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SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO.4/2005 OF 3RD FEBRUARY, 2005

BETWEEN

LAVINGTON SECURITY GUARDS LIMITED- (APPLICANT)

AND

KENYA PIPELINE COMPANY LIMITED- (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Kenya Pipeline Company Limited (Procuring Entity) dated 14th January, 2005 in the Matter of Tender No. SU/QT/428N/04 for Provision of Security Services for Year 2005-2006.

BOARD MEMBERS PRESENT

- | | | |
|--------------------------|---|--|
| 1. Mr. Richard Mwongo | - | Chairman |
| 2. Mr. Adam S. Marjan | - | Member |
| 3. Mr. John Wamaguru | - | Member |
| 4. Prof. N. D. Nzomo | - | Member |
| 5. Eng. D. W. Njora | - | Member |
| 6. Ms Phyllis N. Nganga | - | Member |
| 7. Mr. P.M.Gachoka | - | Member |
| 8. Mr. Kenneth N. Mwangi | - | Secretary/Director, Public Procurement Directorate. |

BOARD'S DECISION

In this appeal to the Board the Applicant has raised eight grounds. In a nutshell the Applicant, through their counsel, Njuguna C. N. raises the following grounds.

The first ground of Appeal was that there was insertion of bids after the tender opening and evaluation contrary to Regulation 28(3) and 30 (1) of the Exchequer and Audit Public Procurement Regulations) 2001 herein referred to as the Regulations. On this ground the Applicant relies mainly on an affidavit sworn by one Col. (Rtd) Elias Chepkoin, the Chief Security Officer of the Procuring Entity who is now under suspension on corruption related allegations.

The Applicant further contends that the letter dated 7th January, 2005 by First Force Security Services Ltd to the Managing Director, Kenya Pipeline Company, does not amount to clarification but is a fresh bid by the said First Force Security Services Ltd. Their main contention is that in the tender application, the said First Force Security Services Ltd did not tender under the category of ROW (Right of Way). The Applicant also contends that the clarification by the Procuring Entity is in breach of Regulation 12 of the Regulations as such request for clarification was not done in writing.

The Second ground of Appeal which was pleaded in alternative to ground number one was that tenderers who had not bid in four specific areas were granted the tender in those areas contrary to regulation 30 (6) of the aforesaid Regulations. The Applicant relied on the draft evaluation report and the final evaluation report and also on the affidavit of Col. (Rtd) Elias Chepkoin, which we referred to earlier.

The Third ground of Appeal was that the Tender Committee revised their recommendations to give preferential treatment to some bidders contrary to Regulation 11.

The Fourth ground of Appeal alleged that some tenderers offered inducement contrary to Regulation 16. The Advocate for the Applicant conceded at the hearing that this ground was speculative and he withdrew it.

The Fifth ground of Appeal was that the successful tenders were not the lowest evaluated tenders contrary to Regulation 30 (8). The Applicant's contention is that some tenderers whose prices were not the lowest evaluated ended up being awarded tender under certain categories.

In their ground of Appeal number six the Applicant contends that the Procuring Entity, departed in its awards from the security criteria used in evaluation of awards and alleged that some Companies were favoured. To the Applicant this amounts to discrimination, contrary to Regulation 11.

The Seventh ground of Appeal by the Applicant was that though the successful Bidders were informed of the outcome of the tender by a letter dated 14th January, 2005, the unsuccessful bidders have not been advised to date, contrary to Regulation 33(1).

The Eighth ground of Appeal was that the Applicant has suffered loss. To them this loss has been caused by the Procuring Entity for failing to award them the tender, though according to the Applicant, their tender was more competitive than the others.

The Applicant in its submission in support of these grounds also contended that two successful tenderers; Gilly's Security and Investigation Services Ltd and Witerose Security System (K) Ltd should have been disqualified at the outset as they had not met the mandatory requirements set out in the tender document. According to the Applicant the said two Companies had not been registered as limited Liability Companies for a period of five years prior to the date of the tender.

On its part the Procuring Entity, Kenya Pipeline Ltd filed a reply dated 8th February, 2005. The Respondent through their Advocate, Mr. Mohammed Nyaoga opposed each and every ground. The reply can be summarized as follows: -

The Procuring Entity contends that this appeal has been filed at the behest of the currently suspended Chief Security Officer Col (Rtd) Elias Chepkoin. The Procuring Entity urged the Board to disregard the affidavit of the said Co. (Rtd) Elias Chepkoin who is under suspension on corruption related allegations.

The Procuring Entity denied accepting any tenders after the deadline for submission. It stated that all the bids were opened on 9th December, 2004 in the presence of all parties. It denies that there was any modification after the deadline save for certain clarifications.

The Procuring Entity stated that it awarded the tenders to the successful tenderers according to the specific areas they had bid for. The Procuring Entity contends that it awarded the tenders only to the successful bidders whose bids

had been determined to be substantially responsive and had been determined to be the lowest evaluated.

The Procuring Entity denied revising their award recommendations and stated that the draft evaluation report, which was produced by the Applicant, was a working draft, which was not signed. It stated that there is nothing wrong in the Tender Committee having a draft evaluation report before arriving at a final report.

The Procuring Entity stated that the procurement process was done in a fair, transparent and non-discriminatory manner. The Procuring Entity stated that the overriding consideration for recommending awards was on the basis of the lowest evaluated price and ability to deliver services in their quoted areas.

The Procuring Entity conceded that it did not advise the unsuccessful bidders of the award of the tender. The Procuring Entity stated it wanted to fall back on the unsuccessful tenders if the successful ones were unable to meet the provisions of the contract.

All in all the Procuring Entity stated that every effort was made to adhere to the letter and spirit of the Public Procurement Regulations aforesaid.

The Board considered the able submissions of the advocates for the Applicant, Procuring Entity and interested parties. The Board has also read and considered all the written submissions by the advocates and the interested candidates and now wishes to make the following observations and findings.

The Procuring Entity confirmed that no contract has been signed with the successful bidders. This appeal is therefore properly before the Board.

Ground number one of the Appeal is two pronged. We wish to state that the allegation that there was insertion of bids, contrary to regulation 28(3) after the tender closing deadline is not backed by any evidence and we dismiss that allegation by the Applicant. The second limb of that ground states that the Procuring Entity breached Regulation 30(1). The said regulation reads as follows: -

“The procuring entity may ask tenderers for clarification of the tenders in order to assist in the examination and evaluation of tenders but no change in the substance of the tender, including changes in price shall be sought, offered or permitted”.

It is common ground that on 7th January, 2005, First Force Security Services Ltd wrote a letter to the Managing Director of the Procuring Entity. The said letter reads as follows: -

07th January, 2005

*The Managing Director
Kenya Pipeline Company
P.O Box 73442
NAIROBI*

Dear Sir

RE: CLARIFICATION ON SECURITY TENDER

This is further to our telephone conversation of this morning when you sought clarification in respect of our tender for security services.

Upon purchase of the Tender documents, we enquired from your supplies personnel in respect of the zoning of your Company operations and we were advised that your operations are zoned as follows: -

From Mombasa to Makindu (PS6) - Coast Zone
From Makindu to Mai Mahiu (PS 22) - Central Zone
From Mai Mahiu to Eldoret and Kisumu - Western Zone

On the basis of the above information, we proceeded to complete the total number of guards required for each zone as detailed hereunder.

| <u><i>Zone</i></u> | <u><i>Total No. of Guards</i></u> | <u><i>Price per Guard</i></u> |
|--------------------|--------------------------------------|--|
| <i>Coast</i> | <i>296 guards 45 Supervisors</i> | <i>10,000.00 Excl. VAT 12,800.00 Excl. VAT</i> |
| <i>Central</i> | <i>139 guards</i> | <i>12,500.00 Excl. VAT</i> |

| | | |
|---------|----------------|----------------------|
| | 18 Supervisors | 14,500.00, Excl. VAT |
| Western | 290 guards | 10,400.00 Excl. VAT |
| | 44 Supervisors | 12,800.00 Excl. VAT |

With regard to availability of 4x4 wheel drive vehicles, we currently have a fleet of 14 such vehicles and a rate of Kshs. 1,500.00 per vehicle per day would be adequate.

We also wish to give the following details: -

- 1. That First Force Security Services Ltd is one of the three companies which constitute the Tracker Group of Companies.*
- 2. The other two sister companies are the Cartrack and 911 Ltd*
- 3. Cartrack deals in recovery of lost/stolen vehicles and is the leading tracking company in Kenya with a vehicle recovery rate of 98%.*
- 4. 911 Ltd is an Emergency Rapid Response Company partnered with Safaricom for efficient response services.*
- 5. The three companies explained above do compliment each other in their services and the Kenya Police has an arrangement especially with Cartrack, which spills over to benefit the two other companies.*

Lastly, First Force Security Services (Guarding) has its own vehicles but will benefit from the standby vehicles for Cartrack and 911 which are stationed along Nairobi-Mombasa-Nakuru-Busia highway and up to our Branch in Kampala (Uganda).

I hope the above clarification will suffice.

**CAXTON MUNYOKI
GROUP MANAGING DIRECTOR
TRACKER GROUP OF COMPANIES "**

It should be noted that the said letter is stated to be in response to a conversation of that morning. We also note that the said First Force Security Services Ltd has provided information on the 4x4 wheel drive vehicles and a rate for their provision.

The Board has perused the original tender documents. First Force Security Services Ltd did not tender for the category of ROW, which includes 4x4 vehicles in all the three zones of Coast, Central and Western.

However, in the letter of award dated 14th January, 2005, First Force Security Ltd was successful and was awarded tenders under the category of ROW. Under that specific category the said company is to provide six 4x4 vehicles at the rate of Kshs. 1,500.00 per vehicle per day which price they had quoted in the letter dated 7th January, 2005. This is the first time that they were giving this quotation under this category.

The letter dated 7th January, 2005 cannot be regarded as a clarification. First Force Security Services Ltd took the opportunity to quote for 4x4 vehicles. They had not tendered for this category as we have already stated. It is our finding therefore that the Procuring Entity breached Regulation 30(1) and condition 16(3) of the tender documents which condition provides as follows: -

"No tender may be modified after the deadline for submission of tenderers".

We also wish to state that the Procuring Entity breached Regulation 12, which makes it mandatory for all clarifications to be done in writing and where the clarification is done in any other form that clarification must be confirmed in writing. The Procuring Entity conceded that it did not seek that clarification in writing.

The upshot of this is that the Applicant succeeds on this ground.

The Second ground of Appeal is made pursuant to Regulation 30(6). A reading of that regulation clearly shows that, that regulation has no relevance to this appeal. Further, the Applicant in their analysis of that ground has highlighted the differences between the draft evaluation report and the Final evaluation report. As submitted by Mr. Nyaoga the draft evaluation report is a working document and on our part we did not see anything wrong in a party making a draft report in the process of evaluation.

We wish to draw the parties to provisions of regulation 31(1) that require that the process of tender must remain confidential until the award of the contract. Since it is not clear when the Applicant obtained the reports we will say no more about that.

The Applicant fails on this ground.

As regards ground number three we wish to set out the provisions of Regulation 11 which states as follows: -

“Candidates shall not be excluded from participation in Public Procurement on the basis of nationality, race or any other criterion not having to do with their qualifications”

As we have stated the reliance on the draft evaluation report to allege that certain candidates were favoured has no merit. It is noteworthy that the said Col (Rtd) Chepkoin signed the final evaluation report as the head of the user department.

We have already stated our view on the draft evaluation report, which Mr. Njuguna for the Applicant relied heavily in support of this ground.

This ground also fails.

Mr. Njuguna for the Applicant has conceded that ground number four was speculative and withdrew the same. We need not say more on that save that parties must avoid making such allegations when they do not have even an iota of evidence to support the same.

We now wish to deal with ground number five and six together. We have already stated that Regulation 11 was not breached. However, the issue raised in the two grounds that the Procuring Entity did not award the tender to the candidates with the lowest evaluated price merits consideration.

Regulation 30(8) provides as follows: -

“The successful tender shall be

- (a) the tender with the lowest evaluated tender price; or
- (b) if the Procuring Entity has not stipulated in the tender documents, the lowest evaluated tender ascertained on the basis of factors affecting the economic value of the tender which have been specified in the tender documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable”.

The question that we wish to consider is whether the Procuring Entity in awarding the tender relied on the final evaluation report as stated in its reply

dated 8th February, 2005 and as submitted by its advocate, Mr. Nyaoga. According to the evaluation report that was signed by all the officers of the user departments all the tenderers who scored a minimum of 70% were qualified for the next stage of evaluation on price. As already stated Regulation 30(8) is clear that the tender shall be awarded to the tenderer with the lowest evaluated tender price unless the Procuring Entity can be able to make the award under Regulation 30(8) (b). Regulation 30(8) (b) is not applicable in this case as we have looked at the tender document and there are no specific stipulations that would enable the Respondent to invoke that Regulation.

Having looked at the award, the Board has confirmed that the Procuring Entity made awards to tenderers who did not have the lowest evaluated price in the following categories: -

- (i) Area of assignment PS 14 awarded to Witerose Security Services who were number two in the evaluation report.
- (ii) Area of assignment PS 10 awarded to Cornerstone Security Guards who were number two in the evaluation report.
- (iii) Area of assignment KPC Headquarters awarded to First Force Security Services who were number six in the evaluation report.
- (iv) Area of assignment Gigiri, Riverside and Managers Residences awarded to First Force Security Services who were number six in the evaluation report.
- (v) Area of assignment PS 25 awarded to First Force Security Services who were number two in the evaluation report.
- (vi) Area of assignment PS 27 awarded to Sunrise Security Services who were number three in the evaluation report.
- (vii) Area of assignment PS 28 awarded to Total Security Surveillance who were number four in the evaluation report.
- (viii) Area of assignment KM335-KM389, CP7A, CP7B, CP7C, PS7 DOMESTIC awarded to Radar Limited who were number three in the evaluation report.
- (ix) Area of assignment KM 390-KM430, KM434-KM449, CP8A, CP8B awarded to Cornerstone Security Guards who were number three in the evaluation report.

As we have stated, Regulation 30(8) is mandatory. By making the above award the Procuring Entity has breached the said Regulation. We note that in the evaluation report the Committee gave reasons for departure from this rule.

Whereas the said considerations appear reasonable we wish to draw the attention of the Procuring Entity to Regulation 30(7), which states:

"The procuring entity shall evaluate and compare the tenders that have been held responsive in order to ascertain the successful tender as defined in sub-regulation (8) in accordance with the procedures and criteria set forth in the tender documents but no criterion shall be used that has not been set forth in the tender documents".

If the Procuring Entity would wish to use any other criteria in addition to those stipulated in the tender document, the same must be set out. Having failed to set out this criteria in the tender documents the Procuring Entity erred in taking into consideration conditions that were not set out.

The upshot of this is that we find that there was breach of Regulation 30(8). Therefore this ground succeeds.

In their ground of Appeal number seven, the Applicant states the Procuring Entity breached Regulation 33(1). The said Regulation is framed in mandatory terms. The Procuring Entities must notify all the parties, successful or otherwise simultaneously.

The Procuring Entity has admitted that there was no notification to the unsuccessful tenderers. We find that Regulation 33(1) was breached by the Procuring Entity and hence this ground succeeds.

In their ground of Appeal number eight, the Applicant complains to have suffered loss by having complied with all the requirements of the tender that was awarded to a non-compliant tenderer and has thus suffered loss under Regulation 42(1). Section D clause 2 of the instructions to bidders was very clear that bidders would bear the cost of preparation of the tender and the employer would not be liable for any costs. Further, from the tender notice the Procuring Entity was under no obligation to accept any tender, not even the lowest. The claim for the sum of Kshs. 3,272,967.00 by the Applicant has no basis and it is hereby dismissed.

Finally we wish to deal with the submission by Mr. Njuguna on the qualification of Gillys Security & Investigation Services Ltd and Witerose Security Systems Ltd. The two firms were registered under the Registration of Business Names Act, Cap 499 before they sought registration under the Companies Act, Cap 486 of the Laws of Kenya. We do not agree that they should have been disqualified, as submitted by Mr. Njuguna.

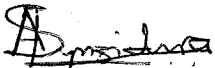
Having made the above findings the question is whether to annul the whole or part of the award made by the Procuring Entity. We have already found that the award to First Force Security Services Ltd under the category of ROW was irregular. We have also found that the Procuring Entity made awards in nine categories to tenderers who did not have the lowest evaluated price. We have also found that the Procuring Entity took into account conditions that were not set out in the tender documents in the evaluation report.

Accordingly, we conclude that the breach of the regulations by the Procuring Entity go to the root of the entire process. As stated in Regulation 4, the purpose of the regulations is to promote economy and efficiency in public procurements to ensure that public procurement procedures are conducted in a fair, transparent and non-discriminatory manner, thereby contributing towards the creation of a sound business climate in Kenya. Whereas we note that this is the first time that the Procuring Entity was subjecting this kind of tender to competition and that it tried to apply rules of fairness the aforementioned breaches are substantial and go to the root of the entire process.

In the premises the Board makes the following orders: -

1. The whole award under the said tender No. SU/QT/428N/04 for provision of Security Services for the year 2005/2006 is hereby annulled pursuant to Regulation 42(5) (d).
2. The Tender shall be re-tendered and finalised within the next Ninety (90) Days from the date hereof under the supervision of the Public Procurement Directorate.
3. The current security contracts shall continue in force until the re-tendering and award thereof.

DATED AT NAIROBI THIS 7TH DAY OF MARCH, 2005


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Chairman
PPCRAB


.....
Secretary
PPCRAB