

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW**

**BOARD**

**APPLICATION NO.38/2007 OF 27<sup>TH</sup> JUNE, 2007**

**BETWEEN**

**CORNERSTONE SERVICES LTD.....APPLICANT**

**AND**

**KENYA PIPELINE COMPANY LTD.....PROCURING ENTITY**

**Appeal against the decision of the Tender Committee of the Kenya Pipeline Company Ltd dated 11<sup>th</sup> June, 2007 in the matter of tender NO.SU/QT/189N/07 for Provision of Security Services.**

**BOARD MEMBERS PRESENT**

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

**IN ATTENDANCE**

Mr. C.R. Amoth	-	Holding Brief for Secretary
Mr. K.K. Kigen	-	Secretariat

**PRESENT BY INVITATION FOR APPLICATION NO.38/2007**

**Applicant, Cornerstone Services Ltd**

Mr. Njuguna Charles - Advocate  
Mr. K. Kiplagat - Lawyer  
Mr. Bernard Okeyo - Marketing Manager

**Procuring Entity, Kenya Pipeline Company Ltd**

Ms. Gloria Khafafa - Advocate  
Mr. M. Otieno - Advocate  
Mr. Mwaniki Gachuba - Supplies Officer  
Ms. Maureen Waithira - Procurement Officer  
Mr. Kiptui M. - Company Secretary

**Interested Candidates**

Mr. Ondego - Administration Manager, Radar Security Services  
Mr. Benjamin Njau - Finance, Radar Security Services  
Mr. Kibet Josphat - General Manager, Brinks Security  
Mr. Kaniara - Director, Kenya Shield

**BOARD'S DECISION**

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

**BACKGROUND**

The advertised tender was for the provision of security services for the year 2007/2008 and 2008/2009. The tender was advertised on 28<sup>th</sup> March, 2007 from competent and eligible security firms through open tendering. It opened/closed on 19<sup>th</sup> April, 2007 after attracting Twenty seven (27 No.) firms. Out of the Twenty seven (27 No.) only Twenty two (22 No.) responded and two (2 No.) were disqualified for failing to meet the minimum mandatory requirements as stipulated in the tender document.

They were:-

- (a) Wima Security Guards who was non responsive
- (b) Private Eye Security (K) Ltd who had no tender security

**Technical Evaluation:**

The Evaluation Committee came up with the evaluation criteria and points to be awarded for each criterion. It set out 70% marks as a minimum technical score for a tenderer to proceed to the financial stage.

The mandatory documents required to be submitted by the bidders were as follows:-

- a) Certificate of incorporation
- b) Tax compliance certificate
- c) Valid trade license
- d) Bid security
- e) Audited financial statement for the last two years
- f) List of office and service equipment
- g) At least 5 reference letters of contracts held over the last 3 years indicating value of each contract
- h) Valid CCK radio frequency licenses

**Site Visit**

The Committee visited tenderers premises whose tenders were substantially responsive to verify the following:-

- a) Original letters of award/contract against client references provided
- b) Operational office
- c) Office equipment
- d) Motor vehicles/cycles
- e) Guards and staff
- f) Trained dogs/vaccination certificates

Thereafter, the Committee evaluated the tenderers on the basis of their responsiveness to the requirements set out in the tender document. The analysis involved scrutiny of the submitted tender documents and the

awarding of scores were based on the marks for each item as per the score sheet.

The detailed evaluation was done in two phases. Phase I entailed individual tender document examination and phase II involved due diligence exercise to ascertain/determine the firms capability to offer services in the various sectors.

The technical evaluation results for the firms were ranked as follows:-

<b>Rank</b>	<b>Company</b>	<b>% Score</b>
1	G4S	98
2	Lavington Security	98
3	Total Security	94
4	Factory Guards	90
5	B.M. Security	84
6	Cornerstone Security	82
7	Riley Services Security	82
8	Gillys Security Services	82
9	Brinks Security	80
10	Kenya Shield Security Services	76
11	Riley Falcon Security services	76
12	Radar Security Services	76
13	Witeros Security Services	73
14	Metro Consultants	73
15	Sunrise Security Services	68
16	Delta Guards	66
17	Spur Security Services	62
18	Race Guards Security	61
19	Shika Shika Security	60
20	Calverier Security	56

The firms that did not meet the minimum technical score of 70% were disqualified at that stage. These were the following:-

No.	Firm	Technical Score (% Marks)
1	Sunrise Security	68
2	Race Guards	61
3	Delta Guards	61
4	Cavalier Security	59
5	Shika Shika Security	57
6	Spur Security	55

**Financial Evaluation:**

The financial bids were opened on 17<sup>th</sup> May, 2007 in the presence of the bidding firms and the Procuring Entities Officials. The 14 firms that pre-qualified at the technical evaluation stage submitted their financial proposals. Out of the fourteen, only one firm (M/s Bob morgan) was found to be non-responsive for failure to indicate the sector in which it was bidding for.

After financial evaluation the firms were ranked as follows for each sector:-

The table below shows the quoted financial analysis for each sector by the pre-qualified 13 firms.

Sector	Firms	Guards		Supervisor		Dog Handler	Vehicle		Total	Ranking
		No. of Guards	Rate per Guard (Kshs)	No. of Supervisors	Rate per Supervisor (Kshs)		No. of Vehicles	Rate per Vehicle (Kshs)		
One	Cornerston	26	11,020.00			22,040.00			308,560.00	1
	Radar	26	16,240.00			31,320.00			453,560.00	2
Two	Total	103	10,150.00	2	17,400.00		2	87,000.00	1,254,250.00	2
	Gillys	103	9,164.00	2	11,600.00		2	59,160.00	1,085,412.00	1
Three	Brinks Security Services	86	14,442.00	3	18,850.00		3	110,780.00	1,630,902.00	1
Four	Metro Consultants	50	11,600.00						580,000.00	1
	Riley Services	50	17,400.00						870,000.00	2
	G4S Security Services	50	20,300.00						1,015,000.00	3
Five	Security Group	96	17,980.00	3	18,560.00		3	324,748.60	2,756,005.80	3
	White Rose Security Systems	96	10,440.00	3	12,180.00		3	34,800.00	1,143,180.00	1
Six	Lavington Security	96	13,000.00	3	15,000.00		3	90,000.00	1,563,000.00	2
	Kenya Shield	96	12,760.00	3	19,720.00		3	654,240.00	3,246,840.00	4
Seven	No Bidders									
	Riley Falcon	62	15,080.00	2	19,720.00		2	243,600.00	1,461,600.00	1

Prices inclusive of VAT and rates per month.

The evaluation committee also made the following observations:-

Sector	Firm	Total	Remarks
<b>One</b>	Cornerstone Security	308,560.00	Cornerstone were contracted for Line 1- KM 405 when the line was punctured on 21 <sup>st</sup> August, 2006 and their contract was terminated.  M/s Cornerstone Security also quoted for an Ad-hoc guard at Kshs.580.00
	Radar Security	453,560.00	-
<b>Two</b>	Total Security	1,254,250.00	M/s Gillys were recommended for offices and residential installations only and NOT for ROW by the Technical Committee.  M/s Total Security quoted Kshs.986.00 and M/s Gillys Security quoted Kshs.1,392.00 for Ad-hoc guard.
	Gillys Security	1,085,412.00	
<b>Three</b>	Brinks Security	1,630,902.00	M/s Brinks also quoted Kshs.522.00 for Ad-hoc guard.
<b>Four</b>	Metro Consultants	580,000.00	-
	Riley Services	870,000.00	M/s Riley Services also quoted Kshs.5,336.00 for residential alarms.
	G4S Security Services	1,015,000.00	M/s G4S Security also quoted Kshs.5,568.00 for residential alarms and Kshs.6,728.00 for security alarms linked to Police.
<b>Five</b>	Security Group	2,756,005.80	-
	Witerose Security System	1,143,180.00	-
	Lavington Security	1,563,000.00	M/s Lavington Security also quoted Kshs.450.00 for Ad-hoc guard, Kshs.5,500.00 for residential alarms and Kshs.5,500.00 for security alarms linked to the Police.
	Kenya Shield	3,246,840.00	M/s Kenya Shield also quoted Kshs.928.00 for Ad-hoc guard.
<b>Six</b>	No Bidder		There was no bidder for this sector.
<b>Seven</b>	Riley Falcon	1,461,600.00	M/s Riley Falcon also quoted Kshs.696.00 for Ad-hoc guard, Kshs.5,220.00 for residential security alarms and Kshs.5,800.00 for security alarms linked to the Police.

Awards were made in respect of sectors 2, 3, 4, 5 and 7. There was no bidder for sector 6. As regards sector 1, it was noted that the previous

contract for Cornerstone Security was terminated as a result of puncturing of line 1 – KM405 which was under the watch of that company.

### **THE APPEAL**

The Applicant filed the Appeal on 27<sup>th</sup> June, 2007 against the process of tender No.SU/QT/189N/07 for Provision of Security services. On 11<sup>th</sup> July, 2007, the Applicant filed a supplementary ground for review. The Applicant was represented by Charles Njuguna, Advocate, together with Bernard Okeyo Marketing Manager. The Procuring Entity was represented by Gloria Khafafa, Advocate, and M. Otieno Advocate, Mwaniki Gachuba, Supplies Officer, Maureen Waithera Procurement Officer, M. Kiptui Company Secretary. Interested candidates were represented by; Ondego & Benjamin Njau for Radar, Josphat Kibet for Brinks Security and Kaniara for Kenya Shield.

At the hearing, the Applicant withdrew grounds 2, 3, 7 and 8 of the Memorandum of Appeal. Therefore, the Board shall deal with grounds 1, 4, 5 and 6 and the supplementary ground filed on 11<sup>th</sup> July, 2007.

Before arguing the grounds of Appeal, the Applicant gave a brief background to the Appeal and highlighted two issues.

Firstly, the Applicant argued that there was a letter advising it that the award had not been made, which was dated 21<sup>st</sup> June, 2007 but received on 2<sup>nd</sup> July, 2007. The letter was dispatched by post on 28<sup>th</sup> June, 2007 as evidenced by the post mark on the envelope.

Secondly, it submitted that the Procuring Entity wrote to the Director General of the Public Procurement Oversight Authority on 25<sup>th</sup> May, 2007. The letter stated that the Applicant was the lowest evaluated bidder. However, the decision of the Tender Committee was vetoed by the Management of the Procuring Entity as evidenced by the letter to the Director General. The said letter showed that there was no dispute that the Applicant had passed the Technical Evaluation stage, and was thereafter invited for financial bid opening.



## **Ground 1 – Breach of Section 66(2) of the Public Procurement and Disposal Act.**

The Applicant submitted that the decision by the Management to veto the award was in breach of Section 66. The veto was on the basis of past performance by the Applicant. However, this was not a criteria set out in the tender document. The Applicant argued that clause 2.24.3(b) of the tender documents provided that past performance of the firms that were currently providing security services to the Procuring Entity would be considered. However, the Applicant was not providing security services at the time of tender. Further, the criteria was applied after the technical and financial evaluation upon noticing that the Applicant was declared to be the lowest evaluated bidder.

The Applicant further argued that in any event the said criteria on past performance was not objective and quantifiable. Therefore this criteria is against the Regulations. Finally, the Applicant argued that Regulation 52 of the 2006 Regulations deals with qualifications as set out in section 31(1) of the Public Procurement and Disposal Act 2005. Under section 31(1), past performance is not one of the criteria to be considered.

In response, the Procuring Entity stated that after technical and financial evaluation, the Applicant was found to be the lowest evaluated. However, the tender committee upon examining the issue of past performance pursuant to section 2.24 . 3(b) made recommendations to the management to seek guidance from the Director General, Public Procurement Oversight Authority (PPOA). Guidance was sought on the ground that the past performance of the Applicant was poor and had resulted in the Procuring Entity incurring a loss of Kshs. 26,500,000 in a previous contract involving the Applicant, which was subsequently terminated. Secondly, the Procuring Entity sought guidance from the Director General PPOA because of the large price difference of Kshs. 155,000.00 per month between the Applicant's price and that of Radar Security Services. The Procuring Entity stated that since it had not received communication from the Director General it had not yet concluded the award of the tender for zone 1.

The Procuring Entity further stated that in any event, past performance was a criteria set out in clause 2.24.3(b) of the tender document and could be applied at any time prior to the conclusion of the tender process.

The Procuring Entity further argued that the tender committee minutes were clear on the issue of the award in regard to zone 1 and that the letter of 25<sup>th</sup> June, 2007 by the Managing Director of the Procuring Entity to the Director General, PPOA did not amount to a veto of the Committee's decision as argued by the Applicant. It stated that the appeal was premature and that the tender validity was to expire on the 19<sup>th</sup> July, 2007 and the Procuring Entity would have made the award by that date were it not for the pending appeal.

Finally, the Procuring Entity stated that under Regulation 52 it was entitled to confirm qualifications in accordance with section 31(1) of the Act. Past performance was a criteria to confirm capability in accordance with section 31(1). Further, the Applicant breached Section 41 of the Act by stating in their tender document that it had an ongoing contract yet that contract had been terminated. This amounted to a misrepresentation.

The Board has carefully examined the representations of both parties and has scrutinized the evaluation reports and tender committee minutes dated 11<sup>th</sup> June, 2007. The Board has noted that the Tender Committee did not award the tender in respect of zone 1. It deferred the item pending guidance from Director General (PPOA). The Board further noted that bidders were required to bid for only one zone out of the seven zone. Therefore, the Procuring Entity could award each zone separately. A decision had not been made in respect of zone 1 as confirmed by the tender committee minutes. The Board has relied on the signed tender committee minutes, as against the letter of the Director General to the PPOA, with regard to the resolutions of the tender committee. As the tender validity was to expire on 19<sup>th</sup> July, 2007, the Procuring Entity could have made a decision within that period. Since no decision has been made, however, the Appeal by the Applicant is speculative and premature.

Accordingly, this ground of Appeal fails.

**Ground No. 4. – Breach of Section 66(4) of Public Procurement and Disposal Act.**

The Applicant submitted that the Procuring Entity failed to award the contract in zone 1 to it despite the fact that it was the lowest evaluated bidder. It stated that the Procuring Entity had awarded contracts in respect of sectors 2-5 and 7 which were in the same tender. Their evaluation and presentation to the Tender Committee was concurrent, hence the decision

to award should have been made for all sectors as per the recommendations of the evaluation committee. Further, the service contract was to commence on 1<sup>st</sup> July, 2007 for all the sectors advertised in the tender. The Applicant argued that section 66(4) was mandatory and there was no discretion on the Procuring Entity not to award the tender after it had determined who was the lowest evaluated tenderer. By failing to make an award for sector 1 the Procuring Entity breached Section 66(4).

In response, the Procuring Entity stated that it had not breached Section 66(4) of the Act in that the tender process was still ongoing and no award had been made. It stated that the evaluation had been completed as required by law within 30 days, and the report presented to the Tender Committee. The Tender Committee in its deliberations on 11<sup>th</sup> June, 2007 deferred the decision for sector 1 and requested the Management to seek guidance from Director General PPOA.. This was on the ground that though the Applicant was the lowest evaluated, it had a poor past performance record that led to loss of Kshs.26.5 million under their watch. It further stated that this appeal was premature as no decision had been made by the Tender Committee in this regard. It therefore denied breach of section 66(4).

The Board having found in the preceding ground that this appeal is premature, this ground cannot be sustained.

Accordingly, this ground also fails.

**Ground No. 5 & 6 together with supplementary grounds for review – viz breach of Sections 39, 66(2) and 67 (2)**

The Applicant argued that the evaluation committee had recommended award of the tender in respect of sector 1 to the Applicant. The Procuring Entity awarded 5 sectors leaving out sector 1. It stated that Regulation 10(2) (b) (c) sets out the functions of the tender committee which include approval of the successful tenderer. The Regulations do not give the management a veto power and no such power was provided for in the tender document. Therefore, the decision not to award was discriminatory and contrary to section 39. Further, it was a requirement that evaluation had to be done within 30 days from the date of tender opening. The Applicant had not received any communication in accordance with section 67(2) though notification in respect of the other sectors had already been done. The decision not to award the contract simultaneously with the other sectors in

the tender was made in bad faith and was aimed at disqualifying the Applicant. Therefore, the Procuring Entity breached sections 39, 66(2) and 67 (2).

In response, the Procuring Entity submitted that each zone was separate and could be awarded separately at different sittings. It reiterated its submissions made in the previous grounds. Further, it argued that the Applicant had breached section 38 of the Act by writing letters which were meant to influence the outcome of the tender. It stated that on this ground alone, the Applicant ought to be disqualified from the tender process.

The Board, as already observed, has noted that no decision has been made in respect of section 1. Since awards could be made for each sector independently, the allegation of discrimination contrary to section 39 has no merit. Further, there can be no breach of section 66(2) and 67(2) as argued by the Applicant in the absence of an award in respect of sector 1. The Applicant ought to have waited for a decision to enable it challenge the action of the Procuring Entity.

Accordingly, these grounds also fail.

The Board has noted that the letter dated 20<sup>th</sup> June, 2007 by the Applicant to Procuring Entity was merely enquiring on the status of the award in respect of sector 1 whereas communication had been sent to other bidders on 15<sup>th</sup> June, 2007. There is nothing in the said letter which can be deemed to be inappropriate influence on the evaluation of the tender. The allegation by the Procuring Entity that the Applicant breached section 38 of the Act therefore has no merit.

Taking all the above matters into consideration, the Appeal is hereby dismissed and the procurement may proceed.

**DATED at NAIROBI this 19<sup>th</sup> Day of July, 2007**

SIGNED .....  
CHAIRMAN

.....  
SECRETARY