

**SCHEDULE 1**  
**FORM 4**  
**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND**  
**APPEALS BOARD**

**APPLICATION NO.41/2005 OF 11<sup>TH</sup> NOVEMBER, 2005**

**BETWEEN**

**ENERGY SUPPORT GmbH.....APPLICANT**

**AND**

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

Appeal against the decision of the Tender Committee of Kenya Power & Lighting Company Limited, Procuring Entity dated 21<sup>st</sup> October, 2005 in the matter of Tender No. KPLC/PT/ET/07/05 for Supply of Dissolved Gas Analyser for Transformer Oil.

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. J. W. Wamaguru	-	Member
Mr. P.M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Kenneth Mwangi	-	Secretary

## **BOARD'S DECISION**

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

## **BACKGROUND**

This tender No.KPLC/PT/ET/07/05 for Supply of Dissolved Gas Analyser for transformer oil was advertised by the Procuring Entity on 25<sup>th</sup> January, 2005. Out of thirteen (13) bidders who bought tender documents, two bidders, Kelman Distributors Africa Ltd. and Davetronics Company Ltd. submitted their bids before 9<sup>th</sup> March, 2005, the closing/opening date. Davetronics Company Ltd. was disqualified at the opening for providing a bankers' cheque as its tender security. The Procuring Entity cancelled this tender as it felt that evaluating one bidder would compromise competition.

Consequently, the Procuring Entity advertised tender No. KPLC/PT/ET/12/05 on 18<sup>th</sup> April, 2005 with different specifications. Five bidders namely, M/s Energy Support GmbH, Kelman Africa (Durban), ABB LTD, Polyhard Trading Co. and Fabric & Supplies submitted their bids before 31<sup>st</sup> May, 2005, the closing/opening date. The tender opening was conducted immediately after closing in the presence of the tenderers' representatives. The prices quoted by the bidders were as follows:

	<b>Name of the Bidder</b>	<b>Financial Bid</b>
<b>1</b>	Energy Support GmbH	Euro 34,170.00
<b>2</b>	Kelman Distributors Africa Ltd	US Dollars 64,500.00
<b>3</b>	Fabrics & Supplies	US Dollars 100,920.00
<b>4</b>	Polyhard Trading Company	US Dollars 118,142.80
<b>5</b>	ABB Ltd	Euro 81,679.96+VAT

The tender document provided for a two stage evaluation process, namely technical evaluation followed by financial evaluation.

### **Technical Evaluation**

The technical evaluation was carried out by a committee of two engineers and was based on conformance to the technical specifications as contained in

Section G of the tender document. The Applicant had submitted two bids, Version 1 and Version 1A. The technical evaluation committee treated Version 1A as an alternative bid and therefore did not consider it. Version 1 was disqualified because the Applicant failed to quote for essential consumables as required. The bid submitted by Fabric & Supplies had lower level of detection of hydrogen (H<sub>2</sub>) gas (10ppm as compared to the KPLC requirement of  $\leq 5$ ). The test type certificate and accuracy/repeatability of test unit had not been provided. The two bidders were therefore disqualified at the technical evaluation stage leaving Kelman Distributors Africa Ltd, ABB Ltd and Polyhard Trading Company to proceed to financial evaluation. The results of the technical evaluation are as tabulated below:

**TECHNICAL EVALUATION FOR DISSOLVED GAS ANALYSER FOR TRANSFORMER OIL  
TENDER KPLC/PT/ET/12/05**

SPECIFICATION	ENERGY SUPPORT		PLYHARD TRADING CO.	ABB LTD	KELMAN DISTRIBUTORS AFRICA LTD	FABRIC & SUPPLIES
	VERSION 1	VERSION 1A				
Brand Name	Mobil GC	Mobil GC	TFGA - P200	TFGA - P200	Transport X	Clarus 500 GC
Country of Origin	Nuess Germany	Nuess Germany	Montreal, Quebec, Canada	Montreal, Quebec, Canada	UK	USA
Detection Limits	Conforms with KPLC requirements	Conforms with KPLC requirements	Conforms with KPLC requirements	Conforms with KPLC requirements	Conforms with KPLC requirements	Does not conform with KPLC specifications for Hydrogen
Service Conditions	The stated service conditions are within the required range	The stated service conditions are within the required range	The stated service conditions are within the required range	The stated service conditions are within the required range	The stated service conditions are within the required range	The stated service conditions are within the required range
Test Samples minimum quantity	Conforms as per the technical manual provided	Conforms as per the technical manual provided	Conforms to KPLC specs	Conforms to KPLC specs	Conforms to KPLC specs	Conforms to KPLC specs
Gas Extraction method	Conforms to the specifications	Conforms to the specifications	Conforms to the specifications	Conforms to the specifications	Conforms to the specifications	Conforms to the specifications
Buchholz Gas Analysis	Conforms to the specifications	Conforms to the specifications	Conforms to the specifications	Conforms to the specifications	Conforms to the specifications	Conforms to the specifications
Injection System	Conforms to the specifications	Conforms to the specifications	Conforms to the specifications	Conforms to the specifications	Not required	Conforms to the specifications
Gas Separation and Detection	Thermal Conductivity Detector (TCD)	Thermal Conductivity Detector (TCD), Flame Ionization Detector (FID) and Methanizer	Thermal Conductivity Detector (TCD)	Thermal Conductivity Detector (TCD)	Photo acoustic Spectroscopy	Thermal Conductivity Detector (TCD), Flame Ionization Detector (FID) and Methanizer
Repeatability/Accuracy	Conforms to KPLC Specs	Conforms to KPLC Specs	Conforms to KPLC Specs	Conforms to KPLC Specs	Conforms to KPLC Specs	Not provided

Consumables	Internal Carrier and burning. External carrier gas (nitrogen not included 2 litres at 200 bar)	Internal Carrier and burning. External carrier gas (nitrogen not included 2 litres at 200 bar)	Internal and External carrier gas	Internal and External carrier gas	No consumables required	Supplied with spares to last 2 years
Dimensions (mm/Kg)	380 x 280 x 460 12-15Kg	380 x 280 x 460 12-15Kg	150 x 360 x 410 13.2Kg	150 x 360 x 410 13.2Kg	170 x 340 x 460 10Kg	Not indicated
Power Supply	Available as an option	Available as an option	Conforms to the required specs	Conforms to the required specs	Standby not specified	Standby not specified
I/O ports	Provided	Provided	Provided	Provided	Provided	Not specified
Computer Software	Provided	Provided	Provided	Provided	Provided	Provided
Computer Calibration Certificate	Provided	Provided	Provided	Provided	Provided	Provided
ISO certification	Provided	Provided	Provided	Provided	Provided	Provided
Type test certificate for equipment	Provided	Provided	Provided	Provided	Provided but no standard quoted	Not Provided
Warranty	Guarantee of spares for 15 yrs	Guarantee of spares for 15 yrs	Guarantee of spares for 10 yrs	Guarantee of spares for 10 yrs	Guarantee of spares for 15 yrs	Guarantee of spares for 10 yrs
<b>Recommendation</b>	<b>Not Recommended</b> -Essential consumable not quoted for or supplied as required	<b>Not Recommended</b> - Alternate offer not considered as per tender	<b>Recommended</b>	<b>Recommended</b>	<b>Recommended</b>	<b>Not Recommended</b> - Detection limits for hydrogen >5 ppm - Accuracy/ Repeatability not specified - Type test certificates not provided

## **Commercial Evaluation**

The financial evaluation was carried out by Harun Karisa and Luke Kamariri who are Assistant Chief Accountant and Supplies Officer respectively. It was based on conformance to the tender requirements.

The results of the financial evaluation are as shown below:

**COMMERCIAL EVALUATION FOR TENDER KPLC/PT/ET/12/05**

NO.	DESCRIPTION	UNIT	KELMAN DISTRIBUTORS	ABB	PLYHARD
			Delivered US\$ (Excl VAT)	Delivered EUR (Excl VAT)	Delivered US\$ (Excl VAT)
1.	Dissolved Gas Analyser for Transformer Oil	1	58,000.00	54,637.25	61,500.00
	TOA New Single user Software Licence			6,965.98	
2.	Sets of spares for 2 years	Per set	1,500.00	5,781.97	28,580.00
3.	Cost of Factory inspection, induction and acceptance tests by two KPLC engineers	Per visit	5,000.00	11,714.56	6,767.24
	Laptop Computer + Docking station with keyboard and monitor			2,580.00	
	<b>TOTAL</b>		<b>64,500.00</b>	<b>81,679.76</b>	<b>96,847.24</b>
		Add 16% VAT	10,320.00	13,068.76	15,495.56
	Freight Charges to Mombasa/Nairobi (VAT Incl)		580.00		5,800.00
		TOTAL PRICE	75,400.00	94,748.52	118,142.80
			USD	EURO	USD
	Equivalent in Kshs VAT Inclusive	KSHS	5,584,878.00	8,584,216.06	8,750,837.08
				Optional EURO	
				5,508.63	
				On site training for 3 people	
	Ex Rate			A maximum six people can be trained simultaneously at an extra cost of	
	US\$ = Kshs74.07				
	Euro = Kshs 90.60				





The results of the evaluation committee were forwarded to the user department which compiled a report recommending the award of the tender to Kelman Distributors Africa Ltd.

In its meeting held on 5<sup>th</sup> October, 2005, the Central Tender Committee concurred with the recommendations of the evaluation committee and awarded the tender to Kelman Distributors Africa Ltd at its tender price of USD 75,400.00 which is equivalent to Ksh. 5,584,878.00. Letters of notification of award were written to both successful and unsuccessful bidders on 21<sup>st</sup> October, 2005.

### **THE APPEAL**

This appeal was lodged on 11<sup>th</sup> November, 2005 against the award of the Central Tender Committee of the Procuring Entity. The Applicant was represented by Ms E. Muigai Advocate while the Procuring Entity was represented by Mr. Mwaura Waihiga Advocate and C.N. Kihara Advocate. Kelman Distributors Africa Ltd, an interested candidate was represented by Mr. Asembo, Advocate.

The Applicant raised five grounds of appeal, which we deal with as follows:

#### **Grounds 1 and 2**

The two grounds have been merged as they both raise the same complaints regarding the evaluation of bids. These are complaints that the Procuring Entity breached Regulations 30(8) and 30(8)(b) by failing to award the tender to the Applicant whose tender was not only the lowest evaluated tender price but had also fully complied with the technical specifications stipulated in the tender documents.

The Applicant argued that it fully complied with Clauses 10.1 and 10.1(b) of Section C of the tender document and had indeed filled the Tender Form and Price Schedule indicating the unit price and the total price as required. Further, its bid of €34,170.00 which is equivalent to Kshs. 2.9 million at a rate of Kshs 86 per Euro is almost a half of Kshs. 5.5 million quoted by the successful bidder. In its letter dated 11<sup>th</sup> November, 2005 it informed the Procuring Entity that its price was inclusive of all consumables. This letter was a follow-up to its earlier letter dated 25<sup>th</sup> August, 2005 whose intention was misunderstood by the Procuring Entity.

On the technical specifications, the Applicant stated it provided a Gas Analyzer that met all requisite technical specification in respect to the measurement of seven gases specified in the tender document. This equipment was to be accompanied by a computer and a laptop. On the allegation that it was disqualified due to its failure to quote for nitrogen gas cylinders as required by Clause 3.6.1, the Applicant argued that it was not a tender requirement although it had offered to supply for 1200 hours which is sufficient to carry out 10,000 operating hours. It further contends that if the Procuring Entity was convinced that a supply of 1200 operating hours is not sufficient to carry out 10,000 operations then it would have sought a clarification for it and not for 1200 hours. For the Procuring Entity to select the equipment amongst the options that the Applicant offered it had to satisfy itself that the equipment had met all the technical specifications.

The Applicant further argued that its agent, Gama Delta Company Ltd, purchased tender document for tender No.KPLC/PT/ET/07/05 but it was verbally informed by the Procuring Entity that the tender had been cancelled. It also received an E-mail together with an attachment from the Procuring Entity, which it used to prepare its bid for tender No.KPLC/PT/ET/12/05. It provided a bid bond for this tender and submitted it on 27<sup>th</sup> May, 2005.

Referring to pages 25 of the further further response filed on 2<sup>nd</sup> December, 2005 and 336 and 337 of the main response filed on 18<sup>th</sup> November, 2005 of the Procuring Entity, the Applicant contends that the tender had two different tender numbers thus making its identification difficult.

Having accepted, evaluated and entered into correspondences with the Applicant, the Procuring Entity should not claim that the Applicant was not a candidate in the tendering process.

In response, the Procuring Entity stated that it advertised two different tenders both of which the Applicant did not participate. The first tender No. KPLC/PT/ET/07/05 was advertised on 25<sup>th</sup> January, 2005 and opened on 9<sup>th</sup> March, 2005 with only two bidders, Kelman Distributors Africa Ltd. and Davetronics Company Ltd. submitted their bids. Davetronics Company was disqualified for submitting a bankers cheque as tender security thus prompting the Procuring Entity to cancel the tender as it lacked competition.

Only the two bidders who submitted their bids were informed of the cancellation.

Consequently, it advertised tender No. KPLC/PT/ET/12/05 on 18<sup>th</sup> April, 2005 with some changes in the technical specifications. To enhance response, it identified three bidders, including the Applicant and informed them via e-mail about advertisement of the above tender. By the time of this advertisement, it was not aware of any link between the Applicant and its purported agent, Gamma Delta. The tenders were opened on 31<sup>st</sup> May, 2005 and the evaluation of the five bids submitted followed.

The Procuring Entity further pointed out that if the Applicant had purchased and submitted tender No. KPLC/PT/ET/07/05 its name would have appeared in the register of the bidders who purchased tender documents. Its name does not even appear both in the tender opening register or in the register of the bid bonds received which appears at page 19 and 22 of the further further response dated 2<sup>nd</sup> December, 2005.

It further contends that the Applicant's name does not appear in the list of bidders who purchased tender documents for tender No. KPLC/PT/ET/12/05. It was a tender requirement that bidders would obtain tender document upon payment of a non-refundable fee of Kshs 3,000.00. The Applicant did not purchase the tender document as per the notice advertised on 18<sup>th</sup> April, 2005. However, accepting and evaluating the Applicant's bid that had breached tender notice and Regulation 24(2) (b) was an oversight.

The Procuring Entity further argued that the bid submitted by the Applicant was based on tender No. KPLC/PT/ET/07/05 which had been canceled. The technical specifications of this tender are different from those of tender No. KPLC/PT/ET/12/05 particularly with respect to Clause 3.6 of Appendix 1.

Having quoted for the wrong tender, the Applicant provided consumables for 1200 hours which is equivalent to 600 operations whereas the requirement was for 10,000 operations. In conclusion, the Procuring Entity stated that awarding the tender to the Applicant would have forced it to engage in another procurement process to procure the consumables that were not to be provided by the Applicant. Further, the appeal is based on different tender, KPLC/PT/ET/07/05.

We have carefully considered the parties' arguments. We have noted that Procuring Entity floated two different tenders, tender No. KPLC/PT/ET/07/05 which was cancelled and tender No. KPLC/PT/ET/12/05. At the hearing, the Applicant conceded that its bid was based on an e-mail message dated 18<sup>th</sup> April, 2005 it received from the Procuring Entity.

We have perused the tender documents submitted to us by the Procuring Entity and noted that Clause 3.6.1 provides as follows:

*Any consumable required (e.g. filters, carrier gas e.t.c if any) for the operation of the analyzer should be stated. The quotation should also contain enough consumables to carry out a minimum of 10,000 operations.*

Further, Clause 3.6.3 provides as follows:

*An Analyzer that does not require any consumables for operation would have an added advantage.*

We have also noted that in its letter dated 25<sup>th</sup> August, 2005, the Applicant stated as follows:

*"...For gases, we shall supply for 1200 hours but you will hire the cylinders from the industrial gas suppliers in Nairobi as it is not possible to export cylinders..."*

In an attempt to clarify its letter of 25<sup>th</sup> August, 2005 the Applicant wrote to the Procuring Entity on 4<sup>th</sup> November, 2005 after the award stating as follows:

*'...Our letter meant that we shall meet all the costs of buying the consumable gases including the cylinders from Nairobi...'*

We have noted that the Applicant's brochure indicate a gas supply for 1200 hours whereas it had quoted for 80 hours in its bid contrary to a minimum of 10,000 operations required by the Procuring Entity.

In our view the Applicant failed to make adequate provision, as required under Clauses 3.6.1 and 3.6.3 of Appendix 1.

Taking the above matters into considerations, we do not agree with the Applicant that its tender was the lowest evaluated and that they met all the technical specifications. It is clear that the Applicant did not even qualify for financial evaluation.

Accordingly, these grounds of appeal fails.

### **Grounds 3 and 4**

These two grounds were withdrawn and therefore we will not comment on them.

### **Ground 5**

This is not a complaint but a statement of losses/damages that the Applicant is likely to suffer. In our view this was an open tender and there was no guarantee from the outset of the tendering process that the Applicant would win it. This is a competitive bidding and we do not consider that the Applicant can fairly claim, at this stage, that it would suffer financial loss and/or any other damages as these are considered to be normal commercial risks.

Finally, we wish to make the following observations:

1. The Applicant offered several options which were part of the tender requirement but did not clarify whether or not they are offered at cost. Therefore, it was difficult to establish the actual cost of each option offered.
2. The first tender No.KPLC/PT/ET/07/05, advertised on 25<sup>th</sup> January, 2005 was cancelled. The Applicant could not have been notified of the cancellation as they were not candidate having not submitted its bid. The Applicant's allegation that it was verbally informed by an official of the Procuring Entity not to submit its bid is in breach of Regulation 31(2).

3. Looking at the e-mail sent to the bidders, it is clear that the Procuring Entity was notifying the potential tenderers who deal with this kind of business that it had floated the tender and details were available in the local newspapers. This e-mail states as follows:

*“Kindly note that the above tender has been advertised in our local newspapers here in Kenya.*

*Best regards.*

*Eng. K.P. Mungai  
Senior Engineer, Transformer Workshop*

*Attachments:*

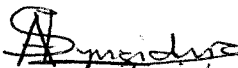
*Left-click the icon or file name to view an attachment”*

The argument by the Applicant that it did not purchase the tender in view of this notice has no basis as this letter is very clear in its terms. The Applicant ought to have been disqualified at the tender opening stage as it had not even purchased the tender document.

Having not purchased the tender document, the Applicant was wrongly evaluated by the Procuring Entity.

Taking into account all the above matters, the appeal fails and is hereby dismissed. Accordingly, the procurement process is ordered to proceed.

**Dated at Nairobi on this 13<sup>th</sup> day of December, 2005**

  
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f CHAIRMAN  
PPCRAB

  
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SECRETARY  
PPCRAB