

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 8/2012 OF 6TH MARCH, 2012

BETWEEN

GILLYS SECURITY & INVESTIGATION SERVICES LTD.....APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LTD.....PROCURING ENTITY

Review against the decision of Kenya Power & Lighting Company Ltd, in the matter of Tender No. KP1/9AA-02/PT/22/11/12 for Provision of Security Guarding Services.

BOARD MEMBERS PRESENT

Mr. Akich Okola - Member (Sitting in for the Chairman)
Mr. Sospeter M. Kioko - Member
Ms. Natasha Mutai - Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Mr. Nathan Soita - Secretariat
Ms. Maurine Namadi - Secretariat

PRESENT BY INVITATION

Applicant, Gillys Security & Investigation Services Ltd

Mr. Charles Njuguna - Njuguna & Partners
Mr. J.W. Ngigi - Njuguna & Partners

Mr. John Ogut - Director
Ms. Isdora Akinyi - Manager

Procuring Entity, Kenya Power & Lighting Company Ltd

Mr. Owiti Awuor - Legal Officer
Mr. Joseph Atwoli - Legal Assistant
Ms. Emily Chepkorir - Legal Assistant
Mr. Benard Ambaka - Chief Supplies Officer
Ms. Caroline Chelimo - Security Officer
Mr. Daniel Muchene - Security Officer

Interested Candidates

Mr. Stanley Okanga - Guardforce Security (K) Ltd
Mr. Stanley Chepkwony - Lavington Security Ltd
Mr. Mungai Mwaura - Delta Guards Ltd (Director)
Mr. Samuel Kimani - Delta Guards Ltd (Legal clerk)
Ms. Rahab Mbuchucha - Hatari Security Guards Ltd
Mr. Jonathan N. Musomba - Riley Services Ltd
Mr. Moses Kaniaru - Kenya Shield Security Ltd
Major (Rtd) F.S. Shikanda - Brinks Security Services Ltd
Mr. Michael Muniu - Starlight Security Services Ltd

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 OF AWARD

Advertisement

The Procuring Entity advertised the tender for Provision of Security and Guarding Services on 13th October, 2011 and closed/opened on 24th November, 2011.

Pre-Bid Conference

A pre-bid conference was held on 24th October, 2011 and tenderers were taken through various issues namely; tender security and validity of tenders, tender evaluation, tender submission and tender closing time among others.

Closing/Opening:

The tender closed and opened on 24th November, 2011 with the following twenty three (23) bidders responding:

1. Apex Security Service Ltd
2. Basein Security Services Ltd
3. Bob Morgan Services Ltd
4. Brinks Security Services Ltd
5. Bedrock Holdings Ltd
6. Delta Guards Ltd
7. G4S Security Services Kenya Ltd
8. Gillys Security Ltd & Investigation Services Ltd
9. Guardforce Security (K) Ltd
10. Hatari Security Guards Ltd
11. Inter Security Services Ltd
12. Kenya Shield Security Ltd
13. Lavington Security Ltd
14. Masswell Security Services Ltd

15. Paramount Investigation & Security Services Ltd
16. Race Guards Ltd
17. Radar Limited
18. Riley services Ltd
19. Riley Falcon Security Services Ltd
20. Robinson Investment Ltd
21. Starlight Security Services Ltd
22. Total Security Surveillance Ltd
23. Vickers Security Services Ltd

EVALUATION

The received tenders were subjected to three stages of evaluation namely; Preliminary Evaluation, Technical Evaluation and Financial Evaluation.

Preliminary Evaluation

Tenderers were subjected to the following 16 parameters:

1. Tender Security - Bank Guarantee or Letters of Credit (All from acceptable and approved locally based Kenyan institutions)
2. Declaration Form
3. Duly completed Tender Form
4. Copy of Company or Firm's registration Certificate
5. Copy of PIN Certificate
6. Copy of valid Tax Compliance Certificate
7. Confidential Business Questionnaire (CBQ)
8. Type Test certificates and their Reports and or Test certificates and their Reports, where applicable
9. Copy of ISO/IEC 17025 accreditation certificate for the testing body/authority, where required.

10. Valid and current ISO 9001 Certificates or for locally manufactured or produced services, valid standardization Mark Certificates from the Kenya Bureau of Standards (KEBS) and any other Product Quality Certificates
11. Catalogues and or Brochures and or Manufacturers/Principal's drawings
12. Duly completed Schedule of Guaranteed service particulars (where required) and Statement of Compliance to Details of Service
13. Principal's or Manufacturer's Authorization (where required)
14. Names with full contact as well as physical addresses of previous customers of similar goods
15. Statement on Deviations
16. Any other document or item required by the Tender Document that is non-financial. (The tenderer shall specify such other documents or items it has submitted.

Six firms namely; G4S, Apex Security Services, Gillys Security & Investigation Services Ltd, Starlight Security Limited, Robinson Security Group and Masswell were disqualified at this stage for failure to meet all requirements.

Technical Evaluation

The remaining seventeen (17) tenderers were subjected to technical evaluation. At this stage, the assignments had been classified into three classes, A, B and C. The cut off point for class A assignments was 86 scores, class B was between 80 and 86 scores while class C was to be awarded to firms attaining between 70 and 79 scores.

Four firms failed to meet the cut off point and were thus disqualified; Kenya Shield Security Ltd, Vickers Security, Paramount Investigation Security Services and Radar Limited.

Four firms attained the score of more than 86 and qualified for class A; BM Security, Brinks Security Services Ltd, Riley Falcon Security and Bedrock Holdings Ltd.

Four firms attained a score of between 80 and 86 points and qualified for class B; Riley Services Ltd, Lavington Security Ltd, Inter Security Services Ltd and Race Guards.

Five firms attained a score of between 70 and 79 and qualified for class C assignments; Delta Guards Ltd, Guardforce Security (K) Ltd, Basein Security Services Ltd, Hatari Security Guards and Total Security Surveillance Ltd.

Financial Evaluation

Financial bids for thirteen (13) technically qualified firms were opened on 16th January, 2012. The opened bids were evaluated and the summary results summarized as shown in the table below;

COST OF TEMPORARY GUARDING SERVICES FOR 1 DAY (A 12 HOUR SHIFT)

NO	SECURITY FIRM	UNIT PRICE (KSHS) FOR A 12 HOUR SHIFT PER DAY ON WEEK DAYS EXCL. OF VAT			UNIT PRICE (KSHS) FOR A 12 HOUR SHIFT PER DAY ON WEEKENDS & PUBLIC HOLIDAYS EXCL. OF VAT		
		PER GUARD	PER SUPERVISOR	PER DOG & HANDLER	PER GUARD	PER SUPERVISOR	PER DOG & HANDLER
1	Bob Morgan Security	1,900.00	2,500.00	3,500.00	2,900.00	3,200.00	4,500.00
2	Brinks Security Services Ltd	850.00	980.00	1,800.00	1,062.50	1,225.00	2,250.00
3	Riley-Falcon Security	1,000.00	1,500.00	3,000.00	1,000.00	1,500.00	3,000.00
4	Bedrock Holdings Ltd	1,300.00	1,600.00	2,500.00	1,300.00	1,600.00	2,500.00
5	Riley Services Ltd	1,000.00	1,200.00	1,800.00	1,800.00	2,600.00	2,600.00

6	Lavington Security Ltd	1,160.00	1,392.00	1,740.00	1,160.00	1,392.00	1,740.00
7	Inter Security Services Ltd	1,160.00	1,392.00	2,088.00	1,160.00	1,392.00	2,088.00
8	Delta Guards Ltd	595.00	714.00	1,667.00	595.00	714.00	1,667.00
9	Race Guards Ltd	1,400.00	1,800.00	3,200.00	1,800.00	3,400.00	5,000.00
10	Guardforce Security (K) Ltd	1,200.00	1,500.00	1,800.00	1,200.00	1,500.00	1,800.00
11	Basein Security Services Ltd	600.00	1,000.00	NIL	750.00	1,000.00	NIL
12	Hatari Security Guards	1,000.00	1,500.00	2,000.00	1,000.00	1,500.00	2,000.00
13	Total Security Surveillance Ltd.	1,200.00	2,000.00	2,500.00	2,200.00	3,000.00	3,500.00

TENDER COMMITTEE DECISION

The tender is yet to be awarded

THE REVIEW

The Request for Review was lodged by Gillys Security & Investigation Services Ltd on the 6th March, 2012 against the decision of Kenya Power & Lighting Company Ltd in the matter of tender No. KP1/9AA-02/PT/22/11/12 for Provision of Security Guarding Services.

The Applicant was represented by Mr. Charles Njuguna, Advocate while the Procuring Entity was represented by Mr. Owiti Awour, Legal Officer. The interested candidates M/S Guardforce Security (K) Ltd was represented by Mr. Stanley Okanga, Branch Manager, M/s Lavington Security Ltd was represented by Mr. Stanley Chepkwony, D/Operations Manager, M/s Delta Guards Ltd was represented by Mr. Mungai Mwaura, Director, M/s Hatari Security Guards Ltd was represented by Ms. Rahab Mbuchucha, Manager, M/s Riley Services Ltd was represented by Mr. Jonathan N. Musombu, Director, M/s Kenya Shield Security Ltd was represented by Mr. Moses Kaniaru, Director, M/s Brinks Security Services Ltd was represented by Major

(Rtd) F.S. Shikanda, Head of Operations and M/s Starlight Security Services Ltd was represented by Mr. Michael Muniu, Director.

The Applicant raised four grounds of Review and requested the Board for the following orders:-

- (a) *Declaration that the tender validity has expired.*
- (b) *Declaration that any award subsequent to expiry of tender validity is null and void.*
- (c) *An order that Procuring Entity do cancel the said tender and issue a fresh tender*
- (d) *Any further order or direction the Board may deem appropriate in the circumstances.*

PRELIMINARY OBJECTION

The Procuring Entity filed a Preliminary Objection on 12th March, 2012 on the following grounds:

1. That the Public Procurement Administrative Review Board (*hereinafter referred to as the "Board"*) presently lacks jurisdiction to hear and determine this Request.
2. That the Applicant lacks the necessary '*locus standi*' to file and/or prosecute the Request.
3. That the Applicant is not a candidate within the meaning of section 93 of the Public Procurement and Disposal Act, 2005 read together with the Public Procurement and Disposal Regulations, 2006.
4. That the Request is not supported by any proper legal provision. Further interim orders cannot be sought and granted in the main suit.
5. That the Request is an abuse of the due process of law.

6. That the Request is a belated and desperate attempt to circumvent fairness and integrity in the procurement process.

At the hearing, the Procuring Entity chose to argue the Preliminary Objection together with its response to the Applicant's grounds of appeal.

The Board notes that Section 93 (1) of the Act provides that "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"

The Board therefore finds that in order to be able to determine whether the Applicant was a candidate who claims to have suffered or risked suffering damage due to a breach of a duty imposed on the Procuring Entity by the Act; and whether the Procuring Entity owed such a duty to the Applicant, can only be arrived at by hearing the merits of the application for review.

REVIEW

The Applicant raised four grounds of review which the Board deals with as follows:

GROUND 1 and 2: Breach of Section 61(1) and 61(2)

These two grounds have been consolidated because they raise similar issues related to extension of the tender validity period.

The Applicant alleged that the Procuring Entity had breached Section 61(1) of Public Procurement and Disposal Act by failing to extend the tender validity before the tender expired. It further alleged that the Procuring Entity had breached Section 61 (2) of Public Procurement and Disposal Act in its failure to

notify each bidder of the extension of tender validity before the tender expired.

In its response, the Procuring Entity denied that it had breached Section 61 of the Act by failing to extend the tender validity period before expiry of the tender. It submitted that its Tender Committee had extended the tender validity period in its meeting of 11th January, 2012, and that this was communicated to the technically responsive bidders vide a letter dated 24th February, 2012.

It further submitted that the Applicant was not notified of the extension of tender validity because it had failed at the preliminary evaluation stage and as such the Procuring Entity was not obliged to notify it of the extension and the need to extend its bid bond. The Procuring Entity averred that its actions were in line with the Tender Document clause 3.25.4 which stated that only technically responsive bidders would be invited to the financial bid opening and clause 3.30.3 which stated that non responsive bidders would have their tenders returned.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board notes the provisions of Section 61 (1) and (2) of the Act which provide as follows:

Section 61(1): *"Before the expiry of the period during which tenders must remain valid the procuring entity may extend that period"*

Section 61(2): *"The procuring entity shall give notice of an extension under subsection (1) to each person who submitted a tender"*

From the documents submitted, and which fact is not in dispute, the Board notes that the tender validity period was 90 days from the tender

close/opening which was held on 24th November, 2011. Accordingly, the tender validity period expired on 22nd February, 2012, and any notification of the extension ought to have been done by that date.

The two issues then for the Board to determine are:-

- i) whether the Procuring Entity had extended the tender validity period before the expiry of the tender in accordance with Section 61(1) of the Act; and
- ii) whether the notice was in this instance due, and given to the Applicant in accordance with Section 61(2) of the Act.

The Board notes that the Tender Committee in its meeting of 11th January, 2012 decided to extend the existing contracts for Security Guarding Services by additional ninety (90) days commencing from 1st February 2012 to 30th April 2012 to allow for the completion of the tendering process. The Board further notes that there was no mention in these minutes of the purported extension of the tender validity period as alleged by the Procuring Entity or any communication to that effect.

The Board notes that the only communication to any of the bidders of any extension of the tender validity period, was done vide the Procuring Entity's letter dated 24th February, 2012 which read in part as follows:-

"We therefore extend the tender validity period by 60 more days so as to expire on 24th April 2012. You are subsequently required to extend the bid bond by 90 more days so as to expire on or after 24th May, 2012".

The Board finds that it is clear from the wording of this letter that the Procuring Entity extended the validity period by 60 more days from 24th February, 2012 to expire on 24th April, 2012.

Therefore, the date the extension and notification of the same was done was on 24th February 2012, which was 2 days after the tender validity period had expired on 22nd February, 2012.

With respect to the Procuring Entity's submission that its Tender Committee had extended the validity period on 11th January, 2012, the Board finds that this purported extension ought to have been minuted and communicated to the bidders before the expiry of the bids on 22nd February 2012 in accordance with Section 61(1) of the Act.

Accordingly, the Board finds that there was no extension of the tender validity period before it expired as required under Section 61(1) of the Act, and consequently this limb of the grounds of appeal succeeds.

As regards the issue as to whether the Applicant ought to have been notified of any extension of tender validity after having been found to be non-responsive at preliminary evaluation, the Board notes that Section 61(2) of the Act requires that the notice is to be given to **each** person who submitted a tender.

The Board also notes that the Tender Document at clause 3.30.3 states as follows:-

"For **Tenders that do not qualify past the technical evaluation stage**, the Financial sets, **will be promptly returned** unopened to the Tenderers **together with the release and discharge of their Tender Securities**. In any event such return, release and discharge will be commenced not later than five (5) days after the completion of the process regarding the Technical evaluation stage".

The Board therefore finds that in the case of the Applicant in this instance, the Procuring Entity ought to have returned its Financial bid and bid bond not later than 16th January 2012, 5 days from when the Tender Committee approved the opening of the financial bids of the thirteen (13) technically compliant bidders, yet it had not done so by the time when this appeal was lodged on 6th March 2012 because its unopened Financial bids and bid bond were part of the tender documents submitted by the Procuring Entity.

In this instance, therefore, the Board finds that the Procuring Entity had a duty to notify the Applicant and any other non-responsive bidder of any extension of the tender validity period having not had its Financial bid and bid security returned as provided for in the Tender Document at clause 3.30.3.

Accordingly, the second limb of these grounds of appeal also succeeds.

GROUND 3: Breach of Sections 66(6) and 67 of the Act

The Applicant alleged that the Procuring Entity had breached Sections 66 (6), and 67 of Public Procurement and Disposal Act, in proceeding to process the tender after the tender validity had expired and that it had failed to evaluate and award the tender within the timelines set in the tender document, the Act and the Regulations.

In its response, the Procuring Entity submitted that the Applicant could not claim that it had breached Section 67 of the Act by failing to evaluate and award the tender within the timelines given and at the same time claim that the tender should be cancelled since it has expired.

It further submitted that there was no award that had been made by the time of the alleged expiry of the tender; and that if indeed the tender had expired, then there could not arise a question of a breach of Section 67 which provides for formal notification of award of the contracts.

In its response to the allegation of evaluation of the tenders beyond the stipulated timelines, the Procuring Entity submitted that it had completed its tender evaluation within the 30 days stipulated for technical evaluation and 5 days for financial evaluation as set out in the tender document and the timelines provided by the Act read together with the Regulations.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board notes the provisions of Section 66(6) of the Act which provides as follows;

Section 66(6): *"The evaluation shall be carried out within such period as may be prescribed"*

The Board also notes the provision of Regulation 16(5) (b) and (7)(b) which provides as follows:

Regulation 16(5); *"A technical evaluation committee established in accordance with paragraph (2)(a) shall be responsible for-*

(a)

(b) *Performing the evaluation with all due diligence and within a period of thirty days after the opening of tenders."*

Regulation 16(7); *"A financial evaluation committee established in accordance with paragraph (2) shall be responsible for -*

(a)

(b) *Performing the evaluation with all due diligence and within a period of five days from the time of completion of the technical evaluation".*

The Board notes that the Tender Document had at clause 3.33 provided for the tender evaluation to be completed within 35 days of the validity period from the date of the first opening of the Tender.

As the Board had noted earlier, the tender close/opening was done on 24th November 2011. Therefore, the evaluation ought to have been completed within 35 days from 24th November, 2011, i.e. on 29th December, 2011.

From the Tender Evaluation Report, the Board finds that the signed but undated evaluation report was tabled at the Tender Committee meeting on 11th January, 2012; and the Tender Committee approved the report and the opening of financial bids; the financial bids were then opened on 16 February, 2012; and the financial evaluation concluded on 2nd February, 2012.

Therefore, the Board finds that the Procuring Entity failed to evaluate the bids within the prescribed periods as set out in the Regulations, and accordingly, this limb of the ground of appeal succeeds.

Regarding Section 67 of the Act, the Board finds that this Section deals with the notification of an award of contract and in this instance the award had not yet been made notwithstanding the Board's finding under grounds 1 and 2 that the tender validity period had not been extended as required under Section 61 of the Act.

GROUND 4

The Applicant alleged that it had suffered loss and damage because it had not been awarded the tender.

In response, the Procuring Entity argued that it has not frustrated the bidder at all. The Procuring Entity asserted that the tendering process is by nature competitive with attendant risk of a bidder failing to succeed. There is no guarantee that the Applicant would be amongst the awardees of this tender.

The Board finds that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business, therefore, the Procuring Entity is not liable for such costs.

As the Board has already found under Grounds 1 and 2, the Procuring Entity had failed to extend the validity period before the expiry of the tender as required under Section 61 of the Act. More specifically, it had failed to notify the Applicant as required to under Section 61(2) of the Act which was a duty it owed the Applicant and as such the Board finds that the Applicant is rightfully before the Board under Section 93 of the Act as a candidate who claims to have suffered or risked suffering damage due to a breach of a duty imposed by the Act on the Procuring Entity.

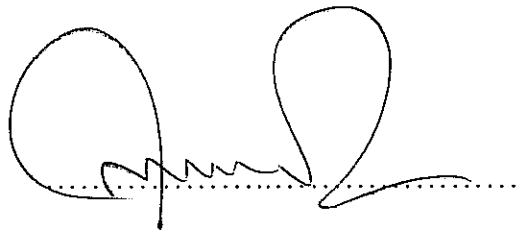
With regard to the failure to extend the validity of the tender before its expiry on 22nd February, 2012, in accordance with Section 61(1) of the Act, the Board finds that the notification letter of 24th February 2012 was outside the tender validity period and therefore at that time the tender was already 'dead'.

Taking into account the foregoing, the Request for Review succeeds. The Board therefore orders, pursuant to Section 98 of the Act, that the Procuring Entity may re-tender.

Dated at Nairobi on this 26th day of March, 2012



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**