

SCHEDULE 1
FORM 4
REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND
APPEALS BOARD

APPLICATION NO.33/2006 OF 11TH JULY, 2006

BETWEEN

SHIKA SHIKA SECURITY ALARMS LTD.....APPLICANT

AND

KENYA SUGAR RESEARCH FOUNDATION.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenya Sugar Research Foundation, Procuring Entity dated 21st June, 2006 in the matter of Tender No. KEREF/PQ/17/06-07 for Supply of Provision of Security Services.

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, Director, Public Procurement |

PRESENT BY INVITATION FOR APPLICATION NO.33/2006

| | | |
|-----------------------|---|--|
| Applicant | - | Shika Shika Security Alarms Ltd |
| Mr. Caleb J. O. Jaoko | - | Advocate |
| Mr. Sam Abishae Awiti | - | Managing Director |
| Mr. Nicholas Ayungo | - | Operations Manager |
| Mr. Wycliffe Oduor | - | Employee |

Procuring Entity - **Kenya Sugar Research Foundation**

Mr. George O. Mogaka

- Legal Officer

Mr. William O. Ochola

- Procurement Officer

Interested Candidates

Ms. M. A. Owuor

- Managing Director, Metro
Consultants & Guardian Ltd

Mr. L. O. Saoke

- Area Manager, Metro
Consultants & Guardian Ltd

Mr. Steven O. Owuor

- Training Manager, Metro
Consultants & Guardian Ltd

IN ATENDANCE

Mr. P. M. Wangai

- Secretariat

Mr. I. K. Kigen

- Secretariat

BOARD'S DECISION

Upon hearing the Applicant, Procuring Entity and the Interested Candidate therein and upon considering the information and documents before the Board, the Board decides as follows:

BACKGROUND

This pre-qualification tender NO: KESREF/17/2006-07 for Provision of Security Services for the year 2006/2007 was advertised by the Procuring Entity in a local daily newspaper on 13th March, 2006. The nine bidders who responded to the tender notice before 4th April, 2006, the closing/opening date were as follows:

1. Papton Services Company
2. Riley Falcon Security Ltd.
3. Metro Consultants & Guardian Ltd.
4. Robinson Security Guards Ltd.
5. Shika Shika Security Services
6. Delta Guards Ltd.
7. Harpcon Security Services
8. Inter Security
9. Bedrock Holdings

The documents were evaluated by the Procuring Entity and all the nine bidders were pre-qualified. They were therefore invited on 25th May, 2006 to participate in the subsequent tender. However, only six bidders submitted their bids before the closing/opening date, which was 2nd June, 2006. Tender opening was conducted immediately after closing in presence of bidders' representatives and the prices read out were as follows:

| Firm No. | NAME | ADDRESS | UNIT PRICE AS READ OUT | | | | | | REMARKS |
|----------|------------------------------------|----------------------------------|------------------------|---------------|------------|-----------------|--------------|-------------|----------------------|
| | | | GUARDS | DOG & HANDLER | SUPERVISOR | AUTOMATIC ALARM | MANUAL ALARM | | |
| 1 | Papaton Security Services Ltd | P. O. Box 3362-40100 Kisumu | - | - | - | - | - | - | The quote was varied |
| 2 | Riley Falcon Security Services Ltd | P. O. Box 1560 Kisumu | 11,600 | 25,000 | - | 5220 | 4640 | Radio alarm | |
| 3 | Metro consultants & Guardian Ltd | P. O. Box 2844 Kisumu | 9,860 | 25,520 | 13,920 | - | - | - | |
| 4 | Robinson Investment Ltd | P. O. Box 2341-40100, Kisumu | 10,000 | 20,000 | - | 4,500 | - | Radio alarm | |
| 5 | Shika Shika Security Alarms Ltd | P. O. Box 8986-00100, Nairobi | 10,450 | 21,000 | 13,000 | 201,500 | 66,792 | | |
| 6 | Delta Guards Ltd | P. O. Box 4095 Eldoret | 8,00 | 8,500 | 25,000 | 4800 | 4,500 | | |

Technical Evaluation

The technical evaluation was conducted by a committee chaired by Mr. S. Kamau and was based on the following criteria:

| CRITERIA/ CATEGORY | SUB | CRITERIA | REMARKS |
|---|---|---|---|
| ADMINISTRATIVE ARRANGEMENT FOR THE ASSIGNMENT | Relevant experience (Cost of current projects) | | This was to determine The Firm that has done works, which are similar in nature and value to the assignment for which KESREF intends to identify a firm. |
| CAPABILITY | TECHNICAL CAPABILITY | Competence & experience of key professional staff | This was to identify the Firm with qualified & experienced Technical supervision staff on the field of Security |
| | FINANCIAL CAPABILITY | Audited reports for the last 5 yrs | This was to identify The Firm that has a sound Financial base |
| LEGALITY | Renewed Certificates, Registrations & Licenses Letters of Introduction from Clients & testimonials | | This was to establish that the firm is operating with valid License from Communications Commission of Kenya & Local Authorities among other Regulatory bodies |
| INDEMNITY ARRANGEMENTS | Responsiveness to specifications | | This was to determine The Firm that has provided adequate insurance cover against third party liability & fidelity for their staff that may be assigned work at KESREF This also includes ability to quote for all the areas of assignment that the user had specified |
| RATING OF THE PROPOSED UNDERWRITERS | | | This is intended to assist the Management in deciding which bidder has spread the risk adequately & proposed reputable underwriters |

Bidders were ranked as follows:

| CRITERIA /CATEGORY | SUB | CRITERIA/ CATEGORY | SUB CATEGORY MAX POSSIBLE SCORE | F1 | F2 | F3 | F4 | F5 | F6 | CATEGOR Y MAX POSSIBLE SCORE | F1 | F2 | F3 | F4 | F5 | F6 |
|---|---|---|---------------------------------|----|----|----|----|----|----|------------------------------|----|----|----|----|----|----|
| ADMINISTRATI VE ARRANGEMENT FOR THE ASSIGNMENT CAPABILITY | Relevant experience (Cost of current projects) | | N/A | | | | | | | 5 | 2 | 5 | 5 | 3 | 5 | 4 |
| CAPABILITY | I) TECHNICAL CAPABILITY | Competence & experience of key professional staff | 5 | 0 | 3 | 3 | 2 | 2 | 4 | | | | | | | |
| | II.) FINANCIAL CAPABILITY | | 5 | 2 | 5 | 5 | 5 | 5 | 5 | 10 | 2 | 8 | 8 | 7 | 7 | 9 |
| LEGALITY | Renewed Certificates, Registrations & Licenses Letters of Introduction from Clients & testimonials References Rules & Regulations governing the project | | N/A | | | | | | | 10 | 3 | 9 | 10 | 8 | 7 | 8 |

The technical evaluation report was forwarded to a Special Tender Committee which conducted financial evaluation on 10th June, 2006. The results of the financial evaluation were as follows:

| S/NO | Description | Qty Required | 1 | | 2 | | 3 | | 4 | | 5 | | 6 | |
|------|---|--------------|-------|------------------|-------|------------------|-------|------------------|--------|------------------|-------|------------------|------|-------|
| | | | Unit | Total | Unit | Total | Unit | Total | Unit | Total | Unit | Total | Unit | Total |
| 1 | Guards | 21 | 11600 | 243600 | 9860 | 207060 | 10000 | 210000 | 10450 | 219450 | 8000 | 168000 | | |
| 2 | Supervisor | 3 | - | | 13920 | 55680* | 13000 | 52000* | 13000 | 52000* | 8500 | 34000* | | |
| 3 | Automatic remote controlled Security Alarm System | 3 | 5220 | 15660 | - | | 74500 | 223500 | 201500 | 201500 | 4800 | 14400 | | |
| 4 | Manually controlled Security Alarm system | 5 | 4640 | 23200 | - | | 4500 | 22500 | 66792 | 66792 | 4500 | 22500 | | |
| 5 | Dog & Handler | 2 | 25000 | 50000 | 25520 | 50500 | 20000 | 40000 | 21,000 | 42000 | 25000 | 50000 | | |
| | Total monthly without items 3,4 & 5 | | | 243,600 | | 248,820 | | 249,000 | | 258,450 | | 224,460 | | |
| | ANNUAL | | | 2,923,200 | | 2,985,840 | | 2,988,000 | | 3,101,400 | | 2,693,520 | | |

Note * These figures reveal errors of addition and should be 41,760, 39,000 and 25,500 as noted by the Board.

In its meeting held on 10th June, 2006, the Special Tender Committee of the Procuring Entity considered the technical evaluation report and awarded the tender to M/S Metro Consultants & Guardian Ltd at its tender price of Ksh 2,985,840.00 which was the third lowest. Letters of notification of award were written to both successful and unsuccessful bidders on 19th June, 2006.

THE APPEAL

This appeal was lodged by Shika Shika Security Services Limited on 11th July, 2006 against the award of the Tender Committee of the Procuring Entity. The Applicant was represented by Mr. Caleb O. J. Jaoko, Advocate while the Procuring Entity was represented by Mr. George O. Mogaka, Legal Officer. Metro Consultants & Guardian Ltd, an interested candidate was represented by Ms. M. A. Owuor, Managing Director.

The Applicant raised five grounds of appeal on the basis of which it requested the Board to make the following orders.

1. Prohibit the Procuring Entity from acting in breach of the Exchequer and Audit [Public Procurement] Regulations 2001 as amended by Legal Notice No. 161 of 2002 and the conditions stipulated in the Tender Documents cited herein above.
2. Require and compel the Procuring Entity to apply the evaluation criteria stipulated in the Tender Document and thereafter annul the part of the evaluations and award of the tender determined irregularly and unlawfully in beach of the regulations afore-cited and/or thereby award the tender to the Applicant or as found appropriate.
3. Review the Procuring Entity's decision and nullify the unlawful decision made irregularly and unlawfully in breach of the regulations aforecited and/or thereby award the tender to the Applicant.
4. Make any other incidental order direction or findings as may be found fair and just".

We deal with each of the grounds of appeal raised by the Applicant as follows: -

Ground One

This was a complaint that the Procuring Entity breached Regulations 13(1), (3), (4), 27 and 30(7) by admitting a bid which lacked tender security.

On breach of Regulation 13(1),(3) and (4), the Applicant argued that Regulation 13(1) stipulated the criteria that a candidate must comply with in order to qualify to participate in public procurement, and that Regulation 13(2) allowed the Procuring Entity to request documentary evidence from the candidates to satisfy itself that the candidates are qualified. It further argued that the Procuring Entity had set out its requirements in the tender document in accordance with Regulation 13(3). Among such requirements was a tender security which was set out under Clause 3.2(b). Failure by the successful bidder to comply with the tender requirements would have led to rejection of its tender in accordance with Clause 2.2 of Section A of the tender document.

On breach of Regulation 27, the Applicant alleged that by accepting the winning bid which was not accompanied with a tender security, the Procuring Entity breached both Regulations 27 and Clause 3.2(b) of Section A of the tender documents.

During the hearing, the Applicant submitted that it was represented at the tender opening on 2nd June, 2006 where the unit price and the bid bond were read out. The Applicant was the only bidder who had submitted a bid bond as required by Clause 3.2(b) of the tender document.

Prior to submitting its bid, the Applicant had contacted the Procuring Entity by telephone to establish the amount of the tender security to accompany the bid and it was informed by the Assistant Security Officer that tender security was a mandatory requirement. The Applicant was further advised that it could base the amount of its tender security on the amount it had quoted in the existing contract. Thereafter, it obtained a bid bond of Kshs 65,000.00 from Giro Commercial Bank Limited and attached it to its tender before submission. The conversation were not recorded in writing.

The Applicant also argued that though Regulation 27 was not worded in mandatory terms, the requirement for tender security became mandatory once it was stipulated in the tender document. It was therefore irregular for

the Procuring Entity to have accepted a bid which had not complied with this requirement.

In response, the Procuring Entity pointed out that although submission of tender security was a tender requirement, it was not part of the evaluation criteria set out under Clause 6.1 of the tender document. The Procuring Entity issued the tender document to bidders on 25th May, 2006 and bidders were required to submit them on or before 2nd June, 2006. This period was considered to be too short for the bidders to obtain tender security from their banks and therefore the requirement of Clause 3.2(b) was waived. Consequently, tender security was not considered at any stage of the evaluation process. The Procuring Entity further argued that Regulation 27 was discretionary and therefore it was upon the Procuring Entity to decide whether or not to require tender security from bidders.

The Board has read Regulation 27 and Clause 3.2(b) which provide as follows:

Regulation 27

“The Procuring Entity may include in the tender document a condition that tenders must be accompanied by a security in the form of a deposit or tender guarantee and the amount of such security shall be such as shall be sufficient to discourage irresponsible tenders and shall remain within the limits specified in the tender documents”.

Clause 3.2

“The tender submitted by the tenderers shall comprise the following:

- (a).....
- (b) Tender Security
- (c).....
- (d).....”

The Board has studied the tender documents, the evaluation report, the minutes of the tender committee that awarded the tender and considered the arguments of the parties. It is clear from Regulation 27, cited above, that if the Procuring Entity required the candidates to submit tender security, then they must do so. The Board further noted that the form of the security and

amount must be clearly specified in the tender document. These are important ingredients without which the tender security could not meet the core objective of discouraging irresponsible bidders. The Board further noted that Clause 3.2(b) required bidders to submit tender security but the form and amount of the security was not specified. It was therefore impossible for the bidders to ascertain the form and amount required for the tender security. Clause 3.2(b) therefore had insufficient information for any bidder to have complied.

With regard to the breach of Regulation 30(7), the Applicant submitted that had the Procuring Entity not breached the Regulations 13(1), (3), (4) and 27 and tender condition 3.2, then the tender would have been properly awarded. However, by the Procuring Entity breaching the other Regulations, it had consequently breached Regulation 30(7) as well.

On its part the Procuring Entity denied that it breached Regulation 30(7) stating that technical and financial evaluations were carried out in accordance with the Regulations as indicated in technical report and tender committee minutes.

Regulation 30(7) provides as follows:

“The Procuring Entity shall evaluate and compare tenders that have been held responsive in order to ascertain the successful bidder, as defined in sub-regulation (8), in accordance with the procedures and criteria set forth in the tender documents but no criteria shall be used that has not been set forth in the tender documents”.

The Board noted that the award was made to the lowest evaluated bidder who met the procedure and criteria already set out in the tender document. Since there were no breaches of the other Regulations, the award was made in accordance with Regulation 30(7).

Accordingly, this ground of appeal fails.

Ground Two

The Applicant alleged that the Procuring Entity irregularly and unfairly failed to evaluate its tender in its entirety in breach of Regulation 13(1), despite the tender being substantially compliant.

The Procuring Entity in response stated that it conducted technical and financial evaluations in a fair, transparent and non-discriminatory manner in accordance with the regulations, and the Applicant's score in both technical and financial evaluations was inadequate.

We have perused the evaluation report and noted that six out of nine bidders, who were pre-qualified, had submitted their bids as at the closing/opening date, 2nd June, 2006. The technical evaluation was conducted first and the Applicant was ranked fourth having scored 41 points. The technical evaluation was carried out based on the administrative arrangement for the assignment, legality, rating of the proposed underwriters and indemnity arrangements as provided for under clause 6.1 of Section A of the tender document.

The Tender Committee awarded the tender to the lowest evaluated bidder at its tender price of Kshs. 2, 985,840.

In view of the above the Board considers the Applicant's bid was properly evaluated along with other bids submitted for the provision of security services.

This ground of appeal therefore fails.

Ground Three

During the hearing, the Applicant abandoned this ground of appeal.

Ground Four

This was a complaint that the Procuring Entity breached Regulation 33(1) by failing to indicate the date of the notification letter which was communicated to it by facsimile on 21st June, 2006. The Applicant argued that the failure to indicate the date of the letter was mischievous and intended to deny it an opportunity to compute the 21 days appeal window period within which the

appeal must be lodged. It further argued that it was wrong for the Procuring Entity to claim that the date of the letter appeared beside the signature of a Mr. Okeyo since it could be construed to be part of his signature. However, the Applicant acted expeditiously and filed the appeal within time.

In response, the Procuring Entity denied that it breached Regulation 33(1) arguing that all notification letters were dispatched simultaneously to all bidders in accordance with Regulation 33(1). The Applicant's letter was sent by fax since the Applicant was based in Nairobi. On the issue of the date of the letter, the Procuring Entity claimed that the letter was signed on 19th June, 2006 which was the date of the letter.

We have carefully considered the parties' arguments and documents before the Board. We find that the Applicant's letter of notification of award was not properly dated. This letter was faxed to the Applicant on 21st June, 2006, and the Applicant filed the appeal on 11th July, 2006. This was twenty days after the date of notification by fax. Therefore, the Applicant did not suffer any prejudice.

Accordingly, this ground of appeal fails.

Ground Five

This was not a ground of appeal but prayers for the remedies and /or orders that the Applicant requested the Board to make.

Taking into account all the foregoing matters, we find no reason to interfere with the Procuring Entity's award. Consequently, we hereby dismiss the appeal and uphold the decision of the Procuring Entity.

Dated at Nairobi this 7th day August, 2006

CHAIRMAN..........SECRETARY.....

