

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 37/2011 OF 14th OCTOBER, 2011

BETWEEN

RILEY FALCON SECURITY 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 October, 2011 in the matter of Tender No. KGN-PROC-46-2011 for Tender for Provision of Security Services 2011 - 2013.

BOARD MEMBERS PRESENT

Mr. Joshua W. Wambua	-	Member, (in the Chair)
Ms. Loise Ruhiu	-	Member
Amb. C. M. Amira	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Riley Falcon Security Services Ltd

- Mr. Njuguna C. M. - Advocate, Njuguna & Partners
Mr. T. O. See - Director

Procuring Entity, Kenya Electricity Generating Company

- Mr. Kiragu Kimani - Advocate, Hamilton Harrison & Mathews
Mr. Thomas Abira - Advocate, Hamilton Harrison & Mathews
Mr. James Tugee - Advocate, Hamilton Harrison & Mathews
Ms. Beatrice Koske - Ag. Legal Manager
Mr. Patrick Kimemia - Supply Chain Manager

Interested Candidates

- Mr. Morris Mutua - Advocate, Brinks Security Ltd, Gilly's Security & Investigations Ltd and Race Guards Limited
Mr. Charles Muliande - Head of Business, G4S
Mr. Allan Wanjala - Contracts Manager, G4S
Mr. Simon Gathuka - Bids Analyst, G4S
Mr. Samuel Wambua - Brinks Security Ltd
Mr. Owino John - Manager, Gillys Security & Investigations Ltd
Ms. Isadora Akinyi - Manager, Gillys Security & Investigations Ltd
Mr. James Cherotich - M. Manager, Total Security Surveillance Ltd
Mr. Richard Ndege - Business Development Manager, BM Security
Mr. Jonathan Musomba - Director, Riley Services

BOARD'S DECISION

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

BACKGROUND

Advertisement

The Procuring Entity advertised the tender for Provision of Security Services 2011 - 2013 on 7th and 14th July 2011. The current contract for provision of security services expired on 15th October 2011.

Closing/Opening:

The tender closed/opened on 29th July 2011 at 2.00pm. The following bidders submitted their bids:

1. G4S
2. BABS Security Services
3. IDAR Group Security Services
4. SPUR Security Services
5. VICKERS Security Services (VSS) Ltd.
6. Kenya Shield Security Services Ltd
7. BEDROCK Security Services
8. K.K Security Services
9. Robinson Security Services
10. Security Group
11. Paramount Investigation & Security
12. Cobra Security Company
13. B.M Security
14. Guardforce Group

15. Security Consultants and Training Services (ARN)
16. Gilly's Security & Investigation Services
17. Cavalier Security Ltd
18. Race Guards Limited
19. Klleen Homes Security Services Ltd
20. Total Security Surveillance Ltd
21. Lavington Security Limited
22. Brinks Security Ltd
23. Inter Security Services Limited
24. Riley Falcon Security Services Limited
25. Hatari Security Guards Limited
26. Radar Limited
27. APEX Security Services
28. Riley Services Limited
29. Texas Alarms Kenya Limited
30. First Force Security Services Limited

EVALUATION

The tender covered all KenGen installations which were categorized into 2 categories namely A and B. Category A was considered based on the following security assessment:

- a) Frequent cases of theft and vandalism experienced i.e. most of Nairobi units, Kipevu, Garissa and Olkaria.
- b) Sizes of the stations where a number of the current contacted security providers are having challenges in providing reliable security services

c) Some of the stations are surrounded by residential areas subjecting them to potential targets for sabotage, terrorism and theft i.e. Lamu and Garissa.

d) Some security companies are not well established to undertake security duties for some KenGen stations due to their vast ground of coverage i.e. Olkaria.

Category A covered the Stima Plaza, Sacco Investment, Muthaiga House, Ngong 1 & II, GT Plant Embakasi, Mombasa road workshop, Nairobi South Power Station, Olkaria, Domes, Olkaria Housing Estates & Eburru, Kipevu, Lamu and Garisa Power Stations

Category B comprised areas with relatively lower security threats than category A i.e. Western and Eastern Hydros Stations.

Four firms namely, First Force Security Services; Spur Security Services; Bedrock Security Services; and Robinson Security services were not evaluated as they did not submit bid bonds as required during tender opening. KK Security inadvertently excluded the first page of their tender security. The Evaluation Committee sought clarification from the firm and confirmed that this was occasioned by bidding mix up. The firm however provided a copy of the missing page and hence proceeded to the next stage of evaluation.

Mandatory Requirements

The firms were evaluated for mandatory requirements on the following parameters:-

a) Original Tender Security

- b) Copy of Certificate of Incorporation or registration
- c) Valid Single Business Permit from relevant local authority
- d) Copies of Pin and VAT certificate of registration
- e) Tax Compliance Certificate
- f) All companies incorporated in Kenya under the Companies Act Cap 486 of the Laws of Kenya must submit evidence of the Company's Annual Return for the year ended 31st December, 2009.
- g) Audited financial statements/account for year 2008/2009 or 2009/2010.
- h) Evidence of physical addresses/premises title, lease or rent agreement
- i) Certificate of Site Visit
- j) Five (5) letters of recommendation for provision of security services of similar magnitude from other reputable corporations other than KenGen.
- k) No History of poor performance of Security Services with KenGen (i.e cases of theft and contract termination)
- l) Proof of compliance with prevailing labour laws in respect to minimum wage, statutory remittances, protective clothing etc. Attach a duly certified letter from the local labour office and NSSF. Provide a certified copy of the payroll for the past three (3) months (to be verified with NSSF headquarters)
- m) Valid Frequency Licence (Not payment receipts) from Communication Commission of Kenya (CCK).
- n) Valid Work Injury Benefit Policy or Group Personal Accident Policy or Employers Liability Policy.
- o) Contractual Liability Insurance Policy Cover with minimum liability of Kshs. 20, 000,000 per event per year. Attach a valid copy of Contractual Liability Insurance Policy document.

- p) Evidence of physical address - attach copies of title, lease or rental agreement
- q) Demonstrate evidence of capability to man CCTV installations.

The Evaluation Committee made the following observations:-

1. Apex Security Services did not submit contractual liability insurance
2. ARN Security Consultant - did not submit PIN certificate, had three referees instead of five, had no evidence of company annual returns, and did not submit certified letter from NSSF and its contractual liability cover was Kshs. 5 million per year instead of Kshs. 20 million.
3. BABS Security Services did not submit any document under mandatory requirements.
4. BM Security did not submit a labour duly certified letter from local labour office.
5. Brinks Security did not submit certified letter from NSSF.
6. Cavalier Security services - the CCK frequency license invalid.
7. Cobra Security Services - tender document will expire on 16th November 2011 instead of 25th December 2011, no certified letter from local labour office, did not submit copy of annual return for the year ended 31st December 2009, CCK frequency license invalid and contractual liability cover 10 million instead of Kshs 20 million per event per year.

8. G4S tender for security service expires on 25th November 2011 instead of 25th December 2011, did not submit evidence of company annual return for the year ending 31st December 2009, did not attach a certified letter from the local labour office.
9. Guard force security services - did not submit evidence of the company annual return for the year 31st December 2009 and record of written complains of past poor performance at Kipevu power station.
10. Hatari Security Services - submitted letter purportedly issued by National Museums of Kenya in attestatation that they had installed CCTV. The National Museums later confirmed in writing that the letter was forged.
11. Idar security services - tender security expires on 20th December 2011 instead of 25th December 2011, did not submit valid single business permit, did not submit recommendations letter for provision of security services, record of written complaints of past poor performance in Garissa power station, did not attach duly certified letter from NSSF, did not submit a copy of CCK frequency license, did not submit WIBA (work Injury Benefit Policy Cover) and did not submit contractual liability insurance policy cover.
12. Inter security services - did not attach duly certified letter from local labour office and a letter of written complaints of poor performance at Ol Kalia power station .
13. Kleen home security - insufficient WIBA cover (only 24 people against over 500 employees).

14. Lavington – history of termination of security contract with KenGen
15. Paramount security – did not submit pin certificate, valid CCK frequency license, WIBA, contractual liability insurance policy cover, duly certified letters from local labour office and NSSF and did not demonstrate evidence of capacity to man CCTV installations.
16. Riley falcon - record of written complaints of past performance at Sondu power station
17. Riley services ltd – no evidence of company annual return for the year ended 31st December 2009.
18. Security group services – tender security expires on 25th November 2011 instead of 25th December 2011, submitted expired tax compliance certificate (23rd November 2010) did not attach duly certified letters from the local labour office and CCK frequency licence invalid.
19. Texas alarms – had expired tax compliance certificate (22nd August 2010), no evidence of company's annual return for the year ended 31st December 2009 and expired WIBA (11TH May 2011).
20. Total security – records of past performance (Nairobi south power station).
21. Vickers Security Services – did not submit evidence of company's annual return for the year ended 31st December 2009, submitted only 4 letters of recommendations instead of 5, did not submit certified letter from local labour office, did not submit WIBA, contractual liability insurance cover, and did not submit evidence of capability to man CCTV installations.

The Evaluation Committee then noted that only three firms out of thirty (30) that submitted their bids were likely to qualify for the next stage of technical evaluation and none of them could have qualified for category "A". In order to enhance competitiveness, the Committee deemed it fit to mark the following mandatory requirements for moderation across the board as per clause 19.3 of the General Information provided in the tender document:-

- a) Accepted tender security that cover tender validity period
- b) Accepted either PIN or VAT Certificate.
- c) Accepted audited accounts as proof of company's Annual Returns or Tax Compliance.
- d) Accept either certified letter from Local Labour office or certified letter from NSSF
- e) Accept evidence of Radio Network Communication.
- f) Adopted a prorated ceiling on contractual liability insurance policy cover for Category "B".

Subsequent to the above moderation, the following eight (8) firms qualified for technical evaluation.

- 1) B.M Security
- 2) Kenya Shield
- 3) Race Guards
- 4) Gilly's Security Services
- 5) KK Security
- 6) Riley Services
- 7) G4S Security
- 8) Brinks Security Services

Category A technical Evaluation

The pass mark for the technical evaluation for category A was set at 80%. The summary results were as shown below:

- 1) B. M. Security 89% pass
- 2) Kenya Shield 34% fail
- 3) Race Guard 53% fail
- 4) Gillys security 56% fail
- 5) KK Guards 85% pass
- 6) Riley Services 58% fail
- 7) Brinks security 75% fail

The following firms did not qualify for Category A for the following reasons:

- 1) Kenya Shield - low fleet capacity, low number of dogs, low annual company turnover and low contractual liability insurance cover.
- 2) Race Guards Security Services - low fleet capacity, no evidence of engagement in five (5) assignments with over 200 guards each, no evidence of capacity to install, man and maintain CCTV and no evidence of over 1000 permanent guards.
- 3) Gillys Security - low fleet capacity, no evidence of engagement in five assignments with over 200 guards each and low contractual liability insurance cover.
- 4) Riley Services - low number of dogs, low annual company turnover, no evidence of engagement in 5 assignments with over 200 guards each and no evidence of capacity to install, man and maintain CCTV.
- 5) Brinks Security - low contractual liability insurance cover, no evidence of capacity to install, man and maintain CCTV.

Category B Technical Evaluation

The pass mark for technical evaluation was set at 80% and was scored as below:

1) B.M security	89% pass
2) Kenya shield	48% fail
3) Race guard	81% pass
4) Gillys security	82% pass
5) KK guard	85% pass
6) Riley services	81% pass
7) G4s	90% pass
8) Brinks security	81% pass

Kenya Shield did not qualify for category B was mainly attribute because of low fleet capacity, low company annual turnover, low proof of contractual liability cover, no capacity to install/maintain and man CCTV.

Evaluation Committee recommended the following firms for opening of their Financial bid documents:

Category A

- 1) B. M Security Services
- 2) KK Guard security service
- 3) G4s Security services

Category B

- 1) BM Security services
- 2) K.K Guard security service
- 3) G4s Security services
- 4) Brinks security services
- 5) Gillys security services
- 6) Race guards security services
- 7) Riley services

Financial Evaluation

The Financial Proposals for the firms that passed the Technical Evaluation stage were opened and evaluated on 12th September, 2011 in the presence of the bidders' representatives. The bidders were separated according to locations they were eligible to bid for based on the score in the technical evaluation stage. The evaluation was carried out in two stages

Stage 1 - Arithmetic Clerk -

Bills of quantities were checked for arithmetic errors.

Stage 2 Comparative Analysis -

The comparative analysis was carried out to compare the correct tender price per month for each location.

The Evaluation Committee noted that there was a tie in the prices submitted by Gillys Security & Investigations Services Ltd and Race Guards for Loitokitok. In order to break the tie the committee was guided by the portfolio awarded to each of them i.e. Race Guard had Kshs. 2, 174,652.00 per

month while Gillys Security had Kshs. 3, 108, 800 per month and decided to award the site to Race Guards Limited.

The Evaluation Committee then recommended the following firms for award:

Category A

Location	Monthly rate VAT incl	Qualified Service Provider
Stima Plaza, Stima Sacco Investment	781,724	Bob Morgan Services
Kipevu	1,325,184	Bob Morgan Services
Lamu, Mokowe	179,626	G4S Security Services
Garissa Power Station	130,094	G4S Security Services
Mombasa road workshop	192,212	Bob Morgan services
Nairobi South Power Station	154,918	G4S Security Services
Ngong Power Station 1&2	133,400	Bob Morgan services
Muthaiga House	53,360	Bob Morgan services
GT Plant Embakasi	291,392	G4Sservices
Olkaria & Domes	955,840	Bob Morgan services
Olkaria II	900,914	G4S Security Services
Olkaria Housing Estates & Eburu	888,386	G4S Security Services

Category B

Location	Monthly rate VAT inc	Qualified service provider
Masinga Power Station	249,400	Gillys Security Services
Wanjii, Mesco, Mathioya Dam	404,840	Race Guards
Ndula Power Station	171,564	Race Guards
Sondu Power Station	815,480	Gillys Secuirity Services
Sosian Power Station	92,220	Race Guards
Gogo Power Station	92,220	Race Guards
Loitokitok & Narok	51,040	Race Guards
Bhulut Farm	25,520	Gilly's Security Services
South Kinangop	25,520	Gilly's Security Services
Malindi Power Station	25,520	Gilly's Security Services
Mugae Power Station	25,520	Gilly's Security Services

Matendeni Quarters	425,720	Gilly's Security Services
Bubisha Power Station	76,560	Gilly's Security Services
Kiambere Power Station	575,360	Gilly's Security Services
Kindaruma Power Station	273,412	Race Guards
Kamburu Power Station	261,464	Race Guards
Gitaru Power Station	350,784	Race Guards
Sagana Power Station	162,168	Race Guards
Tana Power Station	314,940	Race Guards
Turkwel Power Station	864,200	Gilly's Security Services

The approval from the Tender Committee was sought for award of provision for Security Services 2011-2013 at a cost of Kshs. 11,929,962.00 inclusive of VAT per month for a period of two years.

THE TENDER COMMITTEE DECISION

The Tender Committee in its signed minutes dated 27th September, 2011 made the following remarks during the adjudication of the tender:-

- i. The lowest evaluated bidder for Olkaria I & Domes was identified as Bob Morgan Services whereas Olkaria II, Housing and Eburru was G4S Security Services. The committee agreed that there was need to award the entire Olkaria area to one service provider for ease of management and to mitigate against the risk of theft and breach of security since there was no clear boundaries between the two areas. The Committee accepted the recommendation to award the entire Olkaria area to G4S Security Services at the lowest quoted rates.

- ii. That Sondu, Sosiani and Gogo Power Stations be awarded to one service provider, Gilly's Security Services because of the proximity of all the stations in one region and also for ease of administration.

iii. Based on increasing security concerns in Turkwel Power Station the Committee recommended that the contract be awarded to Brinks Security Services Ltd instead of the lowest evaluated bidder, Gilly's Security Services.

iv. Kamburu, Matendeni and Gitaru being strategic Power Stations be awarded to Brinks Security Services Ltd since they were currently on the ground and the stations had experienced security breach by the previous service provider Intersecurity Services Ltd, whose guards had gone on strike and deserted the station due to low wages.

The Committee therefore awarded the tender for provision of security services for year 2011 - 2013 to the following services providers for a period of two years.

Category A

Location	Recommended Bidder	Recommended bidder's Monthly rate VAT incl.	Awarded Bidder	Awarded price VAT inc
Stima Plaza, Stima Sacco Investment	BM Services	781,724	BM services	781,724
Kipevu	BM Services	1,325,184	BM services	1,325,184
Lamu, Mokowe	G4S Security	179,626	BM services	189,312
Garissa Power Station	G4S Security	130,094	BM services	135,952
Mombasa road workshop	BM Services	192,212	BM services	192,212
Nairobi South Power Station	G4S Security	154,918	BM services	155,440
Ngong Power Station 1&2	BM Services	133,400	BM services	133,400
Muthaiga House	BM Services	53,360	BM services	53,360
GT Plant Embakasi	G4S Services	291,392	BM services	291,740
Olkaria & Domes	BM Services	955,840	G4s services	1,031,298
Olkaria II	G4S	900,914	G4s services	900,914
Olkaria Housing Estates & Eburu	G4S	888,386	G4s	888,386
Total				6,078,922

Category B

Location	Recommended Bidder	Monthly rate VAT inc	Awarded Bidder	Awarded Bidder's rate VAT inc
Masinga Power Station	Gillys Security	289,400	Race Guards	289,400
Wanji, Mesco, Mathioya Dam	Race Guards	404,840	Race Guards	404,840
Ndula Power Station	Race Guards	171,564	Race Guards	171,564
Sondu Power Station	Gillys Security	815,480	Gillys Security	815,480
Sosian Power Station	Race Guards	92,220	Gillys Security	92,800
Gogo Power Station	Race Guards	92,220	Gilly's Security	92,800
Loitokitok & Narok	Race Guards	51,040	Race Guards	51,040
Bhulut Farm	Gilly's Security	25,520	Gilly's Security	25,520
South Kinangop	Gilly's Security	25,520	Gilly's Security	25,520
Malindi Power Station	Gilly's Security	25,520	Gilly's Security	25,520
Mugae Power Station	Gilly's Security	25,520	Gilly's Security	25,520
Matendeni Quarters	Gilly's Security	425,720	Brinks Security	554,306
Bubisha Power Station	Gilly's Security	76,560	Gilly's Security	76,560
Kiambere Power Station	Gilly's Security	575,360	Gilly's Security	575,360
Kindaruma Power Station	Race Guards	273,412	Race Guards	273,412
Kamburu Power Station	Race Guards	261,464	Brinks Security	350,842
Gitaru Power Station	Race Guards	350,784	Brinks Security	447,978
Sagana Power Station	Race Guards	162,168	Race Guards	162,168
Tana Power Station	Race Guards	314,940	Race Guards	314,940
Turkwel Power Station	Gilly's Security	864,200	Brinks Security	1,081,990
Total				5,851,040.00

On 30th September, 2011 the Evaluation Committee and made similar recommendations as the Tender Committee on the following Stations; Olkaria I & Domes; Olkaria II, Housing and Eburu; Sondu, Gogo and Sosiani Power Stations; Turkwel Power Station; Matendeni, Gitaru & Kamburu Power

The bidders were then notified vide letters dated 3rd October, 2011.

THE REVIEW

The Applicant, Riley Falcon Security Services Ltd lodged the Request for Review on 14th October, 2011 against the award of tender No. KGN-PROC-46-2011 for Provision of Security Services 2011 - 2013. The Applicant was represented by Mr. Njuguna C. M, Advocate while the Procuring Entity was represented by Mr. Kiragu Kimani, Advocate. The Interested Candidates present included Brinks Security Services, Gillys Security and Race Guard Limited all represented by Mr. Morris Mutua, Advocate. Others were Riley Services represented by Mr. Jonathan Njuguna; Bob Morgan Security Services represented by Mr. Richard Ndege; and G4S Security Services represented by Mr. Charles Muliande.

The Applicant requests the Board for the following orders:-

- (a) *"The procurement entity award be set aside.*
- (b) *The Procuring Entity be ordered to evaluate the Applicant tender on merit.*
- (c) *In the alternative to prayer B the Board do give any other or further orders as it deem just and expedient in the circumstances.*
- (d) *Award the costs of the proceedings to the Applicant against the Procuring Entity."*

PRELIMINARY OBJECTION

The Procuring Entity filed a Preliminary Objection as follows:

- 1) *"The Board has no jurisdiction to entertain the request for review filed, as it has been filed out of time.*

- 2) *The request for review is frivolous and vexatious and made solely for the purpose of delaying the procurement process.*

3) The request for review does not meet the requirements of Section 93 of the Public Procurement and Disposal Act in that it does not identify any breaches of a duty imposed on the Procuring Entity.”

At the commencement of the hearing the Procuring Entity stated that it would argue the Preliminary Objection together with its submissions on the merits of the case.

The Applicant raised nine (9) grounds of review which the Board deals with as follows:

Grounds 1, 2, 3, 4, 5, 6 & 8: Breach of Sections 2, 64, 66 of the Act and Regulations 47, 48 and 50.

The above grounds have been consolidated as they raise similar issues regarding the evaluation process.

The Applicant argued that the Procuring Entity breached Section 66(2) of the Public Procurement and Disposal Act 2005 (hereinafter the Act) in that it adopted an evaluation criterion which was not in the tender document. It submitted that the Procuring Entity had used a criterion on past performance which was discriminatory, subjective and unquantifiable in contravention of Sections 2 and 66(3) (a) of the Act. It stated that it had complied with all the requirements of the tender as required by Section 31 of the Act and that the Procuring Entity erred when it rejected its bid at the preliminary stage contrary to Section 64(1) of the Act and Clause 19.4 of the Tender Document.

Further, the Applicant submitted that the Procuring Entity had modified some criteria during the evaluation and continued to evaluate tenders which had not satisfied the mandatory requirements as set out in the tender document contrary to Regulation 48(1). Finally it stated that the Procuring Entity breached Section 66(4) of the Act and Regulation 50, by failing to evaluate its tender price which was the lowest and that, by so doing, the Procuring Entity awarded the tender to the bidder(s) who were not responsive and could not have been the lowest evaluated as required under Section 66 (4) of the Act.

In response, the Procuring Entity stated that the Request for Review was frivolous within the meaning of Section 93(2) (d) of the Act and is solely intended to delay the procurement process. It stated that the evaluation criteria was contained in the tender documents and was therefore known to the Applicant as soon as it obtained the tender documents. It contended that the Applicant ought to have filed the application within 14 days from the date it had obtained the documents pursuant to Regulation 73(2)(c) of the Public Procurement and Disposal Regulations, 2006 (herein after "the Regulations"). It therefore urged the Board to dismiss the application for being out of time.

Further, the Procuring Entity argued that the Applicant had used information received from the Procuring Entity subsequent to filing of the Request for Review and urged the Board to disregard the submissions raised by the Applicant which were not contained in the application for Request for Review as filed.

The Procuring Entity stated that it had fully complied with the provisions of Section 66 (2) of the Act. It submitted that the Applicant did not comply with the mandatory requirements as set out in the Preliminary Evaluation and

specifically failed to meet the condition which required bidders not to have any prior record of poor performance including theft. Further, the Procuring Entity submitted that it had rejected the Applicant's bid for failure to comply with mandatory requirement in line with Section 64 (1) of the Act.

On the issue of compliance with Section 66 (3) of the Act on whether the criterion on past performance was quantifiable and objective, the Procuring Entity stated that the said mandatory requirement took into consideration the quality of service in accordance with the requirements of the stated provision. It stated that, in procurement of Security services, the parameter of past performance is of paramount importance which cannot be overlooked.

On its part, an Interested Candidate, Riley Services associated itself with the submissions of the Applicant in support of the application.

Other Interested Candidates namely Brinks Security Services, Gillys Security & Investigations and Race Guards associated themselves with the submissions of the Procuring Entity in opposing the Request for Review. Through their Counsel, the parties submitted that the evaluation was conducted in line with the tender documents. They urged the Board to dismiss the Request for Review for lack of merit.

The Board has carefully considered the submissions of the parties and the documents presented before it. The Board notes that the Procuring Entity did a Preliminary Evaluation, Technical Evaluation and Financial Evaluation, as envisaged by the Act.

It is not in dispute that the Applicant, together with twenty two (22) other firms were disqualified at the preliminary stage for various reasons and only eight (8) firms qualified for technical evaluation after moderation of the mandatory requirements by the Evaluation Committee. The Applicant was disqualified due to past poor performance as shown in the Technical Evaluation report signed on 26th August 2011.

The pertinent issue which arises for the Boards' determination is the application of past performance as a criterion in the evaluation of a tender and particularly at the preliminary evaluation stage.

On the onset, in this particular tender, the Board notes from the evaluation report that only three (3) out of the 30 bidders properly qualified to pass the preliminary evaluation stage for Category A. This prompted the Evaluation Committee to modify the following mandatory requirements during the evaluation process:-

Item	Mandatory requirements	Amended Requirement
a)	Original Tender Security (should be valid for 150 days)	Accepted tender security that covered tender validity period of (was 120 days)
d)	Copies of Pin and VAT certificate of registration	Accepted either PIN or VAT Certificate.
e)	Tax Compliance Certificate	Accepted audited accounts as proof of company's Annual Returns or Tax Compliance
f)	All companies incorporated in Kenya under the Companies Act Cap 486 of the Laws of Kenya must submit evidence of the Company's Annual Return for the year ended 31 st December, 2009.	
l)	Proof of compliance with prevailing Labour Laws in respect to minimum wage, statutory remittances, protective clothing etc. Attach a duly certified letter from the local labour office and NSSF. Provide a	Accepted either certified letter from Local Labour office or certified letter from NSSF

	certified copy of the payroll for the past three (3) months (to be verified with NSSF headquarters)	
m)	Valid Frequency Licence (not payment receipts) from Communication Commission of Kenya (CCK).	Accept evidence of Radio Network Communication.
o)	Contractual Liability Insurance Policy Cover with a minimum liability of Kshs. 20,000,000 per event per year. Attach a valid copy of Contractual Liability Insurance Policy document.	Adopted a prorated ceiling on contractual liability insurance policy cover for Category "B".

The Board is alive to the provisions of Section 66 (2) which states as follows:

Section: 66(2) (c)

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender document and no other criteria shall be used."

In this regard, the Board finds that this modification of the mandatory requirements by the Procuring Entity amounted to the introduction of new criteria contrary to the provisions of Section 66(2) of the Act.

The Board further notes the provisions of Section 64 of the Act and Regulations 47(1) & (2) which provide as follows:-

Section 64(1)

"A tender is responsive if it conforms to all the mandatory requirements in the tender documents."

Regulation 47(1)

"Upon opening of the tenders under Section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether:-

a) The tender has been submitted in the required format

- b) Any tender security submitted is in the required form, amount and validity period*
- c) The tender has been signed by the person lawfully authorised to do so;*
- d) The required number of copies of the tender have been submitted;*
- e) The tender is valid for the period required;*
- f) All required documents and information have been submitted; and*
- g) Any required samples have been submitted."*

Regulation 47(2)

- (2) "The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1)."*

The Board finds that the above Regulations envisages that only those bidders who were found to be responsive at the preliminary stage shall be qualified to be evaluated in the next stage. In this case the Evaluation Committee applied powers that it did not have to change the requirements of the tender. Although the Evaluation Committee purported to invoke Clause 19.3 of the tender documents on minor informality or non conformity, the Board finds that failure to meet mandatory requirements is a major deviation, not curable within the powers of the Evaluation Committee. Indeed, by knocking out the Applicant at preliminary stage using the criterion on poor performance, the Board finds that the Procuring Entity erred in that it used a technical evaluation criterion to dismiss the Applicant at the preliminary stage.

As to whether or not the Board could rely on submissions made by the Applicant and based on a report it had obtained from the Procuring entity subsequent to the filing of the Request for Review, the Board's finds that the onus of not releasing the confidential information squarely fell with the

Procuring Entity. In any case, the Board relies on both filed and oral submissions as well as documents presented before it, provided the information is rightly before the Board, is of material fact and relevant to the matter before it.

On the issue raised by the Procuring Entity that this Request for Review was filed out of time, the Board finds that the Request for Review could have been brought up by the Applicant pursuant to Regulation 73 (2) (c) (i) as submitted by the Applicant, but time was still available under Regulation 73 (2) (c) (ii) which the Applicant has utilised. The Board finds that the Applicant is properly before it.

The Board further notes the following anomalies with regard to the evaluation process as depicted below.

- i) At the preliminary evaluation, the Procuring Entity noted that KK Security inadvertently excluded the first page of their tender security and sought clarification from the firm. The firm claimed that this was due to a "bidding mix up " and it then provided a copy of the missing page. The firm was then allowed to proceed to the next stage of evaluation.
- ii) That the Financial Evaluation report dated 12th September, 2011 recommended the awards to the lowest evaluated bidders under category "A" and "B".
- iii) That on 27th September, 2011 the Tender Committee modified the recommendations of the Evaluation Committee by citing various reasons and proceeded to award the tender in line with their modifications contrary to Regulation 11(2) of the Regulations.

iv) That on 30th September, 2011, the Evaluation Committee met again and recommended the awards in line with the Tender Committee modifications as cited above. The Board finds this to be un-procedural and not in line with the procurement Act. It is a further indication that the process was flawed.

Taking into consideration all the above, these limbs of appeal succeed.

Ground 7: Breach of Section 44(c) of the Act

At the hearing, the Applicant withdrew this ground and therefore the Board need not make any findings.

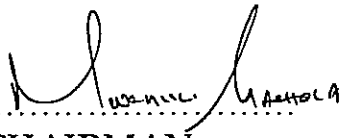
Ground 9: Anticipated Loss

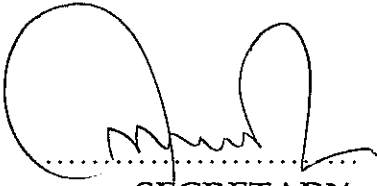
This is not a ground of appeal but a statement of perceived losses/damages arising from anticipated profits the Applicant would have made if awarded the tender. Clause 2 of the tender document under instructions to tenderers stipulates that *"The tenderer shall bear all costs associated with the preparation and submission of its tender and the Procuring Entity, will in no case be responsible or liable for those costs, regardless of the conduct or outcome of the tendering process"*.

The Board has held severally that tendering costs are commercial business risks taken by people in the course of doing business.

Taking into account all the above matters, the Request for Review succeeds and the awards made by the Procuring Entity are hereby annulled. Pursuant to Section 98 (b) of the Act, the Procuring Entity may re-tender.

Dated at Nairobi on this 14th day of November, 2011


.....
CHAIRMAN
PPARB


.....
SECRETARY
PPARB

()

()