

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.1/2012 OF 4TH JANUARY, 2012

BETWEEN

LAVINGTON SECURITY LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Airports Authority dated 15th December, 2011 in the matter of Tender No. KAA/104/2011-2012 for provision of Security Guarding Services.

BOARD MEMBERS PRESENT

Mr. P.M Gachoka	- Chairman
Mr. Akich Okola	- Member
Ambas. Charles Amira	- Member
Eng. Christine Ogut	- Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Lavington Security Services

Mr. Michael Ruto - Manager, Lavington Security Services

Mr. Steve Bundotich - Kale, Maina & Bondotich Advocates

Procuring Entity, Kenya Airports Authority

Mr. Victor Arika - Legal Counsel

Mr. George Kamau - Legal Counsel

Mr. Abraham Ngethe - Manager, warehousing, KAA

Mr. Jonah Biwott - Procurement Assistant, KAA

Interested Candidates

Mr. Githinji Mwangi - Advocate, Hatari Security Services

Mr. Josephat Kimani - Director, Hatari Security Services

Mr. Timothy - B.D.M

Mr. Anthony - B.D.M

Mr. Cheruiyot James - Manager, Total Security Services

BOARD'S DECISION

Upon hearing the representation 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

The tender for provision of security services was advertised in the Daily Nation of Wednesday 5th October, 2011 and was originally meant to close on 25th October, 2011. However, the closing date was extended to 8th November, 2011 by a letter dated 24th October, 2011. The tenders therefore closed on 8th November, 2011 at 11.00 am.

Closing/Opening

As at the time of tender opening on 8th November, 2011 the following thirteen (13) firms had returned their bids;

1. Brinks Security Services Ltd
2. G4S Security Services Ltd
3. Total Security Surveillance Ltd
4. Inter Security Services Ltd
5. Corner Stone Security Services Ltd
6. Lavington Security Services Ltd
7. Hatari Security Guards Ltd
8. Radar Ltd
9. Apex Security Services Ltd

10. Bedrock Holdings Ltd
11. Security Group Kenya Ltd
12. Sentry Security Services Ltd
13. Secure Homes Ltd.

EVALUATION

Preliminary Evaluation

The tenders were subjected to preliminary evaluation to ascertain compliance with the mandatory requirements based on the following criteria;

- Duly filled standard qualification Forms-Litigation and declaration
- Certificate of Registration/Incorporation
- Valid KRA Tax compliance Certificate.
- A signed Certificate of Site Visit in the format provided.
- Copies of Firm's key personnel C.V's to be attached
- Bid Security valued at Kshs. 100, 000.00 valid for 120 days not to expire earlier than 6th March, 2012.
- Completed confidential business questionnaire.
- Audited accounts for the period 2010, 2009 and 2008.

TABLE 1-Preliminary Evaluation

Item No.	Criteria	Brinks Security Services	G4S Security Services	Total Security Services	Inter Security Services	Cornerstone Security Services	Lavington Security Services	Hatariki Security Services	Rad ar Ltd	Ape: Secu y Serv s Ltd
1	Duly filled standard qualification forms-litigation and declaration	yes	yes	yes	yes	yes	yes	yes	yes	yes
2	Certificate of Registration/Incorporation	yes	yes	yes	yes	yes	yes	yes	yes	yes
3	Valid KRA Tax compliance certificate	yes	yes	yes	yes	yes	yes	yes	yes	yes
4	A signed certificate of site visit in the format provided	No-not filled site cert/signed	yes	yes	yes	yes	yes	yes	yes	yes
5	Copies of firm's key personnel CV'S to be attached	yes	yes	yes	yes	yes	yes	yes	yes	yes

6	Bid security valued at Kshs. 100, 000.00 valid not to expire earlier than 6 th March, 2012	No-Expiry date 25/2/2012	No-Expiry date 10/2/2012	yes	No-Expiry date 22/2/2012	yes	No-Expiry date 25/2/2012	yes	yes	No-Expiry date 22/2012
7	Completed confidential business questionnaire form	yes	yes	yes	yes	yes	yes	yes	yes	yes
8	Audited accounts for the period 2010, 2009 and 2008	yes	yes	yes	yes	yes	yes	yes	yes	yes
Remarks		Non responsive	Non responsive	Responsive	Non responsive	Responsive	Non responsive	Responsive	Responsive	Non responsive

TABLE 1 CONTINUED

Item No.	Criteria	Bedrock Holdings Ltd	Security group Kenya	Sentry security services ltd	Secure Homes ltd
1	Duly filled standard qualification forms- litigation and declaration	yes	yes	yes	yes
2	Certificate of Registration/Incorporation	yes	yes	yes	yes

3	Valid KRA Tax compliance certificate	yes	No	No- Expired on 2/8/2011	yes
4	A signed certificate of site visit in the format provided	yes	yes	yes	No- not filled
5	Copies of firm's key personnel CV'S to be attached	No- copies of CV's not provided	yes	No- CV's not provided	yes
6	Bid security valued at Kshs. 100, 000.00 valid not to expire earlier than 6 th March, 2012	yes	No- Expiry date 25/2/2012	No- Expiry date 31/1/2012	No- Expiry date 23/2/2012
7	Completed confidential business questionnaire form	yes	yes	yes	yes
8	Audited accounts for the period 2010, 2009 and 2008	yes	No-	No- no accounts for 2008	yes
Remarks		Non responsive	Non responsive	Non responsive	Non responsive

From the tender evaluation above, nine (9) bidders were disqualified at the preliminary stage for not having met the mandatory requirements for preliminary evaluation.

The following are the nine firms that were found to be non responsive at the preliminary stage, and are listed with the reasons for their disqualification;

Non-Responsive Bidders.

M/s Brinks security services ltd. – Kshs. 8,468,928.00

The bidder did not meet the following mandatory requirements:

- *Bid Security of Kshs. 100,000.00 valid not to expire earlier than 6th March 2012: Submitted but expire earlier on 25th February, 2012.*
- *A signed Certificate of Site Visit: Not filled and signed*

M/s G4S Security services Ltd.- Kshs 16,575,268.00

- The bidder did not meet all mandatory requirements
- *Bid Security of Kshs. 100,000.00 valid not to expire earlier than 6th March 2012: Submitted but expire earlier on 10th February, 2012.*

M/s Inter security services ltd; Kshs. 7,210,560.00

- The bidder did not meet the following mandatory requirements i.e.:

- *Bid Security of Kshs. 100,000.00 valid not to expire earlier than 6th March 2012: Submitted but expire earlier on 22nd February, 2012.*

M/s Lavington security Ltd. - Kshs. 6,264,000.00

- The bidder did not meet the following mandatory requirements:
 - *Bid Security of Kshs. 100,000.00 valid not to expire earlier than 6th March 2012: Submitted but expire earlier on 25th February, 2012.*

M/s Apex security services Ltd . - Kshs. 9,084,192.00

- The bidder did not meet all mandatory requirements
 - *Bid Security of Kshs. 100,000.00 valid not to expire earlier than 6th March 2012: Submitted but expire earlier on 22nd February, 2012.*

M/s Bedrock holdings ltd. - Kshs. 7,015,680.00

- The bidder did not meet all mandatory requirements
i.e.
 - *CV's of Firm's key Personnel to be attached: Not provided.*

M/s Security group Kenya Ltd - Kshs. 981,360.00

The bidder did not meet the following mandatory requirements:

- *Bid Security of Kshs. 100,000.00 valid for 120 days not to expire earlier than 6th March 2012: Submitted but expire earlier on 25th February, 2012.*

M/s Sentry Security services Ltd - Kshs. 7,767,360.00

- The bidder did not meet all mandatory requirements i.e.:

- *A duly completed bid security amounting to 100,000.00 valid for 120 days not to expire earlier than 6th march 2012 – the bid security expire on 31/1/2012*
- *CV's of Firm's key Personnel to be attached: Not provided*
- *Current KRA Tax Compliance Certificate. Provided but valid to 2/8/2011.*

M/s Secure Homes ltd - Kshs. 22,550,400.00

- The bidder did not meet all mandatory requirements i.e.:

- *Bid Security of Kshs. 100,000.00 valid for 120 days not to expire earlier than 6th March 2012: Submitted but expire earlier on 23rd February, 2012.*
- *A signed Certificate of Site Visit: Not filled and signed.*

The following four firms were therefore found to be responsive and were qualified to proceed to technical evaluation;

1) M/s Total Security surveillance ltd- Kshs. 7,725,600.00

2) M/s Cornerstone security Ltd - Kshs 8,073,600.00

3) M/s Ratar Ltd - Kshs 10,022,400.00

4) M/s Hatari security guards Ltd - Kshs 6,932,160.00

TECHNICAL EVALUATION

The four bidders who qualified for technical evaluation were required to provide evidence satisfactory to the Employer of their capability and adequacy to provide security services by submitting the following;

- Proof of similar services undertaken for a minimum of 2 years of security guarding (attached LPOs, reference letters etc.

- Demonstrate availability of transport to ferry their staff to and from the airport on daily basis (proof of motor vehicles ownership or lease agreement)
- Proof of security trained personnel to undertake guarding duties (security related training testimonial required)
- Tenderer must have a dedicated security patrol vehicle which have a basis at KAA Hqs (main gate office) and fitted with VHF Radio communication systems.
- Demonstrate that they have two way Radios which shall be provided to the guards on duty(attached CCK radio communication licensed certificates).

The Technical Evaluation was therefore done as tabulated below;

TABLE 2- Technical Evaluation

No	Criteria	Total Security surveillance	Cornerstone security Ltd	Hatari security guards	Ratar Ltd
1	Proof of similar services undertaken for at least a minimum of 2 years of security guarding (attached Lpos and Reference letters etc.	Yes	Yes	Yes	Yes

2	Demonstrate availability of transport to ferry their staff to and from the airport on daily basis (proof of motor vehicles ownership or lease agreement	Yes	Yes	Yes	Yes
3	Proof of disposal security trained personnel to undertake guarding duties (security related training testimonial required)	Yes	Yes	Yes	Yes
4	Tenderer must have a dedicated security patrol vehicle which have a basis at KAA Hqs(main gate office) and fitted with VHF Radio communication systems.	Yes	Yes	Yes	Yes
5	Demonstrate that they have Radios two way which shall be provided to the guards on duty(attached CCK radio communication licensed certificates)	Yes	Yes	Yes	Yes
	Remarks	Qualifies	Qualifies	Qualifies	Qualifies

Financial Evaluation

1) M/s Hatari security guards Ltd - Kshs. 6,932,160.00

- The bid has no arithmetic error
- It is noted that the Quoted pricing in the form of tender is Kshs 6,514,560.00 but price schedule cost for the two supervisors as per addendum No 1 costing Kshs 417,600.00 which add to a total of Kshs 6,932,160.00.

2) M/s Cornerstone security Ltd - Kshs 8,073,600.00

- The bid has no arithmetic error
- It is noted that the pricing is consistent throughout the document

3) M/s Ratar Ltd - Kshs 10,022,400.00

- The bid has no arithmetic error
- It is noted that the pricing is consistent throughout the document

4) M/s Total Security Surveillance Ltd - Kshs 10,022,400.00

- The bid has no arithmetic error
- It is noted that the pricing is consistent throughout the document

The estimated cost for provision of security guarding services was Kshs. 5,760,000.00.

RECOMMENDATION

The Tender Evaluation Committee upon completing the evaluation process, recommended in its Evaluation Report that the tender be awarded to the lowest evaluated bidder M/s Hatari security guards Ltd. at their submitted bid price of Kshs. 6,932,160.00 (Kenya Shillings Six Million, Nine

Hundred and Thirty two Thousand, One Hundred and Sixty Shillings.).

TENDER COMMITTEE'S DECISION

The Tender Committee in its meeting of 15th December, 2011 adjudicated and approved the award of tender as recommended by the Evaluation Committee. The tender for provision of security guarding services was therefore awarded to Hatari Security Guards Ltd, being the lowest evaluated bidders.

THE REVIEW

Request for Review was lodged by Lavington Security limited on 4th January 2012 in the matter of Tender No. KAA/104/2011-2012 for provision of Security Guarding Services at Kenya Airports Authority. The Applicant was represented by Mr. Bundotich, Advocate while the Procuring Entity was represented by Mr. George Kamau and Mr. Victor Arika, Advocates. An interested candidate M/S Hatari Security Guards Limited was represented by Mr. Githinji Mwangi, Advocate.

The Applicant requests the Board for the following orders:-

- 1. The Tender No. KAA/104/2011-2012 for provision of Security Guarding Services for Kenya Airports Authority be nullified.**

- 2. The Procuring Entity, be ordered to re-tender for provision of security guarding services for the year 2011-2012.**
- 3. In the alternative the decision by the Procuring Entity to reject the Applicant's tender as unsuccessful on the basis that the bid bond was not valid be nullified and the Procuring Entity be directed to admit the Applicant's bid bond and evaluate the applicant's bid.**

The Applicant raises nine grounds of review and the Board deals with them as follows:-

GROUND 1, 2:- GENERAL STATEMENTS BY APPLICANT.

These grounds have been combined as they relate to the manner in which the Procuring Entity advertised the tender notice inviting eligible firms to submit tenders for provision of Security Guarding Services at Kenya Airports Authority Tender No. KAA/104/2011-2012.

The notice indicated that the Tender Validity was 90 days starting from the bid submission date on 25th October, 2011. The Applicant stated that it purchased and submitted the tender documents in accordance with the terms and conditions set out in the tender documents.

In response, the Procuring Entity stated that the tender for provision of Security Guarding Services for Kenya Airports Authority was advertised in print media on 5th October, 2011 and was to close on 25th October, 2011 but the opening of the bids was extended to 8th November, 2011 through an addendum.

The Board observes that these are general statements relating to the advertisement of the tender which do not disclose any breach of the Public Procurement and Disposal Act (herein after referred to as the Act) and the Public Procurement and Disposal Regulations (herein after referred to as the Regulations).

GROUND 3:- BREACH OF SECTIONS 55 AND 53(3) OF THE ACT.

The Applicant submitted that on 24th October, 2011, the Procuring Entity purported to issue an addendum dated 24th October, 2011 by way of an email sent at 09:55 am informing it that the closing date for the tender had been extended to 8th November, 2011 from 25th October, 2011. The Applicant contended that the purported addendum no.1 was illegal, null and void for the following reasons:-

- i. It was issued contrary to the Provisions of section 55 of the Public Procurement and Disposal Act, 2005;*
- ii. The addendum did not comply with the provisions of section 53(3) of the Public Procurement and Disposal Act, 2005;*
- iii. The purported request to the bidders to amend the tender document was accordingly null and void;*
- iv. The addendum did not in any manner alter or modify the terms of the tender as set out in the notice dated 11th*

October, 2011 and the tender documents except the closing date for the tender which in any event was illegal for reasons aforesaid; and

- v. *To the extent that the purported notice dated 24th October, 2011 required the tender documents to be amended the same is a nullity for non-compliance of the mandatory rules.*

In view of the foregoing, the Applicant submitted that the tender process was flawed as the Procuring Entity failed to adhere to the provisions of Sections 53 and 55 of the Act.

In response, the Procuring Entity stated that it issued an addendum dated 24th October, 2011 informing the bidders that the closing date had been extended to 8th November, 2011 from 25th October, 2011. In further response to this ground, the Procuring Entity averred as follows: -

- i. *That it duly complied with the provisions of Section 55 of the Act without any breach. Section 55(3) states that "if the tender documents are amended under section 53 when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, the procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation of amendment of tender". The Applicant has failed to indicate how the addendum was contrary to the provisions of this section;*

- ii. That the addendum dully complied with the provisions of Section 53(3) of the Act which states that **"The procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender document"**. A scanned copy of the addendum was sent to the Applicant on 24th October 2011 as an attachment transmitted by email;
- iii. That the request to the Applicant just like the other bidders to amend its tender accordingly was in order due to changes in the opening dates as clearly indicated in the addendum, and that the main aim of the addendum was to inform the bidders on the extension of the opening date. Therefore, the request to amend the tender documents was meant to alert the bidder on the tender validity period and bid bond;
- iv. That Section 53 of the Act allows modification of the document. Section 53(4) states that **"the addendum shall be deemed to be part of the tender documents"**; and
- v. That the addendum dated 24th December 2011 was to inform bidders of the extension of the opening date, and the request for bidders to amend the tender documents accordingly was to alert them to amend the tender validity and bid bond.

An interested candidate, Hatari Security Limited supported the submissions of the Procuring Entity.

The Board has carefully considered the submissions by the parties and examined the documents presented.

The Board notes that the tender was advertised on 5th October, 2011. The Board also notes that on the 24th October, 2011, the Procuring Entity emailed an addendum to the bidders, including the Applicant informing them that the closing date had been extended to 8th November, 2011 from 25th October, 2011. The said Addendum read as follows:-

"ADDENDUM NO 1.

The following Addendum has been issued:-

The closing date for this tender has been extended to 8th November, 2011 from 25th October, 2011. The time and venue remains the same.

Please amend your tender document accordingly."

The Board notes that section 53 of the Act allows the Procuring Entity to amend the tender document at any time before the deadline for submitting tenders by issuing an addendum. The above provision states;

Section 53(1);

"A Procuring Entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum"

Section 53(2);

"An amendment may be made on the procuring entity's own initiative or in response to an inquiry."

Section 53(3);

"The Procuring Entity shall promptly provide a copy of the addendum to each person to whom the Procuring Entity provided copies of the tender documents."

The Board also notes that section 55(3) states as follows:-

Section 55(3)

"If the tender documents are amended under section 53 when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, the Procuring Entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders"

The Board further notes that the Procuring Entity sent a scanned copy of the addendum to the Applicant as well as to the other Bidders on the 24th October, 2011 as an attachment transmitted by an email.

The Board finds that the addendum No.1 by the Procuring Entity specifically requested the Bidders to extend the deadline for submission of tenders to 8th November, 2011 from the 25th October, 2011. However, the said Addendum failed to specifically

address the tenderers to extend their bid bonds as required by Regulation 41(5) which provides as follows;

“The Procuring Entity shall, where it extends the tender validity period request the tenderers to extend the period of their tender securities.”

In view of the foregoing, this ground succeeds.

GROUND 4 AND 5 - NOTIFICATION

The Applicant alleges that the Procuring Entity vide its notice dated 23rd December, 2011 addressed to the Applicant, notified it that its tender was not successful because it did not provide a valid bid bond. The Applicant Contended that the said notice is not only illegal but is also invalid, null and void for the following reasons:-

- i. The Applicant’s bid bond complied with requirements set out in clauses 2.12.1, 2.12.2 and 2.12.3 of the tender documents;*
- ii. The bid bond submitted by the Applicant was dated 17th October, 2011 and valid up to 25th February, 2012 which is equivalent to 124days and more than 120 days set out in the tender document;*
- iii. The bond submitted by the Applicant complied with the standard tender security form specified in the tender document;*

- iv. *The tender validity period was 90 days after the bid submission as specified in the Procuring Entity's notice dated 11th October, 2011 and clause 2.13.1 of the tender document; and*
- v. *The Applicant shall further aver and maintain that the addendum No. 1 did not extend the tender validity period and accordingly the tender validity period remained as set out in the tender advertisement Notice dated 11th October, 2011 and accordingly the bid bond submitted by the Applicant in its tender documents was valid for all intents and purposes.*

The Applicant further stated that even if there were any deviations in its bid bond, which it denies, the same were minor and did not in any manner materially depart from the requirements set out in the tender documents or at all.

In response, the Procuring Entity stated that the notification dated 23rd December, 2011 addressed to the Applicant was not illegal, invalid, null and void as alleged by the Applicant. The Procuring Entity gave the following reasons as to why the notice was not illegal, invalid, null and void as alleged by the Applicant:-

- i. *That the Applicant's bid bond did not comply with clause 2.12.1 2.12.3 and 2.12.2 of the tender documents. Clause 2.12.2 states that **"the tender surety is required to protect the Kenya Airports Authority against the risk of tenderers conduct***

which would warrant the security forfeiture pursuant to paragraph 2.12.7". The bid bond was short of the 120 days cover as required;

- ii. That the bid bond submitted by the Applicant expires on 25th February 2012 instead of 6th march 2012 as required;*
- iii. That the bid bond from the Applicant did not comply with the standard tender security for specified in the tender documents;*
- iv. That the tender validity period was 90 days after the date of the tender opening as specified in clause 2.13.1 of the tender documents; and*
- v. That the addendum no. 1 extended the tender validity period. Section 53(3 and 4) of the Act states that **"the procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender addendum shall be deemed to be part of the tender documents. The addendum shall be deemed to be part of the tender documents"**.*

The Procuring Entity stated that the notification issued to the bidders vide letter dated 5th December, 2011 was done in due compliance with the Act and the Regulations. It refuted the Applicant's allegations that the notification was intended to prefer another bidder in place of the Applicant.

The Board has carefully considered the submissions by the parties and examined the documents that were presented.

The Board notes that the main issue for determination is whether the addendum as issued by the Procuring Entity was clear and in accordance with the Act.

The Board also notes that the relevant clauses in the tender Document are clauses 2.12.1, 2.12.3 and 2.12.1 and the relevant provision of the Act is Section 52 while the relevant provision of the Regulations is Regulation 41, which provide as follows;

Clause 2.12.1 of the Tender document states as follows:-

"The tender shall furnish, as part of its tender, a tender security for the amount and form specified in the invitation to tender."

Clause 2.12.3 states

"The tender security shall be denominated in Kenya shillings or in another freely convertible currency and shall be in the form of:

- a) A bank guarantee***
- b) Cash***
- c) Such as insurance guarantee approved by the Authority***
- d) Letter of credit."***

Clause 2.12.2

“The tender security is required to protect the Kenya Airports Authority against the risk of tenderers’ conduct which would warrant the Security forfeiture pursuant to paragraph 2.12.7.”

The relevant Provisions of the Act and the Regulations are specified in section 52 (1); 52(3) (e) (iii) and Regulation 41(5) which state as follows:-

Section 52(1) states;

The Procuring Entity shall prepare tender documents in accordance with this section and regulations.

Section 52(3) states;

The tender documents shall set out the following;

- a.***
- b.***
- c.***
- d.***
- e. Instructions for the preparation of and submission of tenders including-***
 - i.***
 - ii.***
 - iii. Any requirement that tender security be provided and the form and amount of any such security; and***
 - iv.***

Regulation 41(5) states:-

The Procuring Entity shall, where it extends the tender validity period, request the tenderers to extend the period of validity of their tender security.

In view of the foregoing provisions of Section 52(3) (e) (iii) of the Act and Regulations 41(5), the Board finds that the addendum issued by the Procuring Entity, was not clear as it failed to clearly state that the bidders were required to extend their tender security. The Board notes that the purpose of an Addendum is to give clear and specific instructions to bidders. The Addendum should be clear and not framed in general terms as the Procuring Entity did in its tender.

Indeed, the Board notes from the evaluation report by the Procuring Entity that out of the thirteen (13) bidders who returned their tenders documents eight Bidders namely Brinks Security Services ltd, G4S Security Services ltd, Inter Security Services ltd, Lavington Security Guards ltd, Apex Security Services ltd, Bedrock Holdings ltd, Security Group Kenya ltd and Secure Homes ltd were disqualified at the preliminary evaluation stage on the ground that their bid bonds expired earlier than 6th March 2012 as required.

In view of the foregoing, the Board believes that the reason why such large number of bidders failed to comply with the requirements of the tender document was because the Procuring Entity's instructions on the addendum were not clear. If the procuring entity wanted the bidders to extend the validity period

of the tender security, which should have been the case, the Addendum should have specifically stated so as required by Regulation 41(5).

Accordingly, this ground succeeds

GROUND 6- BREACH OF REGULATION 66(2) OF REGULATIONS 2006

The Applicant avered that the Procuring Entity did not, upon request provide it with written reasons why its bid bond was rejected contrary to the mandatory requirements of Regulation 66(2) of the Regulations.

In response, the Procuring Entity stated that upon request by the Applicant vide its letter Ref. No. LSL/KAA/SEC/ PKC/C dated 28th December, 2011, the Procuring Entity provided the reasons by its letter Ref No. KAA/104/2011-2012 dated 4th December 2011. The Procuring Entity further stated that it provided the reasons in accordance with Regulation 66(2) of the Regulations, which states that, *“where so requested by an unsuccessful tenderer, a Procuring Entity shall within fourteen days after a request provide written reasons as to why the tender, proposal or application to be prequalified was unsuccessful.”*

The Board has examined the documents that were presented to it and notes that the letter bearing Ref. No. KAA/104/2011-2012 stated to be dated 4th December, 2011 by the Procuring Entity as a response to the Applicant’s letter dated 28th December, 2011 and bearing Ref. No. LSL/KAA/SEC/PKC/C is in fact dated 23rd

December, 2011. The Board therefore notes that the Procuring Entity cannot purport to rely on that letter as a response to the Applicant's letter for the reason that the Procuring Entity's letter is dated five days (5) days before the Applicant's letter of request for reasons of its disqualification.

In view of the foregoing, it is clear that the Procuring Entity did not give the Applicant written reasons why its tender was unsuccessful.

GROUND 7.

The Applicant alleged that the Procuring Entity's action amounted to a fraudulent practice within the meaning of Section 41(i) of the Act, and therefore null and void.

In response, the Procuring Entity averred that it complied with Section 41(i) of the Act as it was not involved in any fraudulent practices

The Board has carefully examined the documents presented before it and the parties' submissions and observes that there was no evidence that the Procuring Entity was involved in any fraudulent practice as alleged by the Applicant.

Therefore, this ground has no merit and it fails.

FOUNDATIONS 8 AND 9 - LOSS

The Applicant alleged that it 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 services a reputable list of clients including the Procuring Entity.

It further alleged that it stands to be irregularly forced into forfeiting a potentially gainful opportunity which it was legally entitled to participate and possibly win the tender in question.

In response, the Procuring Entity averred that the process was procedural and the Applicant is not likely to suffer negative reputation as claimed. It states that it duly complied with statutory procedures under Section 64(i) of the Act which states that ***“A tender is responsive if it conforms to all the mandatory requirements in the tender documents.”***

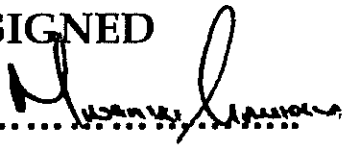
The Board has held severally that tendering cost are commercial business risks borne by business people and therefore each party bears its cost.

Taking into account the foregoing, this appeal succeeds; and the Board orders, pursuant to section 98(1) of the Act that the tender awarded to the successful bidder Hatari Security Guards Limited is hereby annulled.

The Procuring Entity may re-tender using Restricted tendering method and should invite all the bidders who had bought and submitted the tender documents of tender No. KAA/104/2011-2012.

Dated at Nairobi this 31st day of January, 2012.

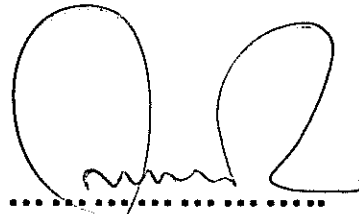
SIGNED



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CHAIRMAN

PPARB



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SECRETARY

PPARB

