

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 32/2008 OF 19<sup>th</sup> SEPTEMBER, 2008**

**BETWEEN**

**LAVINGTON SECURITY GUARDS LTD (APPLICANT)**

**AND**

**KENYA POWER AND LIGHTING COMPANY LTD  
(PROCURING ENTITY)**

Review against the decision of the Tender Committee of Kenya Power and Lighting Company Ltd dated the 16<sup>th</sup> September, 2008 in the matter of Tender No. KPLC1/1C/5/3/34/08 for Provision of Security Guarding Services

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mr. S. K. Munguti	-	Member
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

## **PRESENT BY INVITATION**

### **Applicant, Lavington Security Guards Ltd**

- Mr. Njuguna L. M. - Advocate, Njuguna & Partners Advocates  
Mr. Thuku - Advocate, Njuguna & Partners Advocates  
Mr. K. K. Mose - Operations Manager

### **Procuring Entity, Kenya Power & Lighting Co. Ltd**

- Ms. B. Muendo - Deputy Manager, Legal Services  
Mr. Owiti A. - Legal Officer  
Ms. James Muigai - Principal Procurement Officer  
Mr. R. Nderitu - Security Officer  
Mr. Muiruri Mariga - Legal Assistant  
Ms. Sharon Cheruyiot - Legal Clerk

### **Interested Candidates**

- Mr. B. K. Munyasya - Administrative Manager, Cavalier Security Services Ltd  
Major D. Wabwire - Operations Manager, Riley Falcon Security  
Mr. J. N. Musomba - Director, Riley Services  
Mr. F. O. Oluoch - Director, Tommy Cat Security Services Ltd  
Mr. Walter Owino - Managing Director, Gillys Security Services Ltd  
Mr. V. A. Awiti - Administrator, Gillys Security Services Ltd  
Mr. A. A. Kana - Managing Director, Protective Custody Ltd  
Mr. C. W. Njambuya - Sales, Collindale Security Services Ltd  
Mr. A. M. Sheikh - Director, Basein Security Services  
Mr. Adow Mursal - Director, Basein Security Services  
Mr. Mungai Mwaura - Managing Director, Delta Guards Ltd  
Mr. Polycap Ochola - Chairman, Guard Force (K) Ltd

- Mr. John K. Moni - Operations Officer, Race Guards Ltd
- Mr. Kaniaru M. Kamau - Director, Kenya Shield Security Ltd
- Mr. Kamenyi Ismael - Manager Services, Bob Morgan Security Services Ltd
- Mr. Josephat Kibet - General Manager, Brinks Security Services Ltd
- Mr. James K. Cherutich - Manager, Total Security Surveillance 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 Guarding Services was advertised by the Kenya Power and Lighting Company Ltd on 18<sup>th</sup> June 2008. The tender closed/opened on 18<sup>th</sup> July, 2008. Forty- four bidders bought the tender documents but at the tender opening, only thirty nine bids were submitted. At the tender opening two bids from Ms. Prowler Security and Collindale Security Services were disqualified for not providing bid bonds.

### **EVALUATION**

The Evaluation was carried out by a committee chaired by Mr. Brian Makokha a Senior Security Officer. It was to be done in three stages namely Preliminary, Technical and Financial stages. At the time of lodging the Request for Review, the financial proposals had not been opened.

### **Preliminary Stage:**

This stage involved checking on the provisions of mandatory items failure of which bidders were declared non – responsive. The criteria for evaluation was the provision of:

- i. Bid Bond
- ii. Three sets of bids
- iii. Copy of certificate of incorporation/certificate of registration of business
- iv. Fully completed confidential business questionnaire

Five bidders were found to be non-responsive on the preliminaries and their bids were declared non-responsive. The remaining bids were evaluated on the technical parameters and the cut off score was 70 marks. The bids were evaluated on the following parameters:-

- a) Company Profile
- b) Staff Competency profile
- c) Financial Resources
- d) Experience
- e) Reputation
- f) Social obligations
- g) Other Services

Out of the thirty two firms that were evaluated eighteen firms attained the pass mark. They were as follows:

1. Race Guards Ltd
2. Cornerstone Security Services Ltd
3. Cavalier Security Services Ltd
4. Apex Security Services
5. Protective custody Ltd
6. Inter Security Services Ltd
7. Total Security Surveillance Ltd
8. Kenya Kazi (KK) Security Services Ltd
9. Riley Falcon Security Services
10. Bob Morgan Security Services
11. Riley Services Ltd
12. Securex Agencies
13. Basein Security Services
14. Delta Guards Ltd
15. Radar Security Services Ltd
16. Brinks Security Services Ltd
17. G4S Security Services Ltd
18. Kenya Shield Security Ltd

The Evaluation Committee then recommended to the Tender Committee that the eighteen bidders' financial bids be opened.

### **THE TENDER COMMITTEE DECISION**

The Tender Committee of the Procuring Entity met on 16<sup>th</sup> September, 2008 and deliberated on the technical evaluation report and approved the opening of the financial bids of the eighteen technically qualified bids.

### **THE REVIEW**

The Applicant lodged the Request for Review on 19<sup>th</sup> September, 2008 after being notified that its bid did not qualify technically. The Procuring Entity had invited the bidders, who had passed the technical evaluation for the financial bid opening on 22<sup>nd</sup> September, 2008.

The Applicant was represented by Mr. L. M. Njuguna, Advocate, of Njuguna and Partners Advocates while the Procuring Entity was represented by Mr. A. Owiti a Legal Officer. The interested candidates present included

representatives from Cavalier Security Services Ltd, Riley Falcon Security Ltd, Riley Services Ltd, Tommy Cat Security Services Ltd, Gillys Security Services Ltd, Protective Custody Ltd, Collindale Security Services Ltd, Basein Security Services, Delta Guards Ltd, Guard Force (K) Ltd, Race Guards Ltd, Kenya Shield Security Ltd, Bob Morgan Security Services Ltd, Brinks Security Services Ltd and Total Security Surveillance Ltd.

The Applicant in its Request for Review had raised four (4) grounds of review and the Board deals with them as follows:-

**GROUND 1 AND 2 – BREACH OF SECTIONS 64(2), 66 AND REGULATION 49**

These grounds have been combined as they raise similar issues on responsiveness and evaluation of the tender.

The Applicant argued that the Procuring Entity sent a letter dated 17<sup>th</sup> September, 2008 stating that after technical evaluation, it did not qualify technically as per the criteria set out in the tender documents. It submitted that under Section 66 of the Act, it is only the responsive tenders that proceed to technical evaluation. It further submitted that Regulation 49 clearly states that technical evaluation is conducted after completion of preliminary evaluation.

The Applicant further argued that Procuring Entity had stated in its response to the Request for Review that the Applicant was disqualified at the preliminary evaluation stage for failure to submit the bid security in the required format. Therefore, the Applicant was not subjected to technical

evaluation as alluded in the letter dated 17<sup>th</sup> September, 2008. It argued that a bid that was not responsive at the preliminary stage in accordance with Section 64 of the Act could not be subjected to technical evaluation. It submitted that since the Procuring Entity did not subject the tender of the Applicant to a technical evaluation, it breached Section 66 of the Act and Regulation 49.

Finally, the Applicant argued that the Procuring Entity acted in a discriminatory manner contrary to Section 39 of the Act by rejecting its tender.

In response, the Procuring Entity admitted that it notified the Applicant by a letter dated 17<sup>th</sup> September, 2008, that it did not qualify technically as per the evaluation criteria set out in the tender documents.

It submitted that the Applicant failed to comply with the requirements of the tender documents by failing to furnish the bid security in the form of an on-demand bank guarantee as provided in the format at page 78 of the tender documents.

The Procuring Entity further argued that the Applicant was properly disqualified after preliminary evaluation in accordance with Regulation 47. It argued that the letter dated 17<sup>th</sup> September, 2008 informed the Applicant that its tender did not qualify technically. It submitted that it used the word "technically" in its letter to the Applicant to imply that the communication was being done after both the preliminary and technical evaluation.

It further submitted that the tender document provided that the evaluation was to be done in three stages namely:-

- (i) Preliminary examination and responsiveness under clause 2.20 of the tender documents.
- (ii) Technical evaluation under clause 2.22 of the tender document.
- (iii) Financial evaluation of the technically qualified bidders under clause 2.23 of the tender documents.

Finally, the Procuring Entity argued that it applied the evaluation criteria set out in clause 5.4.1 of the tender documents. It stated that the Applicant failed at the preliminary evaluation stage. Therefore, there was no discrimination as argued by the Applicant, as all the other bidders were subjected to the same criteria.

The Board has considered the submission of the parties and the documents submitted.

The Board has noted that the letter dated 17<sup>th</sup> September, 2008 notified the Applicant that its bid did not qualify technically. Section 66 of the Act and Regulation 49 provide the manner in which the evaluation of a tender should be done. There is no complaint that the tender documents did not contain the criteria for evaluation. A perusal of the tender document shows that it contained clear provisions on how the evaluation was to be done. The Applicant was disqualified at the preliminary evaluation stage in accordance with Regulation 47. As to whether the disqualification on the account of the



bid bond provided by the Applicant was proper, this issue was substantially argued in ground 3 and shall therefore be considered under that ground. But in so far as this ground alleges breach of Section 66 and Regulation 49, the arguments by the Applicant have no merit.

On the allegation that the Procuring Entity discriminated the Applicant contrary to Section 39 of the Act, the Board has noted that the Applicant submitted a tender that was considered on the same criteria with all the other bidders. Its tender was examined at the preliminary evaluation stage and disqualified together with others. Therefore, the allegation of discrimination has no merit.

Accordingly, these grounds of Appeal fail.

### **GROUND 3 – BREACH OF SECTION 64 AND REGULATION 41(3)**

The Applicant submitted that its disqualification on the ground that its bid security was in form of a bankers cheque and not an on-demand bank guarantee was wrong. It argued that the purpose of the tender security was to secure the validity of the tender and to discourage tenderers who are not serious. It stated that the bankers cheque was easily recoverable and that the Procuring Entity could not suffer any prejudice.

The Applicant further argued that Regulation 41(3) clearly stipulates the manner in which a bid security should be given. It argued that a bankers cheque fulfilled the requirements of Section 57 of the Act and Regulation 41(3). It urged the Board to consider the essence of the requirement of

providing a bid security and hold that the Bankers cheque is a proper bid security.

Finally, the Applicant submitted that failure to provide a bank guarantee was a minor deviation excusable under Section 64(2) of the Act. It submitted that the Procuring Entity should have exercised the discretion as provided under Section 64(2) and treat the provision of a bankers cheque instead of a bank guarantee as a minor deviation. It argued that provision of a bankers cheque was a deviation of form and in accordance with Section 72 of the Interpretation and General provisions Act, Cap 2 of the Laws of Kenya, a form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document. The Applicant also relied on Board's decisions in **Application No. 17/2006 Brinks Security Services and Telkom Kenya Ltd** and **Application 39/2005 Patriotic Guards Ltd and The Judiciary**. It submitted there was no substantive difference between a bank guarantee and a bankers cheque.

In response, the Procuring Entity submitted that the Applicant's tender did not conform to all the mandatory requirements as per criteria set out in the tender document. It argued that clauses 2.12.1 and 2.12.3 of the tender document clearly stipulated that a bidder had to give security in form of a bank guarantee. It further argued that clause 2.12.4 of the tender document stated that a tenderer that failed to provide the bid security in the proposed format would be rejected.

Finally, the Procuring Entity submitted that the failure by the Applicant to submit a Bank guarantee was not a minor deviation as envisaged by Section 64(2) of the Act. It stated that the bid by the Applicant failed to pass the

preliminary evaluation stage as set out in the tender document and the bid was properly rejected in accordance with Sections 57 and 66 of the Act and Regulation 41 (3).

The Board has carefully considered the submissions by the parties and all the documents.

The Board has noted that the tender under review was to be evaluated in three stages as indicated in Section II of the tender document. The procuring Entity had evaluated the bids to the technical stage and was to open the financial bids when this Request for Review was filed. The Board has further noted that the bid by the Applicant was declared non responsive at the preliminary stage for submitting a bankers cheque contrary to the requirement in the tender document that the security be in form of a bank guarantee.

The Board has further noted that Section 57(1) and (2) of the Act and Regulation 41(3) provide as follows:-

***Section 57(1) A procuring Entity may require that tender security be provided with tenders.***

***(2) The Procuring Entity may determine the form and amount of the tender security, subject to such requirements or limits as may be prescribed.***

**Regulation 41(3);**

- (1) .....**
- (2) .....**
- (3) The tender security to be provided under section 57 of the Act shall be in any of the following forms only:-**
  - (a) in cash;**
  - (b) a bank guarantee;**
  - (c) such insurance company guarantee as may be approved by the Authority;**
  - (d) a letter of credit;**
  - (e) No tender security shall be accepted under the Act unless such security is valid for a period of at least thirty days after the expiry of the tender period.**
  - (f) A Procuring Entity may, where it deems necessary, verify the authenticity of any tender security.**

It is clear that Section 57 of the Act grants the Procuring Entity the discretion to determine the format of the tender security subject to the requirements or limits prescribed in the Regulations. Regulation 41(3) provides for the four types of bid security namely; cash, a bank guarantee, insurance guarantee as may be approved by the Authority and a letter of credit. The tender security required by the Procuring Entity as stated in Clauses 2.12.1 and 2.12.3 was a bank guarantee of Kenya Shillings 100,000.00. Clauses 2.12.1, 2.12.3 and clause 2.12.4 provided as follows:-

***2.12.1 The tenderer shall furnish, as part of its tender, a tender security for the amount of Kshs. 100,000.00 in the form specified in the Invitation to tender.***

***2.12.3 The tender security shall be denominated in Kenya Shillings or in another freely convertible currency and shall be in the form of a bank guarantee (2.12.3).***

***2.12.4 Any Tender not secured in accordance with paragraph 2.12.1 and 2.12.3 will be rejected by KPLC as non responsive, pursuant to paragraph 2.20.***

Further, the Board has noted that page 78 of the tender document contained the tender security form. The tender security form contained the conditions that the bank was bound to observe including when the guarantee was to take effect and the validity period.

The issue to determine is not whether a bankers cheque is a valid mode of payment as argued by the Applicant. Rather, it is whether the Applicant complied with the tender requirement on bid security. As already noted the Procuring Entity required the bidders to issue a bank guarantee. This was in accordance with Regulation 41(3). That requirement was clearly stated in the tender document. As the Board has held severally, a Procuring Entity has to evaluate tenders in accordance with the criteria set out in the tender documents. If a Procuring Entity deviates from the requirements set out in the tender documents that is a ground for annulment of the tender. This was clearly stated in the **Application No. 4/2005 Lavington Security Guards Ltd and Kenya Pipeline Company**. The Board holds that the

reverse is equally true. When a bidder participates in a tender, it enters a race with clear rules of participation. It is a competition that must be judged on a "like-with-like basis". This reduces the element of discretion on the Procuring Entities. A tenderer who fails to comply with requirements set out in the tender documents will only have itself to blame when it is excluded from tender process at the evaluation stage.

The Board finds that the Applicant failed to comply with a clear requirement on tender security.

Accordingly, it was properly disqualified from the tender process in accordance with Regulation 47. Section 64(1) states that a tender is responsive if it conforms to all the mandatory requirements in the tender documents. Further, Section 64(2) states that a minor deviation is one that does not materially depart from the requirements set out in the tender documents. A tenderer has no discretion to determine any alternative that it should give instead of the requirements set out in the tender documents. If the Board was to hold otherwise, it would open a floodgate for tenderers to determine what alternatives they would give. That kind of scenario would not allow fair competition amongst the bidders as envisaged in Section 2 of the Act. It is not in doubt that a bankers cheque is a recognized mode of payment. However, that was not what the tender documents required. The Applicant is solely to blame for being knocked out for failure to comply with a simple and straight forward requirement. The Procuring Entity did not and cannot be held to have breached any section of the Act or Regulation.

Accordingly, this ground of Appeal also fails.

#### **Ground 4**

This is not a ground but the Applicant's statement of loss. The tendering process is a business risk. Further, 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 loss associated with the tendering process.

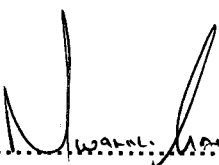
In the circumstances, this Request for Review fails and is hereby dismissed.

● The procurement process may continue.

The Board has noted that the tender validity period expires on 16<sup>th</sup> October, 2008. The financial evaluation of the bid was not done as the tender process was stopped upon filing of this Request for Review on 19<sup>th</sup> September, 2008.

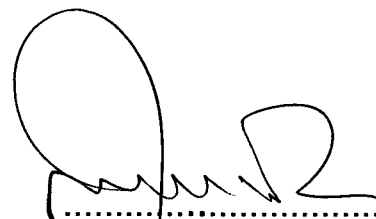
Accordingly, the Procuring Entity should extend the tender validity period by a period of sixty days from 16<sup>th</sup> October, 2008. Further, the bidders who qualified at the technical evaluation stage should be required to extend their  
● tender security by a period of sixty days from 16<sup>th</sup> November, 2008 when the tender security provided is to expire.

**Dated at Nairobi on this 16<sup>th</sup> day of October, 2008**



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**Signed Chairman**  
**PPARB**



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**Signed Secretary**  
**PPARB**

