

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 23/2008 OF 23<sup>RD</sup> JULY, 2008**

**BETWEEN**

**BRINKS SECURITY SERVICES LIMITED (APPLICANT)**

**AND**

**EGERTON UNIVERSITY (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the Egerton University in the matter of Tender No. EU/15/2008-2009 for Provision of Security Services.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Ms. J. A. Guserwa	-	Member
Amb. C. M. Amira	-	Member
Eng. C. A. Ogut	-	Member

**IN ATTENDANCE**

Mr. I. K. Kigen	-	Holding Brief for Secretary
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**PRESENT BY INVITATION FOR APPLICATION NO. 23/2008**

**Applicant, Brinks Security Services Limited**

Mr. Morris Kimuli	-	Advocate for the Applicant
Mr. Nicholas Malonza	-	Lawyer
Mr. Josphat Kibet	-	General Manager

### **Procuring Entity, Egerton University**

Mr. Kisilah D. G	-	Advocate
Prof. L. M. Mumeri	-	Deputy Vice Chancellor, Finance & Administration
Prof. A. Kibor	-	Member, Procurement Committee
Dr. C. M. Nguta	-	Member, Procurement Committee
Dr. B. K. Kitur	-	Member, Procurement Committee
Maj. (RTD) W. Nyangaya-		Chief Security Officer
Ms. Grace Kipchilat	-	Ag. Senior Procurement Officer

### **Interested Candidates**

Mr. Njuguna C. M	-	Advocate, Patriotic Guards Limited
Mr. Eric Okeyo	-	Director, Patriotic Guards Limited
Ms. Carol Serem	-	Legal Officer, Patriotic Guards Limited
Mr. Kaniaru M. K	-	Director, Kenya Shield Security Limited
Mr. J. N. Musomba	-	Director, Riley Falcon Security Limited

### **BOARD'S DECISION**

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

### **BACKGROUND**

The tender was advertised on 11<sup>th</sup> and 15<sup>th</sup> April, 2008 on various daily newspapers. The Tender No. EU/15/2008 – 2009 was for Provision of Security Services – Njoro only.

The tender opening /closing date was 5<sup>th</sup> May, 2008. Eleven firms bought the tender documents and submitted their bids. The tender was opened on the due date and attracted the following bidders: -

1. Riley Falcon Security Limited;
2. Total Security Surveillance Limited;
3. Spur Security Services Limited;
4. Wells Fargo;
5. Patriotic Guards Limited;
6. Cavalier Security Services Limited;

7. Cross Land Security Services Limited;
8. Brinks Security Services;
9. Redants Security Limited;
10. Kenya Shield Security; and
11. Robinsons Investments Limited.

## **THE EVALUATION**

The above firms were evaluated based on the following criteria:-

- 1) Must be registered as a company;
- 2) Member of KSIA and PSIA or any other Association of security firms (provide copies of certificate(s));
- 3) Financial position (provide copies of audited accounts for 2005, 2006 and 2007);
- 4) Trade Licenses;
- 5) Premise; and
- 6) Registration certificates with Communication of Kenya.

Based on the above, the following nine firms qualified for Technical Evaluation:-

1. Riley Falcon Security Limited;
2. Total Security Surveillance Limited;
3. Spur Security Services Limited;
4. Wells Fargo;
5. Patriotic Guards Limited;
6. Cavalier Security Services Limited;
7. Brinks Security Services;
8. Kenya Shield Security; and
9. Robinsons Investments Limited.

Crossland Security Services Limited and Redants Security Limited failed to meet the minimum requirements and were therefore disqualified from further evaluation.

The above nine firms were evaluated based on the following requirements:-

- 1) Proof of relevant business;
- 2) Transport;

- 3) Registration certificates with Communication of Kenya;
- 4) Must have an established branch in Nakuru;
- 5) Provision of Service on credit;
- 6) Submission of Tender Security/Bid Bond;
- 7) Provision of relevant Insurance Covers to Guards (Public Liability and Group Personal Accident);
- 8) Registration of the company and valid trade license;
- 9) Compliance with Government regulation of minimum wages;
- 10) Number of years the company has successfully operated;
- 11) Financial position/Banking facilities;
- 12) Membership of KSIA and PSIA;
- 13) Transport – number of back up vehicles;
- 14) Level of Technology in the organization;
- 15) Past performance of the organization in established Companies/institutions of higher learning;
- 16) Effective communication system;
- 17) Technical knowledge of key officers of the company;
- 18) License(current);
- 19) Curriculum vitae of the following; proprietor, Operation Manager and Nakuru Branch Manager.

Based on the above, three bidders namely, Riley Falcon, Patriotic Guards and Wells Fargo qualified for financial evaluation.

The evaluation committee recommended award to Riley Falcon to be awarded the tender for Laikipia Campus, Nakuru Town Campus, Faculty of health sciences and Show ground for 30 Guards at a total cost of Kshs. 427,950 per month and Patriotic Guards to be awarded the tender for 84 Guards for Njoro Campus at the total cost of Kshs. 1, 232, 500.00

The Tender Committee approved award of tender to the two firms as recommended by the Evaluation Committee.

### **THE APPEAL**

This appeal was lodged on 23<sup>rd</sup> July, 2008 by Brinks Security Services Limited against the decision of the Tender Committee of Egerton University in the matter of Tender No. EU/15/ 2008-2009 for Provision of Security Services - Njoro only.

The Applicant was represented by Mr. Morris Kimuli, Advocate, while the Procuring Entity was represented Mr. Kisilah D. G, Advocate. The Interested Party was represented by Mr. Njuguna C. M, Advocate.

The Applicant in its Request for Review has raised eleven grounds of appeal. Ground 1 has been argued separately while grounds 2 to 9 have been merged because they deal with the same issues. Grounds 10 and 11 regard loss suffered and have been addressed separately.

The Board deals with the grounds as follows:-

**Ground 1 – Breach of Section 67 of the Act and Regulation 46.**

The Applicant submitted that the Procuring Entity did not notify it within the prescribed period that its tender was not successful. It stated that the tenders were opened on 5<sup>th</sup> May 2008 and pursuant to Regulation 46 of the Public Procurement and Disposal Regulations, 2006, the Procuring Entity ought to have completed the evaluation of the bids within 30 days, in this case on or about 6<sup>th</sup> June 2008. It stated that the Procuring Entity did not notify the Applicant of the outcome of the tender until the Applicant enquired about the notification through a letter dated 17<sup>th</sup> July 2008. It was after this enquiry that the Procuring Entity delivered its letter to the Applicant dated 9<sup>th</sup> July 2008, on 18<sup>th</sup> July, 2008.

The Applicant further argued that notification ought to be done within the validity period of the tender in line with the requirements of Section 67(1) of the Public Procurement and Disposal Act, 2005. It submitted that the tender validity period was 60 days commencing on 5<sup>th</sup> May 2008 when the tenders were opened. Therefore, all tenderers ought to have been notified on the outcome of the tender before 5<sup>th</sup> July 2008. It argued that the letters of notification dated 9<sup>th</sup> July 2008, were outside the tender validity period and this was a breach of section 67(1) of the Act.

In response, the Procuring Entity stated that the Applicant was notified that its bid was not successful in good time. The Procuring Entity stated that it complied with both the Public Procurement and Disposal Act, 2005 and the Regulations in so far as the said notification is concerned. It argued that time is only provided simply to ensure that the tender process is finalized but not to be of necessity followed strictly. It stated that the Applicant did not suffer

any prejudice by being notified outside the stipulated time. The Procuring Entity further stated that it did not have any malice. It sought to rely on the Board's past decided case, Application No.60/2007, Patriotic Guards Security Limited VS. Kenya Post Office Savings Bank, on page 11, in which the Board had ruled that failing to notify the tenderer on time did not prejudice it, as the Applicant in that case was able to file its application on time for review by the Board.

The Board has considered the submissions of the parties and examined the documents presented before it.

The Board has noted that the Applicant was notified of the outcome of its bid vide a letter dated 9<sup>th</sup> July, 2008 that its tender was not successful. The Applicant has alleged that it received the said letter on 18<sup>th</sup> July, 2008, and filed its Request for Review on 23<sup>rd</sup> July, 2008. Although the notification was rather late, having filed its Application within the Appeal window period, the Applicant suffered no prejudice. With regard to the validity of the tender, the Board notes that the tenders were opened on 5<sup>th</sup> May 2008 and Clause 2.13.1 of the tender document provided that the tender validity period was 60 days. Further, the Board notes that Section 67(1) of the Public Procurement and Disposal Act, 2005 provides as follows:

*“Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted”.*

The Board finds that the Procuring Entity ought to have notified the successful and the unsuccessful tenderers by 5<sup>th</sup> July, 2008. In this particular instance, the Procuring Entity did not do so until 9<sup>th</sup> July, 2008. The Board holds that the tender validity period expired on 5<sup>th</sup> July, 2008 and since the Procuring Entity did not extend the period, the tender then lapsed with expiry of the tender validity period. In the circumstances, there was no tender to be awarded as the life of the tender had lapsed on 5<sup>th</sup> July, 2008.

Taking into account all the above, this limb of the ground succeeds.

#### **Grounds 2 - 9 on Breach of Sections 31 and 66 of the Act.**

The Applicant argued that the Procuring Entity failed to award the tender to the tenderer with the lowest evaluated price, to the detriment of the

Applicant, since its price was lower than that of the successful tenderer. It stated that Section 66(2) of the Act requires that an objective and quantifiable criteria to be used by the Procuring Entity in evaluating tenders, should be set out in the tender document. It added that such a criteria should be determinate to enable tenderers be sure of what is required of them. It stated that, by failing to have determinate criteria in the tender document, the Procuring Entity was in breach of Section 31 of the Act.

The Applicant further stated that after learning that its bid was not successful, it wrote a letter to the Procuring Entity on 19<sup>th</sup> July 2008 seeking to find out why it's tender was unsuccessful. It submitted that it had since learnt that its tender was not successful on allegation that its past performance with the Procuring Entity was not satisfactory. The Applicant argued that past performance was not one of the criteria set out in the tender document. Further, the Applicant argued that the question of unsatisfactory past performance did not arise since the Procuring Entity on its own volition had extended its earlier contract with the Applicant. The Applicant stated that in any case, it had not received any notice from the Procuring Entity indicating that its performance of its earlier contract had been unsatisfactory.

The Applicant stated that it had taken note of the technical evaluation criterion 'M' requirement in the tender document that tenderers ought to have served in established colleges/institutions of higher learning. It argued that all that was required is to have served such institutions and if it was necessary to evaluate their performance, then the Procuring Entity would have sought for testimonials in addition. It further argued that by relying on its past performance at the Egerton University, the Procuring Entity was bound to be biased against it. Further, the Applicant submitted that the Procuring Entity did not visit its establishment to evaluate it in line with the requirements set out in the tender document. It stated that this led to a subjective assessment of the Applicants tender and was a breach of Section 66(4) of the Act.

In response, the Procuring Entity stated that it did not breach Section 66(4) of the Act as alleged by the Applicant. It stated that Section 66 (4) requires the Procuring Entity to award the tender to the lowest evaluated tenderer. It argued that the Applicant's bid did not pass the technical evaluation stage, and therefore could not have been the lowest evaluated

tenderer as argued. The Procuring Entity stated that the Applicant's past performance record was not satisfactory under the previous contract on provision of security services at the Egerton University. It argued that the criterion on past performance in institutions of higher learning had been set out in the tender document and the evaluation on this criterion was applied across the board to all the tenderers. Further, another criterion was that tenderers were to be visited to evaluate them on other parameters as provided for in the tender document. It stated that other tenderers' premises were visited and evaluation was carried out accordingly. However, it did not visit the Applicant's premises since the Applicant was on site at the University. The Procuring Entity argued that in any event, it had the Applicant's record on the parameters which were to be checked and the unsatisfactory past performance.

In conclusion, the Procuring Entity argued that the Applicant did not qualify at the technical evaluation stage due to unsatisfactory past performance and therefore did not qualify to proceed to the financial evaluation stage. The Applicant therefore was not the lowest evaluated tenderer in the context of Section 66 (4) of the Act.

Patriotic Guards Limited, one of the successful bidders, associated itself with the submissions of the Procuring Entity. It argued that the Procuring Entity was at liberty to evaluate the past performance of the Applicant. It submitted that such past performance was a critical element that the Procuring Entity could not overlook. Further, it stated that the Applicant did not seek for any clarification prior to submission of its bid on how past performance was to be evaluated and therefore its complaint of the Applicant was an afterthought. In this respect, it requested the Board to dismiss the Request for Review as it lacked merit.

The other successful bidder, Riley Falcon Limited, wholly associated itself with the submissions of the Procuring Entity.

The Board has considered the representations by the parties and scrutinized the documents presented before it, and noted that the Applicant passed the preliminary evaluation stage and qualified for technical evaluation. At this stage, the Procuring Entity evaluated the tenderers using the criteria set out in the tender document.



Upon the Board's examination of the Technical Evaluation report, the Board finds that the technical evaluation criteria was not applied uniformly to all the tenderers. For instance, the Board noted that the Procuring Entity did not visit the Applicant's premises. It is further noted that the Procuring Entity in its report indicated that the Applicant had not been remitting staff/employees statutory deductions, namely the NSSF and NHIF. On examination of the original tender document submitted by the Applicant, the Board finds documentary evidence to the effect that the Applicant had been remitting such deductions to the above mentioned institutions. In addition, it is observed that the evaluation report by the Procuring Entity shows that some of the bidders were not evaluated on all the criteria as required under section 66(2) of the Act. For example, Riley Falcon Security Limited was evaluated on Experience with institutions of higher learning, Adequate vehicles, CCTV, Alarm systems, Dogs and Staff with adequate technical training while Wells Fargo was evaluated on CCTV, Alarm systems, Dogs, Adequate vehicles, Specialization in cash in transit and Specialization in cash deliveries. Patriotic Guards Limited on the other hand was evaluated on Good past performance with the Egerton University. This random picking of the parameters to be evaluated was not applied uniformly and thus bidders were not compared on a like by like basis. Therefore, the Board finds that the evaluation process was unfair, subjective and discriminatory.

The Board also notes that the Procuring Entity awarded the tender to two bidders namely, Riley Falcon Security Ltd to provide services at Laikipia Campus and Patriotic Guards Limited to provide services at Njoro Campus. The tender document had not contemplated award to two successful bidders, but only one successful bidder as provided for under Clause 2.24.3 of the tender document which provides as follows:-

*"Subject to paragraph 2.29, the Procuring Entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily."*

Further, Section V on Description of Services in the tender document provides as follows:-

*"This is provision of security services. The University will require approximately 112 Guards. The successful bidder will be expected to sign a*

*contract with the University. The contract price shall include house allowance and all customs duties and VAT and other taxes payable.”*

It is clear from the above provisions that the decision by the Procuring Entity to award the tender to two tenderers was not foreseen in the tender document and was therefore against the above cited clauses.

In the circumstances, these grounds of appeal also succeed.

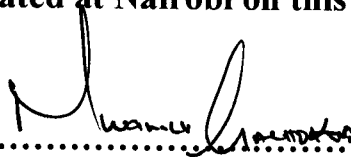
**.Grounds 9 and 10 – Loss suffered**

This is a statement of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it was awarded the tender. Clause 2.2.1 of The Instructions To Tenderers stipulates that “The tenderer shall bear all costs associated with the preparation and submission of its tender, and the Procuring Entity will in no case be responsible or liable for those costs.”

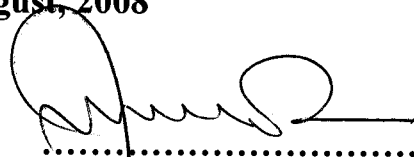
In open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the cost or damages associated with the tendering process, which resulted in the award of the tender to another bidder.

Taking into account all the above matters, the appeal succeeds and the Award is hereby annulled. The Procuring Entity may re-tender. In the meantime, the Procuring Entity is directed to renew the previous security contract for a period of ninety (90) days by which period it ought to conclude the re-tendering process.

**Dated at Nairobi on this 22<sup>nd</sup> day of August, 2008**

  
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**CHAIRMAN  
PPARB**

  
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**SECRETARY  
PPARB**