

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 51/2009 OF 16TH NOVEMBER, 2009

BETWEEN

INTERSECURITY SERVICES LTD.....APPLICANT

AND

**KENYA ELECTRICITY GENERATING COMPANY LTD.
PROCURING ENTITY**

Review against the decision of the Tender Committee of The Kenya Electricity Generating Company Ltd dated 3rd November in the matter of tender for Provision of Security Services.

BOARD MEMBERS PRESENT

Mr. J. W. Wambua	-	in the Chair
Ms. Loise Ruhiu	-	Member
Eng. Christine. A. Ogut	-	Member
Ms. Judith A. Guserwa	-	Member
Amb. Charles M. Amira	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Pamela K. Ouma	-	Secretariat

Ms. Kerina A. Rota - Secretariat

PRESENT BY INVITATION

Applicant, Intersecurity Services Ltd

Mr. Njuguna C. M. - Advocate, Njuguna Githara & Partners

Mr. Okwiry - Director

Procuring Entity, Kenya Electricity Generating Company

Mr. Kiragu Kimani - Advocate, Hamilton Harrison & Mathews
Advocates

Ms. Michi Kirimi - Advocate, Hamilton Harrison & Mathews
Advocates

Ms. Rebecca Miano - Company Secretary

Mr. Dennis Onwanga - Legal Manager

Mr. Patrick Kimemia - Supply Chain Manager

Interested Candidates

Mr. Fredrick Obola - General Manager, Hatari Security Co. Ltd

Mr. Stanely Okanga - Guardforce Security (K) Ltd

Mr. Philip Kariche - Manager Director, Panther Guards

Mr. Charles Alwanga - Operations Manager, Panther Guards

Mr. Sum - Marketing Manager, Riley Services

Mr. Waiyaki - Marketing Manager, Spur Security

Mr. Robert Wangai - Accountant, Sunrise Security

Mr. James K. Cherutich - Marketing Manager, Total Security

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 was advertised by Kenya Electricity Generating Company and were closed at 10:00 p.m. on 3rd November, 2009. Twenty one bids were opened as follows:

1. Robinson Investment
2. Total Security Surveillance
3. Metro Consultants & Guardians
4. Spur Security Services Ltd
5. Panther Track Guards Ltd
6. Radar Limited
7. Sentry & Patrols Ltd
8. Babs Security Security Services Ltd
9. Cavalier Security Ltd
10. Race Guards Ltd
11. Basein Security Services
12. Guard Force Security
13. Idar Group Security Services
14. Sunrise Security Services Ltd
15. Kenya Shield Security
16. Hatari Security Guards
17. Lavington Security
18. Riley Security Services
19. Riley -Falcon Security Services
20. Security Group K Ltd
21. Brinks Security Services

EVALUATION:

The Procuring Entity was in the process of evaluating the bids, when Request for Review was filed. Consequently, the process had to be suspended after notification by the Secretary of the Board in accordance to Section 94 of the Act.

THE REVIEW

The Request for Review was filed by Inter-Security Services Ltd on 16th November, 2009. At the hearing, the Applicant was represented by Mr. Njuguna C. M, Advocate while the Procuring Entity was represented by Mr. Kiragu Kimani, Advocate.

The Applicant requests the Board for the following prayers:-

- (a) A declaration that the procurement entity mandatory requirement that only members of KSIA could bid for category A is discriminative arbitrary and unlawful.
- (b) An order that Procuring Entity do cancel the said tender and issue a fresh tender without the said requirement to all persons who bought the intial tender.
- (c) Any further order or direction the Board may deem appropriate in the circumstances."

Preliminary Objection

At the commencement of the hearing of this Request for Review, the Procuring Entity raised four issues touching on the competence and jurisdiction of the Board that needed to be considered before the request could proceed to hearing on merit. These were:-

1. That the applicant did not submit any bid to the Respondent.
2. Clause 15.1 of the Invitation to Tender required tenders to be submitted not later than 3rd November, 2009 at 10.00a.m.
3. The Applicant had admitted at paragraph 8 of the Request for Review that it attended the Respondent's offices at 10.10a.m. on 3rd November, 2009 and was therefore late in submitting its bid
4. The Applicant having bid for only category B of the tender, it is not a Candidate entitled to challenge the tendering process in category A of the tender

The Procuring Entity stated that the Applicant did not qualify as a candidate within the meaning of the provisions of Section 3 of the Act to be able to lodge the Request for Review. It argued that the applicant did not qualify as a candidate since it did not bid for category A with the Procuring Entity as it had only submitted a bid under category B. It argued that the Board would therefore not have the jurisdiction to hear a request for review from the Applicant. It referred the Board to the case of **Owners of the Motor Vessel "Lilians" -vs- Caltex Oil (K) Ltd C.A. No. 50 of 1989** in which Justice Nyarangi at page 14 held that:

"Jurisdiction is everything and without it the court has no power to make one more step, where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence"

The Procuring Entity also made reference to the Board's ruling in **Appeal No. 55 of 2007 between ZTE Corporation E. Africa and Ministry of Information**

& Communications in which the Board held that a party who had not submitted its bid to the Procuring Entity did not qualify as a candidate.

The Procuring Entity further argued that Clause 15 of the Instructions to Tenderers (hereinafter "ITT") provided that all interested bidders had to submit their bids not later than 10.00 a.m. on the 3rd November, 2009 after which the tender opening process would commence at 10.30a.m. It argued that the Applicant admitted at paragraph 8 of its supportive affidavit to the Request for Review that it attempted to submit its bid to the Procuring Entity at 10.10 a.m. on the 3rd of November, 2009 but the same was rejected as having been submitted ten minutes late. It stated that the Applicant was therefore not a candidate in the premises as it did not submit its bid. It made further reference to the case of **J.B. Lead -Bitter & Co. Ltd -vs- Devon County council 2009 CILL 2713** which deals with the issue of strict compliance with time requirements.

The Procuring Entity also submitted that the evaluation exercise had started by the time the Applicant filed its Request for Review which put everything to a standstill pending determination of the matter before the Board.

The Procuring Entity finally submitted that the Request for Review as filed by the Applicant was made outside the 14 days appeals window from the date of the alleged breach as provided for in the Regulation 73 (2) (c) (i) of the Public Procurement and Disposal Regulations, 2006 (hereinafter "the Regulations"). It also stated that the Applicant purchased the bid documents in mid October after the advertisement was carried out on the 13th October, 2009. It further stated that it is from that date that the Applicant became aware of the Clauses in the ITT which it was complaining about. It submitted that the 14 days period had lapsed long before the Applicant filed its Request for Review. It

therefore urged the Board to dismiss the request for review by upholding the Preliminary Objection.

In response, the Applicant stated that the breach complained of in the Request for Review was in respect of tender documents in so far as they were discriminatory as they stopped any bidder from bidding under category A unless they were members of Kenya Security International Association (KSIA).

It stated that the Procuring Entity reserved the right to amend the tender documents at any time before the closure/opening of the subject tender. It submitted that upon the purchase of the tender documents the applicant through its Association namely Protective Security Industry Association (PSIA) had sought clarification in their letter of 23rd October, 2009 to which the Procuring Entity did not respond. The Applicant conceded that although it submitted its bid at 10.10a.m. which was ten minutes after the closing time, this was twenty minutes before the bids were opened at 10.30 a.m. on the 3rd of November, 2009.

The Applicant further submitted that it qualified as a candidate under the definition given at Section 3 of the Public Procurement and Disposal Act(hereinafter "the Act") which refers to a candidate as a bidder who has submitted its bid to the Procuring Entity even if the Applicant's bid was not accepted or opened. It urged the Board to open its doors to a party who had an interest in the matter and had purchased the tender documents but had delayed its submission by only ten minutes. It added that such a party risked suffering loss or damage as provided for under Section 93 of the Act. It submitted that the Board had jurisdiction to hear a request from such a party whose complaint related to a breach that occurred before the opening of the

tenders. It made reference to the provisions of Section 60(2) of the Act which requires the Procuring Entity to open tenders immediately after the tender closing deadline.

It sought to distinguish the Board's finding in **Application No. 55 of 2007 between ZTE Corporation East African and Ministry of Information and Communication** to the extent that the Applicant in the said matter had failed to submit its bid to the P.E. while in the instant case the Applicant had submitted its bid although late and that the same was rejected. It also submitted that the outcome of the instant Request for Review would have serious implications to the Security Industry. It urged the Board to dismiss the Preliminary Objection and allow the Request for Review to be heard and determined on merit.

On the issue of lodging the Application for Review out of time, the Applicant submitted that the Procuring Entity carried out the advertisement of the tender on the 13th October, 2009 it collected the tender documents on or before 20th October, 2009. It further submitted that on 23rd October, 2009 the Applicant through its industry Association PSIA raised the issue of the discriminatory clauses in the tender documents with the Procuring Entity. It stated that it had expected the Procuring Entity to amend the tender documents to remove the discriminatory clauses which it did not. It submitted that on 3rd November, 2009 when the Procuring Entity closed/opened the bids without amending the tender documents, that is when the breach occurred and that marked the commencement of the fourteen (14) days appeals window. It urged the Board to dismiss the Preliminary Objection.

In reply, the Procuring Entity argued that the Request for Review was filed out of time even if one was to consider the fact that the Applicant had collected its bid documents on the 20th of October, 2009 and had become aware of the alleged discriminatory clauses in the I.T.T on that date. It further argued that the Applicant should have moved to the Board within 14 days from the 20th October, 2009.

On the issue of the ten minutes delay on the part of the Applicant, the Procuring Entity submitted that if the Board was to accept the Applicant's argument on this issue, it would amount to re-writing the I.T.T. to the bidders which was not within the Board's mandate. It referred the Board to the provisions of Section 58(3) of the Act, which provides for the closing/opening of the tenders.

It further argued that Section 60(2) of the Act did not provide for a simultaneous closing/opening of the bids as this would have been expressly stated. The Procuring Entity argued that the Act did not provide any room for flexibility with regard to time. It stated that the Act had expressly distinguished the powers of the Board and those vested in the Public Procurement Oversight Authority under Section 9 of the Act and urged the Board to exercise the powers vested in it under Section 98 of the Act. The Procuring Entity admitted having received the Industry Association's letter of 23rd October, 2009 but conceded that it did not respond to it as the Association was not a bidder in the subject tender.

It therefore urged the Board to uphold its Preliminary Objection and dismiss the request for review.

The Board upon considering the submissions of the parties and examining all documents before it makes the following findings:-

The first issue for the Board to determine is whether the Applicant was a candidate within the meaning of the Act. To determine this question, the Board has noted that the Applicant delivered its bid to the Procuring Entity on 3rd November, 2009 at 10.10 a.m. The Board further finds that the tender Advertisement notice and Clause 15.1 of the I.T.T. clearly stated that the tender documents were to be submitted **not later** than 3rd November, 2009 at 10.00 a.m. The said clause provided as follows:-

“The completed Technical and Financial proposals of the tender must be received by the Procuring entity at the address specified under paragraph 14.1 not later than 3rd November, 2009 at 10.00 a.m.”

The Board holds that the Applicant's bid having been rejected on grounds of late submission (as admitted by the Applicant) could not be examined alongside other bid documents that had been submitted before the 10.00 a.m. deadline on the 3rd November, 2009 as per the instructions given by the Procuring Entity. In the circumstances the Board finds that the Applicant's bid was properly rejected.

The Law

Having found as a matter of fact that the Applicant did not submit its bid to the Procuring Entity within the stipulated period, the question that arises is whether or not the Applicant can lodge a competent Request for Review before the Board. The answer to this question is given by Section 3 and 93(1) of the Act. The said Sections provide as follows:-

Section 3 "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 a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed".

It is clear that the Applicant did not submit a tender to the Procuring Entity within the prescribed time. Thus the applicant was not and is not a candidate within the meaning of the Act. Section 93(1) is clear that only a candidate who claims to have suffered or risks suffering loss or damage due to a breach of a duty imposed on a P.E. can seek Administrative review.

A procurement process is a race governed by rules set out in the Act, Regulations and tender documents. A bidder enters the race by buying the tender documents and submitting the tender documents before the set deadline. It is only a bidder who has entered the race, in accordance with the rules and required format who can lodge a complaint. A complaint by a person standing on the sidelines, with its rejected documents cannot be properly lodged before the Board. The Board is a creature of statute and it can only exercise the powers donated to it by the Act and Regulations.

The Applicant may well have genuine grievances but failed to return its tender documents within the time stipulated in the I.T.T. and Advertisement Notice therefore locking itself out of the race.

In conclusion, the Board would like to reiterate its ruling on the issue in the case of **UNI-IMPEX (IMPORT & EXPORT) LTD** and **MINISTRY OF HEALTH (KEMSA), APPLICATION NO.5 OF 14TH JANUARY, 2004**. This case was based on Regulation 40(1) and (2) of the Exchequer and Audit Regulations, 2001 which is similar to Section 93(1) on whether an applicant who had not submitted a bid was competent to lodge an Appeal.

In that Appeal, the Board stated as follows:-

“In our view, to fall within the definition of a candidate who can claim under the Regulations, a person must be invited. What constitutes an invitation? The first necessary ingredient is that there must be the actual notification of invitation or advertisement. Needless to say, the person invited must become aware of the invitation. The second and fundamental ingredient is in the content of the invitation. On its face, and by its general terms, an advertisement calls upon an invitee, or interested person, to react in certain ways to it. These usually include a necessary step of obtaining or purchasing the tender or bid documents and such like. It is not enough for the advertisement to be to the whole world, but that to become a candidate he who reads it must react to it in one of the ways required by it. The third and final necessary ingredient of an invitation is the return to the advertisers, in the required format and at a specific time or place, of the tender or bid documents or such like. It is the effecting of this third step of returning tender documents that makes the invitee a candidate or, in effect, an examinee. In procurement language, the invitee enters into the competition as one of the persons whose documents will be examined and evaluated for purposes of an award.

These are the necessary ingredients pursuant to which any person becomes transformed into a candidate under the Regulations. A person who does not satisfy all the foregoing criteria can be nothing more than a busybody without sufficient interest in the tender process in issue. Only upon undergoing that transformation process, or upon being unreasonably prevented from doing so, can a person be entitled to make a claim for administrative review as a candidate. In addition, he must show that he has suffered or risks suffering loss or damage arising out of the Procuring Entity's non-compliance with a duty imposed on it by the Regulations".

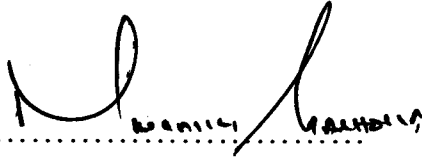
Having determined that the Applicant was not a candidate as provided for in Sections 3 and 93(1) of the Act, and therefore could not lodge a competent Request for Review, the Board holds that the Request for Review lodged before it is incompetent and the Board lacks the necessary Jurisdiction to entertain it.


On the issue of when the fourteen days appeals window started running, the Board finds that the Applicant collected the bid documents on or about the 20th October, 2009. It is on this dated that it technically became aware of the offending Clauses in the ITT. Further the Board notes that the Industry Association's letter of 23rd October, 2009 addressed to the Procuring Entity does not cite the Applicant as the complainant and having learned about the alleged discriminatory clauses in the ITT on the 20th October, 2009, the Applicant had fourteen days appeal window period allowed under Regulation 73 (2) (c) (i), running from that date and lapsing on the 3rd November, 2009. Therefore the appeal having been filed on 16th November, 2009 was filed out of time.

On the second issue raised by the Procuring Entity touching on whether the Applicant having placed its bid for category B of the tender and not category A disentitles it to challenge the tendering process in category A, the Board finds that since it has been held in the foregoing paragraphs that the Applicant did not qualify as a candidate in the meaning of the Act, it is of no consequence that its bid was for category B of the tender and not A.

Taking all the above matters into consideration, the Preliminary Objection succeeds. Consequently, this Request for Review is dismissed and the procurement process may proceed.

Dated at Nairobi on this 9th day of December, 2009


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Signed Chairman


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Signed Secretary