation of the Head of Procurement, the Procuring Entity in a letter dated 16<sup>th</sup> June 2017, awarded the subject tender to M/s Eazy Sales and Services Pty at a price of USD 485,801.43 a decision which has been challenged by the Applicant.

The issue which arises for determination by the Board is whether by declining to award the tender as recommended by the Tender Evaluation Committee the Procuring Entity acted contrary to provisions of Sections 84, 85 and 86 of the Public Procurement and Asset Disposal Act.

The Board has carefully considered the provisions of the law on the basis of which the Head of Procurement of the Procuring Entity gave his professional opinion in the subject procurement proceedings. Section 84 of the Public Procurement and Asset Disposal Act states as follows:

*Section 84 (1) "The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.*

- (2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.*
- (3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."*

Sections 85 and 86 of the said Act further provide as follows:

*Section 85 "Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers".*

*Section 86(1) "The successful tender shall be the one who meets any one of the following as specified in the tender document -*

- (a) *The tender with the lowest evaluated price;*
- (b) .....”.

The Board finds that the Act provides for the role of the Head of Procurement in the procurement process which is to review the tender evaluation committee’s report and provide a signed professional opinion to the accounting officer on the procurement process. The recommendation to the accounting officer is meant to guide him/her in making the decision to award the tender.

The Board notes that in this particular procurement, the Accounting Officer of the Procuring Entity made an award based on the recommendation contained in the professional opinion of the Head of Procurement.

The Board however finds and holds that the Accounting Officer of the Procuring Entity erred in making a decision to award the subject tender based on the recommendation of the Head of Procurement instead of the recommendation of the Tender Evaluation Committee. The Board finds that the decision of the accounting officer was unlawful and contrary to the provisions of Sections 85 and 86 (1) of the Act. If an error was discovered in the evaluation process as had been alleged by the Head of Procurement, the tender evaluation report ought to have been referred back to the evaluation committee for consideration and correction of the error if any.

The Board has however looked at the tender evaluation report prepared by the Procuring Entity’s Tender Evaluation Committee together with the professional opinion given to The Procuring Entity’s Accounting Officer by the Head of the Procuring Entity’s procurement department and finds that the recommendations in the two documents are contradictory in the sense that whereas the Procuring Entity’s Tender Evaluation Committee made a

recommendation of an award of the tender to the Applicant, the Head of Procurement of the Procuring Entity made a recommendation of the award of the tender to the firm of M/s Eazy Sales & Services (Pty) Limited.

The Board has weighed the two recommendations and finds that the recommendation by the Procuring Entity's Tender Evaluation Committee cannot be faulted. It is clear from the evaluation report that the Procuring Entity's Tender Evaluation Committee considered all the relevant factors before making the recommendation of award including the issue of whether the Applicant had provided a Manufacturers Authorization.

The Board further finds that the Tender Evaluation Committee thereafter undertook proper technical and financial evaluation of the tender. The Board has not seen anything improper in the tender evaluation report.

Unlike the tender evaluation report, the Board finds that the professional opinion given by the Head of the Procuring Entity's Procurement Department was not only based on the wrong premise but was influenced by extraneous factors.

One of the wrong premise in the said report was that the manufacturer's authorization provided by the Applicant was not valid and current at the time of tender evaluation because it was valid from 1<sup>st</sup> April, 2017 to 30<sup>th</sup> April, 2017. It was however common ground that this tender closed/opened on 18<sup>th</sup> April, 2016 which fell in between 1<sup>st</sup> April, 2017 and 30<sup>th</sup> April, 2017. The letter of authorization was therefore valid on the date when the Applicant submitted its tender. It would therefore not be reasonably expected that the Applicant would provide another manufacturer's authorization while the one submitted with the Applicant's tender was still valid.

The Board wishes to reiterate that a procuring entity is bound to rely on the documents submitted to it by the bidders at the closing date of the tender while evaluating the tenders submitted to it.

It is not therefore permissible for the procuring entity to rely on extrinsic evidence or documents while evaluating a tender. It is however clear from the documents presented before the Board and the professional opinion by the Head Procurement of the Procuring Entity that his opinion on the validity of the Applicant's manufacturer's authorization was influenced by the letter dated 2<sup>nd</sup> June, 2017 written by JLG Industries to the Procuring Entity endorsing the bid by M/s Eazy Sales Services Pty. The Board however wishes to observe that the reliance on the said document was unlawful since the letter was written after the tender the subject matter of this Request for Review had been evaluated and further because the letter was not contained in the Successful Bidder's tender document. It is also clear from the wording of the letter dated 2<sup>nd</sup> June, 2017 that it was written for the sole purpose of influencing the outcome of the tender in favour of M/s Eazy Sales and Services Pty.

It is finally clear from the letter dated 2<sup>nd</sup> June, 2017 and the professional opinion that the opinion and the eventual award were influenced by the input from strangers who had no role in the evaluation process. The Head of Procurement of the Procuring Entity stated that his opinion was influenced by the Procuring Entity's Secretariat which Counsel for the Procuring Entity stated was comprised of 40 people or thereabouts.

As the Board stated in the case of **AON Kenya Insurance Brokers Ltd -vs- The Teachers Service Commission (PPARB Appl. No. 8 of 2015)**, the process of evaluation of a tender is the sole function of the tender evaluation

committee. The Board was of a similar view in the case of **M/s Wamo Construction Company Ltd -vs- The District Tender Committee Ijara District (PPARB Appl. No. 18 of 2010)** where the Board held that it was unlawful for a body which was not lawfully constituted under the provisions of the procurement law to participate in proceedings touching on the evaluation of a tender or any process relating thereto.

Based on all the above findings, the Board therefore finds that the decision of the Procuring Entity's Accounting officer to award the subject tender to the successful bidder based on the recommendations of the Head of the Procuring Entity's procurement department was contrary to the law.

This ground of the Applicant's Request for Review therefore succeeds and is allowed.

The upshot of all the foregoing findings is that the Applicant's Request for Review succeeds and is allowed on the following terms:-

#### **FINAL ORDERS**

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders on this Request for Review.

- a) **The Request for Review in respect of Tender Number KPA/118/2016-17/CCE for Supply and Commissioning of 1 No. New Self Propelled Boom Man Lift for Kenya Ports Authority be and is hereby allowed.**
- b) **The decision of the Procuring Entity's Accounting Officer awarding the subject tender to M/s Eazy Sales and Services (Pty) Limited as**




contained in the letter of award dated 16<sup>th</sup> June, 2017 is hereby annulled and set aside.

- c) The Procuring Entity's Accounting Officer is hereby directed to award the subject tender to the firm of M/s Mantrad Enterprises Limited in line with the recommendations of the Tender Evaluation Committee and complete the entire procurement process herein including the signing of a contract with the said firm within fourteen (14) days from today's date.
- d) In view of the fact that both parties were partially successful in the Request for Review, each party shall bear its costs of this application.

Dated at Nairobi on this 18<sup>th</sup> day of July, 2017.

  
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**CHAIRMAN**  
**PPARB**

  
.....

**SECRETARY**  
**PPARB**

