

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 30/2008 OF 29 AUGUST, 2008

BETWEEN

HATARI SECURITY GUARDS LIMITED
(APPLICANT)

AND

KENYA COLLEGE OF COMMUNICATION TECHNOLOGY
(PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Kenya College of Communication Technology dated 18 August, 2008 in the matter of Tender No. TC/3/2008 for the provision of Security Guard Services.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. J. A. Guserwa	-	Member
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C.R. Amoth	-	Secretary
Ms. P. K. Ouma	-	Secretariat
Ms. S. Aluoch	-	Secretariat

PRESENT BY INVITATION

Applicant, Hatari Security Guards Limited

- Mr. Peter N. Karaka - Manager
- Mr. Josphat Kimani - Manager,
- Mr. Mwangi P. Githinji - Advocate, Wachira, Mbugu Mwangi
& Co. Advocates

Procuring Entity, Kenya College of Communication Technology

- Mr. Nicholas K. Mwilu - Deputy Director Finance & Administration
- Mr. James Kulubi - Director
- Mr. David Kiugu Ikiao - Procurement Officer

Interested Candidates

- Mr. Njuguna L. M. - Advocate, Lavington Security Ltd
- Mr. Michael K. Ruto - Operations Manager, Lavington Security
Ltd
- Mr. Justus O. Okinoy - Business Development Manager,
First Force Security Ltd
- Mr. Joseph Musyoka - Operations Manager, Brinks Security Ltd

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

The tender for the Provision of Security Guards Services was advertised on 17th April, 2008. It closed/opened on 8th May, 2008 and eleven (11) bids were opened from the following firms:-

1. Brinks Security Services Ltd.
2. Inter Security Services ltd
3. Gillys Security & Investigations Services Ltd.
4. Sentry & Patrols Ltd
5. Hatari Security Services Ltd
6. Wells Fargo Ltd
7. Radar Ltd
8. Lavington Security Ltd
9. Riley Services Ltd
10. First Force Security Ltd
11. Cornerstone Security ltd

EVALUATION

The evaluation was carried out in three stages namely technical, financial and referees.

A technical evaluation accounted for 70 marks and the financial was 30. The cut off mark for the technical evaluation was 52.5 marks.

The bids were evaluated on the following technical parameters:

- Registration Certificate/incorporation
- Current trade licence
- Frequency Certificate from CCK/Radio
- PIN
- VAT
- Tax Compliance
- Recommendation Letters at least three
- Last Three Years Account
- Tender Security
- Public Liability Insurance Cover
- Distribution Of services
- Motor Vehicles/cycles
- Company Profile
- Physical location
- Dogs
- Membership to Associations i.e. KSIA/PSIA
- KCCT Receipts
- Security Site survey

A summary of the technical evaluation results was as follows:-

<u>Bidders</u>	<u>Scores</u>
1. Brinks Security Services Ltd.	69
2. Inter Security Services ltd.	65
3. Gillys Security & Investigations Services Ltd	69
4. Sentry & Patrols Ltd	70
5. Hatari Security Services Ltd	70
6. Wells Fargo Security Ltd	49
7. Radar Ltd	63
8. Lavington Security Ltd	70
9. Riley Services Ltd	70
10. First Force Security Ltd	45
11. Cornerstone Security ltd	65

Arising from the above results two firms namely, M/s Wells Fargo Security Ltd and First Force Security Ltd were disqualified for not attaining the cut off mark.

The remaining bidders were evaluated financially and the results are as tabulated;

No.	BIDDERS	BID Kshs 2 years
1	Brinks Security	8,022,000.00
2	Inter security services	6,960,000.00
3	Gillys security	6,528,480.00
4	Sentry & Patrol	8,129,280.00
5	Hatari security	6,624,000.00
6	Radar security	10,384,320.00
7	Riley security	8,378,640.00
8	Lavington security	7,188,000.00
9	Cornerstone security	6,884,928.00

The Combined Technical and Commercial results were as tabulated:-

BIDDER	Brinks Security	security services	Gillys security	Sentry & Patrol	Hatari security	security	Lavington security	Riley security	Cornerstone security
COMMERCIAL	24.77	28.55	30.44	24.44	30.00	19.14	27.65	23.72	28.86
TECHNICAL	69.00	65.00	69.00	70.00	70.00	68.00	70.00	70.00	65.00
TOTAL SCORE %	93.77	93.55	99.44	94.45	100.00	87.14	97.65	93.72	93.86
RANKING	6	8	2	4	1	9	3	7	5

Referees Evaluation

Security Firm	Evaluating Firm	Customer Care	staff attitude	efficiency	Empathy	Consistency	Handling of customers	Ability	Punctuality	Total score	Aver. Score
Hatari Security	KIRDI	1	1	1	1	1	1	1	1	8	
Hatari	KCCT	4	4	3	3	3	4	3	2	26	17
Lavington Security	PCK	2	2	1	2	2	2	1	1	13	
Lavington Security	Safaricom	2	2	2	2	2	1	2	1	14	13.5
Gilly's Security	KPLC	1	2	3	2	2	2	2	2	16	
Gilly's Security	NHIF	2	3	2	2	3	3	3	2	20	18

- Key:
- 1 - Very Good
 - 2 - Good
 - 3 - Fair
 - 4 - Poor
 - 5 - Very Poor

The Evaluation Committee recommended to the Tender Committee that M/S Lavington Security Services Co. Ltd be awarded Tender for the provision of security services for financial years 2008/2009 and 2009/20010.

THE TENDER COMMITTEE DECISION

The Tender Committee in its meeting held on 14th Aug, 2008 deliberated on the recommendation of the evaluation committee and awarded the tender for Provision of Security Guard Services to Ms Lavington Security Services.

THE REVIEW

The Request for Review was lodged on the 29th day of August, 2008 by Hatari Security Guards Limited against the decision of the Tender Committee of Kenya College of Communication Technology in the matter of Tender No. TC/3/2008 for the provision of Security Guard Services.

The Applicant was represented by Mr. Mwangi P. Githinji, Advocate, Wachira Mburu Mwangi & Company Advocates while the Procuring Entity was represented Mr. David Kiugu Ikiao, Kenya College of Communication Technology.

The Applicant in its Request for Review raised ten (10) grounds of appeal and the Board deals with them as follows:-

Ground 1

The Applicant alleged that it was the lowest evaluated tenderer after both the technical and financial evaluations were completed by the Procuring Entity, and argued that the reason it was denied the tender was because it did not pass what the Procuring Entity called the referee recommendation. It submitted that there is no such requirement both under the Public Procurement and Disposal Act 2005 (hereinafter referred to as the Act) or the Regulations. It submitted that it had passed the technical and financial evaluation and had submitted the lowest price. It

further argued that the Procuring Entity did not have any discretion under Section 66 (4), of the Act, and Regulation 50(3) to award the tender to any other bidder and that the successful tender shall be the tender with the lowest evaluated price.

In its response, the Procuring Entity submitted that it had awarded the tender to the lowest evaluated bidder as per its evaluation report which was prepared in conformity with Regulation 51(1) which states what shall be included in the evaluation report. It further submitted that the Applicant was not the lowest evaluated bidder as alleged, because the Applicant even though having passed both the technical and financial evaluations, failed in the Referee Evaluation.

The Board has carefully examined the documents submitted before it and the parties submissions in regard to the Referee Evaluation criteria, as applied by the Procuring Entity in its evaluation of the tenders and notes the following in the Tender Documents:-

- i) Clause 28 of the Special Conditions, required the tenderers to submit, as a mandatory requirement, recommendations from at least three current clients; and
- ii) The Statement of Experience or List of Organizations/Institutions Provided with Security Services Form, required the tenderers to provide names of five clients they are providing or have provided services for in the past 5 years, and attach three recommendation letters.

The Board notes that the Procuring Entity conducted a technical and financial evaluation of the tenders. The Applicant emerged as the lowest

evaluated bidder, according to the minutes of the evaluation committee, after the combined technical and financial evaluation results.

The Board further notes that the Procuring Entity decided to do a further evaluation on the three lowest ranked bidders from among the eleven bidders shortlisted by applying the Referee Evaluation. It is clear from the Tender Documents that there was no criterion on Referee Evaluation. Indeed, the Tender Documents provided that the technical score was 75% and the financial score was 25% as per Addendum 1 of the Tender Documents.

Therefore, there was no basis for award of marks in what the Procuring Entity called Referee Evaluation.

The Board finds that the successful tender could not have been the tender with the lowest evaluated price because the Procuring Entity exercised a discretion it did not have by applying the Referee Evaluation which was not provided for in the Tender Documents.

Accordingly, this ground of appeal succeeds.

Grounds 2 and 3 - Breach of Section 66(2) of the Act and Regulation 38(e)

These grounds have been consolidated because they raise similar issues.

In these grounds, the Applicant alleged that the Procuring Entity breached Section 66(2) of the Act and Regulation 38(e) by failing to include information about the procedure and criteria for evaluation of

tenders and award, and by applying the Referee Evaluation criteria which was not provided for in the Tender Documents.

In its response, the Procuring Entity stated that it had included, in the Tender Documents, information about the procedures and criteria for evaluation of tenders and award, pursuant to Regulation 38, and that the Applicant had not sought any such information for clarification prior to closing of the tender. The Procuring Entity also submitted that the criteria for evaluation referred to as Referee Evaluation was done pursuant to Regulation 52(1) to confirm the qualifications of the three lowest evaluated bidders.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes Section 66(2) of the Act states that the evaluation and comparison (of tenders) shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

The Board also notes the following applicable Regulations:-

- i) Regulation 38(e) which states that the Tender Documents shall contain the procedure and criteria to be used to evaluate and compare the tenders as set out in Regulations 46 to 52; and
- ii) Regulation 52 which states:-

52 (1) Where so indicated in the tender documents, a procuring entity may prior to the award of the tender confirm the qualifications of the tenderers who submitted the lowest evaluated responsive tender in order to

determine whether the tenderer is qualified to be awarded the contract in accordance with Section 31(1) of the Act.

(2) Where so indicated in the tender documents, if the lowest evaluated tenderer is determined under paragraph (1) not to be qualified in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer who submitted the next lowest responsive bid.

The Board further notes that Regulation 52 gives the Procuring Entity an opportunity to confirm, prior to award, the qualifications of the lowest evaluated responsive tenderer, and should the lowest evaluated responsive tenderer be found not qualified, Regulation 52(2) allows the Procuring Entity to reject the unqualified tenderer and proceed with confirmation of qualifications of the next lowest responsive bid. Such a provision for confirmation of qualification should be stated in the Tender Documents.

However, the Tender Documents did not have this provision for the Procuring Entity to apply the criteria "Referee Evaluation" or confirm qualifications of bidders prior to award of tender.

As already noted in Ground 1, the Procuring Entity applied the criteria "Referee Evaluation" after evaluating the technical and financial evaluation of the bids. This was an introduction of new criteria contrary to Section 66(2) and Regulation 38(e).

Accordingly, these grounds of appeal succeed.

Ground 4 - Breach of Section 39(1) of the Act

The Applicant alleged that the Procuring Entity breached Section 39(1) of the Act by failing to award the tender to the Applicant as it was discriminatory to it. The Applicant submitted that after having passed both the technical and financial evaluation, the only way in which the Procuring Entity did not award the Applicant the tender was by being discriminatory to it.

In its response, the Procuring Entity stated that the tender award was done based on the recommendation of its evaluation committee, which was done in a fair, non discriminatory and transparent manner and that it never breached the provisions of the said Act which states that candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the Regulations.

The Board has noted that the Applicant participated in this tender and was evaluated. Section 39 deals with participation of tenderers in procurement proceedings. There was no evidence to show that there was any discrimination to exclude the Applicant from the tender process.

Accordingly, this ground of appeal fails.

Ground 5 - Breach of Regulation 46

The Applicant alleged that the Procuring Entity breached Regulation 46 by evaluating the tenders outside the period of thirty days contrary to the said Regulation.

In its response, the Procuring Entity stated that it undertook the tender evaluation within the thirty day period pursuant to Regulation 46. It further argued that it had to write to the tenderers' to furnish it with referees for information on the tenderers' past performance before adjudicating and awarding the tenderers. The Procuring Entity further stated that it notified the tenderers of this delay vide a letter dated 2 July, 2008, and that the tender award was made within the tender validity period which was 120 days.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds that:-

- i) The tenders were opened on 8 May, 2008 and the technical evaluation was completed on 24 July, 2008, a period of 77 days after the date of tender opening which is outside the 30 day period stipulated in Regulation 46; and
- ii) The tender award was made on or about 18 August, 2008, which was within the tender validity period of 120 days, which expired on or about 5 September, 2008.

Therefore, even though the Procuring Entity breached Regulation 46, the award was made within the tender validity period, and the Applicant did not suffer any prejudice.

Ground 6 - Breach of Section 67(2) of the Act and Regulation 73(2) (c)

The Applicant alleged that the Procuring Entity breached Section 67(2) of the Act and Regulation 73(2) (c) by failing to notify it promptly of the tender award.

In its response, the Procuring Entity stated that it notified the Applicant in time pursuant to Section 67(2) of the Act and that all tenderers were notified vide a letter dated 18 August, 2008.

The Board notes that Section 67(2) of the Act provides for simultaneous notification of the successful and unsuccessful bidders, and that Regulation 73(2) (c) requires that a request for review be made within 14 days of the notification of award under Section 67 or 83 of the Act.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds no evidence which shows that the Procuring Entity breached Section 67(2) of the Act. The Board has noted that the notification letters to all tenderers were dated 18 August, 2008 and dispatched on 22 August, 2008.

Accordingly, this ground of appeal fails.

Ground 7 - Reliance on Section 44(2) (c) of the Act

The Applicant sought leave to rely on provisions of Section 44(2) (c) of the Act so as to rely on the minutes of the Procuring Entity's Tender Evaluation Committee with regard to the tender in question.

The Board notes that Section 44(2) (c) of the Act provides for the disclosure of information if the disclosure is for the purpose of a review under Part VII (administrative review of procurement proceedings).

The Board further notes that Section 44(3) of the Act states that notwithstanding the provisions of subsection (2), the disclosure to an applicant seeking a review under Part VII shall constitute only the summary referred to in Section 45(2) (e) of the Act.

The Board finds that the Applicant is not entitled to confidential information contained in the Procuring Entity's tender evaluation report; and further that the Applicant did not, after notification of award, apply for an evaluation summary from the Procuring Entity as envisaged by Sec. 45(2) (e) of the Act, and cannot therefore request for it at the hearing.

Ground 8 - That by the Procuring Entity's failure to award the tender to the Applicant, the Applicant has suffered loss and damage

The Applicant alleged that it had suffered loss of expected profit and damage because it had been subjected to unfair competition.

The Board finds that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business; therefore, the Procuring Entity is not liable for such costs.

Grounds 9 and 10

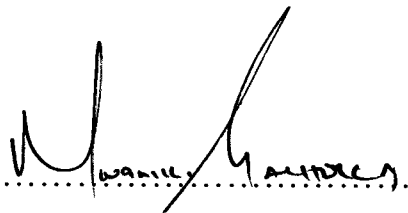
The Board finds that these are not grounds for appeal but mere statements not backed by any allegation of breach of the Act or the Regulations.

The Interested Candidate, M/S Lavington Security Limited, who was the successful tenderer, supported the Procuring Entity's submissions in their entirety.

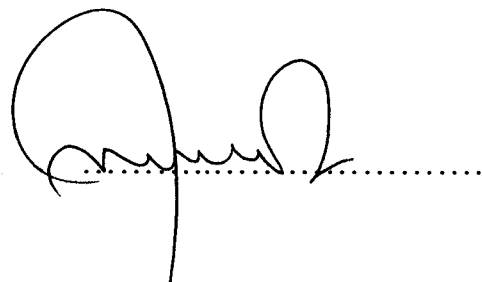
Taking into account all the foregoing matters, the Board orders, pursuant to Section 98 of the Act, that:-

- i) the decision to award the tender to the successful tenderer (Lavington Security Limited) is nullified; and
- ii) The Procuring Entity shall re-tender for this procurement and complete the procurement process within 90 days of the date of this Order.

Dated at Nairobi on this 25th day of September, 2008

A handwritten signature in black ink, appearing to read 'Wanjiku G. Mwangi', written over a horizontal dotted line.

Signed Chairman, PPARB

A handwritten signature in black ink, written over a horizontal dotted line.

Signed Secretary, PPARB

