

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW

BOARD

**CONSOLIDATED REVIEW NOs.53/2009 OF 30TH NOVEMEBR,
2009 AND 54/2009 OF 3RD DECEMBER, 2009**

BETWEEN

**RILEY FALCON SECURITY SERVICES LTD
& TOTAL SECURITY SURVEILLANCE LTD.....APPLICANTS**

AND

KENYA PIPELINE COMPANY LTD.....PROCURING ENTITY

Reviews against the decision of the Tender Committee of the Kenya Pipeline Company Ltd dated 19th November, 2009 in the Matter of Expression of Interest No.SU/QT/306N/09 for Provision of Security Services for the year 2009/2010.

BOARD MEMBERS

| | | |
|--------------------|---|----------|
| Mr. P. M. Gachoka | - | Chairman |
| Ms. Judith Guserwa | - | Member |
| Mrs. L. G. Ruhiu | - | Member |
| Amb. Charles Amira | - | Member |
| Eng. C. A. Ogut | - | Member |

IN ATTENDANCE

Mr. C. R. Amoth - Board Secretary
Mr. P. M. Wangai - Secretariat
Ms. Kerina Rota - Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.53/2009

Applicant, Riley Falcon Security Services Ltd

Mr. C. M. Njuguna - Advocate, Njuguna Githara & Partners
Mr. Kenneth Kangethe - Pupil, Njuguna Githara & Partners
Mr. T. O. See - Director

Procuring Entity, Kenya Pipeline Co. Ltd

Mrs. Gloria K. Masika - Advocate, Kipkenda Lilan Loech & Co. Advocates
Mr. Micky Matheka - Advocate, Kipkenda Lilan Loech & Co. Advocates
Ms. Maureen W. Mwenje - Procurement Officer

PRESENT BY INVITATION FOR APPLICATION NO.54/2009

Applicant, Total Security Surveillance Ltd

Mr. S. K. Bundotich - Advocate, Kale, Maina & Bundotich Advocates
Mr. James Cherutich - Manager

Interested Candidates

- | | | |
|---------------------|---|---|
| Ms. Irene Mikangi | - | Advocate for G4S Security |
| Mr. Timothy Njoroge | - | Marketing Manager, Brinks Security Services Ltd |
| Ms. Evelyn Obara | - | Human Resources & Administration, Gillys Security Ltd |
| Mr. Moses Kaniaru | - | Director, Kenya Shield Security Ltd |

BOARD'S DECISION

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

BACKGROUND OF AWARD

The Expression of Interest (EOI) was advertised by the Procuring Entity on 6th July, 2008. It was for Provision of Security Services for the year 2009-2010. The tender was closed/opened on 21st July, 2009 in the presence of the bidders' representatives.

The following bidders submitted their bids:-

1. Cobra Security Services
2. Cornerstone Security Ltd
3. Sentry and Patrols Ltd
4. Pluto Security Services Ltd

5. Pada Security Services Ltd
6. Robinson Security Group
7. Radar Security Services Ltd
8. Gillys Security and Investigation Ltd
9. Vogue Security Services Ltd
10. Federal Security Services Ltd
11. Crossland Security Services Ltd
12. Lavington Security Services Ltd
13. Metro Consultants and Guardians
14. Guard Force Security Kenya Ltd
15. Riley Services Kenya Ltd
16. Shikashika Security Alarms Ltd
17. Bedrock Security
18. Bravo Agencies Ltd
19. Intersecurity Services Ltd
20. Riley Falcon Security Services Ltd
21. Total Security Surveillance Ltd
22. Pinkertons Professional Security Services
23. Spur Security Services Ltd
24. Gratom Babz Services Ltd
25. Winstar Security guards Ltd
26. Vigilant Security Ltd
27. Apex Security Services Ltd
28. Brinks Security Services Ltd
29. Security Group
30. G4S Security Services Kenya Ltd

EVALUATION

This was conducted by a committee of five members chaired by Mr. David K. Keino and was based on the following mandatory requirements which were set out in the advertisement notice:

- (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) Audited Accounts for the last two years
- (iv) Evidence of a registered office and its physical address.
- (v) Valid Communications Commission of Kenya Radio frequency licenses.
- (vi) Proof that the firms shall 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) The name, office address, telefax number and email address number of the person authorized to receive all correspondences.

Upon evaluation, the following eleven bidders were found responsive and were recommended for invitation to bid:

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

On 7th August, 2009, Kenya Shield Security Services Ltd filed a Request for Review No. 30/2009 against the decision of the Procuring Entity to exclude it from the procurement proceedings. The appeal succeeded and the Board ordered the Procuring Entity to admit and evaluate the Applicant's Expression of Interest along with all other Expression of Interests that had it received.

Tenders were re-evaluated and the following 12 bidders were pre-qualified:

1. Cornerstone Security Services Ltd
2. Radar Limited
3. Gillys Security & Investigation Services Ltd
4. Lavington Security Ltd
5. Metro Consultants and Guardian Ltd
6. Guard Force Security (K) Ltd
7. Riley Security Services Ltd
8. Bedrock Security
9. Inter Security Services Ltd
10. Spur Security Services Ltd
11. Brinks Security Services Ltd
12. Kenya Shield Security

The above 12 bidders were invited to tender vide letters dated 16th November, 2009. Tenderers were required to submit their bids by 2nd December, 2009 at 10.00 a.m.

THE REVIEWS

The Request for Review No.53/2009 was lodged by Riley Falcon Services Ltd on 30th November, 2009 while Request for Review No.54/2009 was lodged by Total Security Surveillance Ltd on 3rd December, 2009. The two Reviews were 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 Applicants were represented by Mr. C. M. Njuguna

and Mr. S. K. Bundotich both Advocates, in applications No. 53 & 54 of 2009 respectively. The Procuring Entity on its part was represented by Mrs. Gloria K. Masika, Advocate.

The Applicant in Request for Review No.53/2009 has raised seven grounds of appeal and urged the Board to make the following orders:

- (a) A declaration that the Applicant is qualified to tender for Provision of security services to the Procuring Entity.
- (b) An order that the Procuring Entity do invite the Applicant to submit its proposal.
- (c) An order that the Procuring Entity do tender/ procure the said services for at least one year.

Any further orders or directions the Board may deem appropriate in the circumstances”.

The Applicant in Request for Review No.54/2009 has raised eight grounds of appeal and urged the Board to make the following orders:

1. The ***Expression of Interest*** for Provision of Security Services for the year 2009-2010 process by the said PE, Kenya Pipeline Company be nullified.
2. The ongoing process of ***Request for Proposals*** for Provision of Security Services for the year 2009-2010 by the said Procuring Entity, Kenya Pipeline Company be stopped forthwith.

3. The entire exercise pertaining to the Tender for Provision of security Services for the year 2009-2010 No. SU/QT/306N/09 by the said PE, Kenya Pipeline Company be set aside forthwith".

At the hearing, it was noted that the two Requests for Review arose from the same tender and involved the same parties. It was therefore agreed by consent of all the parties that the two Applications would be heard concurrently.

REVIEW No. 53/2009

Grounds 1, 2, 3, 4 5 & 6 - Breach of Section 2, 31 & 81 and Regulations 25

These grounds were combined and argued together as they raised similar issues.

The Applicant submitted that the facts relating to this procurement were not in dispute. It stated that it submitted its Expression of interest and included a licence issued by the Communication Commission of Kenya (herein after referred to as CCK) which had expired on 30th June, 2009. It further stated that it had provided a receipt for renewal of fees showing that the Applicant had paid for the renewal of the licence on the 15th September, 2009.

The Applicant further submitted that it had been a service provider to the Procuring Entity for the last three years. It argued that licences

issued by CCK always expire on the 30th June of each year irrespective of the date of issue. It stated that under Section 81 of the Kenya Communications Act, 1998, CCK is obligated to renew the licences within thirty days from the date of application. It argued that having provided the receipt for the renewal fees, it should not have been disqualified from the tender process. It further argued that this requirement on the licences was not applied uniformly as one of its competitors, M/s Riley Security Services, had only provided a receipt for the renewal fees and yet it was not disqualified from the tender process.

The Applicant submitted that the Procuring Entity breached Section 31 (4) of the Act by failing to apply the evaluation criteria uniformly for all the bidders. It argued that this kind of action amounted to discrimination contrary to Section 39 of the Act.

Finally, the Applicant submitted that the Procuring Entity breached Section 26 (3) of the Act for failing to develop an annual procurement plan. It argued that this tender was for a period of six months and this amounted to a split of the tender to avoid an open tender in favour of a request for Proposal which is contrary to Section 30 of the Act. In addition, it argued that it had not been notified of the results of the expression of interest and therefore the Procuring Entity did not promote the objectives of the Act as set out in Section 2.

In response, the Procuring Entity submitted that it applied the evaluation criteria as set out in the tender documents. It stated that the Applicant was disqualified for failing to meet a mandatory requirement that was set out in the tender documents. It further stated that the Applicant provided a licence from CCK expiring 30th June, 2009. That licence had already expired by the time the tender was closing/opening on the 21st of July, 2009 and that defect could not be cured by inclusion of the receipt for renewal fees. Therefore, the Applicant was properly disqualified from further evaluation for failure to meet a mandatory requirement.

On the allegation that it had split the tender, the Procuring Entity submitted that this tender had initially been advertised but the process had to be stopped upon filling the Request for Review of Application No. 30/2009 by Kenya Shield Security Services Ltd. This disrupted the tender process and as the budget was for one year only, the Procuring Entity had no choice but to reduce the tender period from one year to six months which was the remaining period. It therefore argued that it did not split the tender as argued by the Applicant.

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

The Board notes that this tender was advertised on the 6th of July, 2009. The tender notice stated clearly that bidders had to provide a

valid CCK Licence for the year 2009 - 2010 as one of the mandatory documents. The Board has also noted that the Expression of Interest required the bidders to provide a valid CCK Communication Radio Frequency Licence.

The Applicant conceded that its CCK Licence expired on the 30th June, 2009. However, it argued that it had included a copy of a receipt for payment of fees for renewal of the licence for the year 2009/2010 and that the licence was subsequently issued on the 15th September, 2009.

The Board notes that the tender closing/opening date was 21st July, 2009, and as at that date the Applicant did not have a valid CCK Licence. The Board further notes that the Applicant included a licence that had expired on 30th June, 2009. The Board finds that the receipt for payment dated 15th July, 2009 was just evidence that the Applicant had payed for the renewal fees. This cannot be treated as a licence as the receipt does not state on the face of it that upon payment a licence would automatically be issued. It is therefore clear that the Applicant failed to comply with a mandatory requirement and was therefore properly disqualified from further evaluation.

The Board further finds that there was no split of tender as argued by the Applicant and therefore there was no breach of Section 26 (3) of the Act.

Accordingly, these grounds of appeal fail and the Request for Review is hereby dismissed.

REVIEW NO. 54/2009

Grounds 1, 2, and 3 – Breach of Section 76 (1) & (2)

The Applicant argued that the Procuring Entity adopted the wrong procurement method. It stated that a tender for Security Services ought to be procured through an open tender.

In response, the Procuring Entity submitted that under Section 93 (2) (a) the choice of procurement procedure under part IV of the Act is a matter that is not subject to review. It argued that an expression of Interest is part of a step in procurement procedure known as Request for Proposal. Therefore if a Procuring Entity elected to use the Request for Proposal method, it was bound to call for an Expression of Interest.

Finally it argued that the choice of a procurement procedure is a matter entirely at the discretion of a Procuring Entity and the Board had no power to interfere with such discretionary provisions.

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

The Board has noted that the Applicant is challenging the method of procurement used by the Procuring Entity. The Board notes that the argument that an expression of interest is not a procurement method

has no merit in view of Sections 78 & 80 of the Act.

The Board further notes that Section 93 (2) (a) clearly states that the choice of a procurement procedure pursuant to Part IV of the Act shall not be subject to review. In the circumstances, these grounds of appeal fail.

Grounds 4, 5 & 6 - Breach of Section 44 (3) and Regulation 66 (2)

The Applicant submitted that the Procuring Entity was bound by Regulation 66 (2) to give reasons for rejection of the Applicant's Expressions of Interest which was not done.

The Applicant further submitted that they complied with all the tender requirements and provided all the mandatory documents. It urged the Board to scrutinize its tender document and confirm that all the mandatory documents were included.

In response, the Procuring Entity submitted that they did not receive the letter dated 23rd November, 2009 requesting for the reasons why the Applicant was disqualified. In any event, it argued that the Request for Review was filed on 3rd December, 2009 and therefore the fourteen days which the Procuring Entity could have responded had not lapsed.

The Procuring Entity further submitted that the Applicant did not submit the mandatory documents as stipulated in the tender documents. The Procuring Entity stated that it had filed an affidavit

from one of its officers, Maureen Mwenje confirming that at the tender opening, the Applicant's tender document did not include the following documents;

- a) Certificate of Incorporation
- b) Valid CCK Licence
- c) Audited Accounts for the last three years.

The Procuring Entity stated that the tender documents which it had submitted to the Board and which included these three documents must have been substituted after the evaluation of the bids. It argued that this must have been done by the Applicant in connivance with the Procuring Entity's employees.

In answer to a question by the Board as to had the custody of the tender documents, the Procuring Entity admitted that the tender documents were in its custody. On further questioning by the Board on the whereabouts of the tender document of the Applicant that was used by the Evaluation Committee, the Procuring Entity admitted that it was not in a position to produce that tender document.

The Board notes that two issues arise for determination as follows:

1. Whether or not the Applicant was properly disqualified from the tender process; and
2. Whether the Procuring Entity breached the Act and the Regulation by failing to give the Applicant the reasons for its disqualification.

The Board notes that, the Procuring Entity submitted as follows:

1. That the tender document which it presented to the Board is not the same document that was used during the evaluation;
2. That the Applicant's tender document that was used during evaluation did not contain a certificate of registration, CCK Licence for the year 2009/2010 and the audited accounts for the last three years i.e. 2006 - 2008 and that therefore the Applicant was disqualified for failing to meet these mandatory requirements;
3. That the tender document presented to the Board must have been clandestinely substituted by the Applicant with assistance of a person working with the Procuring Entity; and
4. That the Applicant's tender document that is currently before the Board did not have signatures of the members of the tender opening committee and this was evidence that this document must have been substituted after the evaluation.

The Board notes with concern that the issues raised by the Procuring Entity are very serious and go to the root of the entire procurement process. The issues bring into question the integrity and the transparency of the whole tender process.

The Board notes that a procurement process must remain confidential and free from interference from any person. A bidder who attempts to influence the evaluation process must be disqualified at the earliest opportunity. In this particular case, there is no evidence that the Applicant substitute its tender document after the evaluation as argued by the Procuring Entity. Indeed, the Board notes that the Procuring Entity did not state when it realised that the Applicant's tender document had been substituted. This issue was only raised after the filing of this Request for Review.

The fact that the Procuring Entity stated that the tender documents were substituted raises serious issues on how its tender documents are secured during the tender process. It is the duty of a Procuring Entity to ensure that it takes measures to protect the integrity of the entire procurement process. By stating that a document was substituted, this raises serious concern on how this tender was conducted.

The Board notes that Section 2 of the Act provides as follows:-

"2. 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

(a) to maximise economy and efficiency;

- (b) to promote competition and ensure that competitors are treated fairly;*
- (c) to promote the integrity and fairness of those procedures;*
- (d) to increase transparency and accountability in those procedures; and*
- (e) to increase public confidence in those procedures.*
- (f) to facilitate the promotion of local industry and economic development."*

In view of the submission by the Procuring Entity it's clear that the objectives of the Act could not have been achieved.

The Board has carefully scrutinised the tender documents that were placed before it and has made the following observations:-

1. All the tender documents including that of the Applicant bear a green coloured stamp by the Procuring Entity's Internal Audit department.
2. All the documents including that of the Applicant are duly signed by four officers on the 21st of July, 2009 which was the tender opening date.
3. The Board notes that all the signatures in all the tender

documents are the same and that the different officers were using different coloured pens. The question that arises is if the Applicant substituted the tender document as alleged by the Procuring Entity, does that mean that its officers subsequently signed and back dated the date on the stamp?

4. The Applicant's tender document contains the CCK Licence, Audited Accounts for the last three years and the Certificate of Incorporation.
5. The Applicant in Application No. 53 /2009 M/s Riley Falcon Security Services was disqualified for failure to submit a valid CCK Licence. The Board notes that one of the bidders M/s Riley Services Kenya Ltd, who qualified to proceed to the next stage of evaluation, had provided a licence that had expired on 30th June, 2009. Like the Applicant in application no. 53/2009 it had included a receipt for payment dated 16th July, 2009. The question that arises is why Riley Security Services was not disqualified and yet it did not meet a mandatory requirement.

In the circumstances, whichever way the Board looks into this matter, it is clear that the entire tender process was flawed and the integrity of the officers handling the whole tender process is questionable.

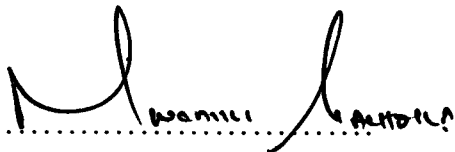
Accordingly, the Board finds that the entire procurement process is tainted with irregularities and is completely flawed. It is therefore not necessary to consider the other limbs of these grounds on the

summary of the evaluation and the reasons for disqualification.

Taking into account all the above matters, these grounds of appeal succeed.

The Board hereby annuls the entire procurement process and orders that a re-tender be done in accordance with the Act and the Regulations.

Dated at Nairobi on this 18th day of December, 2009

A handwritten signature in black ink, appearing to be 'Wameli', written over a dotted horizontal line.

Chairman, PPARB

A handwritten signature in black ink, appearing to be 'W. W. W.', written over a dotted horizontal line.

Secretary, PPARB