

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 17/2006 OF 27th MARCH, 2006

BETWEEN

BRINKS SECURITY SERVICES LTD (APPLICANT)

AND

TELKOM KENYA LIMITED (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Telkom Kenya Limited dated the 9th day of March, 2006 in the matter of Tender No. TKL/C&S/22B/2005 for Provision of Security Services

BOARD MEMBERS PRESENT

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

BOARD'S DECISION

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

BACKGROUND

This tender was re-advertised on 22nd December, 2005 in the daily newspapers. It closed/opened on 19th January, 2006. Thirty-six bids were opened and the following were the quoted prices and bid bonds as at the opening:

BIDDERS NO.	BIDDERS NAME	PRICE in Kshs.	BID BOND AND PLACE OF ISSUE
1.	First Force Security services Ltd	14,732,160.00	385,862.00 Transnational Bank
2.	Davkos Security Services Ltd	2,094,000.00	125,640.00 East Building -Society
3.	Pada Private Investigations Ltd	1,686,610.00	20,000.00 Standard Chartered Bank
4.	Securex Agencies (K) Ltd	4,761,057.68	95,222.00 Giro Bank
5.	Factory Guards Ltd.	47,710,800.00	79,518.00 Standard Chartered Bank
6.	Riley Services Ltd.	6,197,880.00	1,487,491.00 Commercial Bank
7.	Lavington Security Guards Ltd	1,072,000.00	963,600.00 Co-operative Bank
8.	Modern Security Holding Ltd.	9,688,320	167,040.00 Giro Bank
9.	Tabura Security Agencies (K) Ltd	4,141,200.00	82,824.00 Kenya Commercial Bank
10.	Garey Vigilance Security Ltd.	13,946,448.00	217,929.00 K Rep Bank
11.	Total Security Services Ltd.	5,756,500	1,382,000.00 Standard Chartered Bank

12.	Cornerstone Security Services Ltd	21,228,000.00	424,560.00 Equity Bank
13.	Metro Consultant & Guardian Ltd	14,522,160.00	267,403.20 Co-operative Bank
14.	Lamu Security Guards	642,000.00	18,000.00 Equity Bank
15.	Securetta Security	272,000.00	No bid bond
16.	Red Mamba Agencies Ltd	9,288,000.00	92,880.00 NIC Bank
17.	Sunrise Security Services	5,903,450.00	National Bank
18.	Quick Star Security Services	464,000.00	111,360.00 Equity Bank
19.	Sentry & Patrols Ltd.	22,411,200.00	448,224.00 EABS
20.	Armor Group (K) Ltd.	6,466,868.00	129,338.00 Barclays Bank
21.	Dynasty Security Services Ltd.	2,528,220.00	50,564.40 NIC Bank
22.	Spur Security Services Ltd.	18,416,160.00	368,500.00 Middle East Bank
23.	Inter Security Services Ltd.	8,347,200.00	175,296.00 EABS Bank
24.	Wells Fargo Ltd.	2,269,940.00	45,398.80 NIC Bank
25.	Lumwa Security Services Ltd.	2,908,800.00	64,000.00 Consolidated Bank
26.	Cavalier Security	3,579,240.00	290,000.00 Co-operative Bank
27.	Hatari Security Services Ltd.	36,150,240.00	63,939.20 EABS
28.	Delta Guard Ltd.	404,260.00	97,022.00 Bank Draft Barclays Bank
29.	Brinks Security Services Ltd	3,086,551.20	740,772.29 Commercial Bank
30.	Riley Falcon Security Ltd.	7,836,960.00	156,739.20 Commercial Bank
31.	Pinkerton's Kenya Ltd	3,078,180.00	738,763.20

			Transnational Bank
32.	Gilly's Security Investigation Services	3,416,540.00	819,969.00 NIC Bank
33.	Patriotic Guards	968,600.00	19,372.00 Transnational Bank
34.	Protective Custody Ltd	3,995,040.00	80,000.00 Bank Draft African Bank Co-op
35.	Race Guards Ltd	3,572,240.00	642,480 +207,850 Barclays B/B and Bankers
36.	Parklands Security Services Ltd.	3,279,300.00	60,000.00 + 6000 Equity B/B and Banker's

EVALUATION

The bids were evaluated by a committee chaired by Mr. J. W. Mangondu. The first stage was to check for responsiveness to the mandatory requirements, which included: -

- (i) Schedule of compliance
- (ii) Tender security of 2% of the total annual bid price from a reputable bank or a banker's cheque, and valid for 120 days from the date tender was opened as per clause 7.1, 7.2 and 7.3 of the tender document
- (iii) Validity of tenders for 90 days from the date of opening as per clause 11.1
- (iv) Price quoted by the tender being fixed during the term of the contract and not subject to variation or any excesses

Bidders No. 1, 6, 10, 22, 28, 29, 30, 31 and 32 were disqualified for not submitting the Schedule of Compliance. Bidders No. 2,3, 4, 5, 8, 13, 14, 15, 16, 17, 18, 20, 21, 24, 26, 27, 33 and 36 were disqualified for either not submitting a bid bond or for submitting a bid bond that was not 2% of the total annual bid price.

The remaining nine (9) bidders qualified for technical evaluation. Ten (10) marks were awarded for instructions compliance, and 70 marks for the technical criteria and 20 marks for commercial rating in the three categories "A", "B" and "C".

The Central Tender Committee of Telkom Kenya Ltd in its meeting held on 9th March, 2006 approved the award of the Tender for Security Guarding Services to the bidders recommended by the Evaluation Committee. The combined total cost for the whole tender for Headquarter and Regions was Kshs. 66,779,408.00

THE APPEAL

This appeal was lodged on 27th March, 2006 by Brinks Security Ltd. The Applicant was represented by J.W. Kiarie, Advocate, Nduku Musumbi, J. Kibet, James Murage, Advocate and Joshua Maluti. The Procuring Entity was represented by J. K. Bosek, Advocate, Mary Mugo, P. Ndede, J. C. Cheptoo, F. K. Koske, Andrew Lusaka and George G. Muraa. The interested parties included C. N. Kihara, Advocate for Lumwa Security Services, Paul Nyamodi, Advocate for Total Security Limited, John Simon Muli representing Parklands Security, Kenneth M. Kugwa representing Sentry and Patrols Ltd, Njuguna C. M. Advocate for Lavington Security Guards Ltd, Race Guards Ltd, Protective Custody

Limited and Cornerstone Security Services Limited. Others were, Mose K. K. representing Lavington Security Guards Ltd, A. A. Kana of Protective Custody Ltd, Saum Abdallah of Riley Services Ltd, Paul Ndolo of Race Guards Ltd, Richard N. Kimithi of Pinkerton's (K) Ltd. Dorcas Kosgey and Bernard Okeyo both of Cornerstone Security Services Ltd, Mark Dinga of Inter Security Services Ltd, Oluoch Fredrick of Sunrise Security Services, Victoria Awiti and Walter Owino both of Gilly's Security Investigation Services and Paul K. Lelei of Tabura Security Agencies (K) Ltd.

At the commencement of the hearing, Counsel for the Procuring Entity raised a preliminary objection stating that the Applicant's bid was fatally non-responsive as a result of non-submission of the mandatory Schedule of Compliance.

However, Counsel subsequently conceded that determination of responsiveness is an essential part of preliminary examination of a tender, and therefore goes into the merits of the evaluation. As the evaluation represents the core of the appeal, the Board did not consider the purported objection as strictly constituting a preliminary objection, but rather as a response to a ground of appeal, which should be determined with the merits. Counsel for the Applicant conceded the Board's view.

The appeal is based on 13 grounds, which we deal with as follows: -

Grounds 1 and 4

These grounds were argued together and we deal with them as follows:

The Applicant alleges that the Procuring Entity acted in contravention of Regulation 4, which aims at promoting economy, efficiency, and ensuring that fair, transparent and non-discriminatory procedures are followed. It stated that the tender document was crafted in an ambiguous manner to accommodate unfair competition. The tender document required the bidders to set out a mandatory Schedule of Compliance. This meant that the Procuring Entity would allow tenderers to qualify by merely submitting the Schedule of Compliance. It was therefore crafted to sneak in tenderers who were not compliant, but because they submitted the Schedule of Compliance, they would qualify for evaluation. It submitted that it was the duty of the Procuring Entity to ascertain compliance, which should not be left to candidates.

The Applicant sought to demonstrate this ambiguity by using its ground of appeal No. 4, in which Lumwa Security Services and Protective Custody Ltd failed to meet the requirements of Clause 7.1 of the tender document, yet were awarded the contracts. It alleged that the two firms had not submitted the mandatory 2% bid bond of their annual bid price.

In response, the Procuring Entity stated that the Applicant's bid was unsustainable and fatally defective and that it was within its rights to have dismissed it at the initial stage. The Applicant's bid was not accompanied by the mandatory Schedule of Compliance. It averred that the tender document was standard, and that it did not have any ambiguities. Further, none of the candidates who participated in the tender, including the Applicant, sought any clarifications on the contents

of the tender document despite the provision in Clause 4.1 which permits bidders to seek clarification.

The Procuring Entity stated that the mandatory Schedule of Compliance was important, as it would ensure that the bidders understood the tender document and they were to comment on all subclauses. There were clauses in respect of which the bidders were to respond, while others were obligations of the Procuring Entity.

On the allegation that Lumwa Security Services and Protective Custody did not submit the required 2% bid bond of the annual bid price, the Procuring Entity demonstrated that the two firms provided in excess of the required 2%. Protective Custody Limited had an annual bid price of Kshs. 3, 995, 040 and submitted a bankers' Cheque worth Kshs. 80,000. 2% of its annual price was Kshs. 79,900.80. Lumwa Security Services on the other hand had an annual bid price of 2,908,800 and submitted a bid bond from Consolidated Bank valued at Kshs. 64,000. 00. 2% of its annual bid price was Kshs.58, 176.00

An interested candidate Sentry & Patrols Ltd, submitted that the tender requirements were ambiguous, and that the Schedule of Compliance did not add any value to the tender but merely wasted the bidders' time.

The Board has carefully considered the foregoing contentions. We note from a perusal of the tenders submitted, that the prices read out at the tender opening were the annual prices for some of the tenderers, but some tenderers quoted monthly prices in their tender forms. The two

firms indicated not to have provided a complete bid bond did submit sufficient bid bonds.

Therefore ground 4 fails.

On the issue of the tender document being ambiguous, the Board notes that the submissions made by the Procuring Entity were self-contradictory. Clause 1 of the tender document indicated, "tenderers shall provide a schedule of compliance by listing every subclause of all the notes on the **tender** with the words Fully compliant, Partially compliant, Upcoming or Future Compliant and Non Compliant as appropriate against each sub-clause." However, in Section D - General Conditions and Technical Specifications, it provides at the introduction of the Mandatory Schedule of Compliance, as follows " Tenderers shall provide a schedule of compliance by listing every subclause of all notes on the **technical specifications** with the words fully compliant, partially compliant, upcoming or future compliant and non compliant as appropriate against each sub-clause". (Emphasis added)

From the instructions, it did not make sense for the bidders to indicate compliance to all tender subclauses, as some were obligations of the Procuring Entity to effect. Further, the differences in the explanation by representatives of the Procuring Entity illustrated that the requirement was also not clear to them, considering that Section D required the Schedule to refer to the technical specification, whilst Section C Clause 1 required the Schedule to refer to all tender sub-clauses. The same would have been difficult for the tenderers to make sense of. In addition, the submission of the Schedule of Compliance was not

expressly stated in the tender document as one of the criterion that would be used for rejection of tenders at the stage of examination for responsiveness. Regulation 24 (2) (c) requires Procuring Entities to include in tender documents "forms of tender ...". The Procuring Entity did not provide a standard form based upon which bidders would have indicated compliance.

Accordingly, a bidder could indicate compliance in any manner desired. In our view, the Schedule of Compliance requested in the tender did not add any value to the substance of the tender. On the contrary, it enabled the Procuring Entity to disqualify bidders who may have complied with the tender requirements, and at the same time qualify bidders who may not have fully complied to the requirements. This is illustrated in the case of Tabura Security Services which the Procuring Entity qualified for stage two of evaluation despite its tender not being valid for the mandatory 90 days, and its tender security not having a validity period of 120 days. These were both mandatory requirements for responsiveness. Indeed, tender validity is more crucial to the tender, than a list of compliance and therefore the bid for Tabura should have been eliminated at the outset. Regulation 24 (2) and (c) reads as follows: "Without prejudice to the provisions of sub-regulation (1), the tender documents shall contain sufficient information to enable competition among the tenderers to take place on the basis of complete, neutral and objective terms and in particular, tender documents shall include_

- a)
- b)
- c) forms of tender and, where applicable, forms of tender security to be provided;"

The condition for the submission of the Schedule of Compliance was not in accordance with this Regulation.

Accordingly, ground of appeal No. 1 succeeds.

Ground 2

In this ground the Applicant alleged breach of Regulation 4 in that the Procuring Entity failed to ensure fairness by awarding four out of the six winning awards to firms where the directors and managers were from one ethnic group as that of the officer presiding over the tender, namely Mr. Koske. In its representation the Applicant alleged that the Procuring Entity's assertion that a Mr. Mangondu was the chairman of the tender opening and evaluation committee was false as at tender opening Mr. Koske introduced himself as the chairman.

The Procuring Entity in response submitted that the allegation was frivolous, vexatious and embarrassing. It asserted that there were no extraneous matters that were considered in evaluating the tenders as claimed by the Applicant. The said Mr. Koske was not a member of the Evaluation Committee and the Applicant's allegation amounted to defamation against its employee.

We note that the Applicant did not demonstrate that ethnicity was a criterion used for evaluation. In our view this unsubstantiated allegation was not only baseless but also made in bad taste.

This ground of appeal therefore fails.

Ground 3

The Applicant claims that Regulation 4 was further breached by the Procuring Entity as it failed to award it the tender in category B in Nairobi South, Nairobi North and Category C despite it having quoted lower tender prices than the winning firms Lavington Security Guards and Total Security. It submitted that it had met all the tender requirements.

The Procuring Entity responded that the Applicant's bid was disqualified at the initial stages of the evaluation for not submitting the Schedule of Compliance.

Interested candidates namely, Lavington Security, Protective Custody, Race Guards Limited and Cornerstone submitted that the Applicant was not complaining that it was the lowest evaluated bidder.

We note that the Applicant had not been qualified by the Procuring Entity from the initial stage and could therefore not have been awarded in the absence of an evaluation.

Accordingly this ground of appeal fails.

Ground 5

The Applicant claims that the Procuring Entity contravened Regulation 4 by failing to act fairly and in a non-discriminatory manner by awarding 50% of the tender to one firm, namely Race Guards Ltd. This amounted to an unfair distribution of business. It alleged that the firm was awarded a contract worth Kshs. 3 million per month, yet the Applicant

was shut out from participating despite it having met the tender requirements. Though the Applicant had not indicated that it was compliant it had submitted a table of contents that indicated where the required information could be found in its tender document. It was upon the Procuring Entity to verify the compliance or non-compliance of the bidders.

The Procuring Entity responded that Race Guards Ltd won the tenders competitively and it was not favoured.

We have examined the tender document and note that it did not specify or limit the number of stations or categories in the tender that a firm could bid for. Neither does the tender indicate that the award will be shared out equally. All candidates were to bid in the various categories that were offered, and there was no limitation whatsoever on the number of jobs one could be awarded.

Accordingly this ground of appeal fails.

Grounds 6, 9, 10, 11 and 12

In these grounds the Applicant alleged that the Procuring Entity flouted Regulation 4 by acting in a discriminatory manner by awarding the contract in category A to Lumwa Security Services Ltd, though the company did not have VHF/Radio Communication Equipment as it had no proof of frequency allocation. Further, that the Procuring Entity awarded Race Guards Ltd though the firm had not complied with the general conditions and specifications. The Applicant also alleged that the successful bidder did not have VHF/Radio Communication

Equipment, a current workforce of at least 800 guards, proof of the workforce by submission of the NSSF and NHIF contribution certificate, and did not own at least ten operational vehicles and a rapid response radio mounted on back up vehicles.

The Applicant was however unable to demonstrate its allegation by evidence. It had only been verbally informed by someone at the Communications Commission of Kenya that Lumwa Security Services did not have a licence and did not submit any documentary evidence on the same.

In response, the Procuring Entity stated that the requirements in Category A, B and C were not mandatory as implied by the Applicant. If a bidder lacked any of the requirements it would only score less but not be eliminated. The mandatory items in the tender were the Schedule of Compliance, the tender security, tender validity and having a fixed price. It stated that most of the allegations were speculative, baseless and unfounded. In addition, Race Guards Ltd had VHF/Radio Communication Equipment.

The Board has established that the General Conditions and Specifications in the tender stated as follows, "*the bidders shall be expected to meet the conditions for the various categories as indicated.*" In category B and C the introductory sentence reads, "*in addition to conditions listed in Category "A"/"B" they must meet the following conditions.*" These conditions are worded in mandatory language and the Procuring Entity's assertion that the conditions were not mandatory are negated by the language used.

We have examined the tender document of Lumwa Security Services Ltd and established that in their Schedule of Compliance, item 9 for VHF/Radio Communication it had indicated that it was "upcoming". There is no other document to prove it had been allocated Radio frequency. However, Race Guards Ltd qualified for award in Category A and B but not C which required a rapid response radio. Its tender document showed that it had VHF/ Radio communication equipment contrary to the allegation of the Applicant. It however submitted that it did not have a workforce of at least 800 guards.

The Board noted that the Procuring Entity made submission of the Schedule of Compliance to be a mandatory item. However, the technical specifications that would ensure responsiveness of the bidders were, according to them, not mandatory. In our view, the value placed on the Schedule of Compliance was so high as to eliminate some bidders who had actually complied with the technical conditions, whilst qualifying some who had supplied the Schedule of Compliance but had not fully complied with the technical conditions.

In view of the foregoing these grounds of appeal succeed.

Ground 7

The Applicant alleged breach of Regulation 30(1) and (5) and Clause 17.1 of the tender document by not seeking clarification from it during tender evaluation.

The Procuring Entity in response stated that there was nothing that warranted clarification from the Applicant. In addition, the Applicant had been disqualified in the initial stages of the evaluation and the Procuring Entity therefore had no issues that needed clarification.

The Board notes that the Procuring Entity may ask for clarification of tenders as per Regulation 30 (1) so as to assist it in the tender examination and evaluation. It is discretionary for the Procuring Entity to seek clarification. This limb of the argument, therefore, fails.

With regard to Regulation 30 (5), the Procuring Entity is granted discretion to regard a tender as being responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the tender documents. The Applicant was disqualified as a result of being non responsive in a mandatory condition of the tender.

Though the Schedule of Compliance was mandatory, it should have been considered to be a minor deviation, as it did not change the substance of the tender. The Procuring Entity did not provide a format that was to be used to fulfill this mandatory requirement. Mandatory requirements should only be items that touch on the qualification and responsiveness of the bidders. On this limb, the ground succeeds.

Ground 8

On this ground, the Applicant claimed that Regulation 4 was further contravened by the Procuring Entity failing to award it the tender despite it being its immediate past contractor. Instead, the Procuring

Entity awarded Cornerstone Security Ltd whose past contract was revoked for failure to perform.

In response, the Procuring Entity submitted that past performance was not a condition or requirement of the tender. It was not obligated to consider an extraneous matter.

The Board has carefully considered this contention and confirmed from the tender documents that past performance was not a condition of the tender. Further the evaluation criteria as contained in the tender document was followed as illustrated in the evaluation report submitted to the Board. The Applicant has also not provided evidence that Cornerstone Security Services Ltd had not qualified for the award of the current tender under appeal.

Accordingly this ground of appeal fails.

Ground 13

The Applicant submitted that it would suffer loss of business and profits worth Kshs. 1,800,000.00. It further requested the Board to annul the award of the tender, order a retender and in addition declare the tender document ambiguous and void.

In response, the Procuring Entity stated that the ground was alien to it.

An interested candidate, Lumwa Security Services Ltd argued that the Procuring Entity had not done anything that warranted its decision being declared illegal. The Applicant could only seek for certain clauses

to be termed illegal, and not the entire tender document. Further, it argued that the Board had no powers to declare a tender document ambiguous or void.

On the issue of loss, we note that any tendering process is a business risk. In competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. Consequently, it cannot claim loss of business and profits as a result of the tender being awarded to another bidder.

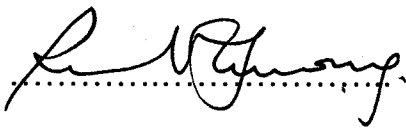
In conclusion the Board finds the mandatory requirement for submission of a Schedule of Compliance as an unfair way of eliminating bidders, considering that the tender document did not identify it as being a criteria for responsiveness failure to submit of which would lead to elimination. Further, this Schedule had no standard format. The Procuring Entity should have verified the bidders responsiveness instead of relying on the bidders self-evaluation. The Board notes that nine bidders were instantly locked out of the competition, without further examination, for failing to submit the Schedule of Compliance sheet, which was in effect a self-evaluation statement. This was inappropriate.

In view of the foregoing, the appeal succeeds and the Board hereby annuls the awards made. Further, the Board orders a re-evaluation of all the bids including the bids of the nine bidders who were eliminated for lack of the Schedule of Compliance. The Procuring Entity is also hereby

ordered to re-award this tender within a period of forty five days from the date of this decision.

In view of our orders herein, the Procuring Entity is required to extend the current security contracts for a period not exceeding sixty days so as to ensure continued security during the re-evaluation and award period. The bidders should further be requested to extend their tender validity as necessary.

Dated at Nairobi on this 26th day of April, 2006



Signed Chairman



Signed Secretary

