

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 14/2014 of 25TH APRIL, 2014

BETWEEN

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

AND

MASENO UNIVERSITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Maseno University dated 22nd April 2014 in the matter of Tender No.MSU/T/13/2013-2015 for Provision of Security Guarding Services.

BOARD MEMBERS PRESENT

Mr. Paul Gicheru - Chairman

Me. Nelson Orgut - Member

Eng. Weche Okubo, OGW - Member

Mr. Peter Ondieki, MBS - Member

IN ATTENDANCE

Pauline Opiyo - Secretary to the Board
Stanley C Miheso - Secretariat
Philemon Kiprop - Secretariat
David Ipaat - Secretariat
Judy Maina - Secretariat

PRESENT BY INVITATION

Applicant - **Gillys Security & Investigation Services Ltd**
Njuguna Charles - Advocate
George Nyakundi - Site Manager

Procuring Entity - **Maseno University .**
Francis Wasuna - Advocate
Robert Adala - Procurement Officer
Bernice Ogonda - Asst Registrar QA
Reuben Ogeti - Procurement Officer

Interested Parties

Mwamu J. A. - Advocate, Bedrock Holdings Ltd.
Stephen Ayugi - Director, Bedrock Holdings Ltd.
William Olol - Director, Bedrock Holdings Ltd.
Bobastles Owino - Marketing Manager, Bedrock Holdings Ltd.

- Daniel Opar - Operations Manager, Bedrock Holdings Ltd.
- James Nyarandi - Branch Manager, Robinson Inv Limited
- Lilian Achieng - Marketing Manager, Riley Falcon Security Services Ltd

BOARD'S DECISION

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

BACKGROUND OF AWARD

1.0 Introduction:

The tender for the provision of Security Services at Maseno University was advertised on 13th February 2014 in both the Daily Nation and the Standard Newspapers.

Closing/Opening

The tender closed/opened on 27th February, 2014. The tender attracted the following eight bidders

Table 1: List of Bidders

	Tenderer Name	Bidder Number
1	Nine One Ltd. P. O. Box 79448 Nairobi	B1
2	Robinson Investment Ltd. P. O. Box 2341 Kisumu	B2
3	Mocam Security P. O. Box 5050 Nairobi	B3

4	Gillys Security P. O. Box 78073 Nairobi	B4
5	Inter Security Services Ltd. P. O. Box 18574 Nairobi	B5
6	Envag Associates (K) Ltd. P. O. Box 56656 Nairobi	B6
7	Riley Falcon Security Services. P. O. Box 876 Kisumu	B7
8	Bedrock Holdings Ltd. P. O. Box 1004 Kisumu	B8

2.0 Technical Evaluation Committee:

The Tender Processing Committee comprised four members under the chairmanship of Prof. Raphael Kapiyo, Dr. Felix Kioli, Mr. Willis Wandei and Ms Benice Ogonda.

3.0 Evaluation Procedure:

The evaluation comprised of three stages, namely:

Stage 1: Preliminary Verification

Stage 2: Technical Evaluation

Stage 3: Financial Evaluation

3.1 Preliminary Stage

In this stage all tenderers were expected to comply with the following mandatory requirements:

- 4.1.1 Form of Tender (duly signed and stamped by the bidder).
- 4.1.2 Tender security (1% of the tender price).
- 4.1.3 Valid up to date tax compliance certificate (KRA).
- 4.1.4 Recent NSSF Compliance/Remittance Certificate.
- 4.1.5 Recent NHIF Compliance/ Remittance Certificate.
- 4.1.6 Certificate of incorporation and/or change of name.
- 4.1.7 Business Questionnaire Form (completed with all required information and attachments).
- 4.1.8 Copy of Membership Certificate (KSIA/PSIA).
- 4.1.9 Audited Financial Accounts for the last 2 years (2012 and 2013 or 2011 where 2013 is not available)
- 4.1.10 Letter of compliance from Ministry of Labour

The evaluation at this stage was done on a YES/NO basis. Any bidder who did not meet any of the mandatory requirements in stage one was disqualified and did not proceed to the next level of evaluation process.

The Board has noted the following significant events that transpired at this stage.

1. B1- The value of the security bid was 0.09% of the tender price. A gazette notice was submitted instead of a recent letter of compliance from the Ministry of Labour.
2. B2- The value of Tender Security submitted was 0.96%
3. B6- Had no certificate of compliance to confirm NSSF remittances. Instead, a copy of a registration certificate was attached.

4.2 Technical Evaluation Stage

In this stage, tenderers were expected to meet and earn the scores allocated to each of technical requirements set out at page 6 of the decision. The total score for this stage added up to a total of 100 points of the total score and tenderers were expected to score a minimum of 70% in order to proceed to the next stage.

Requirements:

4.2.1 Competence of proposed Key Staff	10pts
4.2.2 Proof of experience in offering similar Services	10pts
4.2.3 Evidence of security Backup/ Response vehicles	10pts
4.2.4 Evidence of Insurance Covers	10pts
4.2.5 Evidence of Monetary Capacity in handling similar business	10pts
4.2.6 Evidence of Firm Premise	10pts
4.2.7 Proof of adequate communication Equipment	10pts
4.2.8 Evidence of use of other security gadgets	10pts
4.2.9 Evidence of ability to effectively supervise Personnel while on duty	10pts
4.2.10 Evidence of ownership of guard Dogs	10pts

The results of evaluation at this stage are as summarized below

B7 and B8 passed the set minimum score of 70%.

B3 Had an operations office in Webuye far from the assignment area and did not quite demonstrate ability to carry out the assignment due to insufficiency of security equipment.

B4 and B5, with their establishments in the premises of Sondu Miriu Electricity Plant and Kisumu respectively, did not demonstrate ability to handle the assignment. They had inadequate security gadgets and no evidence of ability to supervise their personnel on duty owing to the fact that they had no trained supervisors.

4.3 Financial Evaluation Stage

The prices quoted by the tenderers were used for evaluation at this stage. Financial scores contributed 50 points of the total score and this was evaluated relatively on the basis of lowest quoted price using the formula $P_c = \frac{P^L}{P} \times 100$ where;

P_c is the allocated score, P^L is the lowest quoted price of bids and P is the bidder's price under consideration.

Table 4: Financial Evaluation Results

Bidder	P	P^L	P^L/P	$P_c = (P^L/P) \times 100$
B7	48,140,079.24	47,067,360.00	0.977	97.78
8	47,067,360.00	47,067,360.00	1.000	100.00

5.0 Combined Score

Bidders were ranked on the basis of combined score: Technical and Financial. The bidder with the highest combined score was recommended for the award of the tender as follows.

Table 5: Combined Score Results

Bidder	Technical Score (100) – Table 3a and 3b	Financial Score (100) – Table 4	Combined Score (200)	% Score	Rank
7	93.00	97.77	190.77	95.385	2
8	96.43	100	196.43	98.215	1

6.0 Recommendation for Award

M/s Bedrock Holdings Ltd, Bidder No. 8 is the bidder with the highest combined scores and therefore, is recommended for consideration of the award of the Tender No. MSU/T/13/2013-2015 for provision of security: services at a total Tender Price of Kshs. 47,067,360.00 (Kenya Shillings Forty Seven Million, Sixty Seven Thousand, Three Hundred and Sixty only) for 225 guards and Three Supervisors per year, VAT inclusive.

6.2 The contract duration be for two years subject to renewal upon satisfactory service delivery as per the requirement in the tender documents.

11.0 THE TENDER COMMITTEE DECISION

The Tender Committee in its meeting held on 22ND April, 2014 deliberated on the recommendations of the Evaluation Committee and Awarded Tender No: MSU/T/13/2013-2015 the Provision of Security Services to Bedrock Holdings Ltd, Bidder No. 8 total Tender Price of Kshs. 47,067,360.00 (Kenya Shillings Forty Seven Million, Sixty Seven Thousand, Three Hundred and Sixty only) for 225 guards and Three Supervisors per year, VAT inclusive

THE DECISION OF THE BOARD

It is clear from this Request for Review that the Applicant was dissatisfied by the award of the subject tender to M/s Bedrock Holdings Limited (Herein after referred to as the Successful Bidder).

The Applicant therefore lodged a Request for Review dated 25th April, 2014 with the Board on the same day it learnt about the results of the tender.

The Applicant was represented by Mr. Njuguna Charles, advocate while the Procuring Entity was represented by Mr. Francis Wasuna advocate while the successful bidder was represented by Mr. Mwamu J. A. Advocate.

The Applicant set up several grounds of review in support of its Request for Review which basically revolved around allegations of breaches of the Public Procurement and Disposal Act of 2005 and the Public Procurement and Disposal Regulations made pursuant to the Provisions of the Act. The Board has considered all the grounds for Review, the arguments for and against the Request for Review, the replies thereto all the affidavits which were filed and for the purpose of this decision consolidated the grounds into four .The Board will now consider and make a determination on each of the four grounds .

Grounds 1, 5 &6 -Breach of Section 65 and 66 of the Public Procurement & Disposal Act, 2005(herein after referred to as the Act) and Regulation 16,47,48 and 66(2) and as revised of the Public Procurement and Disposal Regulations, 2006 (herein after referred to as the Regulations)

These grounds for review raise similar issues touching on the criteria for the evaluation of bids.

The Applicant argued that the Procuring Entity failed to carry out the evaluation in an impartial manner contrary to the requirements of the Tender Documents and the provisions of section 2 of the Act. The Applicant further argued that the Procuring Entity visited some of the bidders at their main operational offices but did not visit the Applicant's offices in Nairobi thereby giving some bidders undue advantage and that such an action was in breach of the provisions of section 66 of the Act and Regulation 47 and 48 of the Regulations.

The Applicant submitted that it was wrong for the Procuring Entity to have visited its Sondu Miriu Electricity and Kisumu sites since it had expressly stated in its confidential business questionnaire that its office was in Nairobi and that this had disadvantages the Applicant argued that though clause 2.2 of the tender document provided that bidders would be visited at their nearest operational premises and assessed there, the fact that they had indicated in their confidential business questionnaire the location of their offices as Nairobi, the Procuring Entity was bound to visit them there.

Though Mr. Njuguna had in his earlier submissions denied that the Applicant had offices in Kisumu, he later confirmed in the course of his submissions that the Applicant indeed had what he termed as a 10 x 10 office in Kisumu and an operational site at Sondu Miriu.

Mr. George Nyakundi who is the Applicants Kisumu area site Operational Manager confirmed to the Board during the hearing of the Request for Review that the Applicant's Kisumu and Sondu Miriu did not have a sufficient number of dogs and that the firm did not have communication equipment that would enable it immediately respond to it and that in case of an emergency it was impossible for a customer to send a distress signal from Kisumu or Maseno to its Nairobi office since they did not have communication boosters.

The Applicant further argued that the Procuring Entity waived items 6 and 9 some of the mandatory requirements set out in the Tender

Document and hence the entire evaluation was not objective as it was set to give a premeditated result to preferred bidders.

In conclusion the Applicant submitted that the action of the procuring Entity led to rejection of Applicant's tender which was, in the Applicant's view, competitive.

Mr. Wasuna learned Counsel for the Procuring Entity started off his submissions by reminding the Board that the most significant issue for the Board's determination was whether or not the Applicant had capacity to render the services which were the subject matter of this tender. Counsel for Procuring Entity urged the Board to find and hold that the particulars set out in the confidential business questionnaire and the provisions of clause 2.2 of the tender document were not in conflict and that none of the two clauses could override the other. According to Mr. Wasuna the particulars given in the Business questionnaire related to information on where the Applicants' Head offices are located and that it was not unusual for companies or even the police to have headquarters or central operational coordination centres and also have branches in other towns. It was the Procuring Entity's position that clause 2.2 of the Tender Documents specifically provided that bidders would be visited at their nearest operational premises and assessed based on certain particulars which were set out in the said clause. Clause 2.2 of the Tender Document in the Procuring Entity's view are clear and speak for themselves and were geared at ensuring that the bidders had the necessary capacity to effectively and timeously respond to an emergency. Counsel wondered how a tenderer who had admitted

that it had a 10 x 10 office in Kisumu and whose facility at Sondu Miriu Electricity plant could not demonstrate capacity could be expected to be awarded the tender by the Procuring Entity. The Procuring Entity then gave a detailed account of how it attempted to contact the Applicant's representative for the purposes of carrying out the site based evaluation and stated that the applicant's representative one Mr. Nyakundi became evasive but the Procuring Entity nonetheless finally conducted a site based evaluation at it's Sondu Miriu Electricity Plant and ranked the Applicant base on its findings there.

On this aspect of the Review, the Procuring Entity finally argued that a site based evaluation was expressly provided for in clause 2.2 of the tender document and that it was therefore an evaluation criteria expressly stipulated in the tender document and the Applicant's argument that the Procuring Entity had breached the Provisions of Section 64 and 66 of the Act did not therefore hold any water.

The Procuring Entity therefore urged the Board to find and hold that it adhered to all the provisions of the Act, the Regulations and the requirements of the Tender Document in processing the tender. It further asserted that it adhered to the evaluation procedure and criteria as set out in the Tender Documents and that in particular it conducted a site visit which formed the main part of the evaluation process and that all bidders were contacted by telephone and Short Messages Service(SMS messages) prior to the scheduled site visits.

On the issue of waiver of mandatory requirements ,the Procuring Entity submitted that no mandatory requirement was waived and that it considered all the mandatory requirements including mandatory requirements no. 6 and 9 while carrying out the evaluation and, in any event, if any mandatory requirements were waived such waiver had affected all the bidders equally that neither the Applicant nor the successful party was affected by any such omission and that neither of the two had been disqualified on account of such omission.

Mr. James Mwamu for the successful bidder as would be expected supported the position taken by Mr. Wasuna for the Procuring Entity and in addition invited the Board to uphold the objectives of the Procurement law as set out in Article 227 of the Constitution and Section 2 of the Act. According to the successful bidder, the Board would not be furthering these objectives if it cancelled and or awarded the tender to the Applicant which had not demonstrated the capacity to carryout the tendered works at the nearest point where the services were required to be rendered.

Mr. Mwamu urged the Board to therefore find that the tender had rightly been awarded to his client. He urged the Board to uphold the award in order for the Procuring Entity to start enjoying the required services.

The successful party finally indicated that awarding the tender to it would not only promote the local industry but would also offer the

much needed employment opportunities to the residents of Kisumu and its environs.

The Board has heard the rival arguments and observes from the documents submitted to it that the tender the subject matter of this dispute was advertised on or about 13th February, 2014 and that the Tender Documents issued to the bidders had criteria to be used at the various stages of evaluation. These criteria can briefly be summarized as follows:-

- Stage 1: Statutory mandatory requirements.
- Stage 2: Technical Evaluation stage 70% pass mark
 - 2.1 Desk evaluation (50 marks)
 - 2.2 site based technical evaluation (50 marks)
- The Financial evaluation stage

At the preliminary evaluation stage a yes /no format was used to indicate whether or not a bidder provided or met that requirement. Bidders who met all the mandatory requirements were declared responsive while those that failed to meet any of the mandatory requirements were declared non-responsive.

At this stage of evaluation the Applicant and four other bidders were declared responsive while three other bidders were declared non responsive at this stage and therefore did not proceed to the technical evaluation stage.

The Board has further established from the documents that the technical evaluation criteria was clearly spelt out in the Tender Documents with a marking scheme for both desk evaluation and site evaluation.

The outcome of the technical evaluation according to the available documents was as follows:-

	Particulars	Average Scores					
		Max	B3	B4	B5	B7	B8
1	Competence of proposed Key Staff	10	5	7	1	7	8
2	Proof of experience in offering similar Services	10	6/10*10 =6	7/10*10 =7	1/10*10 =1	6/10*10= 6	10/10*10 =10
3	Evidence of security Backup/Response vehicles.	10	11/32*10 =3.4	23/32*10 =7.18	11/32*10 =3.4	32/32*10 =10	27/32*10 =8.43
4	Evidence of Insurance Covers	10	6.67	10	6.67	10	10
5	Evidence of Monetary Capacity in handling similar business	10	10	10	10	10	10
	TOTALS	50	31.07	41.18	22.07	43	46.43

Table 3b. Site Technical Evaluation Scores

STAGE 2					
BIDDER NUMBERS.	B3	B4	B5	B7	B8
Evidence of Premise:					
Building Facility	2	2	2	2	2

Accessibility	2	2	2	2	2
Parking Yard	0	2	0	2	2
Matching Parade/Ground	2	2	0	2	2
Garage	0	0	0	2	2
Proof of Adequate Communication Equipment					
Security Control Room	2	0	2	2	2
Power back-up	0	2	0	2	2
VHF Portable Radios	0	1	1	1	1
VHF Base Station Radio	0	0	0	1	1
Qualified Radio Control Staff	0	0	2	2	2
Radio Frequency License CCK	2	0	0	2	2
Evidence of use of other security Gadgets					
Motor cycles	3.34	0	3.34	3.34	3.34
Metal detectors	3.33	0	0	3.33	3.33
Scanning Machines	0	3.33	0	3.33	3.33
Evidence of Ability to effectively supervise Personnel while on duty					
Supervisory gadgets	4	0	4	4	4
Supervisory Reports	0	0	3	3	3
Training of supervisors	0	0	0	3	3
Evidence of ownership of guard Dogs					
Guard Dogs	4	4	0	4	4
Certificate of vaccination	0	0	0	2	2
Dog Kennels	2	2	0	2	2
Competence of the dog master.	0	0	0	2	2
TOTALS	26.67	20.34	19.34	50	50
COMBINED TECHNICAL SCORES	57.74	61.52	41.41	93	96.43

It's clear from the above results that two bidders attained the set minimum score of 70% which was stated in the Tender Document and proceeded to Financial Evaluation.

The Applicant who is bidder No.4 did not attain the pass mark of 70% and therefore did not proceed to the financial evaluation stage.

Evaluation of tenders is inter-alia governed by the provisions of Section 66(2) of the Act, Regulations 48 and 49 of the Regulations and the stipulations in the Tender Documents. These provisions inter-alia stipulate as follows in so far as the same are relevant to this dispute:-

Section 66(2) the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) –

(a) the criteria must, to the extent possible, be objective and quantifiable; and

Regulations 48 (2) the classification of a deviation from the requirements as minor under section 64(2) (a) of the Act shall be applied uniformly and consistently to all the tenders received by the procuring entity.

Regulation 49 (1): Upon completion of the preliminary evaluation under Regulation 47, the evaluation committee shall conduct a technical Evaluation by comparing each

tender to the technical requirements of the description of goods, works or services in the tender document.

(2) The evaluation committee shall reject tenders which do not Satisfy the technical requirements under paragraph (1).

Clause 2.2 of the Tender Document on the other hand provides as follows:-

2.2 sites based technical evaluation.

"Bidders will be visited at their nearest operational premises and assessed based on the following particulars... .."

The Board has considered the documents submitted to it and the arguments made by the parties and has established that :-

- i) The criteria used in the evaluation of the tenders was clearly spelt out at Section 4 of the Tender Document with a clear and quantifiable marking scheme for each parameter under consideration.
- ii) The evaluation committee omitted mandatory requirements No.6 (recent letter of compliance from Ministry of Labour) and No.9(copy of membership certificated for KSIA and PSIA) in its preliminary evaluation.
- iii) Both the Applicant and the successful bidder attached necessary documents to support or meet the requirements in requirements no. 6 and 9.
- iv) The Applicant's low score was attributed to site technical evaluation in which it scored zeros for 12 out of the 21 items checked.

- v) The Applicant in its business questionnaire had indicated that the location of its Head Office was in Nairobi in its confidential Business Questionnaires which was founded through a letter dated 17th February, 2014.
- vi) The Applicant's official letterhead however showed it had branches in the following other towns; Mombasa, Kisumu, Eldoret, Nakuru, Kakamega, Nyeri and Embu. This fact was conceded by Mr. Njuguna learned Counsel for the Applicant upon an inquiry from the Board.

On the complaint that the Evaluation Committee ought to have carried out a Site based technical evaluation at the Applicant's Nairobi office, the Board wishes to observe that the method of site based technical evaluation was expressly provided for clause 2.2 of in the Tender Document and the Board upon hearing the rival submissions accepts the explanation given by the Procuring Entity namely that there indeed exists a destination between the contents of the confidential Business Questionnaire and what was expressly set out in clause 2.2. of the Tender Documents. While the Applicant's confidential Business Questionnaire indicated that its Headquarters was in Nairobi clause 2.2 of the Tender Document which all bidders agreed to be bound by permitted the Procuring Entity to carry out a site based technical evaluation at each bidders nearest operational offices/sites which in the case of the Applicant turned out to be the Sondu Miriu Electricity site. The Board entirely agrees with Mr. Wasuna and Mr. Mwamu's argument that this was meant to gauge capacity and the Board wonders

how one could mobilize dogs and enough manpower in case of a security emergency from an operational site in Nairobi for an emergency in Kisumu. The Applicant through Mr. Nyakundi admitted and rightly so that the Sondu Miriu site and the Kisumu office could not effectively respond to an alarm by a consumer of the Applicant's services since they did not have the equipment to transmit and have the Nairobi office respond to the alarm. The Board therefore finds that the requirement being one that was contained in the tender document was not exteneous. It was therefore known to all the bidders from the onset and the Procuring Entity was not therefore required to inform the Applicant of an already existing criteria in writing. Furthermore, the arrangements to visit the site was mutually made between the Applicant and the Procuring Entity and the Board did not find any correspondence to indicate that the Applicant objected to this being done at the appointed site. Site based evaluation at the nearest operational offices is of particular significance because the services to be rendered were to be rendered at the Procuring Entity's Kisumu Hotel, Kisumu City Campus and its colleges at Siriba, and Homabay.

The Board takes judicial notice that the nearest operational office for the purpose of effective delivery of security services is and must be taken to be the place proximately located to the institutions which were to receive the said services ,namely the Sondu Miriu Electricity Site or it's Kisumu office and not it's Nairobi office and it was therefore proper for the Procuring Entity to use the Applicant's Sondu Muriu Electricity Site or it's Kisumu office/operational site as the basis

for the site based technical evaluation whose main objective was to ensure that the Applicant had capacity to render the services. Security by its very nature is a service that requires rapid response which can only be delivered from the place nearest to the place where that service is to be provided.

At any rate, the Board expects that both the Applicant's Nairobi and satellite branch offices are all well equipped both in terms of manpower and equipment and have the necessary competencies to handle security issues. The Board reiterates that clause 2.2 of the Tender Document which is in simple and clear language bound the Applicant and it stipulated that bidders would be visited at their nearest operational premises. It cannot surely be argued that the Tender document was silent or that this was an extraneous criteria.

The Board therefore finds and holds that the Procuring Entity was right in evaluating the Applicant's Sondu Miriu site and that the Procuring Entity's action was in line with what is envisaged by Regulation 49(1) as read together with clause 2.2 of the Tender Document and therefore the Applicant was rightly rated based on the evidence at its Sondu Miriu operational site.

On the basis of all the foregoing findings, the consolidated Applicant's grounds of Review as set out under ground 1 therefore fail and are accordingly dismissed.

Ground 2: Breach of Regulation 16 of the regulations

On the second ground of Review the Applicant argued that the Evaluation Committee incorporated members of the Tender Committee particularly one Mr. Robert Adala into the tender evaluation committee yet he was a member of the Tender Committee and that this action contravened the provisions of Regulation 16 of the Regulations.

In response to that submission, the Procuring Entity denied that any member of its Tender Committee was appointed to or participated in the evaluation of the tender and therefore denied that there was any breach of the provisions of Regulation 16 of the Regulations.

The Board has gone through all the documents which were placed before it and finds as follows:

- i) The evaluation report from the documents submitted shows that evaluation was carried out by the following four members; Dr. Felix Kioli, Mr Willis Wandei and Ms Bernice Ogonda under the chairmanship of Prof Raphael Kapiyo.
- ii) The Documents submitted further show the Operational based site visits were conducted by the following members; Dr. Felix Kioli, Mr Willis Wandei and Ms Bernice Ogonda under the chairmanship of Prof Raphael Kapiyo.
- iii) The minutes of the Tender Committee show that the members of the tender committee who adjudicated the tender under review were Prof Catherine Muhoma - chairing, Prof. Wilson Odero, Mr. Mathew Oriyango, Prof. Edward Kochung, Prof. Collins Ouma,

Ms Florence A.Odhiambo, Dr .Gideon Momanyi and Reuben N. Ogetii being the Secretary.

The Regulation 16(4) which the Applicant relied upon indeed prohibits a person who has been appointed as a member of Tender Committee from being appointed to and/or taking part in the Tender Evaluation process. The Board however finds, and holds, that the Applicant has not established that Mr.Robert Adala or any other member of the Tender Evaluation Committee was appointed to or took part in the tender evaluation process and this ground of Review therefore also fails and is hereby dismissed.

Ground 3: Breach of Regulation 46 of the Regulation as amended

The Applicant argued that the Procuring Entity did not carry out the evaluation of the tender within the period of 15 days set out in Regulation 46 of the Regulations as amended in 2013.

The Procuring Entity in response denied that it breached the provisions of section 66(6) and Regulation 46 of the Act as it complied with the requirements of Regulations 14(2) of the Regulations by seeking an extension of the time for evaluation from the Procuring Entity's accounting officer and that this extension was granted via an endorsement on the letter seeking extension which is dated 11th March, 2014.

In the letter the Procuring Entity sought for an extension for a period of further three weeks starting from 14th April, 2014. The reason advanced for this request was stated as "a looming staff industrial strike".

The Board notes that this tender was advertised on or about 13th February, 2014 with an opening/closing date of 27th February, 2014. The evaluation was concluded on 19th March, 2014.

Regulations 46 of the regulations which governs the issue of evaluation of tenders provides as follows:-

Regulation 46: A procuring entity shall, for purposes of section 66 (6) of the Act, evaluate the tenders within a period of fifteen days after the opening of the tender.

From the dates and the events the Board has outlined above, the period within which the tenders ought to have been evaluated started running from 28th February, 2014 and lapsed on 15th March, 2014. The evaluation of the tender under review was however concluded on 19th March, 2014 and an award made on 22nd April, 2014. This period fell 32 days beyond the stipulated time.

The parameters within which a party can request for extension and the grounds upon which the Request must be based on are however set out in Regulation 14(2) of the Regulations which reads as follows:-

14(2)" Where a tender is complex or has attracted a high number of tenderers, the accounting officer or head of the procuring entity may extend the period for tender evaluation under paragraph (1) for a further period within the tender validity period not exceeding thirty more days from date of expiry of initial period".

The provisions of Regulation 14(2) therefore permits a Procuring Entity to extend the 15 days period stipulated under the Regulations for a further period of time not exceeding 30 days where a tender is complex or has attracted a high number of tenders and that the extension must be done within the tender validity period. The late evaluation of tenders is one of the most common complaints raised by bidders and time has now come for Procuring Entities to comply with the strict timelines and the Board suggests that the Director General gives appropriate directions on this issue.

But coming back to the case before us, the Board notes that the reason given for extension falls short of the provisions of Regulation 14(2) since a looming industrial strike is not a reason to extend the evaluation period under the law.

The Board is however sensitive to the fact that several bidders participated in this tender and were evaluated uniformly on the basis of the same criteria and the Board would be punishing these bidders on the basis of a mistake on the part of the Procuring Entity which largely arose because of lack of a proper reading of the Provisions of Regulation 14(2) of the Regulations.

The Board held in the case of **Hatari Security Guards Limited =vs= Kenya College of Communications Technology (PPRB) Application No. 30 of 2008**) that so long as evaluation is conducted and a tender is awarded within the tender validity period an applicant has to

demonstrate the prejudice he has suffered in order for this Board to nullify an award.

The Applicant in this case did not suffer prejudice since none was demonstrated to the Board and the Applicant in any event of the firm position that it would rather that the tender be re-evaluated and that the Board should treat it's prayer for nullification as an alternative prayer.

The Board therefore finds that prejudice having not been demonstrated this ground of Review fails.

GROUND 4: Breach of Section 67 of the Act

The Applicant argued that the Procuring Entity breached the Provisions of Section 67 of the Act by failing to notify it of the results of this tender simultaneously with the notification given to Successful Bidder.

The Procuring Entity stated that it notified all tenderers including the Applicant of the outcome of the tender process by letters allegedly dispatched on 25th April, 2014

The Board has looked at all the documents submitted to it by the Procuring Entity and notes that the letters of Notification to all bidders were dated 22nd April, 2014. The Board however notes that though the letter addressed to the Successful Bidder and the unsuccessful bidders are dated 22nd April, 2014 no evidence was adduced before the Board to show how these letters were dispatched. The Board however finds that in spite of the absence of evidence of service of the notification; the

Applicant was able to file this Request for Review on time and raised the substantive grounds of Review which it ably argued on merit. The Board therefore holds that the Applicant did not suffer any prejudice.

In view of all the above findings and pursuant to the powers conferred upon the Board by the provisions of Section 98 of the Act, the Board makes the following orders:-

- (a) The Request for Review dated 25th April, 2014 and filed by the Applicant herein be and is hereby dismissed.
- (b) The Procuring Entity is therefore at liberty to proceed with the procurement process and may enter into a contract with the successful bidder within Fourteen (14) days from today.
- (c) The stay order issued by the Board upon the filling of this Request is hereby vacated.
- (d) The Board makes no order as to costs.

Dated at Kisumu this day of 16th May, 2014.

.....

Chairman

PPARB

.....

Secretary

PPARB