

THE REPUBLIC OF KENYA
THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 2/2009 OF 21ST JANUARY, 2009

BETWEEN

**DELTA GUARDS (K) LTD AND GUARDFORCE SECURITY
LTD(APPLICANTS)**

AND

**KENYA POWER & LIGHTING COMPANY LTD
.....(PROCURING ENTITY)**

Appeal against the decision of Kenya Power and Lighting Co. Ltd, the Procuring Entity, in the matter of Tender No. KPLC1/1C/5/3/34/08 for the Provision of Security Guarding Services.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Mr. Akich Okola	-	Member
Mrs. L.G. Ruhiu	-	Member
Miss Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C.R. Amoth	-	Board Secretary
Mr. Gilbert Kimaiyo	-	Secretariat

PRESENT BY INVITATION

For the Applicant

Delta Guards Ltd and Guardforce Security Ltd

Mr. Njuguna Charles	- Advocate
Mr. Andrew Ombwayo	- Advocate, Anginda & Associates
Mr. Musinga Munyithya	- Musinga & Munyithya Co. Advocates
Mr. S. K. Bundotich	- Total Security Serveillance

For the Procuring Entity

Ms. Imelda Bore	- Legal Officer, KPLC
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BOARD'S DECISION

Upon hearing the representation of the parties and upon reading the documents before it, the Board decides as follows:-

BACKGROUND OF AWARD

This tender was advertised by the Procuring Entity on 18th June, 2008. It was for the provision of Guarding Services. The tender closed/opened on 18th July, 2008. Out of forty- four bidders who bought the tender documents, only thirty nine submitted their bids before the closing of the tender.

EVALUATION

The Evaluation was carried out by a committee chaired by Mr. Brian Makokha a Senior Security Officer. It was to be done in three stages, namely, Preliminary, Technical and Financial stages. At the time of lodging the Request for Review, the financial proposals had not been opened.

Preliminary Stage:

This stage involved checking on the responsiveness of the tenders to the mandatory requirements. The criteria for preliminary evaluation was the provision of:

- i. Bid Bond
- ii. Three sets of bids, one original and two copies
- iii. Copy of certificate of incorporation/certificate of registration of business
- iv. Fully completed confidential business questionnaire

Seven bidders were found non-responsive at the preliminary evaluation stage and their bids were disqualified from further evaluation. The remaining bids were evaluated on the technical parameters where cut off score was 70 marks. The bids were evaluated on the following parameters:-

Company Profile

- a) Staff Competency profile
- b) Financial Resources
- c) Physical facilities
- d) Experience
- e) Reputation
- f) Social obligations
- g) Other Services

Out of the thirty two tenderers that were evaluated, the following nineteen tenderers attained the pass mark and therefore qualified for financial evaluation:

1. Race Guards Ltd
2. Cornerstone Security Services Ltd
3. Cavalier Security Services Ltd
4. Apex Security Services
5. Protective custody Ltd
6. Inter Security Services Ltd
7. Total Security Surveillance Ltd
8. Kenya Kazi (KK) Security Services Ltd
9. Riley Falcon Security Services
10. Bob Morgan Security Services

11. Riley Services Ltd
12. Securex Agencies
13. Basein Security Services
14. Delta Guards Ltd
15. Radar Security Services Ltd
16. Brinks Security Services Ltd
17. G4S Security Services Ltd
18. Kenya Shield Security Ltd
19. Guard Force Security Services

Financial Evaluation

Financial Proposals were opened on 22nd September, 2008 in the presence of the bidders' representatives. The financial scores and technical scores were combined using the following formula:

$$B = \frac{C_{low}}{C} X + \frac{T}{T_{Thigh}} (1-X)$$

Where;

- C = evaluated bid price
- C low = the lowest of all evaluated bid price amongst responsive bids
- T = technical score
- T_{Thigh} = technical score achieved by the bid that was scored highest among all responsive bids
- X = weight for price (0.3).

Following this exercise, one dissatisfied bidder, namely, Lavington Security Limited, filed a Request for Review No. 32/2008 of 19th September, 2008. The consequence of this action by Lavington Security Limited was that the procurement process was suspended with effect from September 19th, 2008 pending the outcome of the review. The Board heard the said Application No. 32 of 2008, and dismissed the application on 16th October, 2008. The Board ordered the Procuring Entity to extend the tender validity period and proceed with the evaluation process. Accordingly, the Procuring Entity wrote to the Applicants, among other bidders, on October 15th, 2008, requesting them to extend the tender validity period for a further period of sixty days. The Applicants responded positively to this request. The validity

period of the tender was extended to December 15th, 2008, with effect from October 15th, 2008.

Following this extension, the Procuring Entity carried out the financial evaluation of the bidders, including the Applicants, which had passed the technical evaluation stage before the suspension of the evaluation process. This evaluation was done on December 1st, 2008. The Tender Committee of the Procuring Entity met on December 16th, 2008 and awarded the tenders to seventeen bidders, whose combined technical and financial scores, in the judgement of the Procuring Entity, merited award.

The Applicants being some of the unsuccessful bidders filed this Request for Review on 21st January, 2009.

THE REVIEW

This Request for Review was lodged by Delta Guards Ltd and Guard Force Security (K) Ltd, the Applicants on 21st January, 2009 against the decision of the Corporation Tender Committee of Kenya Power & Lighting Co. Ltd, the Procuring Entity dated 8th January, 2009 in the matter of Tender No.KPLC1/1C/5/3/34/08 for Provision of Guarding Services.

The Applicants have raised nine grounds of appeal and urged the Board to make the following orders:

- (a) The procurement entity award be set aside.
- (b) A declaration that the tender had lapsed.
- (c) The Board do give any other or further orders as it deem just and expedient in the circumstances

The Board deals with the grounds of appeal raised by the Applicants as follows:

GROUND 1

The Applicants argued that the tenders were opened on 18th July 2008 and that the evaluation ought to have been completed by 18th August, 2008, going by the provisions of Section 66 of the Public Procurement

And Disposal Act, 2005 and Regulation 46, (herein referred to as the Act and Regulation), respectively.

Applicants further argued that even if time started running from the date the Board gave the ruling in Application No. 32/2008 (Lavington Security Vs Kenya Power and Lighting Co. Ltd, the 30 days would have run from 16th October, 2008 and expired on 16th November, 2008. The Applicants referred to the first evaluation, and stated that Application No. 32 of 2008 was filed when the 30 days period provided for evaluation had already expired. Therefore, the Procuring Entity had breached Section 66 of the Act and Regulation 46.

In response, the Procuring Entity stated that the First Applicant was an interested party in Application No. 32/2008, and ought to have raised the matter in that Application. It argued that the Applicants having failed to file a Request for Review on the issue of tender evaluation period could not, therefore, raise the issue as they were time-barred.

The Board has considered the submissions of the parties and examined the documents before it.

The issue to be considered in this ground is whether the Procuring Entity breached Section 66(6) and Regulation 46 that relate to the period the evaluation of the tender should be completed.

The Board has noted that this tender was the subject in **APPLICATION NO. 32 OF 2009, LAVINGTON SECURITY GUARDS LTD AND KENYA POWER AND LIGHTING COMPANY LTD.**

That Request for Review was filed on 19th September, 2008 when the evaluation process was in progress. Upon hearing that Application, the Board dismissed the said Application and directed the Procuring Entity to extend the tender validity period by 60 days to enable it complete the evaluation process.

The Board has further noted that the Applicants herein, Delta Guards Ltd and Guard Force (K) Ltd participated in the Request for Review as interested parties. Mr C. M. Njuguna, Advocate now appearing for the two Applicants in this Request for Review was the Advocate for Lavington Security Guards in Application No. 32 of 2008. Having failed to raise the issue of breach of Section 66 (6) and Regulation 46

during that hearing the Board finds that this argument is an afterthought.

The Board has further noted that the evaluation process was interrupted by the filing of Application No. 32 of 2008. At that time the Board's Secretary, in accordance with Section 94 directed the Procuring Entity to suspend all procurement proceedings until the conclusion of the said Application. The said Application No.32 of 2008 was heard and dismissed by the Board on 16th October, 2008. Therefore the evaluation process could not be continued by the Procuring Entity after the filing of that Request for Review. The time could not run from the date of tender opening as envisaged by Regulation 46 which states as follows:-

“A Procuring Entity shall, for purposes of Section 66 (6) of the Act, evaluate the tenders within a period of 30 days after the opening of the tender.”

Accordingly, taking into account the facts of this case, the Procuring Entity did not breach Sections 66(6) of the Act and Regulation 46 as argued by the Applicants. Accordingly, this ground fails.

GROUND 2

The Applicants argued that the Procuring Entity wrote a letter dated 15th October, 2008 and informed the tenderers that the new tender validity expiry date was 15th December 2008. It further argued that it was not in dispute that although the Procuring Entity had discretion under Section 61(1) of the Act to extend the tender validity period beyond the 60 days as directed by the Board in Application No. 32/2008, it did not do so.

The Applicant submitted that under Section 67 of the Act, notification of award ought to be done before the expiry of tender validity period. It stated that this provision was included in Clause 2.27.2 of the Tender Document. In Clause 2.72.2, the Procuring Entity indicated that before the expiry of the tender validity, it would notify the successful tenderer in writing that its tender had been accepted.

The Applicant argued that the Procuring Entity ought to have notified the unsuccessful tenderers within the tender validity period. The Applicant further argued that the rationale behind the section on tender validity period was that the tenderer offers to provide goods or services at a specific price which is valid within that specified period.

The Procuring Entity would only accept the offer within that period. In support of this contention, the Applicant referred the Board to **Application No.23/2008, Brinks Security Vs. Egerton University**, in which the Board held that once the tender validity had lapsed, the life of the tender was presumed to have expired and, therefore, there was no tender to be awarded.

In conclusion, the Applicant argued that the Procuring Entity failed to observe the mandatory provisions of Section 67 of the Act, despite the fact that it had the discretion to extend the tender validity period beyond the time ordered by the Board.

In response, the Procuring Entity submitted that the validity period was not a matter of mutual consent between the Procuring Entity and the tenderer. In its view, this was a matter of law. The Procuring Entity further argued that notwithstanding the contents of the letter by the Procuring Entity to the bidders informing them that the period of validity had been extended to December 15th, 2008, the Board had the mandate to determine when the tender validity period had expired. In its view at the date of notification, which was January 8th, 2009, the tender was still valid.

The Procuring Entity further submitted that once the Secretary to the Board gave notice of suspension of the procurement proceedings pursuant to Section 94 of the Act, time stopped running. It pointed out that the tenders were opened on September 22nd, 2008, but that on September 23rd, 2008, a Request for Review was filed by Lavington Security Guards Ltd. The determination of that Request was made on October 16th, 2008. It argued that during this period, which lasted 28 days, time stopped running and that the sixty days of validity of the tender ordered by the Board was in addition to the 28 days. Accordingly, the notification issued by the Procuring Entity on January 18th, 2009, was within the validity period.

The Board has considered the submissions made by the parties and the documents submitted.

The issues that arise for determination are as follows:-

1. Upon issuance of a notice by the Secretary to the Board pursuant to Section 94 of the Act does time stop running for purposes of tender validity period?

2. Since the notice to the Procuring Entity to suspend further procurement proceedings was issued by the Secretary on 23rd September, 2008 and the ruling by the Board was delivered on 16th October, 2008, should the said period of twenty eight days be taken into consideration when determining the tender validity period?
3. When did the tender validity period expire and was the notification of award to the tenderers done in accordance with Section 67?

The Board will answer the three questions together as they are intertwined. It is also necessary to set out the provisions of Sections 52(1) and 3(h), 61(1) and 94 of the Act. The said Sections provide as follows:-

Section 52(1) The Procuring Entity shall prepare tender documents in accordance with this section and the regulations.

(2)

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

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

Section 94 Upon receiving a request for a review under section 93, the secretary to the Review Board shall notify the procuring entity of the pending review and the suspension of the procurement proceedings in such manner as may be prescribed”.

As provided in Section 52(1) and 52 (3)(h), the Procuring Entity is required to include a statement in the tender documents indicating the period which tenders must remain valid. This raises another question; why prescribe a tender validity period in the tender document? The reason for this is that when a tenderer submits a bid to the Procuring Entity, it is making an offer to the Procuring Entity. The Procuring Entity will either accept or reject the offer. To enable the Procuring Entity evaluate all the bids, a tender validity period is prescribed in the tender documents. The tenderer is required to make a declaration that the price offered in the tender documents is binding and can not be changed within that period.

Further, the tenderer is also required to provide a tender security in accordance with Section 57 of the Act. The tender security is required to be valid for thirty (30) days from tender validity expiry date.

The importance of tender validity period is further buttressed by Regulation 47(1) (e) and (2) which provide as follows:-

(1) "Upon opening of the tenders under Section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether:-

- (a)**
- (b)**
- (c)**
- (d)**
- (e) the tender is valid for the period required;**
- (f)**

(2) The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1)".

As can be discerned from the above quoted provisions, the tender validity period defines the life of the tender, so to speak. If the tender validity period is not extended by the Procuring Entity before the expiry date, the tender suffers a natural death. This was held by the Board in application **No. 2 of 2007, Lantech (African) Ltd and Ministry of Finance** where the Board held as follows:

"It is clear..... that where there is power to extend validity such power ought to be invoked before the expiry of the instrument whose life is being extended. accordingly the tender whose validity had already expired cannot be resuscitated by a purported extension."

The Board has also noted that Sections 52(3) (h) and Sections 61(1) have given full mandate to a Procuring Entity to determine the period of the tender validity. Further, the Procuring Entity also has the discretion to extend the tender validity period as it deems necessary to enable it complete the tender evaluation process and the subsequent notification.

Having said that, it is necessary to examine the circumstances of this tender and the Board has noted the following:-

1. Clause 2.13.1 of the Tender document provides as follows:-

“... Tender shall remain valid for 90 days or as specified in the invitation to tender after date of tender opening prescribed by Kenya Power & Lighting Co. Ltd, pursuant to paragraph 2.18. A tender valid for a shorter period shall be rejected by Kenya Power & Lighting Co. Ltd as non-responsive.

2. The tender opening date was on 18th July, 2008 and the tender validity period was to expire on 17th October, 2008. However, before the Procuring Entity could conclude the evaluation process, a Request for Review, No. 32 of 2008 was filed on 19th September, 2008. On 23rd September, 2008, the secretary to the Board issued a notice pursuant to Section 94 of the Act to the Procuring Entity to suspend further procurement proceedings. The said notice stated as follows:-

“..... you are hereby notified that on 19th September, 2008 a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above mentioned tender.

Under the Public Procurement and Disposal Act 2005 and Public Procurement Regulation, 2006, no contract may be signed between the Procuring Entity and the Tenderer awarded the contract unless the appeal has been finalized.

A copy of the Request for Review is forwarded herewith to the Procuring Entity.

Dated on 19th day of September, 2008”

3. The Board delivered its ruling in Application No. 32 of 2008 on 16th October, 2008. The said Request for Review was dismissed. The Board further stated as follows in the ruling:-

“.....The Board has noted that the tender validity period expires on 16th October, 2008. The financial evaluation of the bid was not done as the tender process was stopped upon filing of this Request for Review on 19th September, 2008.

Accordingly, the Procuring Entity should extend the tender validity period by a period of sixty days from 16th October, 2008.

Further, the bidders who qualified at the technical evaluation stage should be required to extend the tender security period by a period of sixty days from 16th November, 2008 when the tender security provided is to expire”.

4. On 15th October, 2008, the Procuring Entity wrote to the bidders on the issue of tender validity. A sample letter to the bidders read as follows:-

“Our Ref: KPLC1/2A/8/1C-17/AO: co

Your Ref: To be advised

Wednesday October 15th 2008

**Guardforce Security (K) Limited
P.OBox 41229-80100
MOMBASA**

ADVANCE COPY BY E-MAIL: security@guardforce.co.ke

Dear Sirs

**RE: PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD APPLICATION NUMBER 32 OF 2008 OF 19TH
SEPTEMBER, 2008 LAVINGTON SECURITY LIMITED VS
KPLC**

Please refer to the above.

Further to our previous communication to you, and following directives issued by the Board on 13th October, 2008, we hereby extend the tender validity period in this Tender for a further period of sixty (60) days from initial expiry date as per the tender document. The initial expiry date was 16th October, 2008. Accordingly, the new tender validity expiry date is 15th December, 2008. Still further, in compliance with the Board’s further directives issued on the date aforesaid, you are advised to extend your Tender Security for thirty (30) days after the tender validity period.

Yours faithfully

FOR: KENYA POWER & LIGHTING COMPANY LIMITED

A. OWITI

FOR: DEPUTY MANAGER, LEGAL SERVICES”.

It is clear from the said letter that the Procuring Entity extended the tender validity up to 15th December, 2008.

The Procuring Entity argued that it was entitled to add another twenty eight days being the period that there was a stay of procurement proceedings pursuant to section 94 of the Act. The argument is attractive but not correct. Section 94 of the Act is clear that once a Request for Review is filed, the Procuring Entity must stop further procurement proceedings. The Procuring Entity must stop further evaluation and where an award has been made no steps should be taken towards signing the contract. This is to enable aggrieved bidders to lodge a complaint with the Board.

As regards, the tender validity period, this is clearly set out in the tender documents and governed by Section 61(1) of the Act. The Procuring Entity is given the discretion to extend the tender validity as it deems fit.

In this instant matter, the Procuring Entity extended the tender validity period to 15th December, 2008. It had the discretion to extend that period further pursuant to Section 61(1) but failed to do so. Having failed to do so, the tender validity period on 15th December, 2008. The communication to the bidders after 15th December, 2008 was, therefore, not done in accordance with Section 67(1) of the Act.

The Procuring Entity is the author of its own misfortune. It failed to explain why it did not complete the financial evaluation and communication to the bidders by 15th December, 2008 as per its own letter dated 15th October, 2008. It also failed to explain why it did not extend the tender validity period beyond 15th December, 2008 in accordance with Section 61(1) of the Act, if it needed more time.

The argument that time stopped running when a notice was issued by the Secretary on 23rd September, 2008 is an afterthought and no stretch of argument on Section 94 of the Act can support that submission. A plain reading of Section 94 clearly shows that it only stops the Procuring Entity from taking further steps in the

Procurement proceedings. The tender validity period is governed by Section 6(1) of the Act as the Board has already held.

Taking all the above into consideration, this ground of Appeal succeeds.

Grounds 3, 4, 5 and 8.

These grounds have been combined as they raise similar issues, namely the evaluation of the tenders which resulted in the Procuring Entity not awarding the tender to the bidder with the lowest evaluated price.

The Applicants submitted that the Procuring Entity breached Section 66(4) as read together with Regulation 52, as well as Clause 2.26 of the Instructions to the Tenderers by not awarding the tender to the lowest evaluated bidder. The Applicants stated that they were qualified in terms of the tender.

The Applicant further argued that the class differentiation according to which bidders were evaluated by reference A or B was not in the tender documents. In their view, there was no class differentiation in terms of class A and B. In support of this contention they pointed to clauses 2.9.3 and 2.9.4 of the Tender Documents which called for fixed prices and disallowed price variations, respectively. They contended that the bidders were required to offer one unit price across the board without differentiation as to categories A or B.

In their view, Clause 2.26.8 of the Tender Document set up the formula to be used for determining the lowest evaluated bidder. After applying the formula, one could determine the lowest evaluated bidder in each category, but not many firms as done by the Procuring Entity. The Applicant contended that the lowest evaluated price was to be specific. To illustrate this point, they pointed as examples, Basin Security Services which was awarded a contract for supply of guard services in Nairobi at the rate of Ksh. 8100.00 per guard; Bob Morgan Services Ltd, which was awarded a contract for the supply of guard services in Nairobi at the rate of Ksh. 11,500.00; Cavalier Security Ltd, which was awarded a contract for the supply of guard services in Nairobi at the rate of Ksh. 8,750.00 per guard; and G4S, which was awarded a contract to supply guard services in Nairobi, at the rate of Ksh. 16,000.00.

The Applicant submitted that the range in which the prices were given shows that the evaluation was not done in accordance with Section 66(4) Of the Act. Categorization into class A and B left room for manipulation so that preferred candidates could be awarded tenders at higher prices which would result in unfair evaluation. They further submitted that Clause 2.26.8 did not provide for distribution of awards of the tender: rather, it provided for award to the lowest evaluated bidder in each category, which could only end up with one firm in each category as provided in the Tender Document. They argued that the Procuring Entity awarded many firms in each category which was not provided for in the Tender Document.

The Applicant acknowledged that clause 2.26.7 of the Tender Document provided for Bidders attaining 86-100 points would be considered for award of tenders in category A and those attaining 70-85 points to category B. They argued that application of this provision could not result in bidders with lowest evaluated prices being awarded the tender.

The Applicants further argued that the Procuring Entity must have used evaluation criteria that was not set out in the tender document in evaluating the 2nd Applicant's bid. In this respect they referred to the letter dated January 8th, 2009, informing the Applicant that its bid was not successful. The reason for its unsuccessful bid was stated to be Procuring Entity's lack of confidence in capability to provide tendered services." The Applicants contended that lack of capacity was a technical issue and was only raised in connection with the Second Applicant, and not applied across the board. They contended that this was raised solely to block the second Applicant from participating in the tender.

In response the Procuring Entity argued that the evaluation process was conducted in accordance with the evaluation criteria set out in the Instructions to Tenderers. It stated that the evaluation in three stages, namely; preliminary, technical and financial evaluation stages. These were the only criteria that were used in the evaluation of all the tenders including those submitted by the Applicants.

The Procuring Entity further argued that the Applicants were not the lowest evaluated bidders and that the evaluation leading to determination of the lowest evaluated bidder was done using criteria which was contained in the Tender Document. In this regard, he invited the Board to peruse the documents filed by the Applicants.

The Procuring Entity further submitted that regarding the claim by the Applicant that there was discrimination, the fact that there was an existing customer-client relationship between the Applicants and the Procuring Entity, was a basis on which its past performance could be used to evaluate it. In its view, therefore, there was no discrimination.

On its part, an Interested Candidate, Bob Morgan Services Limited, submitted that the decision by the Procuring Entity was sound and within the law and therefore, the Application should be dismissed. In support of this contention, it argued that all the bidders were accorded equal opportunity. It therefore urged the Board to dismiss the Application.

Riley Falcon Security, an interested Candidate, supported the Procuring Entity and argued that following the decision by the Procuring Entity, it had incurred expenses, and entered into contractual commitments which would be adversely affected if the Board were to uphold the Application.

Total Security Surveillance, supported the Procuring Entity and urged the Board to dismiss the Application.

In reply, the Applicants stated that the extension of the tender validity period was done by the Procuring Entity in accordance with section 61 of the Act. In doing so, the Procuring Entity specified the date to which the validity would expire and having done this, it could not depart from it. Accordingly the validity period expired on 15th December, 2008 in accordance with the letter to the bidders.

The Board has combined the submissions of the parties and the documents submitted.

The Board has noted that the evaluation was done in three stages namely preliminary, technical and evaluation stages. To arrive at the lowest evaluated bidder, Clause 2.26.7 required the Procuring Entity to combine the technical and financial evaluation scores and award the tender to the bidder with the highest combined score. No information was provided by the Procuring Entity to demonstrate that the technical scores and financial scores were combined.

Further, the Board notes that the Procuring Entity conducted a site visit on the premises of the bidders. The Board also notes that the

tender document had not provided for site visit. In addition, the site visit was done to the premises of the bidders who had scored between 60-70 marks in the technical evaluation and their scores were adjusted as follows:

No	Bidder's Name	Previous Scores	Current Scores
1.	Sunrise Security	67	55
2.	Eagle Watch	63	57
3.	Metro Consultants	63	57
4.	Ivory Security	65	49
5.	Riley Services	65	74
6.	Kenya Shield	66	74

Arising from the above adjustments of the technical scores, Kenya Shield and Riley Services attained the cut-off score of 70% in the technical evaluation. Thus they qualified for financial evaluation. Kenya Shield was one of the successful bidders.

The Procuring Entity stated that the Second Applicant (Guard Force Security (K) Ltd) has been providing it with similar services. However, due to the Second Applicant's negligence, the Procuring Entity incurred losses amounting over Kenya shillings fifteen million. The Procuring Entity therefore contended that it could not award the tender to Guard Force Security (K) Ltd. The Board notes that the evaluation criteria are set out in clause 5.5 of the tender document did not include past performance of bidders.

The Board finds and holds that taking into consideration all the above matters, the evaluation process was flawed and was not done in accordance with the criteria set out in the Tender Document.

Accordingly, these grounds of appeal succeed.

GROUND 6 BREACH OF SECTION 39

The Applicants argued that the failure by the Procuring Entity to award them the tender was discriminatory and in breach of section 39 of the Act.

On its part, the Procuring Entity submitted that the Applicants were evaluated in accordance with the evaluation criteria set out in the

Tender Document. It argued that the same criteria were used in the evaluation of all tenders and that the Applicants were not the lowest evaluated bidders.

The Board notes that the Applicants were evaluated along with other bidders. Both Applicants had scored above the threshold of 0.9 for Class A and 0.8 for Class B set up by the evaluation committee but were not awarded the tender. Having participated in the tender, the Board holds that there was no discrimination as envisaged in Section 39 of the Act.

This ground of appeal therefore fails

GROUND NO. 7- Breach of Section 45(2) and (3)

In this ground, the Applicants alleged that the Procuring Entity breached Section 45(2) and (3) of the Act read together with Regulation 66(2). They argued that the Procuring Entity failed to provide the reasons for the failure of their tenders and a summary of the evaluation and comparison of the tenders.

In response, the Procuring Entity denied the breach of the aforementioned section of the Act and Regulation as alleged by the Applicants. It argued that the said information was contained in its letters of 8th and 20th January, 2008 to the Applicants.

The Board has perused the documents submitted by the parties. The Board notes that after receiving notification of award letter dated 8th January, 2009, Delta Guards Ltd wrote to the Procuring Entity on 14th January, 2009 requesting for a summary of the evaluation and comparison of tenders. The Procuring Entity responded to this letter vide letter Ref: KPLC/1C5/3/34/08 of 20th January, 2009. The Procuring Entity informed the Applicant that it could not have been awarded the tender as its tender price was higher than that of the successful bidders. However, the Procuring Entity's letter did not include summary evaluation pursuant to Sec. 45(3) (e) of the Act.

The Board notes that the request for a summary was made on 14th January, 2009 and the Request for Review was filed on 21st January, 2009. The Board further notes that Section 45(3)(e) does not state the period within which the summary should be given. The Request for Review was filed soon after the request for summary of the evaluation was made and the delay of about eight days cannot be said to be unreasonable.