

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 9 OF 12TH FEBRUARY OF 2016

BEDROCK HOLDINGS LIMITED.....APPLICANT

AND

KENYA PIPELINE COMPANY LIMITED.....PROCURING ENTITY

Review against the decision of the Kenya Pipeline Company Limited vide the notification letter dated 29th January, 2016 in the matter of Tender No. RWC/125 Provision of Security Services for the Period 1st February 2016 – 31st January 2018.

BOARD MEMBERS PRESENT

1. Paul Gicheru - Chairman
2. Gilda Odera - Member
3. Peter Ondieki - Member
4. Nelson Orgut - Member

IN ATTENDANCE

Philemon Kiprop - Secretariat
Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant - Bedrock Holding Ltd

1. Benard Koyoko - Advocate
2. Wilson Ololo - Bedrock Holdings Ltd

Procuring Entity - Kenya Pipeline Company Ltd

1. Geoffrey Imende - Advocate
2. Wanjiru Ngige - Advocate
3. Emmah Wabuce - KPC

Interested Parties

1. James Cherotich - BDM Total Security Services
2. Wilson Kiptalam - Sales Manager, Total Security
3. Magdaline Karwigi - BDM Gilley Security & Investigation Services Ltd
4. Raymod Koech - Finance Manager, Lavington Security Ltd
5. Wilfred Kiao - Procurement, Lavington Security
6. Stephen Mwangi - Director, Hatari Security
7. Major Muigai - Manager, Hatari Security

THE BOARD'S DECISION

Upon hearing presentations from the parties and the interested candidate and upon considering the information in the documents before it, the Board decides as follows:

BACKGROUND OF AWARD

The tender no SU/QT/675/N/15 for the Provision of Security Services for the period 1st February, 2016 to 31st January, 2018 was advertised in the Daily Nation and the Star Newspapers on Friday 20th November, 2015. The Tender closing date was 8th December 2015.

At the tender opening date of 8th December, 2015, Twenty-five (25) bidders, including the Applicant, submitted their bids.

The closing date of the Tender was 8th December 2015. At the said tender closing date, twenty-five bidders, including the Applicant, submitted their bids.

On 11th December 2015, an unsuccessful bidder M/s Witerose Radio Alarms (K) Ltd filed a Request for Review before the Public Procurement Administrative Review Board (hereinafter referred to as 'the Board') alleging that there arose several breaches when the tender was advertised on 20th November 2016. On 4th January 2016, the Board dismissed the Request for Review and ordered the procurement process to be completed within 30 days.

Evaluation

The Procuring Entity carried out evaluation in three stages namely; Preliminary Evaluation, technical evaluation stage (Phases I and II) and financial evaluation.

The bidders who submitted their tenders were first subjected to preliminary evaluation and the results of the preliminary evaluation were as follows:-

No.	Bidder	Mandatory Requirements
1	Radar Security Ltd	Responsive
2	Riley Falcon Security Services Ltd	Responsive
3	Sunrise Security Services Ltd	Responsive
4	Inter-security Ltd	Responsive
5	Gilleys Security & Investigations Services Ltd	Responsive
6	Hatari Security Guards Ltd	Responsive
7	Lavington Security Guards Ltd	Responsive
8	Gylo Success Co. Ltd	Responsive
9	Cornerstone Security	Responsive
10	Bedrock Security Services Ltd	Responsive
11	Guardforce Security Group	Responsive
12	Total Security Surveillance Ltd	Responsive
13	Bedrock Holdings Ltd	Responsive
14	Apex Security Services	Responsive
15	Radio Alarm Witerose	Responsive
16	Vickers Security	Responsive
Nine bidders listed below did not submit all the mandatory requirements:		
1	Lamu Security Guards	Non-Responsive
2	Newham Security Services	Non-Responsive
3	Citadelle Security	Non-Responsive
4	Secures Services Ltd	Non-Responsive

5	Kenya Shield Security Ltd	Non-Responsive
6	Brinks Security Services Ltd	Non-Responsive
7	Perk Security Ltd	Non-Responsive
8	ARN Security Con& TRU	Non-Responsive
9	911 Security Group	Non-Responsive

The bidders who were established to have been responsive at the preliminary evaluation stage were subjected to phase 1 of Technical Evaluation whose results were as follows:-

TECHNICAL EVALUATION -PHASE I - MINIMUM SCORE 85%		
No.	Firm	Score
1	Rilley Falcon Services	91
2	Lavington Security Ltd	89
3	Gillys Security and Investigations Ltd	89
4	Hatari Security Ltd	88
5	Bedrock holdings	88
6	Gyto Security Services	87
7	Radar Security	87
8	Total Security Ltd	86
SCORES BELOW 85%		
1	Vickers Security Ltd	72
2	Guardforce Security	70
3	Whiterose Security	70
4	Intersecurity Services	64
5	Cornerstone Security	55
6	Bedrock Services Ltd	40
7	Sunrise Security	37
8	Apex Security	34

Technical Evaluation - Phase II - Scored 85 % and above

No.	Firm	Score
1	RILEY FALCON SECURITY SERVICES	
2	RADAR LIMITED	
3	LAVINGTON SECURITY LIMITED	
4	HATARI SECURITY LIMITED	
5	GILLEYS SECURITY & INVESTIGATIONS LTD	

Technical Evaluation Phase II - Scored Below - 85%

1	TOTAL SECURITY SURVEILLANCE	
2	BEDROCK HOLDINGS	
3	GYTO SECURITY (k) LIMITED	

Security Firms Recommended For Financial Evaluation

No.	Firm	
1	RILEY FALCON SECURITY SERVICES	
2	RADAR LIMITED	
3	LAVINGTON SECURITY LIMITED	
4	HATARI SECURITY LIMITED	
5	GILLEYS SECURITY & INVESTIGATIONS LTD	

Financial Evaluation Recommendation

The following lowest bidder per region were recommended as below for award by the tender evaluation committee:-

Lavington Security Limited at Kshs.53, 806,482.36

Hatari Security Limited at Ksh.42, 996,000

Gilleys Security & Investigations Ltd at Ksh.96, 300,000.00

THE REQUEST FOR REVIEW

This Request for Review was filed by M/s Bedrock Holdings Limited against the decision of the Kenya Pipeline Company Limited to declare the Applicant's tender as unsuccessful in the tender for the Provision of Security Services for the period February, 2016 to January, 2018 as communicated by the procuring entity vide its letter dated 29th January, 2013 which the Applicant produced and annexed at page 103 of its Request for Review.

The Applicant set out 10 grounds in support of the Request for Review which was supported by the annexed supporting statement of William Onyango Ololo the Applicant's Managing Director.

The Applicant sought for the following orders:-

1. The Board be pleased to review all records of the procurement process particularly the alleged preliminary and technical evaluations thereof relating to Tender No. SU/OT/675N/15 and establish what criteria was used and if not according to law and the

tender document annul the results of such an evaluation and direct a fresh re-tendering.

2. The Respondent's decision notifying the Applicant that it had not been successful in Tender NO. SU/OT/675/15 by way of the letter dated 29th January, 2016 be set aside and nullified.
3. The Respondent's decision awarding Tender No. SU/QT/675N/15 to the alleged successful bidder be and is hereby set aside and nullified.
4. Further or in the alternative, the entire tender process be nullified and the Respondent be ordered to re-tender afresh.
5. Grant an order terminating the procurement process and direct commencement of a new procurement process.
6. The Respondent be and is hereby ordered to pay the costs of an incidental to these proceedings; and
7. Such further relief of alternative relieve as this Board shall deem just and expedient.

During the hearing of the Request for Review, the Applicant was represented by Mr. Bernard Koyoko Advocate while the procuring entity was represented by Mr. Geoffrey Imende Advocate. The following interested parties appeared at the hearing of the Request for Review; Total Security Services, Gilley Security and Investigations Limited, Lavington Security Services Ltd and M/s Hatari Security Ltd. All the above interested parties indicated during the hearing of the Request for Review

that they did not desire to take any position in the matter and did not therefore make any submission inspite of being invited by the Board to do so.

The Board will now therefore proceed and consider the parties arguments and render a decision on the grounds that were argued before it.

The Applicant's case

Although the Applicant had set out a total of 10 grounds the basis for it's Request for Review, Counsel for the Applicant abandoned several grounds of the Request for Review and only opted to argue two grounds.

Mr. Koyoko's first ground for objecting to the procuring entity's decision was that the procuring entity erred by declaring the Applicant's tender as unsuccessful at the technical evaluation stage on the ground that it had not furnished a valid frequency licence from the Communication Authority of Kenya (CAK) which must include both VHF and HF frequencies.

Mr. Koyoko submitted that it was the Applicant's believe as stated in paragraph 8(i) of the Request for Review and at paragraph 12.1 that all bidders did not satisfy that mandatory requirement and invited the Board to review the bids submitted by various bidders to satisfy itself on this aspect.

Mr. Koyoko submitted that the issue of whether the bidders could obtain a valid frequency licence from the Communication Authority of Kenya was the subject matter of an earlier Request for Review before the Board namely Request for Review No. 61 of 2011 between Witerose Radio Alarms (K)

Limited -vs- Kenya Pipeline Company Limited which related to the same tender and stated that the basis for the Applicant's submission was the admission by several bidders that it was impossible for security firms which were participating in this tender to obtain a valid Frequency license from the Authority.

Counsel for the Applicant produced the Board's decision given on 4th January, 2016 in Review No. 61 of 2015 and annexed it at pages 71 to 102 of its Request for Review and specifically referred the Board to the arguments made by Counsel for the Applicant and the interested parties in Request for Review No. 61 of 2015 to support his submissions.

Counsel for the Applicant therefore urged the Board to find that on the basis of the said submissions, none of the other bidders could have possibly complied with the requirement and urged the Board to order for a retender of the subject procurement. He stated that it would be discriminatory to the Applicant if the Applicant were to be disqualified on an issue which affected all the other bidders who were facing the same predicament as the Applicant.

Turning to the letter which declared the Applicant's bid as unsuccessful and which appears at page 103 of the Request for review, Counsel for the Applicant conceded that the Applicant's bid was declared unsuccessful on among other grounds because the Applicant did not prove that it had HF communication equipment but not because the Applicant did not have a valid frequency license from the Communication Authority of Kenya (CAK). He further conceded that the Applicant did not have the said

license and stated that the Applicant had made an application for the license although he did not have the application letter with him.

Counsel for the Applicant further stated that the Applicant was not questioning the other five (5) grounds on the basis of which the Applicant's tender had been declared as unsuccessful as contained in the letter dated 29th January, 2016.

Turning to the second ground for challenging the decision of the procuring entity Mr. Koyoko submitted that the Board in its decision in Review No. 61 of 2015 had directed the Procuring Entity to complete the Procurement process within 30 days from the date of the said decision, namely from 4th January, 2016 and while relying on the contents of paragraph 2 of the Procuring Entity's response dated 24th February, 2016 where the procuring entity had admitted that no award had been made in respect of the subject procurement, Mr. Koyoko submitted that the procuring entity was in breach of the Board's orders and that the Board ought to annul the entire process and order for a re-tender since the timelines within which the procuring entity was required to complete the process had lapsed.

Based on the above two grounds, the Applicant therefore prayed that the Request for Review be allowed in terms of the prayers set out in the Request for Review.

The procuring entity's response

Mr. Imende on behalf of the procuring entity opposed the Applicant's Request for Review and submitted that the Applicant's contention that the

Applicant and all the other bidders did not provide valid frequency licenses had no factual nor legal basis. He stated that the Applicant had not led any evidence to support the allegations made and that it was clear from the Applicant's submission that the Applicant was basing that allegation on a supposed previous position taken by parties who are not named.

Counsel for the procuring entity further submitted that the Board cannot make an affirmative finding in favour of the Applicant based on speculation.

Counsel for the procuring entity additionally submitted that the issue that the Applicant was now raising had been raised and determined in Review application No. 61 of 2015. He referred the Board to pages 28 and 29 of the Board's decision given on 4th January, 2016 and stated that the Board had specifically found that the requirement of a VHF and HF radio signals was a mandatory requirement and further that the Communications Authority of Kenya has power to authorise and issue HF/VHF and UHF radio frequencies and networks. Counsel for the procuring entity therefore submitted that the Applicant which participated in Review No. 61 of 2015 as an interested party could not re-raise the same issue in a subsequent application. He stated that no appeal or an application for judicial review had been lodged against the Board's decision and the decision was therefore final.

Counsel for the Applicant further stated that the letter addressed to the Applicant and which formed the basis of the Request for Review was not in

consonance with the Request for Review as far as the grounds for review were concerned since the reason given in the letter was lack of the HF Communication equipment whereas the Applicant's case as framed was alleging inability by the bidders to obtain a license from the Communication Authority of Kenya. The procuring entity urged the Board to find that the nature of the tender that was before the Board was of strategic importance to the nation as the procuring entity operates over 121,000 km 's of pipeline which traverses 14 Counties and it was therefore of utmost importance that the procuring entity be given a go ahead to secure the facility as the previous contract had lapsed.

Turning to the Applicant's argument that the procuring entity had breached the Board's order in Review No. 61 of 2015 that required the Procurement Process be completed within a period of 30 days from the date of the Board's decision, Counsel for the procuring entity objected to this ground and submitted that the Applicant had not raised this as a ground in it's Request for Review and that the Applicant could not therefore rely on this ground to support it's Request for Review since this was a new ground.

Counsel for the procuring entity however confirmed that the evaluation of the tenders had been completed and a recommendation for award made to the three lowest evaluated bidders on 2nd February, 2016 which was well within the period of Thirty (30) days granted by the Board.

Counsel for the Applicant further stated that the Board had the power to grant an extension of time to a procuring entity to enable it comply with the Board's directions even if there was a default.

He attributed the delay in completing the procurement process to the internal changes that had occurred in the procuring entity's management. He also stated that the evaluation process involved 3 stages where phase 2 of technical evaluation required the procuring entity's tender evaluation committee to visit bidders at their premises to confirm the physical presence of all the 15 items forming part of the criteria for technical evaluation.

He also submitted that the procuring entity had failed to complete the procurement process within the period of Thirty (30) days because the filing of this application by the Applicant had stopped the tender committee from meeting to adopt the tender evaluation committee's recommendation on the award of the tender.

Counsel for the Applicant therefore prayed that the Applicant's Request for Review be dismissed with costs.

The Applicant's response to the procuring entity's submissions

In a short response to the procuring entity's submissions, Counsel for the Applicant revisited the Board's decision in Review No. 61 of 2015 and stated that the particulars of the bidders who had taken the position that a valid frequency licence from the communication Authority of Kenya could

not be issued to security firms were listed at pages 4 and 5 of the said decision and included Lavington Security Limited, GuardForce Group Limited, Bed Rock Holdings Limited, Riley Falcon Security Limited among others.

On the issue of compliance with the Board's direction that the subject procurement be completed within Thirty (30) days, Counsel for the Applicant submitted that the issue of the time when this Request for Review was filed could not be used by the Applicant as a basis for explaining the delay since the Request for Review had been filed one week after the expiry of the period of the time fixed by the Board.

He therefore urged the Board to find merit in the Request for Review and allow the same.

The Board's decision

The Board has considered the Request for Review, the accompanying statement and the documents filed in support of the Request for Review. The Board has also considered the procuring entity's response to the Request for Review dated 24th February, 2016 together with the accompanying replying affidavit sworn by Harry Kithinji on 25th February, 2016 in addition to the evaluation reports and the original tender documents supplied to it by the procuring entity.

The Board has also considered the oral and the written submissions made before it by the parties.

On the first ground of review argued by the Applicant, namely that the procuring entity erred in declaring the Applicant's bid as unsuccessful on the ground that the Applicant and none of the other bidders provided a valid frequency license from the Communication Authority of Kenya, the Board notes that the said ground was on the Applicant's own admission based on speculation and was allegedly founded on the parties submissions in Review No. 61 of 2015.

The Board has however read through the parties arguments and its decision in the above review and finds that upon considering the said issue, the Board made the following finding at pages 28 and 29 of the said decision which was not challenged before the High Court by any of the parties to the said review.

"On the issue of the requirement of a VHF and HF radio signals these are mandatory conditions in the tender document. The Board has perused all the evidence placed before it and contrary the Applicant's submissions, a perusal of exhibit HK4 annexed to the affidavit of Major (Rtd) Harry Githinji being a document from CCK and particularly pages 8 and 12 thereof show that the Authority has power to authorise and issue HF/VHF/UHC radio frequencies/Networks".

The effect of the said decision which has now become final and binding on the parties by virtue of the Provisions of Section 175(1) of the Public Procurement and Asset Disposal Act and Section 100 of the former Public Procurement and Disposal Act 2005 is that the Board found as a fact that a

frequency licence is capable of being issued by the Communication Authority of Kenya to security firms.

The said issue having been determined by the Board in it's previous decision, the same is now *res judicata* and the Applicant cannot revisit it.

In the case of **Lotta -vs- Tanaki (2003) 2 EA 556** the court stated as follows regarding the issue of *res judicata* in relation to suits, a position which the Board also finds to be applicable to it's decisions:-

"The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit".

Secondly on this issue, Counsel for the Applicant did not place any evidence before the Board to support the contention that other bidders did not produce frequency licenses. To the contrary the Board finds and this is clear from it's decision in Review No. 61 of 2015 that at the time that Request for Review was heard and determined, bidders had not returned their tender documents to the procuring entity and what they were challenging was what they saw as onerous conditions contained in the tender document. The Board has perused the tender documents submitted by various bidders and finds that the following firms complied with all the mandatory requirements including providing valid frequency licences from the Communication Authority of Kenya.

No.	Bidder	Mandatory Requirements
1	Radar Security Ltd	Responsive
2	Riley Falcon Security Services Ltd	Responsive
3	Sunrise Security Services Ltd	Responsive
4	Inter-security Ltd	Responsive
5	Gilleys Security & Investigations Services Ltd	Responsive
6	Hatari Security Guards Ltd	Responsive
7	Lavington Security Guards Ltd	Responsive
8	Gyto Success Co. Ltd	Responsive
9	Cornerstone Security	Responsive
10	Bedrock Security Services Ltd	Responsive
11	Guardforce Security Group	Responsive
12	Total Security Surveillance Ltd	Responsive
13	Bedrock Holdings Ltd	Responsive
14	Apex Security Services	Responsive
15	Radio Alarm Witerose	Responsive
16	Vickers Security	Responsive

The Board has infact confirmed from the Applicant's own tender document that the Applicant included four frequency licenses namely NO. 1021291, 1020559, 1013989 and 1016537 all issued to the Applicant by the communication Authority of Kenya on 11th August, 2015 in it's tender document and that explains why the Applicant was subjected to technical evaluation but failed to qualify for financial evaluation because upon a physical inspection by the procuring entity, the Applicant was found not to have an HF communication equipment but not because it did not have a frequency license. The Applicant could not have therefore proceeded to technical evaluation and achieve a score of 64% if indeed it had not provided a frequency license which the Board has confirmed to have been part of the Applicant's tender document.

In view of the above finding, the Board therefore finds that the Applicant's case on this ground was based on the wrong premise and this ground of the Applicant's Request for Review therefore fails and is disallowed.

Turning to the second ground namely that the procuring entity breached the Board's direction in Review No. 61 of 2015 by failing to complete the procurement process within a period of Thirty (30) days as ordered by the Board, the Board has perused the Applicant's Request for Review and the statement in support of the Request for Review and finds that the only reference to the Board's decision and the period of Thirty (30) days were only mentioned in passing in ground 6 of the Request for Review and in paragraph 10 of the statement in support of the Request for Review. The Applicant did not however seek to challenge the procuring entity's decision on the ground that it did not complete the procurement process within the period of Thirty (30) days and the Board therefore agrees with Mr. Imende's submissions that this ground of review was not part of the Applicant's Request for Review as framed and to allow the Request for Review on this ground would be prejudicial to the procuring entity and the other bidders since they did not have sufficient notice of this ground to enable them respond to it and provide documents to rebut the allegation.

The Board is alive to the fact that it can consider issues that arise from the pleadings filed by the parties, but the Board can only do so if all the parties to the proceedings before it have been given sufficient opportunity to respond to the issue which was not the case here since this issue was raised from the bar during the hearing of the Request for Review. If the Applicant

desired to challenge the procurement process on this ground then it ought to have specifically raised the issue or seek to amend the Request for Review since it was in possession of the Board's decision in Review No. 61 of 2015 which is produced at pages 71 to 102 of the Request for Review.

The Board finally notes that the procuring entity evaluated the Applicant's tender and concluded the exercise and notified the Applicant that its tender was unsuccessful on 29th January, 2016. This was within the period of Thirty (30) days granted by the Board. The Applicant therefore ceased to be a participant in the tender process from 29th January, 2016. The Applicant conceded that all the grounds given by the Procuring entity for the Applicant's failure to attain the overall score of 85% to enable it proceed to financial evaluation were of the Applicant's own admission valid. The Board therefore finds that the Applicant has suffered any prejudice as a result of the procuring entity's alleged failure to complete the Procurement Process within Thirty (30) days.

This ground of the Applicant's Request for Review therefore fails and is dismissed.

FINAL ORDERS

In view of all the foregoing findings and in the exercise of the powers conferred upon it by the Provisions Section 173 of the Public Procurement and Asset Disposal Act the Board makes the following orders on this Request for Review.

- a) The Applicant's Request for Review dated 11th February, 2016 therefore fails and is hereby dismissed.
- b) The procuring entity is therefore at liberty to proceed and complete the procurement process herein.
- c) Each party shall however bear it's own costs of this Request for Review.

Dated at Nairobi this 4th day of March, 2016


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CHAIRMAN
PPARB

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SECRETARY
PPARB

