

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.39/2007 OF 27TH JUNE, 2007

BETWEEN

SUNRISE SECURITY SERVICES LTD.....APPLICANT

AND

MINISTRY OF FINANCE..... PROCURING ENTITY

Appeal against the decision of the Tender Committee of Ministry of Finance, Procuring Entity dated 14th June, 2007 in the matter of Tender No.MOF/3/2006-2007 for 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

IN ATTENDANCE

Mr. C. R. Amoth - Holding Brief for Secretary
Mr. P. M. Wangai - Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.39/2007

Applicant, Sunrise Security Services Ltd

Mr. Crispin Odhiambo - Advocate, Mohammed & Muigai
Advocates
Ms. Caroline Ndindi - Legal Officer
Mr. Simon Mbosha - General Manager

Procuring Entity, Ministry of Finance

Mr. N. M. Mghendi - Principal Procurement Officer
Mr. Godfrey Busolo - Assistant Secretary

Interested Candidates

Ms. C. W. Ondego - Administration Manager, Radar
Ltd
Mr. Kennedy Mose - Operations Manager, Lavington
Security Ltd
Mr. Benard Okeyo - Marketing Manager, Cornestone
Security
Mr. Jackson Ogembo - Manager, Hatari Security Services
Ltd
Mr. Josphat Kibet - General Manager, Brinks Security
Services Ltd

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

This tender was advertised by the Procuring Entity on 21st February, 2007. It was closed/opened on 15th March, 2007 in the presence of the bidders' representatives. Out of 17 bidders who bought tender documents, 12 bidders returned their bids before the closing/opening date of the tender.

Technical Evaluation

This was carried out in two main stages and the results were as tabulated below:

Stage 1: Fulfillment of the minimum requirements

This involved determination of responsiveness of the tenders to some tender conditions, which were considered by the evaluation committee as minimum requirements. The summary of the evaluation were as follows:-

Bidder Nos.	Bidder Name	Minimum Tender Requirement						Remarks
		<i>A bid security of Kshs. 100,000.00 valid for 120 days</i>	<i>Certificate of Incorporation</i>	<i>A valid Tax Compliance Certificate</i>	<i>Fully filled confidential business questionnaire and form of tender</i>	<i>All risks cover and public liability insurance covers</i>	<i>Membership to Kenya Security Industry Association (KSIA)</i>	
	M/S Shika Shika Security Alarms Limited	X	√	X	X	√	X	i) Their bid security from Giro Bank expires on 11 th July 2007 ii) No Tax Compliance Certificate iii) Confidential Business Questionnaire not stamped. iv) Form of tender not signed. v) No certificate of membership from KSIA. vi) Disqualified

Bidder Nos.	Bidder Name	Minimum Tender Requirement						Remarks
		A bid security of Kshs. 100,000.00 valid for 120 days	Certificate of Incorporation	A valid Tax Compliance Certificate	Fully filled confidential business questionnaire and form of tender	All risks cover and public liability insurance covers	Membership to Kenya Security Industry Association (KSIA)	
2	M/S Securex Agencies (K) Limited	X	√	X	X	X	X	i) Their bid security from Giro Commercial Bank expires on 9 th June 2007. ii) Tax compliance not valid expired on 12 th October 2006 iii) Confidential Business Questionnaire not signed nor stamped. iv) No certificate of membership from KSIA. v) Disqualified
3	M/S Brinks Security Services Limited	√	√	√	√	√	X	i) Bid security from Diamond Trust Bank expires on 12 th July 2007 ii) No certificate of membership from KSIA. iii) Has fulfilled all the other Minimum requirements iv) Disqualified
4	M/S G4S Security Services (K) Limited	√	√	√	√	√	√	i) Bid security from Standard Chartered Bank expires on 21 st September 2007 ii) Has a certificate of membership from KSIA iii) Has fulfilled all the other Minimum requirements iv) Recommended for further evaluation
5	M/S Security Group Kenya Limited	X	√	√	√	√	√	i) Their bid security from standard Chartered Bank expires on 11 th June 2007. ii) Has a certificate of membership from KSIA

Bidder Nos.	Bidder Name	Minimum Tender Requirement						Remarks
		A bid security of Kshs. 100,000.00 valid for 120 days	Certificate of Incorporation	A valid Tax Compliance Certificate	Fully filled confidential business questionnaire and form of tender	All risks cover and public liability insurance covers	Membership to Kenya Security Industry Association (KSIA)	
6	M/S Cornerstone Security	√	X	X	√	√	X	iii) Disqualified. i) Bid security from Equity Bank expires on 12 th July 2007 ii) Have not attached the certificate of incorporation iii) Have not attached the tax compliance certificate. iv) No certificate of Membership from KSIA v) Disqualified
7	M/S Intersecurity Services Limited	X	√	√	√	√	X	i) Their bid security from KCB expires on 12 th June 2007. ii) Tax compliance expired on 1 st March 2007 and had applied for a new one (proof provided) iii) No certificate of membership from KSIA. iv) Disqualified
8	M/S Total Security Surveillance Limited	X	√	√	√	√	√	i) Their bid security expires on 13 th June 2007. ii) Has a certificate of Membership from KSIA iii) Has fulfilled all the other requirements. iv) Disqualified
9	M/S Radar Limited	√	√	√	√	√	√	i) Their bid security from EABS expires on 16 th July 2007. ii) Has a certificate of membership from KSIA iii) Has fulfilled all the other Minimum requirements iv) Recommended for further evaluation.

Bidder Nos.	Bidder Name	Minimum Tender Requirement						Remarks
		A bid security of Kshs. 100,000.00 valid for 120 days	Certificate of Incorporation	A valid Tax Compliance Certificate	Fully filled confidential business questionnaire and form of tender	All risks cover and public liability insurance covers	Membership to Kenya Security Industry Association (KSIA)	
10	M/S Lavington Security Limited	√	√	√	√	√	X	i) Their bid security from EABS expires on 16th July 2007. ii) No certificate of membership from KSIA iii) Has fulfilled all the other Minimum requirements iv) Disqualified
11	M/S Hatari Security Services Limited	X	√	√	√	√	X	i) Bid security from Family Finance expires on 16 th April 2007. ii) Form of tender and Confidential Business Questionnaire Signed but not stamped iii) No certificate of membership from KSIA. iv) Disqualified
12	M/S Sunrise Security	X	√	√	√	√	X	i) Their bid security from National Bank expires on 30 th June 2007 ii) No certificate of membership from KSIA. iii) Disqualified

KEY:-

- √ - Fulfilled the condition
- X - Not fulfilled the condition.

Based on this information, two bidders namely G4S Security Services Limited and Radar Limited qualified for the next stage of the evaluation which involved comparison of their bids with the requirements of the tender document set out under Appendix to Instructions to Tenderers.

Stage 2: Fulfillment of the necessary tender requirements

The summary of the technical evaluation was as follows:

RQMTS. NO.	TENDER REQUIREMENTS	Max. Points	BIDDER NOS.	
			B4	B9
1.	Experience of over five (5) years	10	10	10
2.	Audited books of accounts for the last three (3) years	10	7.8	6
3.	Five (5) Reference letters from Clients (minimum contract price Kshs.200,000 per month	10	10	10
4.	Compliance certificate from NSSF and NHIF	10	10	10
5.	Evidence of manpower capacity of not less than 100No. guards	5	5	2.6
6.	Evidence of patrol vehicles (min. 10No. registered in own company names)	5	5	2.5
7.	Evidence of being networked to Kenya Police	10	5	5
8.	Valid CCK frequency license	10	10	10
9.	Company profile with CVs of Directors and Management	5	5	5
10.	Evidence of Workman's compensation compliant	10	7.8	10
11.	Indication of availability of back up crew dedicated to MOF	5	5	3
12.	Proof of financial stability	10	10	10
	TOTALS	100	90.6	84.1

Based on this information the two bidders qualified for financial evaluation for having attained more than 80% in the technical evaluation.

The results of the financial evaluation were as follows:

S/No.	Firm's Name	Tender sum per Guar per Month (Kshs.)	Ranking
1.	G4S Security Services Ltd	37,120.00	2
2.	Radar Ltd	30,160.00	1

RECOMMENDATION

Based on the above ranking the user department recommended Radar Ltd for the award of the tender at a monthly cost of Kshs. 30,160.00 per guard per month.

In its meeting held on 10th May, 2007, the Ministerial Tender Committee concurred with the recommendations of user department to award the tender to Radar Limited at its monthly tender price of Kshs. 30,160.00 per guard.

Letters of notification of award to the successful and of regret to the unsuccessful bidders, were written on 14th June 2007.

THE APPEAL

This Appeal was lodged by Sunrise Security Services Limited on 27th June, 2007 against the decision of the tender committee of the Ministry of Finance, Procuring Entity of 14th June, 2007 in the matter of tender No.MOF/3/2006-2007 for Provision of Security Services.

The Applicant was represented by Mr. Crispin Odhiambo of Mohammed & Muigai Advocates while the Procuring Entity was represented by Mr. Godfrey Busolo, Assistant Secretary and Mr. N. M. Mghendi, Principal Procurement Officer. Lavington Security Ltd and Radar Ltd, Interested Candidates, were represented by Mr. Kennedy Mose, Operations Manager and Ms. C.W. Ondego, Administration, respectively.

The Applicant raised four grounds of appeal which we deal with together since they raised similar complaints with regard to the evaluation of the tenders.

Grounds One and Two

These grounds of appeal have been consolidated since they raised similar concerns on the evaluation and award of the tender.

In these grounds of appeal, the Applicant claimed that the Procuring Entity acted contrary to Section 66(2) of the Public Procurement & Disposal Act, 2005 by using different procedures and criteria other than that set out in the tender document. The Applicant further claimed that the Procuring Entity breached Section 66(4) by rejecting its tender which should have been the lowest evaluated tender.

At the hearing, Counsel for the Applicant submitted that the appeal revolved around the issue of validity of its tender security which was used by the Procuring Entity to disqualify its tender. He argued that the Applicant's tender was substantially responsive having complied with the tender requirements. Counsel pointed out that the Applicant had submitted a tender security dated 14th March, 2007. That tender security was issued by the National Bank of Kenya and it was apparent that it would remain in force up to and including, thirty (30) days after the period of tender validity. This was an indication that the tender security was valid for the entire period as required in the tender document. Counsel stated that the statement on the tender security that the guarantee would expire on 30th June, 2007 and that any demand in respect thereof should reach the bank no later than that date, was an "arithmetical" error which had no bearing on the ranking of the tenders. He contended that such an error was a minor deviation and could have been corrected by the Procuring Entity by way of a clarification. Citing Section 64(2) (a), (b) and (3), Counsel stressed that minor deviations that do not materially depart from the requirements set out in the tender document which could be corrected without affecting the substance of the tender, could not make a tender non-responsive.

Counsel further stated that the Procuring Entity breached Clause 2.20.4 of Section I of the tender document by failing to carry out a preliminary evaluation on the tenders to determine their

responsiveness, before proceeding to detailed evaluation. He argued that all tender requirements were lumped together and were only considered in the detailed evaluation.

Finally, Counsel stated the tender price of Kshs. 24,000.00 quoted by the Applicant was lower than that of the successful tenderer. Therefore awarding the tender to a candidate whose tender price was not the lowest was contrary to the purpose of the Public Procurement & Disposal Act, 2005 as stipulated under Section 2(a). Consequently, the Board should annul the award of the tender and grant the prayers sought by the Applicant in the Request for Review.

In response, the Procuring Entity denied that it breached Sections 66(2) and (4) of the Public Procurement & Disposal Act, 2007 on the evaluation and award of the tender. The Procuring Entity stated that the evaluation committee developed an evaluation criteria based on its requirements which were set out in the tender document. The technical evaluation was done in two stages and the tender was awarded to the lowest evaluated bidder.

The Procuring Entity submitted that it was explicit in the Invitation to Tender that the tenderers were required to submit a tender security of Kshs. 100,000.00 from a reputable bank. It was also a tender requirement that tender security be valid for an additional 30 days beyond the 90 days tender validity period. Counting 120 days from 15th March, 2007 when the tenders were opened, the validity of tender security would expire on 12th July, 2007. However, as noted during the evaluation of tenders, the Applicant's tender security dated 14th March, 2007 and issued by the National Bank of Kenya was valid up to 30th June, 2007. The Bank had clearly stated that any demand with respect to the guarantee on the tender security should reach it not later than 30th June, 2007. The Applicant's tender security was valid for 108 days instead of 120 days. It was therefore disqualified from further evaluation for being non-responsive.

Further, the Procuring Entity submitted that the responsiveness of the tender should be determined based on the contents of the tender

without recourse to extrinsic evidence as per Clause 2.20.4 of the Instructions to Tenderers.

In support of the arguments of the Applicant and their written submissions, Mr. Kennedy Mose for Lavington Security Ltd submitted that the entire tendering process was unfair and the Board should annul the award of the tender.

On her part, Ms. C. W. Ondego, for Radar Ltd, opted not to comment on the appeal.

The Board has carefully considered the parties' arguments on these grounds and all the information before it. The Board has also perused a copy of the tender document that was issued by the Procuring Entity to the bidders. It is not disputed that the key issue for determination is whether the Applicant's tender security complied with the tender requirements.

Paragraph 5 of the Invitation To Tender provides as follows:

"Prices quoted should be net inclusive of all taxes, must be in Kenya Shillings and should remain valid for 90 days."

The Board further noted that paragraph 6 of the same section provides as follows:

"Tenders must be accompanied by a bid security of Kenya Shillings 100,000.00 from a reputable bank valid for an additional 30 days beyond the tender validity period."

The Board further noted that the tender document contained a tender security form which set out the format and conditions that bidders were to comply with.

The Board has also perused the copy of the Applicant's tender security that was submitted together with its tender. The Board notes that the Applicant presented its tender security in a different format

from that prescribed by the tender form, and its wording was also different. For instance the Bank has stated that the guarantee was valid up to and including, thirty (30) days after the period of tender validity and shall expire on 30th June, 2007. To stress this condition as to the date, the bank stated that the guarantee would become null and void upon expiry, regardless of whether or not the original tender security was returned to it for cancellation. These statements were not in the tender security form provided to the candidate and therefore made the Applicant's tender security both conditional, and valid only up to 30th June, 2007. Thus the tender security was not in conformance with the tender requirements.

The Board notes that the requirement for tender security though discretionary, becomes mandatory once it is stipulated in the tender document. The Applicant was therefore properly disqualified for submitting a tender security which was valid for a shorter period than that set out in the tender document. The Board does not accept the argument by the Applicant that the expiry date of the tender security was correctable as an arithmetic error during the evaluation through a clarification.

With regard to evaluation of tenders, the Board noted that the evaluation was conducted in three stages and the Applicant was disqualified at stage one of the evaluation where responsiveness of the tender was considered, and no extrinsic evidence was used by the Procuring Entity. Consequently, the Applicant's tender was properly not evaluated in the subsequent stages.

Accordingly, these grounds of appeal fail.

Ground Three

This is a statement of losses/damages that the Applicant is likely to suffer due to the award of the tender to another bidder.

However, this being an open tender, there was no guarantee that a particular tender would be accepted, and just like any other bidder,

the Applicant took a commercial risk when it entered into the tendering process. Consequently, the Applicant cannot claim losses/damages from anticipated business opportunity. Further, it was clear from the tender document that bidders shall bear all cost associated with the preparation and submission of their tenders.

Ground Four

This was a statement that the Applicant was entitled to a fair procurement process and is not a ground of appeal. Accordingly, we do not need to comment on it.

Taking into consideration all the above matters, the appeal fails and we hereby dismiss it. The procurement process may therefore proceed.

Dated at Nairobi this 19th day of July, 2007


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CHAIRMAN


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SECRETARY

