

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 30/2009 OF 7TH AUGUST, 2009

BETWEEN

KENYA SHIELD SECURITY LIMITED APPLICANT

AND

**KENYA PIPELINE
COMPANY LIMITED PROCURING ENTITY**

Appeal against the decision of the Kenya Pipeline Company Limited in the matter of Expression of Interest for the Provision of Security Services for the year 2009-2010, Tender No. SU/QT/306N/09.

BOARD MEMBERS PRESENT

Mr. P.M Gachoka	-	Chairman
Mr. Joshua Wambua	-	Member
Eng. Christine A. Ogut	-	Member
Amb. Charles M. Amira	-	Member
Ms. Judith Guserwa	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Kerina A. Rota	-	Secretariat
Mr. Gilbert Kimaiyo	-	Secretariat

PRESENT BY INVITATION

Applicant, Kenya Shield Security Limited

- Mr. C.M. Njuguna - Advocate, Njuguna Githara and Partners Advocates
- Mr. William C. Githara - Advocate, Njuguna Githara and Partners Advocates
- Mr. Moses Kaniaru - Director

Procuring Entity, Kenya Pipeline Company Limited

- Ms. Gloria K. Masika - Advocate, Kipkenda, Lilan & Koech Advocates
- Micky Matheka - Advocate, Kipkenda, Lilan & Koech Advocates
- Mr. D. B. Kapten - Advocate
- Ms. Maureen M. Mwenje - Procurement Officer

Interested Candidates

- Mr. Eluid Ndungu - Marketing Manager, Gratom Babz Security Services Ltd
- Mr. Francis Membo - General Manager, Bravo Agencies Ltd
- Mr. Isaac Kirui - Assistant Operations Manager, Gillys Security and Investigation Ltd

BOARD'S DECISION

Upon hearing the representations of the parties and upon examining the documents before it, the Board decides as follows: -

BACKGROUND OF THE AWARD

The Expression of Interest was advertised by the Procuring Entity on 6th July, 2009 and it was for Provision for Security Services for the year 2009-2010-SU/QT/306N/09. The tender was closed and opened on 21st July, 2009 in the presence of the bidders' representatives.

The following bidders submitted their bids:-

1. M/s Cobra Security Services
2. M/s Cornerstone Security Ltd
3. M/s Sentry and Patrols Ltd
4. M/s Pluto Security Services Ltd
5. M/s Pada Security Services Ltd
6. M/s Robinson Security Group
7. M/s Radar Security Services Ltd
8. M/s Gillys Security and Investigation Ltd
9. M/s Vogue Security Services Ltd
10. M/s Federal Security Services Ltd
11. M/s Crossland Security Services Ltd
12. M/s Lavington Security Services Ltd
13. M/s Metro Consultants and Guardians
14. M/s Guard Force Security Kenya Ltd
15. M/s Riley Services Kenya Ltd
16. M/s Shikashika Security Alarms Ltd
17. M/s Bedrock Security
18. M/s Bravo Agencies Ltd
19. M/s Intersecurity Services Ltd
20. M/s Riley Falcon Security Services Ltd

21. M/s Total Security Surveillance Ltd
22. M/s Pinkertons Professional Security Services
23. M/s Spur Security Services Ltd
24. M/s Gratom Babz Services Ltd
25. M/s Winstar Security guards Ltd
26. M/s Vigilant Security Ltd
27. M/s Apex Security Services Ltd
28. M/s Brinks Security Services Ltd
29. M/s Security Group
30. M/s G4S Security Services Kenya Ltd

EVALUATION

The Procuring Entity evaluated the tenders based on the mandatory requirements as set out in the Advertisement Notice. The bidders were required to:-

- (i) Demonstrate the legal capacity to enter into a contract for the provision of the services in form of a certificate of Incorporation/Registration.
- (ii) Demonstrate compliance to tax remittance in Kenya by providing a valid Tax Compliance Certificate.
- (iii) To give audited Accounts for the last two years.
- (iv) To give evidence of a registered office and its physical address.

- (v) To give a Valid Communications Commission of Kenya Radio frequency licenses.
- (vi) To show that the firms was not be limited or disqualified under any of the provisions of the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations.2006.
- (vii) To give the name, office address, telefax number and email address number of the person authorized to receive all correspondences.

Out of the thirty firms that submitted their Expression of Interest, the following eleven firms met the mandatory requirements and were pre-qualified.

1. M/s Cornerstone Security Ltd
2. M/s Radar Security Services Ltd
3. M/s Gillys Security and Investigation Ltd
4. M/s Lavington Security Services Ltd
5. M/s Metro Consultants and Guardians
6. M/s Guard Force Security Kenya Ltd
7. M/s Riley Falcon Security Services Ltd
8. M/s Bedrock Security
9. M/s Intersecurity Services Ltd
10. M/s Spur Security Services Ltd
11. M/s Brinks Security Services Ltd

THE REVIEW

This Request for Review was lodged by Kenya Shield Security Services Ltd on 7th August, 2009 against the decision of the Kenya Pipeline Company Ltd in the matter of Expression of Interest No. SU/QT/306N/09 for Provision of Security Services for the year 2009-2010.

The Applicant was represented by Mr. C. M. Njuguna, Advocate while the Procuring Entity was represented by Ms. Gloria K. Masika, Advocate. The interested candidates, M/s Gratom Babz, M/s Bravo Agencies Ltd and M/s Gillys Security and Investigation Ltd were represented by Mr. Eluid Ndungu, Mr. Francis Membo, and Mr. Isaac Kirui respectively.

The Applicant has raised four grounds of appeal and urged the Board to make the following orders:

- (a) That the Procurement Entity decision to reject the Applicant Expression of Interest be set aside.
- (b) Procurement Entity be ordered to evaluate the Applicant Expression of Interest dated 15th July 2009.
- (c) Any further order or direction the Board may deem appropriate in the circumstances.

GROUND 1, 2 & 3 - Breach of Section 80 of the Public procurement and Disposal Act and Regulation 47 as read together with Regulation 57 of the Public Procurement and Disposal Regulations

The Board has consolidated grounds 1, 2&3 since they raises similar issues.

The Applicant stated that the Procuring Entity breached Section 80 of the Public Procurement and Disposal Act, and Regulation 47 as read together with Regulation 57 of the Public Procurement and Disposal Regulations (hereinafter referred to as "the Act" and the "Regulation", respectively). It further stated that it submitted the Expression of Interest to the Procuring Entity on 20th July 2009 and found two unmarked tender boxes on the ground floor of Kenpipe Plaza. Upon enquiry from the receptionist its representative was advised to deposit the tender document in either of the two tender boxes. It argued that the failure by the Procuring Entity to open its tender document on 21st July 2009 was solely caused by the Procuring Entity's failure to provide different tender boxes for different tenders. It further argued that its tender document must have been left in the tender box or was mixed up with the tender documents that were to be opened on 23rd July, 2009.

The Applicant submitted that one of the key objectives of the Act is to promote integrity and fairness of procurement procedures as set out in Section 2(c) of the Act which provides as follows:

"to promote the integrity and fairness of those procedures".

It further submitted that the Procuring Entity must build integrity in its procuring system to ensure that the procuring system was not breached either by innocent act or premeditated act. It stated that one of the key areas which that system can be absolved is through loss or misplacement of tender documents.

The Applicant stated that Regulation 44 clearly sets out how the tender box is to be locked and time to be opened. It further stated that tender box should only be opened at the tender opening date and not earlier. Consequently it submitted that tender documents with different tender opening dates should not be placed in the same tender box.

The Applicant informed the Board that there were two procurements which were running simultaneously. There was a pre-qualification for 25 different items which was advertised on 2nd July, 2009, and the closing date was 23rd July, 2009. It submitted that on 6th July, 2009 the Procuring Entity advertised for pre-qualification for security services which was to close on 21st July, 2009. It further submitted that the Procuring Entity had two Tender Boxes, at its headquarters and it did not allocate the tender boxes to any of these procurements. As a result, tender documents with different opening dates were put in the same tender boxes.

The Applicant stated that the Affidavit sworn by its director, Mr. Moses Kaniaru clearly stated that he personally took that tender documents on 20th July, 2009 and deposited them in the tender box at 4:15 p.m. It further stated that the Procuring Entity disputed this fact in an Affidavit

sworn by Ms Josephine Karambu. It referred the Board to paragraph 11 of the Affidavit which reads as follows:

“I was present at the Tender Opening on 23rd July, 2009 at 10:00 a.m. at our offices, and I confirm that the Applicant’s tender was among those in the tender box on 23/07/2009. I recognised it because I had been present in the Tender opening on 21/07/2009”.

It alleged that one could only recognise what it had seen before and the reading of paragraph 11 of the Procuring Entity’s affidavit suggested that Ms Josephine had actually seen the tender documents on 21st July, 2009 and that was the reason she could recognise them on 23rd July, 2009. It disputed the allegation of the Procuring Entity that it delivered its tender document on 21st July, 2009 after 11.00 am.

The Applicant submitted that its tender documents were submitted within time and the documents must have been mixed up at the sorting point, either intentionally or innocently and then left in the tender box. It alleged that there were over 148 tenders for the general tender and there were thirty one tenders for security tender and all the documents were deposited in the same tender boxes.

In conclusion, the Applicant submitted that the procurement process as carried out by the Procuring Entity did not satisfy Section 2(c) of the Act.

In response, the Procuring Entity stated that it was not in dispute that the deadline for submission of the tender in question was 21st of July, 2009 at 10.00 a.m. as clearly set out in the advertisement notice. Further, all the tenderers were invited to attend the tender opening as required by the law. It stated that it was also not in dispute that the Applicant did not attend the tender opening. It urged the Board to note that the envelopes for that particular Expression of Interest were clearly marked as specified in the Advertisement ***"Expression of Interest for Provision of Security Services for the year 2009/2010 and that reference"***. It admitted that there was another advertisement, whose tender opening was on the 23rd July, 2009 and those bids were required to be marked ***"category number that" "prequalification for supply of goods, works and services"***. It further urged the Board to take note of the fact that those markings were very distinct and different and there was no way a group of about thirty people who were at the bid opening of that tender boxes could fail to identify the respective tenders.

The Procuring Entity submitted that it had provided the tender boxes as required under Section 58 of the Act and that the tender boxes were placed in an accessible place. It further submitted that at 10:00 a.m., both tender boxes were opened by Ms Josephine Karambu and Mr Bobby Lekulale who had different keys of the tender boxes. It stated that all the boxes were emptied in the presence of twenty one representatives of bidders who were independent witnesses. It further stated that during the opening, the contents of the tender boxes were called out, verified and recorded in a register in the presence of bidders' representatives. Further, it stated that after that, the boxes were locked and returned to

the usual place since there was another ongoing tender submission process.

The Procuring Entity submitted that the reason why Ms Josephine Karambu was sure that if at all the Applicant submitted his bid it must have been done after 11:00 a.m. was because all the documents submitted before that time were removed from the tender boxes in the presence of all bidders. It further argued that the reason Josephine Karambu deponed in the affidavit that she recognised the Applicant's document on the 23rd July, 2009 was because she knew that any document marked "***Expression of Interest for Provision of Security Services***" belonged to a tender that had been opened two days earlier.

The Procuring Entity submitted that Ms Josephine Karambu had also clarified in her affidavit that there was no mix up of the tender documents during the tender opening on 21st July, 2009 because if there was any, it would have been noticed by the twenty one tenderers who witnessed the opening of the tenders. The Procuring Entity argued that it usually conducted their tender openings in a similar manner and there had never been any mix up before.

The Procuring Entity submitted that Section 80 of the Public Procurement and Disposal Act, 2005 had not been violated as the Expression of Interest was carried out in accordance with that provision.

In regard to Regulation 47, the Procuring Entity submitted that this was followed. It further submitted that the manner in which the evaluation was done is set out clearly in the minutes.

The Procuring Entity submitted that Section 57 of the Act was not applicable because this was an Expression of Interest.

The Procuring Entity argued that the failure to submit a tender document on time was a serious breach of the Regulations which is expressly barred by Section 58(3) of the Act and stated that the tender documents must be submitted by the set deadline. It further submitted that Section 60(2) of the Act states that only tenders received before the deadline could be opened and evaluated. Consequently, it stated that under Section 64 of the Act, the Applicant's tender was non-responsive since it did not conform to a mandatory requirement on deadline of submission and therefore the Procuring Entity had no choice but to mark its tender document as "late". It further stated that Section 58 of the Act provides as follows:

"A tender which is submitted outside time must be returned".

The Procuring Entity stated that there was nothing in the Act that required it to provide different boxes for different tenderers. It further stated that the Applicant never waited for formal communication from it and hence its prayer was premature.

The Procuring Entity submitted that Regulation 73(1) (c) (i) was clear that a Request for Review should be filed within 14 days of an award or occurrence of the breach. It argued that the Request for Review was time barred since the breach the Applicant is alleging occurred on 21st July, 2009 and thus the fourteen days ended on 4th August, 2009. It further stated that Request for Review was filed on 7th August, 2009 which was out of time and therefore the Board has no jurisdiction.

The Board has carefully considered submissions of parties and carefully examined the documents that were submitted.

The Board has noted that the Expression of Interest tender No. SU/QT/306N/09, the subject matter of Request for Review was advertised on 6th July, 2009. The Board has also noted that there were other tenders advertised on 2nd July, 2009 and all bid documents were to be placed in the two tender boxes situated on the ground floor of Kenpipe plaza. The bids in respect of this Request for Review were to be opened on 21st July, 2009 whereas other tenders were to be opened on 23rd July, 2009. The Applicant alleged that it submit its tender on 20th July 2009. On its part the Procuring Entity alleged that the Applicant's tender document must have been submitted at 11.00 am on 21st July 2009 one hour after the closing/opening time of the subject tender.

The issues that arise for determination by the Board from the conflicting position taken by the Applicant and the Procuring Entity are as follows:-

1. Whether the Request for Review was filed within time.
2. Whether the Applicant was a Candidate within the provisions of the Public Procurement and Disposal Act and whether the Board has jurisdiction to hear and determine the Request for Review.
3. Whether the Procuring Entity conducted the procurement process in line with the requirement of the Public Procurement and Disposal Act and the Regulations.

With respect to the first issue above, the Board notes that Section 58(3) provides that the tender must be submitted before the deadline and any tender received after that deadline should be returned unopened.

The Board further notes that the Applicant started making enquiries about its bid on 3rd August, 2009 when it went to the Procuring Entity's office and was informed that its bid had been rejected.

The Board also observes that the Applicant's tender was rejected by the Procuring Entity on the ground that it was submitted after the deadline. However, the Procuring Entity did not return the tender documents to the Applicant as envisaged by Section 58(3) of the Act. From the evidence placed before the Board there is nothing to show that the Applicant was aware that its bid had been rejected before the 3rd August 2009. The duty to inform a bidder that its tender had been rejected lies on the Procuring Entity. Taking these facts into consideration the Board

finds that this Request for Review was filed on 7th August, 2009 and the appeal window was to expire on 17th August, 2009. Therefore this Request for Review was filed within the stipulated time.

The second issue for determination is whether the Applicant was a Candidate within the meaning of Section 3 of the Act and whether the Board has jurisdiction to hear and determine this Request for Review.

The Board notes that Sections 3(1) and 93(1) of the Act provide as follows:

Section 3(1) - *"In this Act unless the context otherwise requires-*

"Candidate" means a person who has submitted a tender to a Procuring Entity"

Section 93(1)-*"Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on the Procuring Entity by this Act or the Regulations may seek administrative review as in such manner as may be prescribed"*

The Board notes that the Applicant bought tender documents and submitted them to the Procuring Entity. The issue that is in dispute is whether the tender documents were submitted before the stipulated deadline that is 10.00 am on the 21st July, 2009. The Board finds that the Applicant bought the tender documents and submitted them to the

Procuring Entity but it is not clear whether the submission was done within the stipulated time. Accordingly, the Board finds that it has the jurisdiction to hear and determine this Request for Review as it has to determine whether the Applicant submitted the tender documents within the stipulated time.

The third issue for determination is whether or not the Applicant submitted its bid before or after the deadline for submission.

Having examined the Tender Advertisement Notice, the Board notes that all the bidders were expected to *“submit their Expression of Interest in a sealed envelope clearly marked “EXPRESSION OF INTEREST FOR PROVISION OF SECURITY SERVICES FOR THE YEAR 2009-2010-SU/QT/306N/09” addressed to:*

*The Managing Director
Kenya Pipeline Company Limited
Kenpipe Plaza
P.O. Box 73442-00200
NAIROBI, KENYA*

And be deposited in the Tender box situated on the Ground floor of Kenpipe Plaza, Sekondi Road, Off Nanyuki Road, Industrial Area, Nairobi, so as to be received on or before 21st July 2009, 10.00 am. EOIs submitted later than this date and time shall automatically be disqualified. Opening of the EOIs will take place immediately thereafter

in the presence of the bidders or their representatives who choose to attend”

The Board notes that the above tender notice clearly showed how bidders were required to prepare their Expression of Interest, where and when to deposit them.

The Board has perused the minutes of tender closing/opening of 21st July, 2009 and notes that the Applicant's tender documents were not among the thirty Expression of Interest documents received and opened as per the said minutes. The Board further notes that whereas the Applicant alleged that it deposited its tender document on 20th July 2009 in one of the two unmarked tender boxes, the Procuring Entity has stated that the two tender boxes were marked 'TENDER BOX' and both of them were opened on the 21st July, 2009 at 10.00 am. The Board further noted that the Applicant was not among the 21 bidders/representatives who witnessed the opening. The Board notes that the Procuring Entity in its response to the Request for Review states that the bidders/ representatives present confirmed that all the boxes had been opened and their contents called out, verified and recorded in a register. Further, the Board notes that the 21 bidders/representatives present recorded their names and appended their signatures in the register. However, the Board observes that the Procuring Entity did not record how many bid documents were in the two tender boxes, how many were removed and how many were returned into the Tender Boxes.

The Board further notes that the tender opening minutes had no indication that the bidders' representatives who witnessed tender opening confirmed that all tenders for the subject tender were removed from the tender box and that the tenders that were returned in the box were for a different tender.

The Board notes that the Procuring Entity stated that on 23rd July, 2009 when it was opening the bids for a different tender, it found the Applicant's bid in respect of the Tender No. SU/QT/306N/09 for Provision of Security Services being among those tender documents. It therefore considered the Applicant's bid document to have been submitted late. On Examining the Applicant's tender, the Board notes that it bears the mark "LATE", stamped, signed and dated 23rd July, 2009. The Board observes that it may appear therefore that the Applicant did not submit its bid before the deadline for submission of the tenders. However, the Board also observes that there is a possibility that the bid documents for Applicant remained in the Tender boxes with the other bids that were to be opened on 23rd July, 2009.

The Board observes that the duty to ensure that the tender process is conducted in a manner that promotes integrity and fairness in a procurement process lies with the Procuring Entity. Whereas the Act does not stipulate that different tenders must be put in different tender boxes, a Procuring Entity is duty bound to ensure that tenders must not be interfered with before the deadline set for the closing and opening. In this particular tender, the Procuring Entity advertised tenders which had two different opening dates. The different tenders were to be

deposited in any of the two tender boxes. As already noted, the Procuring Entity did not record the number of bids that were removed and those that were returned to the tender boxes on 21st July 2009. Further, the Board has noted that although there were 21 bidder's representatives who were present on 21st July 2009 they did not sign anywhere that they had verified that all bids documents for this particular tender were removed from the tender boxes. Under the circumstances, it may be possible that the Applicant's bid may have been left in the tender box or mistakenly returned with the other tender documents which were to be opened on 23rd July 2009. Whereas it is also possible that the Applicant could have submitted its bid document after the deadline, the minutes kept by the Procuring Entity failed to capture in detail the process of opening and sorting out of the various tender documents in the two tender boxes.

Taking the above facts into consideration, the Board gives the benefit of doubt to the Applicant and holds that the tender documents were submitted within time.

The fourth issue for determination is the whether the Procuring Entity carried out the procurement process in line with the provisions of Section 2(c) of the Act which provides as follows:

“(a) The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives-

(b).....

(c) *to promote the integrity and fairness of those procedures;*"

The Board finds that the Procuring Entity advertised different tenders that were closing/opening on 21st July, 2009 and 23rd July, 2009 respectively. The Board also observes that the Procuring Entity had two tender boxes which were not marked for the different tenders.

The Board finds that the Procuring Entity could not have observed Regulation 44 (c) which requires the tender box to remain locked until the time for tender opening with respect to the opening of tenders on 23rd July, 2009. It was upon the Procuring Entity to put in place measures that ensured that the different bids were put in different tender boxes distinctively marked for the specific tender. Indeed, the Board notes that at the hearing the Procuring Entity did not explain why the two tender boxes could not have been marked separately for the two different tenders.

As the Board has already observed, the minutes of the tender opening of 21st July, 2009 did not capture all the details on which bids were removed and returned in the tender box. It was the obligation of the Procuring Entity to provide sufficient evidence that the tender opening process was done in the manner envisaged in the Act.

In the circumstances, the Board's findings are that the procurement process was not conducted in accordance with the requirements of Section 2 (c) of the Act.

Accordingly this ground of appeal succeeds.

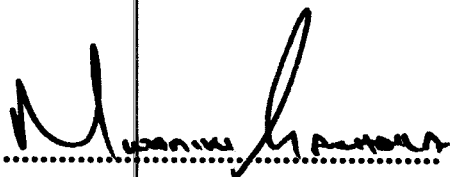
GROUND 4

Ground 4 is a mere statement not backed by any breach of the Act and the Board need not make any finding on it.

Taking into account all the foregoing matters, the Appeal succeeds.

The Board orders the Procuring Entity to admit the Applicant's Expression of Interest and evaluate it together with all the other qualifying bids that were submitted.

Date at Nairobi on this 7th day of September, 2009



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**

