

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 52/2011 OF 16TH DECEMBER, 2011

BETWEEN

TOTAL SECURITY SURVEILLANCE LIMITED.....APPLICANT

AND

KENYATTA UNIVERSITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenyatta University dated 16th August, 2011 in the matter of Tender No. KU/TNDR/21/SS/2011-2012 for provision of security services.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	- Chairman
Mr. Joshua Wambua	- Member
Ms. Judith Guserwa	- Member
Mrs. Loise Ruhui	- Member
Eng. Christine Ogut	- Member

IN ATTENDANCE

Mr. C.R Amoth	- Secretary
Mrs. Maurine Kinyundo	- Secretariat
Mr. L. Otieno	- Secretariat

PRESENT BY INVITATION

Applicant, Total Security Surveillance

- Mr. Steve Bundotich - Advocate, Kale Maina & Bundotich Advocates.
Mr. Wilson Kiptalam - Sales Administrator, Total Security Services.

Procuring Entity, Kenyatta University

- Mr. Emmanuel Wetangula - Advocate, Mohammed Muigai & Co.
Mr. Gabriel Mwangi - Advocate, Mohammed Muigai & Co.
Mr. Paul Nyaosi - Advocate, Mohammed Muigai & Co.

Interested Candidates

- Mr. Morris Kimuli - Advocate, Brinks Security Services.
Mrs. Jenipher Kimuli - Katumbi Isike, Lawyer Brinks Security Services.
Mr. Timothy Njoroge - Business Development Manager, Brinks Security Services.

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

(Open Tendering)

The tender for provision of security services at Kenyatta University was advertised in the Daily Nation on 15th July, 2011 and closed on 5th August, 2011 at 10 a.m.

Closing/Opening

As at the time of tender opening on 5th August, 2011 the following seven (7) firms had returned their bids;

1. Brinks Security
2. Lavington Security Limited
3. NVI Five Security Inv. Ltd
4. Total Security Surveillance
5. Babs Security Services
6. Hatari Security Guards Limited
7. Sunrise Security

EVALUATION

The tenders were first subjected to a preliminary evaluation as per the criteria set in the tender documents on 15th August, 2011 to ascertain compliance with the mandatory requirements before moving to technical

evaluation stage. The results of the evaluation are as summarized in the table below;

TABLE 1- PRELIMINARY EVALUATION ON OPEN TENDER

A	MANDATORY REQUIREMENTS	YES/NO	BIDDER 1 BRINKS SECURITY SERVICES LTD	BIDDER 2 LAVINGTON SECURITY LIMITED	BIDDER 3 NVI FIVE SECURITY INV. LTD	BIDDER 4 TOTAL SECURITY	BIDDER 5 BABS SECURITY SERVICES LTD	BIDDER 6 HATARI SECURITY GUARDS LIMITED	BIDDER SUNI SECL SERV
A1	Certificate of Incorporation/ Business Registration		√	√	√	√	√	√	√
A2	Registration with KZIA*		x	x	x	√	x	x	x
A3	Tax Compliance certificate from KRA		√	√	x	√	√	√	√
A4	Current Business Permit		√	√	√	√	√	√	√
A5	Compliance with legal minimum wage		√	x	x	x	x	x	x
A6	Contractual Obligation/Indemnity Insurance cover		√	√	x	√	√	√	√
A7	Current VHF Certificate from CCK		√	√	x	√	√	√	x
A8	Bid Bond (Tender Security) 2% of the tender sum		√	√	√	√	x	√	√
A9	Attach a PIN certificate		√	√	√	√	√	√	√
	*Attach current document of proof								

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A10	Attach copies of certificates of 13 dog handlers		X	X	X	√	X	X	X
A11	Audited Accounts for the last three years 2008, 2009 and 2010		X	√	√	√	X	√	X
A12	Credit Period: More than 30 days		X	√	X	X	X	√	X
	Company/ Business Profile								
A13	Disclosure of Directors/ partners/sole proprietor		√	√	√	√	√	√	√
A14	Confidential Business Questionnaire duly completed		√	√	√	√	√	√	√
	MUST disclose the authorized signatory or one with power of attorney								

√ means they met the respective requirement.

X means they did not meet the respective requirement.

Remarks:

That bidder No. 1, Ms. Brinks Security Services:

- i. Provided a letter of intention to be registered by KSIA instead of a registration certificate
- ii. Did not attach certificate of 13 dog handlers
- iii. Their 2010 audited accounts were not signed by the auditor
- iv. Did not indicate terms of credit

That bidder No. 2 Ms. Lavington Security Limited:

- i. Are not registered with KSIA
- ii. Did not attach proof of legal minimum wage compliance
- iii. Attached nine (9) instead of 13 dog handlers certificates
- iv. Did not indicate terms of credit

That bidder No. 3 Ms. NVI Five Security Inv. Limited:

- i. Are not registered with KSIA
- ii. They attached a tax compliance certificate expired on 20th March, 2011.
- iii. Did not attach proof of legal minimum wage compliance
- iv. They did not provide indemnity cover
- v. They did not provide VHF Certificate from CCK
- vi. Did not attach certificate of 13 dog handlers
- vii. Did not indicate terms of credit

That bidder No. 4 Ms. Total Security:

- i. Did not indicate terms of credit

That bidder No. 5, Ms. Babs Security Services Limited

- i. Are not registered with KSIA
- ii. Did not attach proof of legal minimum wage compliance
- iii. Provided bid bond less than 2% of the tender sum
- iv. Did not attach certificate of 13 dog handlers
- v. Their 2009 audited accounts were not signed by the auditor

- vi. Did not indicate terms of credit

That bidder No. 6 Ms. Hatari Security Guards Limited:

- i. Are not registered with KSIA
- ii. Did not attach proof legal minimum wage compliance
- iii. Attached twelve (12) instead of 13 dog handlers certificates
- iv. Did not attach certificate of 13 dog handlers

That bidder No. 7, Ms Sunrise Security Services:

- i. Are not registered with KSIA
- ii. Did not attach proof of legal minimum wage compliance
- iii. They did not provide VHF Certificate from CCK
- iv. Did not attach certificate of 13 dog handlers
- v. Their 2008 audited accounts were not attached
- vi. Did not indicate terms of credit

That none of the bidders met all the mandatory requirements and were hence disqualified and did not proceed to the technical evaluation stage

The Tender Evaluation Committee in its meeting held 15th August, 2011 thus recommended that since none of the bidders met all the mandatory requirements, they all be disqualified and the tender the tender was found to be non-responsive.

TENDER COMMITTEE'S DECISION

The Tender Committee in its meeting held on 16th August, 2011 decided that the tender was non-responsive for the reason that none of the bidders met all the mandatory requirements.

Restricted Tendering

Further, the Tender Committee in its meeting held on 14th October, 2011 decided that the procurement of security services be done immediately using revised evaluation criteria and through restricted tendering method.

The Tender Committee further decided in the same meeting that the following bidders be included in the restricted tender:

- a. The bidders who participated in the initial open tender for the provision of security services and are registered members of KSIA,
- b. The bidders who participated in the subsequent restricted tender and were all above the budget

Tender Notice

The following listed firms were subsequently contacted by calling on 17th & 18th October, 2011 for restricted tendering;

1. M/s. Brinks Security Services
2. M/s. Lavington Security Services
3. M/s. NVI Five Security Inv. Ltd
4. M/s. Total Security
5. M/s. Babs Security Services Ltd
6. M/s. Hatari Security Guards Ltd
7. M/s. Sunrise Security Services
8. Imelda Securex
9. Hellen BM security
10. G4S
11. Faith Radar

The minutes of the Tender Opening meeting held on 8th November, 2011 indicate that only nine (9) firms had bought the tender documents as listed below:-

1. M/s. Lavington Security Services
2. M/s. Brinks Security
3. M/s. Radar Security
4. M/s. NVI5 Security
5. M/s B.M. Security Services
6. M/s Babs Security Services
7. M/s Hatari Services
8. M/s M/s G4S
9. M/s Securex

Closing/Opening

As at the time of tender opening on 8th November, 2011 the following six (6) firms had returned their bids;

TABLE II

NO	FIRM	BID SUM QUOTED	BID BOND AMOUNT	REMARKS
1	Hatari security guards Ltd	36,853,200.00	737,064.00	Presented the original and copy of the tender document
2	Lavington security Ltd	41,904,000.00	840,000.00	"
3	Radar security	51,069,132.00	1,036,000.00	"
4	Brinks security	4,134,240.00	1,254,840.00	"
5	Babs security	33,705,000.00	56,175.00	"
6	B.M Security	6,201,360.00	124,027.20	"

EVALUATION

The tenders were subjected to three stages of evaluation namely, Preliminary Evaluation, Technical Evaluation and Financial Evaluation.

Preliminary Evaluation

The tenders were evaluated for responsiveness based on the revised criteria and conformity to mandatory requirements stated in the tender document. The following are the results of the preliminary evaluation;

TABLE III- PRELIMINARY EVALUATION ON RESTRICTED TENDERING

	Firms	1.Hatari security	2.Lavington security services	3.Radar security	4.Brinks security	5.Babs security	6.B.M security services
A	MANDATORY REQUIREMENTS						
A1	Certificate of Incorporation/ Business Registration	√	√	√	√	X	√
A2	Registration with KSLA*	x	x	√	√	x	√
A3	Tax Compliance certificate from KRA	√	√	√	√	X	√
A4	Current Business Permit	√	√	√	√	X	√
A5	Compliance with legal minimum wage	√	√	√	√	x	√
A6	Contractual Obligation/Indemnity Insurance cover	√	√	√	√	X	√
A7	Current VHF Certificate from CCK	√	√	√	√	X	√

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A8	Bid Bond (Tender Security) 2% of the tender sum	√	√	√	√	x	√
A9	Attach a PIN certificate	√	√	√	√	X	√
A10	Attach current document of proof Attach copies of certificate of 13 dog handlers	√	√	√	√	x	√
A11	Audited Accounts for the last three years 2008, 2009 and 2010	√	X	√	√	x	√
A12	Company/business profile Disclosure of Directors/partners/sole proprietors	√	√	√	√	x	√
A13	Confidential Business Questionnaire duly completed	√	√	√	√	X	√
A14	Directors/partners/sole proprietorship MUST disclose the authorized signatory or one with power of attorney	√	√	√	√	X	√
	RESPONSIVENES	x	X	√	√	x	√

Remarks:

- Bidder Nos. 1, 2 and 5 failed to meet all the mandatory requirements hence were disqualified from evaluation under technical requirements.
- Bidder Nos. 3, 4 and 6 met all the mandatory requirements hence qualified for evaluation under technical requirements

Technical Evaluation

The responsive bids were further subjected to a technical evaluation based on the criteria set in the tender documents. The results of the technical evaluation were as shown in the table below;

TABLE IV-TECHNICAL EVALUATION

B	SPECIFIC REQUIREMENTS FOR TECHNICAL EVALUATION	POINTS	3.Radar security	4.Brinks security	6.B.M.Security services
B1	Audited Accounts for the last three years 2008,2009 & 2010..... The scoring criteria has been attached as an annexe to this criteria	18	18	18	18
B2	Staff welfare Indicate whether you have any staff welfare scheme(give details) -with scheme.....1 -with no scheme.....0	1	1	1	1
B3	Corporate Social Responsibility Indicate whether you have any activities under corporate social responsibility. -With an activity.....1 -with no activity.....0	1	1	0	1

TABLE IV CONTINUED

B4	<p>c) Technical Proposal.....(marks to be awarded from the balance of the total)</p> <p>Attach a detailed technical proposal on how you plan to implement the contract detailing the issue of uniforms,motorized supervision and other guarding gears.</p>		9	9	9
	<p>d.) Experience in the industry</p> <p>starting with the most current, indicate similar assignments with at least 5 firms in the last three years.</p> <p>Provide references containing period, volume of business, number of guards, discharge terms and recommendation from the resoective firms.</p> <p>The references from the respective firms must be written within the bid period</p> <p style="padding-left: 40px;">- Current assignments(2011) of similar nature</p> <p style="padding-left: 80px;">0 Firm.....0</p> <p style="padding-left: 80px;">1 Firm.....1</p> <p style="padding-left: 80px;">2-5 Firms.....2</p> <p style="padding-left: 80px;">5-7 Firms.....4</p> <p style="padding-left: 80px;">Over 6 Firms.....5</p> <p style="padding-left: 40px;">-Previous assignments (before 2011) of similar nature</p> <p style="padding-left: 80px;">0 Firm.....0</p> <p style="padding-left: 80px;">0-2 Firms.....1</p> <p style="padding-left: 80px;">2-5 Firms.....2</p> <p style="padding-left: 80px;">5-7 Firms.....4</p> <p style="padding-left: 80px;">Over 6 Firms.....5</p>	9	5	5	5
B5	<p>Maximum volume of business</p> <p>Above 40 million.....8</p> <p>Above 35-39 million.....4</p> <p>Above 30-34 million.....2</p> <p>29-26 million.....1</p> <p>Less than 25 m.....0</p>	8	8	8	8

TABLE IV CONTINUED

B6	<p>Indicate the value of indemnity cover (attach prove)</p> <p>Less than 1 million.....0</p> <p>1-2 million1</p> <p>Above 2m -3 m.....2</p> <p>Above 3m-5m.....4</p>	8			
B7	<p>Litigation history</p> <p>Please submit an undertaking that no matter of litigation in respect to provision of security services is pending in court against Directors, firms,staff & Assigns of your organization under similar assignment. Indicate any convictions in the past against the firm, directors or partners related to provision of security services.</p> <p>(provide details i.e. status, value and period)</p> <ul style="list-style-type: none"> - With adverse litigation history.....0 - With no adverse litigation history.....2 	2	2	2	0
B8	<p>Minimum wage requirement</p> <p>Indicate the salaries earned by the lowest paid guard(attach evidence)</p> <ul style="list-style-type: none"> -Less than Government minimum wage.....0 -Government minimum wage and above.....4 	4	4	4	4
B9	<p>Indicate the terms of employment for the guards</p> <ul style="list-style-type: none"> -above 90% of guards are casual workers.....0 -76%-89% of guards are casual workers.....1 51%-75% of guards are casual workers.....4 25%-50% of guards are are casual workers.....6 <p>*proof of the terms of employment for the guards must be attached</p>	6	1	0	0
B10	<p>Provincial branches and number of guards distribution</p> <ul style="list-style-type: none"> -Branches in less than 2 provinces.....0 -Branches in 2-4 provinces.....1 -Branches in 4-6 provinces.....2 -Branches in 6-8 provinces.....4 	4	1	4	4
B11	<p>Provide the strength of the company's vehicles & Equipment</p>		2	4	6

TABLE IV CONTINUED

	(Attach copies of chattels for the fleet)				
	-Less than 10 vehicles.....0				
	-11-20 vehicles.....2				
	-21-30 vehicles.....4				
	-Above 30 Vehicles.....6	6			
B12	Dog section		0	3	0
	Indicate the number of dogs in active service, their ages, breed and vaccination certificates				
	-less than 20 dogs.....0	5			
	-20-50 dogs.....1				
	-over 50 dogs.....3				
	Indicate the number of dog handlers, their ages and experience				
	-less than 10 handlers.....0		1	1	1
	-handlers.....1				
	-over 20 handlers.....2				

TABLE IV CONTINUED

<p>B13</p>	<p>Key personnel</p> <p>Provide detailed CV and copies of Certificates/testimonials for:</p> <p>E. Operations Manager</p> <p>-chief inspector level/captain and above with a clean discharge certificate.....1</p> <p>-At least form 4 level of education.....1</p> <p>-If with 10 years and more experience in security industry.....1</p> <p>F. Person who will be directly responsible for the contract</p> <p>-chief inspector/captain level and above.....1</p> <p>-Form four level of education.....1</p> <p>-5 or more year's experience in security industry.....1</p> <p>G. Senior most guard(supervisor guard on post)</p> <p>-Corporal/sergeant level and above.....1</p> <p>-"O" level or above.....1</p> <p>-5 or more years' experience in security industry/armed forces.....1</p> <p>H. Person in charge of dog handling</p> <p>-certificate in dog handling.....1</p> <p>-Form four level or above.....1</p> <p>-5 or more years' experience in security industry/armed forces.....1</p> <p>-35 years of age and above.....1</p>	<p>13</p>			
<p>B14</p>	<p>Guards training</p> <p>*indicate the minimum level of training that the guards must have attained for a similar assignment(attach a prove document). Attach an approved training manual/curriculum and indicate the qualifications of the trainer.</p> <p>-if provided.....1</p> <p>-if not provided.....0</p> <p>-training manual.....2</p> <p>-training nfacilities.....2</p> <p>-Qualification of trainer rank of inspector.....2</p>				

TABLE IV CONTINUED

	-indicate the institution that your guards get trained (attach a certified curriculum) -state whether the training institution is accredited (attach the certificate of accreditation)	8	2	2	2
	-indicate the frequency and duration of refresher training if any.....1 (attach a certificate sample)		1	1	1
B15	Staff supervision With regard to this contract, indicate the number of supervisory visits per twelve hour shift -Below 2 visits.....0 -2 visits.....1 -Above 3 visits.....2 Indicate the average load ratio of supervisor(s) in relation to the guards	2			
			1	0	1
B16	Document Conformity -presented in the required format.....1 -Not presented in the required format.....0	1			
			1	1	1
	TOTAL SCORE	102	82	90	84

Remarks:

*All the three bidders scored over 70% of the total marks i.e 71.4 out of 102 marks hence all qualified for financial evaluation.

FINANCIAL EVALUATION

The following were the results of the financial evaluation of the bidders who passed the technical evaluation stage;

TABLE V

S.NO	Bidder Name	Bid Amount in Ksh.
1.	3. Radar Security	51, 069,132/=
2.	4. Brinks Security	49,610,880/=
3.	6. B.M Security Services	74,416,320/=

RECOMMENDATION:

The evaluation committee recommended that the tender committee deliberates and considers the tender for provision of security services to the lowest evaluated bidder **M/s Brinks security** at a total cost of **Ksh 49, 610,880/= (forty nine million, six hundred and ten thousand, eight hundred and eighty shillings only.)**

TENDER COMMITTEE DECISION

The Tender Committee in its meeting of 18th November, 2011 under Minute No. 3.2 adopted the recommendation of the Evaluation Committee and awarded the tender for provision of security services to M/s Brinks Security at a total cost of Kshs.49,610,880.00.

THE REVIEW.

The Applicant Total Security Surveillance lodged the Request for Review against the decision of Kenyatta University for Provision of Security Services. The Applicant was represented by Mr. Steve Bundotich, Advocate Kale Maina & Bondotich Advocates while the Procuring Entity was represented by Mr. Emmanuel Wetangula and Mr. Paul Momanyi Advocates, Mohammed Muigai & Co. Advocates. The interested party was Brinks Security Services and was represented by Mr. Morris Kimuli, Advocate Katumbi Isike & Co. Advocates.

The Applicant requests the Board for the following orders;

- 1. The Tender No. KU/TNDR/21/SS/2011-2012 for provision of security services to Kenyatta University be nullified.*
- 2. The purported notification of award or contract for provision of security services for the year 2011-2012 by the said Procuring Entity, Kenyatta University under Tender No. KU/TNDR/21/SS/2011-2012 be cancelled forthwith.*
- 3. The Procuring Entity, be ordered to re-tender for provision for security services for the year 2011-2012.*

On the 16th December 2011 the Applicant filed this Appeal against the decision of the Respondent not to notify the Applicant whether its Tender was successful or not and to purportedly award a Tender outside the tender validity period in the matter of Tender No.

KU/TNDR/21/SS/2011-2012 for the provision of Security Services to Kenyatta University published in the Daily Nation newspaper of 15^h July 2011. The Applicant in its request for Review raised grounds of Appeal revolving around breaches of sections 66, 67 and Regulation 73 as set out here below.

1. *The Procuring Entity published a notice in the Daily Nation Newspaper of 5th August, 2011 inviting suitably qualified firms to submit tenders for provision of security services for the year 2010-2011 but failed to notify the Applicant of the outcome of the tender contrary to the mandatory provisions of Section 67 (1), and (2) of the Public Procurement and Disposal Act.*
2. *The Procuring Entity has purported to secretly award a tender to an interested party contrary to the express and mandatory provisions of Section 67 (1) and (2) of the Public Procurement and Disposal Act 2005.*
3. *The Procuring Entity breached Section 67 (1) of the Public Procurement and Disposal Act 2005 when it purported to accept a tender from an interested party when the tender validity period had expired.*
4. *The Procuring Entity breached the mandatory provisions of Section 61 of the said Act when it purported to accept a tender as successful from an interested party without extending the tender validity period.*
5. *Without prejudice to the above position the Procuring Entity failed to give reasons whether the Applicant's bid was successful or unsuccessful, pursuant to Regulation 66 (1) and (2). The Applicant's attempts to get an explanation have been ignored.*

6. *The Applicant stands to suffer a negative professional reputation as a key player in the industry due to such un procedural process, yet the Applicant is highly rated and service a reputable list of clients including the procuring entity.*
7. *The Applicant stands to being irregularly forced into forfeiting a potentially gainful business opportunity which it was legally entitled to participate and possibly win the tender under question.*

Preliminary Objection by the Procuring Entity

At the commencement of the hearing of the Request for Review the Procuring Entity raised a Preliminary Objection pursuant to Regulation 77 on the ground that the Request for Review had been filed out of time by a non-candidate and therefore the Board had no Jurisdiction.

The Procuring Entity argued that the Request for review was filed by the Applicant on 16th December 2011 and was out of time. In support of the claim the Procuring Entity stated that the notification of the cancellation of the Tender No. KU/TNDR/21/SS/2011-2012 to the Applicant was done through a letter dated 17th July 2011, which was posted by the Registered mail on the 25th August 2011. It noted that the letter was erroneously dated 17th July, 2011 instead of 17th August, 2011. It further stated that there was no doubt that the Applicant received this letter as it was posted to their address and this fact was not denied. It argued that having been notified

on the 25th August 2011 the Appeal window of fourteen days prescribed by Regulation 73(2) started to run on 26th August 2011 and lapsed on the 8th September, 2011.

It further argued that the Applicant on being notified of the cancellation of the original Tender that had been advertised on the 15th August 2011 failed not to participate in the retender, and as such was not a candidate in the second Tender. Therefore, it argued that the Applicant lacked the capacity to file the Request for Review before the Board. The Procuring Entity submitted that the Board had a duty to determine the question as to whether it had jurisdiction before dealing with the merits of the Request for Review. In support of this contention it referred the Board to the case of ***Voith Hydro GmbH & Co. Versus Kengen company Ltd Application no. 55/2009*** in which the Board held that it had no jurisdiction to hear and determine a Request for Review that was filed out of time.

In response the Applicant opposed the Preliminary Objection as being misconceived. It stated that it never received any notification of the cancellation of the tender of 5th August 2011 and as such time could not run without ascertaining when communication of the decision of the Procuring Entity on the subject tender was done. It denied having received the letter of 17th July 2011 which had a rubber stamp of 25th August 2011. It argued that to date it had not received any communication about the outcome of

the tender of 5th August 2011 although it was aware that a retender had been done in November and the Interested Party had been awarded the tender. It argued that in so far as there had been no notification of the ongoing breaches, Regulation 73(2)(C)(ii) would not apply. This being the case therefore, the Applicant argued the Request for Review was within time and the Board should proceed to hear and determine the Application on merit.

The Applicant argued that in any event Regulation 73 did not apply to breaches which occurred before notification which was the case in this tender. It stated that Regulation 73(1) only applies to breaches that occur after the notification to the bidders.

In conclusion, the Applicant urged the Board to dismiss the Preliminary Objection to pave way for hearing of the matter on merit.

An Interested Party M/S Brinks Security supported the arguments by the Procuring Entity with regard to the Preliminary Objection and urged the Board to dismiss the Request for Review.

The Board has carefully considered the submissions by the parties and considered the documents before it.

The Board notes that here is no dispute that the subject Tender was advertised on 5th August 2011 and the Applicant participated in the said tender. However, it is disputed that after the evaluation of the bids the Procuring Entity notified the Applicant amongst other bidders of the cancellation by a letter dated 17th July 2011.

The Board notes that the notification letter of 17th July 2011 addressed to the Applicant amongst other bidders has a rubber stamp date of 25th August 2011. The Board has perused the **original** postal records submitted by the Procuring Entity and noted that on 25th August 2011 the Procuring Entity posted by registered mail 15 letters to all the bidders who had participated in the subject Tender to their respective postal addresses as provided to the Procuring Entity. The Board notes that whereas the Applicant denies having received the said letter, it does not deny that the address to which the same was sent belongs to it. The Board further notes that whereas the said letters bear the date of 17th July 2011, the date may indeed be an erroneous date given the fact that the subject tenders were closed/opened on 5th August 2011 and evaluated on the 16th August 2011 after which they were found to be non-responsive and therefore communication in regard could only be after the 16th August 2011.

The Board therefore finds that the Applicant was notified of the cancellation of Tender No. KU/TNDR/21/SS/2011-2012 by the Procuring Entity in terms of Section 37 of the Public Procurement and Disposal Act. However, with regard to whether they were notified of the decision of the

Procuring Entity to retender the Board notes that the alleged 'telephone calls' to the bidders to retender are not in line with the above cited section and as such the Board is inclined to find that it is very possible that the Applicant may not have been notified of the retender process.

In view of the foregoing finding, the Board directs that the Preliminary Objection raises matters of fact and not strictly breaches of law and hence the need to hear and determine the Request for Review on merit. The Board so directs.

With regard to the main grounds in the Request for Review the Board deals with them as hereunder

Grounds 1, 2, 3, and 4 – Breaches of Sections 61 and 67 (1) and (2) of the Act

The Applicant stated that it participated in **Tender No. KU/TNDR/21/55/2011 – 2012** in respect of the provision of security services which Tender closed/opened on the 5th of August 2011. It argued that from the said date it had neither been notified of the outcome of its bid nor the outcome of the tender generally. It stated that it had made several enquiries from the Procuring Entity but there had been no response to its letters. It further stated that in the month of November 2011 it had written

to the Director General of the Public Procurement Oversight Authority to intervene in the matter as it had heard that there was a retender and the interested party had been awarded the Tender.

It submitted that it had not received any notification from the Procuring Entity even up to the time of filing the Request for Review before the Board although it was aware that there was another service provider (Interested Party) on the ground offering security services, which had been procured through a purported restricted tendering process. The Applicant added that the purported award of the restricted Tender to the Interested Party was outside the tender validity period contrary to Section 67(1) of the Act. The Applicant argued that the tender validity period of the original tender had expired before it was notified of the outcome of the tender.

In response, the Procuring Entity stated that whereas it had advertised the subject Tender which closed/opened on the 5th August 2011 the same was cancelled on the 16th August 2011 when the bids were declared to be non-responsive by the Evaluation Committee. It submitted that all the bidders including the Applicant were notified of the cancellation of the subject Tender No. KU/TNDR/21/SS/2011 vide a letter erroneously dated 17th July 2011 instead of 17th August 2011 which letters were posted under certificate of postage to the Bidders' respective postal addresses. The Procuring Entity added that following the cancellation of the original

Tender, all the bidders who had participated in the tender were invited through 'telephone calls' to re-tender under the restricted method being re-tender No. KU/REST/TNDR/21/SS/2011-2012. It submitted that although the Applicant was invited to participate in the restricted tender, it did not respond. The Procuring entity submitted that the Applicant failed to challenge the cancellation of the original Tender within the specified time.

It submitted that the current service provider was awarded the tender pursuant to a restricted tender that was done after the cancellation of the tender in which the Applicant had participated. It argued that since that award had nothing to do with the tender in which the Applicant participated, the Board could not nullify it.

With regard to the issue of the Tender validity period the Procuring Entity stated that clause 2.10.1 of its Tender documents provided for a validity period of **90 days** from the Tender opening date within which it had evaluated and found all the bidders to be non-responsive.

On its part, the Interested Party associated itself with the submissions of the Procuring Entity and argued that the Request for Review was filed out of time and should be dismissed. It further submitted that the Applicant was not a candidate in the restricted tendering process in which it had been awarded the Tender and therefore it could not challenge the award under Tender No. KU/REST/TNDR/21/SS/2011-2012.

The Board has considered the submissions by all the parties and the documents placed before it, and makes the following findings;

The Board notes that the original Tender was advertised in the Daily Nation newspaper as an open Tender on 15th July 2011 and was closed/opened on 5th August 2011. The Board further notes that the Tender validity period of this Tender was 90 days which was supposed to expire on 3rd November 2011. The Board notes that the Applicant participated in this Tender which was cancelled on the 16th August 2011 by the Procuring Entity's Evaluation Committee after finding all the bids, including that of the Applicant to be non-responsive. The Board also notes that all the bidders were notified of the cancellation vide the letters dated 17th July 2011 which are reflected as having been posted on the 25th August 2011 from the original certificate of postage documents availed to the Board by the Procuring Entity. The Board finds that the bidders, inclusive of the Applicant were duly notified of the outcome of the original Tender No. KU/TNDR/SS/2011-2012 as required by **Section 37 of the Act which states:-**

Section 37(1);

If procurement procedure used is open or restricted tendering or a request for proposals, communications between the procuring entity and a person seeking a contract for the procurement shall be in writing.

(2) If the procurement procedure used is direct procurement or a request for quotations, communications between the procuring entity and a person seeking a contract for the procurement shall either be-

a.) in writing; or

b.) referred to and confirmed in writing.

(3) To the extent allowed under written directions of the Authority, electronic communications may be used instead of written communications.

On the issue of the validity period, the Board notes that the Tender validity period for the first Tender was 90 days from the 5th August 2011 and could have run upto 3rd November 2011 had the Tender not been cancelled on 16th August 2011. The Boards notes that the cancellation was done within the Tender validity period, and as already noted above the Applicant was notified by registered mail. Accordingly, the Board finds that the Applicant did not lodge its Request for Review within the stipulated appeal window of fourteen days from the date of notification of the cancellation of the award pursuant to Sections 93(1) of the Act and Regulation 73 (2)(c) of the Regulations which state:-

Section 93 (1);

Subject to the provisions of this part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.

Regulation 73(1)

A request for review under the Act shall be made in Form RB1 set out in the fourth schedule to these Regulations.

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

a.)

b.)

c.) be made within fourteen days of-

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

ii.) the notification under Sections 67 or 83 of the Act:

The Board further notes that on 21st November, 2011 the Applicant wrote to the Director General of the Public Procurement Oversight Authority to intervene in this tender. Therefore, though the Applicant was aggrieved, the Board finds that the Applicant did not take any action to invoke the

jurisdiction of the Board within the prescribed time. Accordingly, this ground of appeal fail.

Grounds 5:- Breach of Regulation 66(1) and 66(2).

The Applicant alleged that the Procuring Entity failed to give it reasons for the rejection of its bid pursuant to regulation 66(1) & (2). It went on to state that the reasons given in the Procuring Entity's evaluation report to the effect that it did not indicate its terms of credit was not true as it had done so in its bid documents.

In response, the Procuring Entity stated that the Applicants bid was declared non-responsive alongside all other bids leading to the cancellation of the original Tender No. KU/TNDR/21/SS/2011-2012. It further stated that the Applicant being an unsuccessful Tenderer in the open Tender did not request it for reasons why it was unsuccessful as per the provisions of Regulation 66.

The Board has considered the arguments by all parties and noted that the Procuring Entity evaluated all the bids submitted in the original Tender and found them to be non-responsive. However, a scrutiny of the evaluation report on the Applicant's bid reveal that the reason of its rejection was that it did not indicate the terms of credit.

However, upon perusal of the Applicant's original bid documents, the Board notes that the Applicant had indeed indicated its terms of credit as being **forty five days**. Therefore, the arguments by the Applicant are therefore valid. This notwithstanding, since notification of the cancellation of the tender was done by registered mail on 25th August, 2011, the last day for lodging the appeal was 8th September, 2011 and this application was filed on 16th of December, 2011, out of time.

Grounds 6 and 7

The Applicant alleged that it stood to suffer a negative professional reputation as a key player in the industry due to such an un-procedural process yet it was a highly rated service provider to its clients including the Procuring Entity. It also argued that it would be irregularly forced into forfeiting a potentially gainful business opportunity which it was legally entitled to participate in and win the Tender.

In response, the Procuring Entity argued that the Applicant had failed to disclose and prove a breach of the Act or the regulations on which it was relying on these grounds and hence its inability to substantively respond thereto.

The Board has considered the foregoing arguments and makes the following findings.

The Board has on several occasions, held that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business and therefore each bidder carries its own costs.

In view of the foregoing, the Request for Review fails and is hereby dismissed. The subject Tender under challenge being Tender No. KU/TNDR/21/SS/2011-2012 was cancelled on the 16th of August 2011 and as such there is no Tender for the Board to cancel and/or award. There will be no orders as to costs.

Further, having perused the original tender documents, the evaluation report and in the interests of justice, the Board notes as follows;

1. On the Evaluation Report dated 17th and 18th October, 2011 it is indicated by hand that all the bidders who participated in the tender were to be invited to participate in the Restricted tender No. KU/REST/TNDR/21/SS/2011-2012. The purported communication to the bidders by telephone was contrary to Section 37 of the Act as one cannot confirm whether or not all the other bidders, including the Applicant were called and invited to participate in the Restricted Tender.
2. The Applicant had written to the Director General on the 10th and 21st November 2011 and the Board notes that the Director General has powers under Section 102 Of the Act to investigate and take appropriate action. Therefore the Board directs that this decision be

taken to the Director General for appropriate action. The Director General should conclude his enquiry into the subject Tender process and communicate its report to the parties.

DATED at Nairobi this 16th day of January 2012.

SIGNED

CHAIRMAN.....

PPARB

SECRETARY.....

PPARB