

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 26/2015 OF 11TH JUNE, 2015

BETWEEN

KENYA SHIELD SECURITY LTD..... APPLICANT

AND

KENYA PIPELINE COMPANY LTDPROCURING ENTITY

PRESENT BY INVITATION

Paul Gicheru	Chair
Peter Ondieki	Member
Gilda Odera	Member
Paul Ngotho	Member

APPLICANT KENYA SHIELD SECURITY LTD

Moses Kurgat Advocate, Kiplangat & Associates

PROCURING ENTITY-KENYA PIPELINE COMPANY LTD

Absent at the hearing.

Interested Parties

1. Richard Kipngeno Advocate representing Lavington Security Ltd, Bedrock Holdings Ltd, Total security & Surveillance (K) Ltd, Gilleys Security & Investigations Ltd, Riley Falcon Security

Ltd, Guardforce Group Ltd and
Intersecurity Ltd.

BACKGROUND OF AWARD

The Procuring Entity is a government corporation, which operates the national petroleum pipeline and various filling stations in the country. It requires security services in its premises.

Advertisement

The Procuring Entity advertised the Open Tender in the *Standard* and *Daily Nation* newspapers on 8th and 13th May, 2015 for bids from eligible tenderers for the provision of security services for the period 1st July, 2015 to 30th June, 2017, being Tender No. SU/QT/226N/14.

The Procuring Entity issued Clarifications/Addenda on 22nd May and 29th May, 2015, the former extending the Tender Closing date to 10th June, 2015.

Closing/Opening:

The Tender closed/opened at a meeting held on 10th June, 2015 at 10.00 a.m. at which Tenderers' representatives who chose to attend were present.

THE REQUEST FOR REVIEW

This Request for Review was filed by M/s KENYA SHIELD SECURITY LIMITED ("the Applicant") of P.O. Box 7230-20100 Nakuru on 11th June, 2015, leading to the suspension of the procurement process pending the outcome of this application.

Orders Sought

The Applicant sought for the following orders:-

- a) *That the Procuring Entity be directed to waive and/or delete the clauses that require bidders to submit a Professional Indemnity cover of minimum Kshs 100 Million as one of the mandatory requirements for the Tender;*
- b) *That the Procuring Entity be directed to waive and/or delete the requirement that bidders submit 3 existing contracts of similar magnitude of between 300-500 guards for each assignment and amend the Tender Document to promote fair competition;*
- c) *That the Procuring Entity be directed to waive and/or delete the requirements that bidders who submit audited accounts for the last two years with annual turnover of Kshs 100 Million - 1 Billion be awarded points ranging from 0-5 points and/or amend the Tender Document to promote fair competition;*
- d) *That the Procuring Entity be directed to waive and/or delete the requirement that bidders submit Contractual Liability Cover with minimum limit per event for existing clients ranging from 20 - 100 Million;*
- e) *The Procuring Entity be directed to amend the scoring criteria awarding zero (0) marks for bidders with 1-5 years experience in order to allow and encourage fair competition;*
- f) *The Procuring Entity be directed to unbundle the Schedule of Requirements in compliance with Regulation 9 of the Public Procurement & Disposal (Preferences & Reservations)*

Regulations, 2011 as amended by Regulation 6 of the Public Procurement & Disposal (Preferences & Reservations) (Amendment) Regulations, 2013;

g) Any award of tender be nullified and/or cancelled forthwith;

h) Alternatively and without prejudice to 1 to 7 above, the tender proceedings be annulled in their entirety;

i) The Applicant be awarded costs of and incidental to this application and the proceedings herein; and

j) Such other or further orders and/or directions as the Honourable Board shall deem just and expedient.

When this Request for Review came up for hearing before the Board the Applicant was represented by Mr. Moses Kurgat Advocate from the firm of M/s Kiplagat and Associates while the Interested parties M/s Lavington Security Ltd, Bedrock Holdings Ltd, Total Security (K) Ltd, Gilleys Security and Investigations Ltd, Riley Falcon Security Ltd, Guardforce Group Ltd and Intersecurity Limited were all represented by Mr. Richard Kipngeno Advocate.

Though the Procuring Entity was served with a hearing notice dated 22nd June, 2015 notifying it of the hearing date of the Request for Review, neither Counsel for the Procuring Entity nor a representative from the Applicant firm was present when the Request for Review was argued.

The hearing notice which was served upon Counsel for the Procuring Entity on 22nd June, 2015 reads as follows:-

"You are hereby required to appear on Thursday 2nd July, 2015 at 10.00 a.m. when the complaint against you will be heard by this Board sitting at 10th Floor Boardroom, National Bank Building Harambee Avenue, Nairobi".

"If you fail to appear, the Applicant may proceed with the complaint and determination by order of the Board may be made in your absence".

The Board duly convened for the hearing of the Applicant's Request for Review at 10.00 a.m. on 2nd July, 2015 as scheduled but upon realizing that there was no representation on the part of the Procuring Entity, the Board gave the Procuring Entity more time to enable it's representative attend Court and moved the hearing of the Request for Review to 10.35 a.m.

When the parties present appeared before the Board at 10.35 a.m. and there being no application for adjournment by the Procuring Entity or it's advocate or any other reason for the adjournment of the hearing on that day, the Board allowed the Applicant to proceed with its application under the Provisions of Regulations 80 (a) of The Public Procurement and Disposal Regulations 2006 which provides as follows in material part.

"80: If on the day set for the hearing of a Review for which due notification has been given:-

(a) The Applicant appears and the Procuring Entity fails to appear, the hearing of the Request for Review shall proceed in the absence of the Procuring Entity unless the Review Board deems it fit to adjourn the hearing".

The hearing therefore commenced at 10.35 a.m. and ended at 11.00 a.m when both Counsel for the Applicant and Counsel for the Interested Parties left the Boardroom after fully arguing the Application. Mr. Ligunya advocate for the Procuring Entity however arrived in the Boardroom at 11.30 a.m. by which time all the other advocates had left the Boardroom.

All the above notwithstanding it is noteworthy that the Procuring Entity filed a Memorandum of Response to the Applicant's Request for Review on 22nd June, 2015 in answer to the Applicant's Request for Review. Though the Request for Review proceeded in the absence of Counsel for the Procuring Entity, the Board will however take into account the contents of the Procuring Entity's Memorandum of Response while considering the grounds and the issues raised by the Applicant.

Grounds For Review

The Applicant raised a total of seven grounds of review namely:-

Ground 1:- Breach of Sections 2, 31(1) to (4), 34 (1) & (2) and 52 of the Public Procurement & Disposal Act, 2005 and Article 227 of the Constitution of Kenya, 2010

The Applicant argued that the Procuring Entity breached the above Article of the Constitution and the Sections of the Act when it included Clauses 1.2 and 2.24.3(b) in the Tender Document as well as Item No. 15 in the Clarification No. 2 of 29th May 2015. The clauses required bidders to provide a professional indemnity cover with a minimum of Kshs. 100,000,000 as part of the mandatory requirements for the Tender.

The Applicant stated that this requirement was unnecessary, unfair, unreasonable, oppressive, unlawful and restrictive because security

services are not classified and or categorised as professional services and no professional indemnity cover is issuable by any insurance company in Kenya in respect thereof.

The Applicant further alleged that the said clauses impose a mandatory requirement that will make all tenders to be potentially non-responsive thus negating and defeating the purpose of the procurement proceedings.

The Respondent (Procuring Entity) in its Memorandum of Response stated that the Applicant was being speculative on the practicability of this requirement and that the Applicant had factually proved that this requirement was impossible.

The Procuring Entity stated in its Memorandum of Response that the confirmation which the Applicant had attached to the Request for Review was only a letter from one Insurance Company which merely reflected that Insurance Company's position namely that it was not in the business of providing professional indemnity for security firms and that the information was not requested by the Applicant but by Guardforce Group Limited.

The Procuring Entity additionally stated that the averment by the Applicant in paragraph 10 that the requirement for a professional indemnity had the potential of making tenders to be non-responsive, was not a ground of complaint and that section 65 of the Act provides that, if the Procuring Entity determines that none of the submitted tenders is responsive, the Procuring Entity shall notify each person who submitted a tender accordingly.

Ground 2:- Breach of Sections 2, 31(1) to (4), 34 (1) & (2), 39(1) and 52 of the Public Procurement & Disposal Act, 2005 and Article 227 of the Constitution of Kenya, 2010

On the 2nd ground of review the Applicant stated that the Procuring Entity breached the above sections of the Act and the Constitution when it included in Phase 1 - Technical Evaluation Requirements Schedule on page 20 of the Tender Document a requirement that bidders submit three existing contracts of similar magnitude of between 300-500 guards for each assignment with a scoring criteria as follows:

- a) Above 500 guards - 5 marks
- b) 400-500 guards - 3 marks
- c) 300 - 500 guards - 2 marks

The Applicant contended that the clause was unreasonable, impractical, oppressive, unfair, inequitable, restrictive, inhibitory, and discriminatory, and that the requirement locks out candidates who may not meet the aforesaid threshold of 3 contracts of 300-500 guards per assignment and yet are otherwise technically and financially capable of providing the required services.

The Applicant alleged that from it's experience, the Procuring Entity has never awarded a contract requiring 500 guards per assignment to a single security service provider. The Applicant attached copies of the existing contracts between the Procuring Entity and various security service providers in support of this position. Counsel for the Applicant submitted that this particular tender was for a total of 514 guards in various parts of the Country.

Counsel for the Applicant further submitted that the said requirement and scoring criteria was tailored to suit specific large market players with a view to discouraging fair and open competition to the disadvantage of small and medium sized market players.

The Procuring Entity in its Memorandum of Response averred that the requirement for submitting evidence of similar contracts was not a mandatory requirement under the Tender Document and as such it does not bar anyone from participating in the bid. The Procuring Entity further stated in its Memorandum of Response that this requirement had a weighted score such that a bidder who had not handled similar contracts before may earn fewer marks under this category but may equally outcompete other bidders in other areas which it has significant advantage.

The Procuring Entity further stated in its Memorandum of Response that the Applicant's attempt to have the weighted requirements waived or deleted would compromise the procurement process thereby leading to the procurement of poor quality services and that the Procuring Entity had the discretion to determine which standards are the most appropriate for the tender in question. The Procuring Entity submitted that this discretion could only be interfered with in very limited circumstances and in the instant case, there was no allegation from the Applicant that the Procuring Entity exercised its discretion non-judiciously.

Ground 3:- Breach of Sections 2, 31(1) to (4), 34 (1) & (2), 39(1) and 52 of the Public Procurement & Disposal Act, 2005 and Article 227(1) of the Constitution of Kenya, 2010

The Applicant stated that the Procuring Entity breached the above sections of the Act and the Constitution when it included in phase 1 Technical Evaluation Requirement schedule under the criteria on Financial Capability on pages 22-23 of the Tender Document a requirement that bidders who submit audited accounts for the last two years with annual turnover of :-

- a) Over Kshs 2 billion- earns 5 points
- b) Kshs. 1 billion to 1.9 billion – 3 points
- c) Kshs 500-900 million- earns 2 points
- d) Less than Kshs 100 million- earns 0 points

The Applicant argued that the requirement was unfair, discriminatory, inhibitory, oppressive and restrictive, and that it was meant lock out candidates who may not have attained the required financial thresholds but have technical capability. The Applicant further stated that the distribution of the marks and the scoring criteria was unrealistic and unreasonable as it was skewed or aligned to favour the big market players.

The Applicant stated that the requirement was unreasonable, anti-development and discouraged fair competition, and that the Procuring Entity has historically awarded contracts to several small and medium sized service providers without the necessity of the high turnover thresholds specified in the instant tender document.

In its Memorandum of Response, the Procuring Entity averred that there was nothing illegal or unconstitutional in the requirement that the bidders demonstrate financial capacity to undertake the tender at hand and that the requirement was not mandatory such that a participant who is disadvantaged to this extent will only lose marks but would score highly in another area of demonstrated competence.

The Procuring Entity stated in its Memorandum of Response that these requirements were aimed at getting the best and the most competent bidder and that the Applicant's prayers if allowed would significantly lower the standards thereby leading to the procurement of poor quality services to the detriment of both the Procuring Entity and the public in general.

Ground 4:- Breach of Sections 2, 31(1) to (4), 34 (1) & (2), 39(1) and 52 of the Public Procurement & Disposal Act, 2005 and Article 227(1) of the Constitution of Kenya, 2010

Counsel for the Applicant argued on the basis of the above ground that the Procuring Entity breached the above sections of the Act and the Constitution when it included in phase 1 Technical Evaluation Requirements on page 20 of the tender Document a requirement that bidders submit *proof of Contractual Liability cover with a minimum limit per event for existing clients as follows:*

- a) Kshs 20-30 million - 1 mark
- b) Kshs 31-40 million-2marks
- c) Kshs 41-50 million- 3 marks
- d) Kshs 51-100 million-5marks.

The Applicant further stated that the requirement was unreasonable, unfair, inhibitory, arbitrary, oppressive, and discriminatory for the reasons that it openly discriminates against bidders who are not required under existing third party contracts to provide such cover and that there is no technical relevance of requiring such third party covers where the Procuring Entity is not a beneficiary in any event.

The Respondent in its Memorandum of Response stated that this requirement was not factually impossible nor is it a legal requirement that the Procuring Entity has to lower the bar so as to allow participants who would otherwise be ineligible to participate. Further, there is no standard tender legal document that procuring entities are obliged to use and as such procuring entities are supposed to use their discretion to come up with the requirements.

The Procuring Entity further stated in its Memorandum of Response that Section 52 of the Act provides for what the tender document should contain and that no specific violation had been demonstrated by the Applicant.

Ground 5:- Breach of Sections 2, 31(1) to (4), 34 (1) & (2), 39(1) and 52 of the Public Procurement & Disposal Act, 2005 and Article 227(1) of the Constitution of Kenya, 2010

On this ground of review, the Applicant alleged that the Procuring Entity breached the above sections of the Act and the Constitution when it included in phase 1- Technical Evaluation Requirements Schedule on page 19 of the tender Document a scoring criteria of zero (0) marks for bidders with 1-5 years experience.

The Applicant further alleged that the requirement unfairly disadvantaged candidates who may not have attained over 5 years experience and yet are otherwise technically and financially capable to providing the services.

In its response, the Procuring Entity stated that there was nothing unfair or discriminatory in the requirement and that there is nothing more fair than applying the same criteria to all persons without preference.

Ground 6:- Breach of Sections 2, 34 (1) & (2), and 39(1) of the Public Procurement & Disposal Act, 2005, Regulation 19 of the Public Procurement & Disposal (Preferences & Reservations) Regulations, 2011 and Article 227(1) of the Constitution of Kenya, 2010

The Applicant stated that the Procuring Entity breached the above sections of the Act the Regulations and the Constitution by not unbundling the tender into smaller lots to attract interest from more tenderers.

The Procuring Entity, in it's Memorandum of Response averred that under the said Regulations, the use of the word "may" in the Regulations means that the requirement to unbundle the procurement of services into smaller units is discretionary. The Procuring Entity further averred that in this regard and taking into account the sensitive nature of the contract at hand, it was in the best interest that the contract is bundled together to promote efficiency and meet the emerging challenges.

Ground 7:- The allegation of loss and damage by the Applicant.

The Applicant finally submitted that it was likely to suffer loss and damage due to the aforesaid breaches of duty imposed on the Procuring Entity by the Act, the Regulations and the Constitution if the entire procurement process was not annulled.

In response, the Procuring Entity stated in its Memorandum of Response that the Applicant had not set out any case for loss of income and had not demonstrated any such loss.

The Procuring Entity stated that when a party decides to take part in a tendering process, it is much aware that it is taking a commercial risk and if it turns out unsuccessful it cannot be heard to complain of loss or any risk of suffering loss and that should the Procuring Entity discontinue the process, the bidders would be refunded any tender security offered.

Mr. Richard Kipngeno who appeared on behalf of the Interested Parties supported the Applicant's Request for Review and stated that the tender document prepared by the Procuring Entity was clearly designed to lock out small and medium enterprises from participating in the subject tender. He submitted that his clients were as at the time of filing the Request for Review his clients were still rendering services to the Procuring Entity and that this was being done pursuant to previous tenders which did not contain the kind of conditions which the Procuring Entity had introduced in this tender.

Counsel for the Interested Party submitted that the requirements as set out were not only not fair but did not promote fair competition, were

unreasonable and were apparently tailor made or prepared with a particular tenderer in mind.

He therefore supported the Applicant's Request for Review and prayed that the same be allowed.

ISSUES FOR DETERMINATION

The Board has considered the Request for Review and the Procuring Entity's Memorandum of Response and finds that this Request for Review raised the following two issues for determination.

- Does the Board have jurisdiction to hear this Request for Review?
- Did the requirements set out in the tender document breach the Provisions of Sections 2, 31(1-4)34(1-2) and 52 of the Act and Article 227 of the Constitution of Kenya 2010 as set out in grounds 1, 2, 3, 4, 5, 6 and 7 of the Applicant's Request for Review.

ISSUE NO. 1

Does the Board have jurisdiction to hear this Request for Review?

The Procuring Entity in paragraph 4 of its Memorandum of Reply challenged the Board's jurisdiction to hear this Request for Review on the ground that it was time barred under Regulation 73(3) of the Public Procurement and Disposal Regulations 2006 as read together with Regulation 20 of the 2013 Amended Regulations which require an Applicant to file a Request for Review within 7 days upon becoming aware of the breach or within 7 days upon the making of an award.

The Procuring Entity stated in its Memorandum of Response that the period of Seven days started running from 8th May, 2015 when the tender was advertised or at latest on 29th May, 2015 which is the day that the last clarification was made.

Regulation 73 of the Public Procurement & Disposal Regulations, 2006, as amended in 2013 reads as follows:-

73. (1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these Regulations.

(2) The request referred to in paragraph (1) shall-

(a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within Seven days of-

(i) the occurrence of the breach complained of where the request is made before the making of an award;

The Board has perused the Procuring Entity's advertisement of this tender. The advertisement did not contain the grounds which the Applicant has raised in this Request for Review and it would therefore have been premature for the Applicant to commence these proceedings at that point since it did not have knowledge of the tender document.

Contrary to the Procuring Entity's position, the Applicant has submitted documentary proof in the form of Receipt No. 0000341674 from the

Procuring Entity which shows that it purchased the tender documents from the Procuring Entity on 5th June 2015. This was supported by the witness statement from Moses Kaniaru, a Director of the Applicant Company that indeed that was the date that the Applicant obtained the tender documents, which contains the details complained of in the Request for Review.

The Applicant, having learnt of the Procuring Entity's requirements on 5th June, 2015 it had upto 12th June 2015 to file the Request for Review. It filed this Request for Review on 11th June 2015 and was, therefore, within the statutory period of 7 (Seven) days.

In addition, there was no material placed before the Board to show that the subject tender had been evaluated and a winner declared. This tender is therefore still alive and the Applicant's Request for Review cannot therefore be said to be premature.

The Board therefore finds that this Request for Review was filed within time and having therefore established that it has jurisdiction, the Board will address the merits of the Request for Review.

ISSUE NO. 2

The Board has consolidated grounds 1, 2, 3, 4, 5, 6 and 7 since they all challenge the criteria and the requirements set out by the Procuring Entity in the tender document which the Applicant alleges were in breach of the Provisions of Sections 2, 31(1-4),34(1-2) and 52 of the Act and Article 227 of the Constitution of Kenya 2010?

The Constitution of Kenya 2010 Article 227. (1) Stipulates that *“When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.”*

That provision is expounded in s. 2 of the Act, which states that the objectives of the Act are *“(a) to maximise economy and efficiency; (b) to promote competition and ensure that competitors are treated fairly; (c) to promote the integrity and fairness of those procedures; (d) to increase transparency and accountability in those procedures; and (e) to increase public confidence in those procedures and (f) to facilitate the promotion of local industry and economic development.”*

S. 31.(1) of the Act provides that a person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria –

(a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;

(b) the person has the legal capacity to enter into a contract for the procurement;

(c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;

(d) the procuring entity is not precluded from entering into the contract with the person under section 33;

(e) the person is not debarred from participating in procurement proceedings under Part IX.

(2) The procuring entity may require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

(3) The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents or the request for proposals or quotations or, if a procedure is used to pre-qualify persons, in the documents used in that procedure.

(4) The procuring entity shall determine whether a person is qualified and that determination shall be done using the criteria and requirements set out in the documents or requests described in subsection (3)."

"34.(1) The procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured." and

"52.(1) The procuring entity shall prepare tender documents in accordance with this section and the regulations.

(2) The tender documents shall contain enough information to allow fair competition among those who may wish to submit tenders.

(3) The tender documents shall set out the following –

(a) the specific requirements prepared under section 34 relating to the goods, works or services being procured and the time limit for delivery or completion;

(b) if works are being procured, relevant drawings and bills of quantities;

(c) the general and specific conditions to which the contract will be subject, including any requirement that performance security be provided before the contract is entered into;

(d) the tender number assigned to the procurement proceedings by the procuring entity;

(e) instructions for the preparation and submission of tenders including – (i) the forms for tenders;

(ii) the number of copies to be submitted with the original tender;

(iii) any requirement that tender security be provided and the form and amount of any such security; and

(iv) any requirement that evidence be provided of the qualifications of the person submitting the tender;

(f) an explanation of where and when tenders must be submitted, a statement that the tenders will be opened immediately after the deadline for submitting them and an explanation of where the tenders will be opened;

(g) a statement that those submitting tenders or their representatives may attend the opening of tenders;

(h) a statement of the period during which tenders must remain valid;

(i) the procedures and criteria to be used to evaluate and compare the tenders;

(j) a statement that the procuring entity may, at any time, terminate the procurement proceedings without entering into a contract; and

(k) anything else required, under this Act or the regulations, to be set out in the tender documents.

The Applicant submits that the Procuring Entity breached the above legal provisions by requiring tenderers to provide a professional indemnity cover of a minimum of Ksh. 100,000,000/= and a contractual liability cover, 3 existing contracts of 300-500 guards an annual turnover of minimum One Billion (Kshs. 1,000,000,000/= for the last two years.

The Applicant submitted that the various thresholds and the scoring method accompanying those tender requirements were unreasonable and restrictive, thereby locking out many security firms.

The Applicant stated that the provision of security services was a "skilled trade" and not a "profession" and that, therefore a professional indemnity cover was not available in the market. It submitted a letter from the African Merchant Assurance Company Ltd (AMACO) to the Procuring Entity which reads as follows:-

“8th June 2015

**Kenya Pipeline Company Ltd
P O Box 73442 – 00200
NAIROBI**

Dear Sirs,

**RE: PROFESSIONAL INDEMNITY COVER- GUARDFORCE
GROUP LTD**

We wish to inform you that we don't provide professional indemnity cover to security firms noting that their work is not professional.

Kindly assist where necessary.

Yours faithfully,

(signed)

**Francis O. Odalo
BRANCH MANAGER”**

The Procuring Entity raised several issues regarding that letter. Firstly, it stated that the letter is addressed to “Guardforce Group Ltd”, and not to the Applicant and secondly that the issuing Insurance Company stated that it did not provide such a policy and that this did not therefore mean that no other underwriters in Kenya could do so. The Procuring Entity pointed out that the Applicant had not produced letters from any other insurance companies and that the Applicant had not in any case demonstrated that such a cover is not available.

The Applicant's arguments about security services not being “a profession” sounds persuasive and having alleged and produced the letter as it did, the burden of proof on whether or not professional indemnity insurance is available was on the Procuring Entity, which put that requirement in the tender documents. The Procuring Entity did not

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discharge that burden nor point out to the Board what Provision of the law requires persons carrying out the business of security guards to have a professional indemnity cover. The Board is of the view that requiring an insurance cover to cover any loss would have been the more reasonable requirement to achieve the objective of compensation in case of a loss.

The Board notes that the limit of Kshs. 100 Million for professional indemnity, which is a mandatory requirement, was communicated to the tenderers through a clarification from tenderers and is not contained in the initial tender documents. The omission of such an aspect does not inspire confidence that the Procuring Entity gave the tender documents the attention required in such a major procurement.

The Procuring Entity stated in its Memorandum of Response that the tender requirement for 3 existing contracts of 300-500 guards was not a mandatory requirement and so it did not bar anybody from taking part in the tender even though tenderers with more guards would score more points. However, according to the Applicant, the requirement meant that a tenderer must have existing contracts involving at least a total of 900-1,500 guards to earn the maximum marks. It is this cumulative number which the Applicant was aggrieved by.

The Board has considered this requirement on the number of guards and finds that the requirement is far too high and cannot in all fairness be described as reasonable nor is it meant to promote competition.

In any event the interested parties submitted that though they are still rendering similar services to the Procuring Entity, the requirement on the number of guards is simply prohibitive and that they themselves did not have that number of guards yet they were able to provide the required services. This contention was not disputed by the Procuring Entity at the hearing and so the Board accepts it.

Regarding the reasonableness or otherwise of the minimum annual turnover of Ksh.1,000,000,000 for two years, the Applicant submitted annual accounts from various security companies, which were Interested Parties in these proceedings. Gilly's Security And Investigation Services Ltd for example had a turnover of Kshs. 440,576,949/= and 410,325,391/= in 2013 and 2014 respectively according to the annual accounts submitted by the Applicant.

The Board wishes to observe that the law emphasizes the issue of fairness and promoting competition in tender processes. The law also imposes the element of reasonableness on Procuring Entities when preparing tender documents.

The Board finds that *prima facies* the requirement that a bidder provides evidence of an annual turnover of Kshs. 1 Billion per year for a period of two years is excessive and does not in anyway promote fairness and competition. This requirement therefore contravenes the provisions of Article 227 of the Constitution and Sections 2, 31, 34 and 52 of the Public Procurement and Disposal Act.

Board's Decision and Final Orders

In view of what the Board has already determined above and more particularly on the issue of the requirement for a professional indemnity cover of minimum Kshs. 100,000,000, the requirement of proof of 3 existing contracts of 300-500 guards and the requirement of an annual turnover Kshs.1,000,000.000/= for two years, the Applicant's Request for Review succeeds.

The Board also wishes to observe that it is also apparent that the Procuring Entity did not give the tender documents the necessary attention in view of the gaps and omissions such as the one on the initial absence of the requirement for a professional indemnity from the tender document and which the Board has already highlighted above.

The Board has in the past had occasion to examine and declare tender documents whose contents contravene the Provisions of the Constitution, the Act and the Regulations as illegal and anullity where the requirements set out in the said documents are outrightly unfair, unreasonable and inhibit competition such as was in the case of **Unfree Duty Free & Others -vs- Kenya Airports Authority (PPRB Review No. 50 of 2013)** and in the case of **Transcend Media Group Limited -vs- Kenya Airports Authority (PPRB Review No. 6 of 2014)**.

Where the Board observed as follows on the requirement on experience.

"The Board however finds that the requirement that a party must be a member of 5 years good standing in any of the associations or bodies in order to participate in a tender is oppressive and restrictive. Such a

requirement locks out practitioners who may have not attained the 5 years threshold and yet are otherwise technically and financially capable”.

In view of all the foregoing reasons this Request for Review therefore succeeds and in exercise of the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal Act 2005 the Board makes the following orders:-

- (i) The entire Procurement process in respect of tender No. SU/QT/226N/14 for the Provision of Security Services is hereby annulled.
- (ii) Owing to the nature of the services to be procured, the Procuring Entity shall re-tender and complete the Procurement process for the Provision of Security Services within 30 days from the date of this decision.
- (iii) The Procuring Entity shall prepare a fresh tender document containing requirements and criteria that allows for fair competition and the re-tender document shall be approved by the Director General of the Public Procurement Oversight Authority, who will give prior written approval of the re-tender document in order to ensure reasonableness, fairness, transparency and which will also promote competition and achieve all the other objectives set out in the Constitution, the Act and the Regulations.

- (iv) In view of the above orders and more particularly the order on re-tender which may involve the participation of the Applicant and the Interested Parties in the fresh tender process, each party shall bear it's own costs of the Request for Review.

Dated at Nairobi on this 8th day of July, 2015.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

