

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO.45/2006 OF 26TH SEPTEMBER, 2006

BETWEEN

BRINKS SECURITY SERVICES LIMITED, APPLICANT

AND

**KENYA POWER AND LIGHTING COMPANY LIMITED,
PROCURING ENTITY**

Appeal for Administrative Review against the decision of the Tender Committee of Kenya Power and Lighting Company dated 25th April, 2006 in the matter of Tender for Provision of Security Services.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Eng. D. W. Njora	-	Member
Mr. Joshua Wambua	-	Member
Mr. P. M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. Kenneth N. Mwangi	-	Secretary

IN ATTENDANCE

Mr. P. M. Wangai - Secretariat
Mr. I. K. Kigen - Secretariat

PRESENT BY INVITATION FOR APPLICATION 45/2006

Applicant, Brinks Security Services Limited

Mr. Philip Wambugu G - Lawyer, B. M. Musau and
Company Advocates.
Ms. Sheila Mugo - Advocate, B. M. Musau and
Company advocates
Mr. Josphat Kibet - Sales and Marketing Manager, Brinks
Security Services Limited
Mr. Joshua Maluu - Special Projects Manager, Brinks
Security Services Limited

Procuring Entity, Kenya Power and Lighting Company Limited

Mr. Owiti A. - Legal Officer

Interested Candidates

Mr. Njuguna C. M - Advocate for the seven (7) interested
candidates as follows:

- (i) Lavington Security Guards
Limited.
- (ii) Witerose Security Systems
Limited.
- (iii) Cavalier Security
- (iv) Kenya Shield Security Limited
- (v) Delta Guards Limited
- (vi) Race Guards Security Limited
- (vii) Inter Security Limited

Mrs. Caroline Ndindi - Legal Officer, Sunrise Security
Services Limited

Mr. Paul Ndolo	-	Manager, Race Guards Security Limited
Mr. O.M. Kaindi	-	Operations Manager, Race Guards Security Limited
Mr. Kamenyi Ismael	-	B.M Security Services Limited
Mr. Moses K. Kamau	-	Director, Kenya Shield Security
Mr. Henry O. Komolo	-	Base Manager, Witerose Security
Col (Rtd) R. J. Kiluta	-	Director, Cavalier Security
Mr. Githinji Mwangi	-	Advocate, Hatari Security
Mr. Peter Karaka	-	Manager, Hatari Security
Mr. A. M. Sheikh	-	Director, Basein Security Services Limited
Mr. Nicholas Ayungo	-	Operations Manager, Shika Shika Security

BOARD'S DECISION

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

BACKGROUND

The tender was advertised in the local dailies on 20th March 2006 and opened on 19th April 2006.

The tenders of the following bidders were opened.

1. Accurex Investigation Bureau and Security Firm Co. Ltd.
2. Apex Security Services Ltd.
3. Armor Group Kenya Ltd,
4. Armoured Security Alarms (E.A.) Ltd,
5. Basein Security Services Ltd,
6. Bob Morgan Security Services Ltd,
7. Brinks Security Services Ltd.
8. Cavalier Security Limited
9. Commandos Security Guards (K) Ltd,
10. Crush Security Guards & Private Investigators,
11. Delta Guards Ltd,
12. Dynasty Security Services Ltd.

13. Eagle Watch Company Limited
14. Eveready Security Guards Co. Ltd,
15. G4S Security Services (Kenya) Ltd,
16. Gillys Security & Investigation Services Ltd,
17. Hatari Security Guards Ltd,
18. Inter Security Services Ltd,
19. Kali Security Company Ltd,
20. Kenya Shield Security Ltd,
21. Lavington Security Guards Ltd,
22. Parklands Security Services Ltd,
23. Race Guards Ltd,
24. Riley Services Limited,
25. Riley-Falcon (Security) Ltd,
26. Secure Homes Ltd,
27. Securex Agencies (Kenya) Ltd,
28. Security Systems (K) Ltd.
29. Shika Shika Security Alarms Ltd,
30. Spur Security Services Ltd,
31. Sunrise Security Services Ltd,
32. Total Security Surveillance Ltd,
33. Witerose Security Systems Kenya Ltd,
34. Wells Fargo Ltd,

The following were the 12 successful bidders

1. Basein Security Services Ltd,
2. Bob Morgan Security Services Ltd,
3. Crush Security Guards & Private Investigators,
4. Delta Guards Ltd,
5. Race Security Services
6. Cavalier Security Services
7. Inter Security Services Ltd,
8. Kenya Shield Security Ltd,
9. Lavington Security Guards Ltd,
10. Sunrise Security Services Ltd,
11. Total Security Surveillance limited,
12. Witerose Security Systems Kenya Ltd,

THE APPEAL

The appeal was lodged on 26th September 2006 by Brinks Security Services Limited against the award of tender for security services by KPLC

The Applicant sought 5 prayers as follows:

1. A declaration that the Procuring Entity took into account extraneous considerations when disqualifying the Applicant from the tendering process;
2. The decision of the procuring entity to disqualify the applicant from participating in the tender be annulled in whole;
3. The procurement process be terminated;
4. The Board otherwise be pleased to revise the unlawful decision by the Procuring Entity and substitute its own decision for the unlawful decision; and
5. The costs of this appeal are awarded to the applicant.

The Applicant was represented by Mr. B. Musau, Advocate, the Procuring Entity was represented by Mr. Owiti A, the Legal Officer, the 1st -7th Interested Candidates were represented by Mr. Njuguna C. M, Sunrise Security Services Limited was represented by Ms. Caroline Ndindi, Legal Officer and Eagle Watch Company Limited was represented by J.M. Karanja, Managing Director.

The Applicant in its Memorandum of Appeal raised seven grounds of appeal which are hereby dealt with as follows:

Grounds 1, 2, and 3

These grounds have been consolidated as they raise the same issues.

At the hearing the Applicant argued that the Procuring Entity breached Regulations 13 (3) and 13 (4) by rejecting the Applicant's tender on the basis of extraneous requirements which were not set forth in the tender documents. The actions of the Procuring Entity were therefore unlawful.

The Procuring Entity disputed the assertions of the Applicant and stated that Regulation 13 (1) was worded in mandatory terms. In particular, it argued that Sub-Regulation 1 (d) required candidates, including the Applicant, to fulfill tax and social security obligations. Further, the fact that the Applicant was not a foreign candidate as defined in the Regulations meant that it could not merely submit a statement declaring its compliance with such tax and social security obligations. The Procuring Entity also denied the use of extraneous requirements and stated that they found it prudent re-examine the tender document due to the ambiguities contained in it.

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The Board has carefully considered the arguments of the parties. The complaints are grounded on an allegation of breach of Regulation 13. The Board observes that Regulation 13(1) concerns the use of pre-qualification method, and Regulations 13 (3) and 13 (4) are provisions concerning pre-qualification documents and procedure. These Regulations are therefore irrelevant to this appeal, which relates to the award of an open tender and not to a pre-qualification process.

Accordingly, these grounds fail.

Grounds 5 and 6

These two grounds have also been merged since they raised the same issues concerning the breach of Regulation 24(2). The Applicant claimed that the tender documents issued by the Procuring Entity did not contain sufficient information to enable competition amongst the tenderers on the basis of complete, neutral and objective terms. The Applicant further stated that the Procuring Entity acted unlawfully by rejecting its tender due to its failure to comply with mandatory requirements with regard to the minimum wage guidelines. The Applicant observed that the Procuring Entity required it to submit supporting documents from the Ministry of Labour, the National Hospital Insurance Fund and National Social Security Fund as proof of compliance. However these were extraneous requirements that were not in the tender documents.

During the hearing, the Applicant argued that the Procuring Entity in its letter Ref: SEC.40 (1326 No. 7) /AQ: oa dated 3rd October, 2006 had not only admitted that the statement on compliance to the minimum wage

guidelines was open to different interpretations by different bidders, but had also conceded ground three of the Memorandum of Appeal and that the tendering process should be annulled. By so doing the Procuring Entity conceded that the Applicant was unfairly disqualified from the tendering process. However, the Applicant left it to the Board to decide the most appropriate relief as prayed for.

On its part, the Procuring Entity stated that the letter referred to by the Applicant only made an express admission that the statement on wage guidelines was open to different interpretations, but did not admit the grounds of appeal. It argued that Clauses 23.3 (c) (xii) of Section C and paragraph 1 of Section F on Statement of Compliance to Minimum Statutory Wage Guidelines were statements which did not give guidance on the nature of evidence required as proof. Since there were no requirements for documentary evidence as proof of compliance, it was therefore difficult for any bidder to comply with such requirements. The Procuring Entity further argued that for a bidder to participate in public procurement, it must demonstrate that it was qualified in accordance with Regulation 13(1). It further contended that the Applicant was a local candidate and was therefore obliged to provide documentary evidence of qualification and not a mere statement which could only be provided by foreign candidates.

Finally, the Procuring Entity urged the Board to terminate the tendering process and order re-tender to enable it to ensure that the procurement process was conducted fairly. This process would take about six months.

On their part, the successful bidders argued that they were already on site offering the security services pursuant to the award of the tender. Accordingly, they asserted that Regulation 4 was intended to protect all parties to a tender in the public interest. Counsel argued that it would not be in the public interest to terminate their services as they had been properly secured.

The Board has carefully considered the parties' arguments and the documents before it. The Board has noted that the failure by the Procuring Entity to submit all the required tender documents, and in particular the evaluation report, despite several requests by the Secretariat, denied it useful information. However, based on the arguments of the parties, it is clear that the contentious issue was the Statement of Compliance to Minimum Wage Guidelines as contained under Sections C and F of the tender document. The

Board has also noted that the Procuring Entity had conceded that Clause 23.3 was ambiguous as indicated in its letter Ref: SEC 40 (1326) No. 7)/AO: oa dated 3rd October, 2006. That letter reads as follows:

'...the documents required in support of the statement were not specific and were, therefore, open to different interpretations by the different bidders.'

The Board has also read the letter from the Procuring Entity Ref: KPLC 1/1B/1/2/AMG/pao dated 21st September, 2006 informing the Applicant that its bid was not successful due to its failure to include the documents listed therein as proof of compliance. These documents were as follows:

1. *A letter from the Ministry of Labour*
2. *A letter from the National Hospital Insurance Fund*
3. *A letter from the National Social Security Fund*

The Board has considered the contents of this letter and noted that it was not in line with Section C and F of the tender document. This was in contravention of Regulation 24(2), as it did not enable competition on the basis of neutral and objective terms

Consequently, these two grounds of appeal succeed.

Grounds 6 and 7

The two grounds relate to costs incurred and loss suffered by the Applicant.

The Applicant argued that having spent a substantial amount of time and money in the preparation and submission of the tender, there was loss of business opportunity and frustration of a legitimate expectation that it would win the award.

In response, the Procuring Entity stated that such losses were based on mere expectations. However, being an open tender the bidder should also expect to lose

The Procuring Entity argued that it was incumbent upon the Applicant to bear the costs associated with the tender. In fact the legislature did not confer on the Board powers to grant costs.

The Board has carefully considered the arguments of the Applicant, Procuring Entity and Interested Candidates and observed that these were statements of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it were awarded the tender. In open competitive bidding there is no guarantee that a particular tender will be accepted, and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the cost or damages associated with the tendering.

The Board has also considered the submissions of interested candidates, which briefly are as follows:

Mr. Njuguna C.M for the 1st – 7th successful candidates argued that there was no ambiguity in the tender document as it is only the Ministry of Labour that could confirm whether statutory minimum wage guidelines were adhered to.

He further submitted that the jurisdiction of the Board was wide and not limited to the Procuring Entity, the Applicant and Interested Candidates, but more importantly encompassed the public interest. The essence of the Regulations was therefore to protect public interest thus the Board ought to ensure that the Regulations were complied with.

Mr. J. M. Karanja representing Eagle Watch Company Limited argued that the Procuring Entity exercised extraneous powers not set out in the tender document during evaluation. The failure by the Procuring Entity to comply with the 21 days before signing the contract was a breach of Clause 29.2 of its tender document.

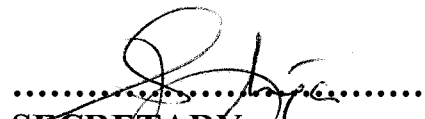
Ms. Caroline Ndindi asserted that the Procuring Entity acted contrary to Regulation 33(1), which was unlawful. The procurement process was marred with irregularities due to the total disregard of the Regulations. In the interest of justice, the Board should compel the Procuring Entity to re-tender afresh and act in a lawful manner in its subsequent tenders.

The submissions of interested candidates considered in their entirety do not alter the Board's findings regarding the actual grounds of appeal and response as submitted by the Applicant and the Procuring Entity.

Taking into account all the above matters, the appeal hereby succeeds and the Board hereby terminates the procurement process as prayed for by both the Applicant and Procuring Entity pursuant to Regulation 42(5)(f). Consequently, the Procuring Entity should re-tender and, in the public interest, should restrict the tender to tenderers who participated in the terminated tender proceedings at no cost to them in terms of purchase of tender documents.

Delivered at Nairobi on this 27th day of October, 2006


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB