

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.60/2007 OF 31ST OCTOBER, 2007

BETWEEN

PATRIOTIC GUARDS SECURITY SERVICES LTD...APPLICANT

AND

KENYA POST OFFICE SAVINGS BANK... PROCURING ENTITY

Appeal against the decisions of the Tender Committee of the Kenya Post Office Savings Bank, Procuring Entity, of October, 2007 in the matter of Tender No.KPOSB/050/007 for Provision of Security Services (Category B).

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Amb. C. M. Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Mr. S. K. Munguti	-	Member
Ms. N. Mutai	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. C. R. Amoth - Holding brief for Secretary
Mr. P. M. Wangai - Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.60/2007

Applicant, Patriotic Guards Security Services Ltd

Mr. Charles Njuguna - Advocate, Njuguna & Partners
Advocates
Ms. Pauline Kiplagat - Legal Officer, Njuguna & Partners
Advocates

Procuring Entity, Kenya Post Office Savings Bank

Mr. J. Louis Onguto - Advocate, J. Louis Onguto
Advocates
Ms. Mercy Mbiyiwe - Company Secretary
Ms. Agnes Odhiambo - Director, Finance &
Administration
Mr. Sylvester Obuon - Senior Manager, Administration
Mr. Charles Mbithi - Treasury Manager

Interested Candidate, Riley Services Ltd

Mr. Walter Owaga - Agimba & Associates Advocates
Mr. J. N. Msomba - Director

BOARD'S DECISION

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

BACKGROUND

This tender was re-advertised by the Procuring Entity in the Daily Nation and East African Standard Newspapers on 2nd August, 2007 the tender closed/opened on 31st August, 2007 in the presence of the bidders' representatives. A total of 15 bidders returned their bids before the closing /opening date of the tender. The prices read out at the tender opening were as follows:

No.	Firm	Amount (Kshs)	Bid Bond
1.	Riley Falcon Security Services Ltd	13,920.00 (Day/Night Guard) 16,240.00 (Armed Guard) 30,160.00 (Dog Handler)	363,590.40
2.	Cornerstone Security Services	11,600.00 (Day/Night Guard) 11,600.00 (Armed Guard) 26,680.00 (Dog Handler)	300,672.00
3.	Inter Security Services	12,180.00 (Day/Night Guard) 19,720.00 (Armed Guard) 30,160.00 (Dog Handler)	281,000.00
4.	Apex Security Services	16,500.00 (Day/Night Guard) 52,200.00 (Armed Guard) 28,000.00 (Dog Handler)	33,060.00
5.	Patriotic Group Ltd	14,821.00 (Day/Night Guard) 19,140.00 (Armed Guard) 42,340.00 (Dog Handler)	500,000.00
6.	Wells Fargo Ltd	17,748.00 (Day/Night Guard) 19,140.00 (Armed Guard) 37,120.00 (Dog Handler)	39,539.76
7.	First Force Security Ltd	16,850.00 (Day/Night Guard) 17,980.00 (Armed Guard)	No bid bond

		31,001.00 (Dog Handler)	
8.	Galleys Security Ltd	10,440.00 (Day/Night Guard) 11,600.00 (Armed handler) 23,200.00 (Dog Handler)	127,680.00
9.	Total Security Surveillance Ltd	12,000.00 (Day/Night Guard) 13,500.00 (Armed Guard) 28,000.00 (Dog Handler)	292,920.00
10.	Lavington Security Ltd	12,000.00 (Day/Night Guard) 13,500.00 (Armed Guard) 28,000.00 (Dog Handler)	26,070.00
11.	Metro Consultants & Guardian Ltd	13,600.00(Day/Night Guard) - -	No Bid Bond
12.	Sunrise Security Services Ltd	12,760.00 (Day/Night Guard) 14,152.00 (Armed Guard) 30,160.00 (Dog Handler)	29,510.00
13.	Riley Services Ltd	14,500.00 (Day/Night Guard) 20,880.00 (Armed Guard) 30,740.00 (Dog Handler)	368,880.00
14.	Securex Ltd	20,880.00 (Day/Night Guard) - 35,960.00 (Dog Handler)	7,516,80
15.	G4S Security Services Ltd	19,140.00 (Day/Night Guard) 20,300.00 (Armed Guard) 39,440.00 (Dog Handler)	42,595.20

Technical Evaluation

This was carried out in two stages, namely, compliance with the technical requirements followed by an inspection stage, which accounted for 55 % and 5 % marks respectively. Bidders were required to obtain at least 38.5 % in the technical evaluation stage to qualify for the inspection stage.

A summary of the technical evaluation scores was as follows:

No.	Firm	Scores (%)
1	Riley Service Ltd	44.07
2	Patriotic Group Ltd	39.67
3	Wells Fargo Ltd	39.83
4	G4s Security Services Ltd	39.70
5	Riley Falcon Security Services Ltd	38.28
6	Securex Ltd	36.30
7	Lavington Security Ltd	35.25
8	Total Security Surveillance Ltd	34.07
9	Firstforce Security Group	30.70
10	Gilley Security Ltd	29.77
11	Appex Security Services	24.73
12	Inter Security Services	24.38
13	Sunrise Security Services Ltd	23.25
14	Cornerstone Security Services	22.12
15	Metro Consultant & Guardian Ltd	Eliminated

Arising from the Technical Evaluation, four bidders, namely G4S Security Services Ltd, Riley Services Ltd, Patriotic Group Ltd and Wells Fargo Ltd qualified for the Inspection Stage, having attained more than 38.5 % cut-off mark. The four bidders satisfied the inspection criteria and were therefore awarded 5 marks each.

A summary of the combined technical and inspection scores were as tabulated hereunder:

N.	Firm	Technical Scores (%)	Inspection Score (%)	Combined technical and Inspection Scores
1	Riley Services Ltd	44.07	5	49.07
2	Patriotic Group Ltd	39.67	5	44.67
3	Wells Fargo Ltd	39.83	5	44.83
4	G4S Security Services Ltd	39.70	5	44.70

Financial Evaluation

This accounted for 40 % . A summary of the combined technical and the financial scores were as follows;

No.	Firm	Technical Score	Financial Score	Total score
1.	Riley Services Ltd	49.07	40.00	89.07
2.	Patriotic Group Ltd	44.67	39.13	83.80
3.	Wells Fargo Ltd	44.83	32.68	77.51
4.	G4S Security Services Ltd	44.70	30.30	75.00

RECOMMENDATION

Based on the above results, the Evaluation Committee recommended the award of the tender to Riley Services Ltd, at a cost of Kshs. 18, 444, 000.00 per annum.

Award of the tender

In its meeting held on 11th October, 2007, the Tender Committee concurred with the recommendations of the Evaluation Committee and awarded the tender to Riley Services Ltd, at a cost of Kshs. 18, 444, 000.00 per annum.

Notification of the award

Notification of award to the Successful Bidder was dated 12th October, 2007 while the unsuccessful bidders were notified by letters dated 29th October, 2007. A letter terminating the ongoing contract with the Applicant was dated 15th October, 2007.

THE APPEAL

This Appeal was lodged by Patriotic Guards Security Limited on 31st October, 2007 against the decision of the Tender Committee of Kenya Post Office Savings Bank, the Procuring Entity, with respect to the award of tender No.KPOSB/050/2007 for Provision of Security Services (Category B). The Applicant further filed supplementary grounds of Appeal on 6th November, 2007.

The Applicant was represented by Mr. Charles Njuguna, while the Procuring Entity was represented by Mr. J. Louis Onguto, both Advocates. Riley Services Ltd, an interested candidate, was represented by Mr. Walter Owaga also an Advocate.

The Applicant had raised seven grounds of appeal in its request for review and two supplementary grounds of review.

PRELIMINARY ISSUE

At the commencement of the hearing, Mr. Onguto for the Procuring Entity informed the Board that the request for review filed by the Applicant related to tender No.KPOSB/050/007. The tender was for Provision of Security Services, Category B. Consequently, the Procuring Entity filed a Memorandum of Response and other documents as required by the Board based on that tender. However, the supplementary grounds of review filed by the Applicant on 6th November, 2007 related to Category A which was a different tender. Counsel urged the Board to reject the supplementary grounds of appeal.

In response, Mr. Njoroge, Counsel for the Applicant, stated that the two tenders were the same but the Procuring Entity separated them during the awarding. He pointed out that although Category A was awarded in July, 2007 and the bidders notified, no contract had been signed between the Procuring Entity and the successful bidder. However, the Applicant conceded that the time for filing its Application for review, challenging the Award under category A had

lapsed. Consequently he withdrew the supplementary grounds for review.

In the Circumstances the Board need not comment on the supplementary grounds since they have been withdrawn by the Applicant.

The Board deals with the other grounds of appeal as follows:

Ground One

This was a complaint that the Procuring Entity breached Section 52 of the Public Procurement & Disposal Act, 2005 read together with Regulation 38 of the Public Procurement & Disposal Regulations, 2006. The Applicant stated that the Procuring Entity failed to set out in the tender documents the procedures and criteria to be used in the evaluation and comparison of tenders. These were mandatory requirements pursuant to Section 52(3) (i) and Regulation 38(d) and (e). The Applicant further alleged that the tender document did not contain adequate information to facilitate fair, objective and open competition amongst the bidders. According to the Applicant, these were critical failures which inhibited evaluation and comparison of tenders on the technical requirements.

In response, the Procuring Entity stated that the tender document satisfied all the relevant provisions of the Act and the Regulations. The tender document was explicit and that explains why no bidder sought any clarification from the Procuring Entity. The Procuring Entity contended that the information contained in the tender document was adequate and included the evaluation criteria specifying all the parameters to use in the evaluation of the tenders. Based on that information, the Evaluation Committee developed a score sheet and applied it uniformly to all bidders in the evaluation of their tenders. The Procuring Entity stressed that four bidders, including the Applicant, attained the cut-off marks in the Technical Evaluation and therefore qualified for the Financial Evaluation. This was a clear demonstration that the information contained in the

tender document and evaluation criteria were adequate to enable bidders to compete fairly in the tendering process.

The Board has examined the copy of the tender document that was issued by the Procuring Entity to the bidders and noted that it contained information relating to the Technical, General and Financial requirements of the tender. It is also apparent that the tender document contained the evaluation criteria, outlining the evaluation parameters which were allocated marks during the evaluation of tenders.

Accordingly, this ground of appeal fails.

Grounds Two, Three, Four and Five

These grounds of appeal have been consolidated since they raised similar complaints regarding the evaluation and award of the tender.

In these grounds, the Applicant alleged that the Procuring Entity breached Section 66 of the Public Procurement and Disposal Act, read together with Regulations 46, 47 and 50.

The Applicant stated that the Procuring Entity breached Section 66(2) by evaluating tenders using a criterion that was not set out in the tender document. The Applicant alleged that it was apparent from the letter Ref: KPOSB/ADMIN/32/2007 of 25th October, 2007 that past performance was used in the evaluation of its tender. Such a criterion could not have been as objective and quantifiable as required under Section 66(3) (a) of the Public Procurement & Disposal Act, 2005. It pointed out that the criterion was not applied objectively and was merely intended to lock out the Applicant. The Applicant urged the Board to note that no past contract between it and the Procuring Entity had ever been terminated or any loss suffered by the Procuring Entity due to poor performance on the part of the Applicant.

The Applicant further alleged that the tendering process was not conducted fairly. It argued that the bids submitted by Wells Fargo Ltd, Apex Security, Lavington Security Services, Securex and G4S Security Services, were not accompanied by sufficient bid bonds and yet their financial bids were evaluated.

Finally, the Applicant alleged that the Procuring Entity breached Section 66(4) by failing to award the tender to the bidder with the lowest evaluated price. The Applicant submitted that although it did not have details of the Evaluation Report to support this allegation, the Board should satisfy itself by perusing the tender documents before it that the tender was awarded to the bidder with the lowest evaluated price.

In response, the Procuring Entity denied that it breached Section 66 and Regulations 47 and 50 as alleged by the Applicant. The Procuring Entity submitted that although it was a tender requirement for the bidders to provide letters of reference from their past clients, past performance was not used in the evaluation and award of the tender. It argued that the reference of the Applicant's past performance in the letter Ref: KPOSB/ADMIN/32/2007 dated 25th October, 2007 could not have prejudiced the Applicant.

Further, the Procuring Entity submitted that the tender was evaluated using the criteria set out in the tender document. No other criteria was used in the evaluation of tenders. It contended that out of the 15 bidders who submitted their bids, only four, including the Applicant, qualified for Financial Evaluation. The other 11 bidders were disqualified at the Technical Evaluation stage. The Procuring Entity stated that the tender was awarded to Riley Services Ltd, the lowest evaluated bidder, in accordance with Section 66(4) of the Act. The Procuring Entity stated that the Applicant was not the lowest evaluated bidder as alleged.

The Board has perused the documents submitted by the Procuring Entity and in particular the copy of the blank tender document issued to the bidders and the Evaluation Report thereof. The Board notes

that the tender document contained evaluation criteria for the evaluation of tenders outlining the parameters to be used in the evaluation of tenders. The tender was awarded to Riley Services Ltd who were the lowest evaluated bidder. The Board further notes that the Applicant was the second lowest evaluated bidder.

With regard to the allegation that the Procuring Entity evaluated tenders using a criterion that was not set out in the tender document; the Board notes that Past Performance was not an evaluation parameter and was not used in the evaluation and award of the tender. However, the Evaluation Committee had made certain observations touching on the Applicant's Past Performance. One of such observations was the recommendation that the award of the tender be extended to the third lowest evaluated bidder in the event that the lowest evaluated bidder declined the Award. The Board further notes that that recommendation did not feature in the minutes of the Tender Committee during the award of the tender. Consequently, the Applicant's complaint that Past Performance was used as a criteria to award the tender could only be valid if the lowest evaluated bidder declined the offer and the award was extended to the third lowest evaluated bidder as recommended by the Evaluation Committee.

The Board also considered the Applicant's submission that the bids submitted by Wells Fargo Ltd, Apex Security, Lavington Security Services, Securex and G4S Security Services were not accompanied with sufficient bid bonds and yet their financial bids were evaluated. The Board noted that of the aforementioned bidders, only Wells Fargo Ltd and G4S Security Services qualified for the financial evaluation having attained the cut off mark. Of these two the Board noted that the bid bonds were insufficient pursuant to the tender requirements. However, the Board notes that no prejudice is suffered by the Applicant as a result of the said insufficiency since the tender was awarded to Riley Service Ltd who were the lowest evaluated bidder and whose bid bond was adequate.

Accordingly, these grounds of appeal have no merit and therefore fail.

Ground Six

This was a complaint that the Procuring Entity breached Section 67(2) of the Act by failing to notify the Applicant of their unsuccessful bid simultaneously with the notification of the award to the Successful bidder. The Applicant argued that the purported notification of award vide letter Ref: KPOSB/ADMIN/11/2007 of 15th October, 2007 informed it of termination of its past contract, with the Procuring Entity. That letter had no reference to the award of the tender under reference and could not satisfy the requirements of Section 67(2) of the Act. This was confirmed by the Procuring Entity's Affidavit at paragraph 9 sworn by Mr. Sylvester Obuon, stating that the successful bidder was notified of the Award on 12th October, 2007 while the Applicant was notified on 15th October, 2007.

In response, the Procuring Entity stated that although Section 67(2) of the Act required communication to the parties to be done at the same time, there was no prescribed format of such communication. It argued that the letter Ref:KPOSB/ADMNI/11/2007 of 15th October, 2007 informed the Applicant that its contract with the Procuring Entity had ended and it should prepare to hand over to another company. Based on the information contained in that letter, the Applicant was able to file the Appeal within the statutory 14 days appeal window period. This was a clear indication that the Applicant was aware that the tender had been awarded to another tenderer. The Procuring Entity further submitted that there was a possibility that the Applicant received its notification of award letter before the successful bidder despite the two letters bearing different dates.

The Board has read the Letter Ref: KPOSB/ADMNI/11/2007 of 15th October, 2007 which purportedly communicated the award of the tender to the Applicant. The letter reads in part as follows:-

"... As you may be aware, competitive bidding was done for the job and following the outcome, we wish to humbly inform you that your contract ends on 15th November, 2007. This notice is therefore to serve as one month's notice to your company as required by the terms of the contract. Please note that the hand over to another company shall take place on 15th November, 2007..."

It is apparent from the above letter that the Applicant was only informed of the termination of a contract but not the award of the tender. Further, the Board notes that paragraph 9 of the Procuring Entity's affidavit indicated that the Award of the tender was communicated to the successful bidder and the Applicant on 12th and 15th October, 2007, respectively. This fact was not disputed by the parties during the hearing. Therefore, although the communication of the Award was not in accordance with Section 67(2) of the Act, the Board notes that the Applicant was not prejudiced having filed the request for review within the 14 days appeal window period, pursuant to Regulation 73(2) (c) of the Public Procurement & Disposal Regulations, 2006.

Accordingly, this ground of appeal also fails.

Ground Seven

This is a statement of loss/damages that the Applicant is likely to suffer. The cost amounted to Kshs. 1, 664,635. 00 which was the contract price for one year.

In our view, this being an Open Tender, there was no guarantee that the Applicant would be awarded the tender. In addition, the Procuring Entity had the right to accept or reject any tender, pursuant to Clause 8 of the General Conditions of the Tender.

In the circumstances, this ground of appeal also fails.

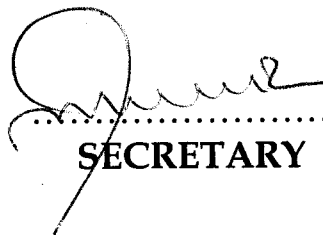
On his part Counsel for the successful bidder submitted that the Procuring Entity complied with all the legal requirements of the Public Procurement & Disposal Act and the Regulations thereof in the processing and subsequent awarding of this tender. Therefore, the Appeal lacks merit and should be dismissed.

The Board having taken into consideration all the above matters, the appeal fails and is hereby dismissed. The Procurement process may proceed.

Dated at Nairobi this 28th day of November, 2007



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CHAIRMAN



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SECRETARY