

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO.10/2012 OF 9TH MARCH, 2012

BETWEEN

LAVINGTON SECURITY GUARDS

LIMITED.....APPLICANT

AND

KENYA POST OFFICE SAVINGS

BANK.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Post Office Savings Bank dated 21st February, 2012 in the matter of Tender No. KPOSB/056A/012-013 for provision of Security Guarding Services.

BOARD MEMBERS PRESENT

Mr. P.M Gachoka - Chairman

Ambs. Charles Amira - Member

Ms. Natasha Mutai - Member

Mrs. Loise Ruhiu - Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Lavington Security Guards Ltd

Mr. Fredrick Okeyo - Advocate, Otieno Okeyo Advocates

Procuring Entity, Kenya Post Office Savings Bank

Mr. J. Louis Onguto - Advocate, J. Louis Onguto Advocates
Ms. Winnie Ochieng - Lawyer, J. Louis Onguto Advocates
Mr. C.M Karani - M/PRC, Postbank

Interested Candidates

Mr. Jackson Nyaga - Legal Officer, Wells Fargo
Major(Rtd) F.S Shikanda - Head of operations, Brinks Security
Mr. Joshua Maluti - Operations Manager, Riley Falcon

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

The Kenya Post Office Savings Bank invited tenders from its list of prequalified candidates for the provision of Security/Guarding Services Category "A". The invitation was by phone calls to nine prequalified candidates.

Closing/Opening

As at the time of tender opening on 28th December, 2011 five firms had returned their bids for Tender No. KPOSB/056A/012-013 for provision of security/guarding services Category A at Kenya Post Offices Savings Bank. The five firms that returned their bids are as follows;

- a. Wells Fargo
- b. Lavington Security Services
- c. Riley Falcon Security Services
- d. G4S
- e. Brinks Security Services.

EVALUATION

The tenders were evaluated into four stages using the criteria provided for in the tender documents. The four stages were;

- Preliminary evaluation where all the firms were assessed against the mandatory requirements. Any firm which did not satisfy the mandatory requirement had their bid rejected;
- Technical evaluation where all firms were evaluated using bidder's documentation and the evaluation criteria provided;
- Financial evaluation which was done according to the financial evaluation criteria. Only the companies that met the technical requirements were evaluated in this category.
- Post Qualification. Here, confirmation of qualifications of the recommended firms who submitted the lowest evaluated bids was done in accordance to Section 31(1-5) of the Public Procurement and Disposal Act,2005 and Regulation 52(1) of the Public Procurement and Disposal Regulations,2006 and guidelines in the tender document Section 2.24.2 and 2.24.3

Preliminary and Technical Evaluation

The results of both the preliminary and technical evaluations were as summarized in the table below;

TABLE A

	WF	G4S	RFSS	LSL	BSS
Mandatory requirements	NO	NO	NO	YES	NO
Technical requirements	-	-	-	87	-
Overall score	-	-	-	87	-

Abbreviations

WF: Wells Fargo Limited

RFSS: Riley Falcon Security Services Ltd

LSL: Lavington Security Limited

G4S: G4S Security Services Kenya Limited

BSS: Brinks Security Services Limited

Observations.

It was observed that only one firm met the mandatory requirements from the documentation and hence qualified for technical and subsequently financial evaluation.

It was note that one of the firms (Lavington Security Ltd) did not provide license to use a chemical mace. This is an important chemical in guarding our branches.

Financial Evaluation

Lavington Security Limited which was the only firm that passed both the preliminary and technical evaluations was further subjected to a financial evaluation and its financial quote is as summarized below;

TABLE B

	No. of Guards	Rate	Total	Total amount per year	Total amount per 2 years
Day Guard	48	22,600.00	1,084,800.00	13,017,600.00	26,035,200.00
Night Guard	36	22,600.00	813,600.00	9,763,200.00	19,526,400.00
Armed Guards	17	24,700.00	419,900.00	5,038,800.00	10,077,600.00
Dog Handler	2	35,000.00	70,000.00	840,000	1,680,000.00
TOTAL	103		2,388,300	28,659,600.00	57,319,200.00

After both the preliminary, technical and financial evaluations, the scores of all the firms that participated were summarized as shown in the table below;

TABLE C

CATEGORY A	WF	ISS	RFSS	RSS	LSL	BSS
Technical requirements out of 70 marks	-	-	-	-	60.9	-
Financial score out of 30 marks	N/A	N/A	N/A	N/A	30	N/A
Overall score out of 100%	N/A	N/A	N/A	N/A	90.9	N/A

Post Qualification

Firms were requested to provide the following information for post qualification;

- Financial institution where the firm have rendered security guarding services for at least 15 years;
- Contract period and contracts awarded
- Contact person/ reference person of the firm

Analysis was thus conducted based on the above stipulated parameters and the results were as follows;

- i.) Lavington Security Ltd provided a list of firms without the required details, category, contracts and contact persons.
- ii.) The list provided under financial institutions do not qualify to be under financial institutions
- iii.) Therefore the 15 years experience in provision of security guarding services could not be ascertained.
- iv.) Due to the above, the firm was non-responsive.

RECOMMENDATION

After the close of evaluation, the evaluation committee recommended that provision for Security Guarding Services be re-advertised since all firms were non-responsive.

TENDER COMMITTEE'S DECISION.

Upon consideration of the recommendations of the Evaluation Committee, the Tender Committee decided that the tender for provision of security guarding services be re-tendered using the prequalified bidders.

THE REVIEW

The Applicant Lavington Security Guards Limited lodged the Request for Review against the decision of the Tender Committee of Kenya Posts Office Savings Bank in the matter of Tender No. KPOSB/056A/012-013 for provision of security guarding services. The Applicant was represented by Mr. Frederick Okeyo of Otieno Okeyo & Co. Advocates while the Procuring Entity was represented by Mr. J. Louis Onguto of J. Louis

Onguto & Co. Advocates. The interested parties were Riley Falcon represented by Mr. Joshua Maluti, its operations manager, Wells Fargo Limited represented by Mr. Jackson Nyaga, its Legal Officer and Brinks Security represented by its head of operations, Major(Rtd) F.S Shikanda.

The Applicant requests the Board for the following orders;

1. The decision of the Procuring Entity communicated vides a letter dated 23rd February, 2012 finding the Applicant's bid for Tender No. KPOSB/056A/2012-2013 for provision of Security/Guarding Services Category A as non-responsive be annulled.
2. The Procuring Entity, be ordered to award Tender No. KPOSB/056A/012-013 for provision of Security/ Guarding Services Category A to the Applicant.

The Applicant's memorandum of review had included 13 items which were categorized as follows:

Item numbers 1 -7: These are mere statements of fact which the Board need not comment upon.

Items numbers 8 - 13: These are noted to be the grounds relied upon by the Applicant in this request for review. The Board deals with the six grounds for review as follows:

GROUPS 8,9,10, 11 and 12- Breach of Sections 31(1) - (5), 62 and 66 of the Public Procurement and Disposal Act, herein after referred to as the Act, Regulation 52(1) of the Public Procurement and Disposal Regulation, herein after referred to as the Regulations and Clauses 12.9.1, 2.24.1 - 3 of the Tender document.

These grounds have been consolidated as they raise similar issues relating to the evaluation of tenders.

The applicant submitted that the Procuring Entity had erred in declaring that all the tenders that had been submitted were non-responsive. It argued that its bid was responsive in that it had met all the mandatory requirements that were set out in the tender documents. It stated that its tender had the lowest evaluated price and therefore it ought to have been awarded the tender.

It stated that the Procuring Entity breached the provisions of Clause 2.19.1 of the tender document when it sought further details from the Applicant vide the letter dated 1st February, 2012. It further stated that the Procuring Entity had requested that the Applicant provide confirmation of fifteen years experience in guarding financial institutions. The Applicant stated that it had replied to the Procuring Entity in a letter dated February 3rd, 2012 wherein it had pointed out the fact that the Procuring Entity was prohibited under Sections 53(1 - 4), 59 (2) and 62(1) and (2) from opening up issues related to the tender after the tender closing date.

It submitted that on 6th February, 2012, the Procuring Entity had further written to it to the effect that the confirmation of experience was being sought under clauses 2.24.1, 2.24.2, 2.24.3 of the tender document. The Applicant argued that the provisions the Procuring Entity was using to justify its action were relevant only in the event that a tender had been evaluated and an award made. It further argued that this must be seen as an admission by the Procuring Entity to the effect that it had awarded the tender to the Applicant who had successfully passed all the evaluation stages and that is why it was now undertaking post qualification examination under the above quoted provision. It wondered then, how the Procuring Entity could purport to end the tender process in accordance to Section 65 of the Act on the grounds that all tenders had been found to be non-responsive.

The Applicant added that Section 65 of the Act could only apply if all tenders were found to be non-responsive at the Preliminary stage and not when one of the tenders had gone through all the stages and had indeed been awarded the tender as it had already proved.

In conclusion the Applicant averred that the Procuring Entity purported to evaluate its tender using procedure and criteria not set out in the tender document contrary to the provisions of Section 66 of the Act. It further averred that the Procuring Entity's decision was arrived at on consideration of extraneous matters other than those set out in the tender document and governing law.

In response the Procuring Entity submitted that it had satisfied all the relevant provisions of the Public Procurement and Disposal Act 2005 and the Regulations made there under in inviting the various pre-qualified bidders to quote for the services specifically sought.

The Procuring Entity further submitted that it had found no evidence in the Applicant's bid to show that the Applicant had met the mandatory requirement of having a minimum of fifteen years experience in the provision of the security guard services in a financial institution. The Procuring Entity added that the Applicant, despite written request, did not avail evidence to show that it had 15 years of experience in security guarding services in financial institutions.

The Procuring Entity stated that it was not in breach of Section 66 of the Act as the Applicant's tender was non-responsive. It further stated that the tender documents under clause 2.19.1. had specifically allowed the Procuring Entity to seek for further clarification from the tenderers. The Procuring Entity added that the tender document under clause 2.22.6 authorized and allowed the Procuring Entity to reconfirm details provided or purported to have been provided by the tenderer in the tender document.

The procuring Entity argued therefore that it was not in breach of section 62 of the Act as it was perfectly entitled to seek clarification from the Applicant on its bid which was lacking in material, yet mandatory respects.

The Procuring Entity submitted that it did not attempt to amend the Tender document in rejecting the Applicant's bid as being non-responsive, since its decision was premised on the initial original Tender document presented by the Applicant.

It further submitted that its decision was not premised on a consideration of any extraneous matters but rather had a legal and factual foundation based on the Act and Tender Document.

The Procuring Entity concluded that the Applicant had not exhibited any evidence that in examining, evaluating and/or comparing the Applicant's bid, the Procuring Entity used a procedure or a criteria not set out in the Tender Document.

It added that the decision to disqualify the Applicant's tender for being non-responsive had basis and was objective as the Applicant, as well as all the other candidates, did not meet the mandatory criteria set out in the Tender document. It concluded that all the tenderers were duly notified pursuant to Section 65 as they failed to meet a preliminary mandatory requirement.

The Procuring Entity averred that the tender process as well as the examination, evaluation and comparison of tenders thereof was fair and competitive to all the parties.

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

The Board notes that the issue for determination is whether or not the Applicant was unfairly declared to be non-responsive.

The Board notes that of the nine prequalified bidders who had been invited via telephone to collect tender documents, only the following five had collected and submitted their bids on time:

1. Brinks Security Services Limited;
2. Lavington Security Limited;
3. Riley Falcon Security Services Limited;
4. Wells Fargo Limited; and
5. G4S Security Services Limited.

The Board further notes that the evaluation was carried out in four stages namely Preliminary, Technical, Financial and Post Qualification stage.

The Board notes that at the Preliminary Evaluation all the five firms were assessed against the mandatory requirements and any firm which did not satisfy the mandatory requirements had their bid declared non-responsive and therefore rejected.

The Board notes that out of the five bidders only the Applicant's bid was found to be responsive and thus proceeded to technical evaluation stage where it scored 87% and subsequently proceeded to the financial evaluation stage.

The Board also notes that the overall scoring was provided in the Tender document as follows:

<u>Criteria</u>	<u>Max Marks</u>
Mandatory requirements	All Mandatory
Technical Requirements	70
Financial Proposal	30
Total	100

The Board notes that the Applicant's technical score was recalculated to 60.9% out of the possible 70% as per the above table. There being no other responsive bidder, the Applicant was awarded the highest possible financial score of 30% thus getting a combined score of 90.9%

The Board notes that at this point, as part of the post qualification, the Applicant was requested to provide the following information:

1. Financial institutions where the firm has rendered security guarding services for at least 15 years;
2. Contract period and Contracts awarded; and
3. Contact person/Reference person of the firm.

The Board takes note of the Procuring Entity's letter of 1st February, 2012 that was sent out to the Applicant which states in part as follows;

".....For a firm to be considered for award of the tender, the firm must have a minimum of fifteen (15) years experience in provision of security guarding services in financial institutions.

We therefore request that you provide a confirmation of experience as related to provision of security guarding services in financial institution for at least 15 years.

Please provide the following:-

- a.) Financial institutions where the firm has rendered security guarding services for the last 15 years.(provide copies of the contracts)*
- b.) The contract period for the contracts awarded*
- c.) The contact person/reference person of the firms.*

Please note that the bank will confirm the above information from the reference of the financial institutions provided....."

The Board notes that the Applicant, in reply to the Procuring Entity vide its letter dated 3rd February, 2012 categorically refused to submit the required information stating in part as follows;

".....In our opinion , you are opening up issues related to the tender after the closing date and as such we are not a party to it, as the process has proceeded to opening of financial bids....."

The Board notes that the tender document at page 20 of 55 which was headed "Preliminary Requirements (Mandatory)" had stated in part as follows;

"Bidders must have a minimum of 15 years experience in provision of Security Guarding Services in financial institutions for category A."

The Board further notes the Applicant's argument to the effect that post qualification evaluation can only apply after award of tender and not at the evaluation stage.

The Board is aware that the qualification requirements under Section 31 of the Act are ordinarily carried out after the award of the tender.

The Board takes note of Regulations 51(1)(h) and (i) and 52 (1) as follows :

Regulation 51(1)(h) – *An evaluation report prepared, under section 66(5) of the Act shall include:*

(a)

(b)

.....

(h) *the results of any confirmation qualification conducted under Regulation 52 and*

(i) *a recommendation to award the contract to the lowest evaluated tender.*

(j).....

Regulation 52 (1) – *where so indicated in the tender documents, a procuring entity may prior to the award of the tender confirm the qualifications of the tenderers who submitted the lowest evaluated responsive tender in order to determine whether the tenderer is qualified to be awarded the contract in accordance with Section 31(1) of the Act.*

From above it is obvious that an evaluation committee is given leeway to confirm the qualifications of the tenderers who submitted the lowest evaluated responsive tender so long as the tender document has allowed for such post qualification to be carried out.

The Board notes that Regulation 52(1) allow a Procuring Entity to confirm qualification of the tenderer who submitted the lowest evaluated responsive tender prior to award.

The Board further notes under Regulation 51(1)(h) that the results of any confirmation of qualification conducted pursuant to Regulation 52(1) should be included in the Evaluation Report. In addition, the Board notes that post qualification can only be done if the tender document provide for such an exercise. In this tender, the Board observes that Clause 2.19.1 of the tender document indicated that the Procuring Entity would conduct a post-qualification.

Therefore, the Board finds that the post-qualification that was done by the Procuring Entity was proper.

The Board notes that the only reason why the Applicant's tender had not been rejected with the others at the preliminary stage is that the Applicant had at its content page indicated that it had met the criteria for 15 years experience in provision of Security services to financial institutions.

However, on perusal of the Applicant's bid document at pages 106-113 , the Board notes the confirmation letters from the following firms whom the Applicant had served;

1. *National Hospital Insurance Fund- Over three years.*
2. *POSTA Kenya- Over four years.*
3. *Rural Electrification Authority- one year.*
4. *Kenya National Library Service.*
5. *Telkom Kenya Limited (Orange).*
6. *Office of the Deputy Prime Minister and Ministry of Finance- Two years*
7. *National Water Conservation and Pipeline Corporation- One year.*

From above, it is clear to the Board that the Applicant did not satisfy the criteria of 15 years service to financial institutions.

The Board therefore finds that the Procuring Entity rightly declared the Applicant's tender to be non-responsive even at this late stage which was in line with the provisions of Regulations 51 and 52 above.

The Board also finds that the Procuring Entity was within its right to invoke the provision of section 65 to notify all the bidders that their tenders had been found to be non-responsive and that there would be a retender at a future date.

The Board does not find any evidence to suggest that the Procuring Entity's decision was arrived at on consideration of any extraneous matters other than those set out in the tender document and the Act and Regulations.

Taking into consideration all the above the Board finds that the Applicant's tender was properly evaluated and declared to be non-responsive and therefore these grounds of review fail.

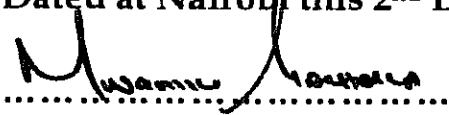
Ground 13

The Applicant submitted that it stands to being irregularly forced into forfeiting a potentially gainful business opportunity though it had legally participated and complied with all the requirements and which it had won.

With regard to The Applicant's prayers for costs, the Board has on numerous occasions in the past held that tendering costs are business risks that bidders undertake when they enter into the tendering process. Such costs are normally borne by the tenderers.

Taking into account all the foregoing, this Request for Review fails and is hereby dismissed. The Board pursuant to Section 98(b) of the Act upholds the Procuring Entity's decision to invoke Section 65 of the Act and orders that the Procuring Entity may retender.

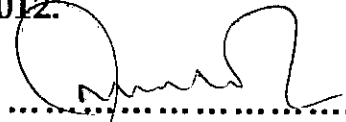
Dated at Nairobi this 2nd Day of April, 2012.



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CHAIRMAN

PPARB



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SECRETARY

PPARB