

THE REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 31/2008 OF 10<sup>TH</sup> SEPTEMBER 2008

BETWEEN

LAVINGTON SECURITY LTD ..... APPLICANT

AND

AGRICULTURAL

FINANCE CORPORATION .....PROCURING ENTITY

Appeal against the decision of the Tender Committee of Agricultural Finance Corporation in the matter of Tender No. AFC/6/2008 for Provision of Security-Guarding Services

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Eng. Christine Ogut	-	Member
Mrs. Loise Ruhiu	-	Member
Mr. Akich Okola	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Board Secretary
Mr. Peter Wangai	-	Secretariat

**PRESENT BY INVITATION FOR APPLICATION NO.31/2008**

**Applicant, Lavington Security Ltd**

- Mr. C. M. Njuguna - Advocate, Njuguna & Partners  
Advocates  
Mr. Kennedy Mose - Manager

**Procuring Entity, Agricultural Finance Corporation**

- Mr. Rashid Ngaira - Advocate, Rashid Ngaira  
Advocates  
Mr. Joseph K. Bett - Procurement Officer

**Interested Candidates**

- Mr. S. K. Bundotich - Advocate for Total Security  
Surveillance Ltd  
Mr. James Cherutich - Marketing Manager, Total  
Security Surveillance Ltd  
Mr. Josphat Kibet - General Manager, Brinks Security  
Services Ltd  
Mr. Moses K. Kamau - Director, Kenya Shield Security  
Ltd

**BOARD DECISION**

Upon hearing the representation of the parties, the Board decides as follows:-

**BACKGROUND OF AWARD**

This tender was advertised by the Procuring Entity on 8<sup>th</sup> April, 2008. The tender was for provision of security-guarding services. Tenders were opened on 30<sup>th</sup> April, 2008 in the presence of bidders'

representatives. Eleven bidders who returned their bids were as follows:

1. Cornerstone Security Services
2. Wells Fargo Ltd
3. Winstar Security Services Ltd
4. Sunrise Security Services
5. Total Security Surveillance Ltd
6. Hatari Security Services
7. Lavington Security Ltd
8. Cavalier Security Services
9. Kenya Shield Security
10. Brinks Security Services Ltd
11. Inter Security Services Ltd
12. Sentory & Patrol Ltd

### **Technical Evaluation**

This was conducted to determine the responsiveness of the tenders to the term of the reference. It was based on the following parameters:

1. Company profile ( 25 marks)
  - (i) Audited accounts
  - (ii) Statutory documents
  - (iii) Affiliations to security and gov. bodies
  - (iv) Branch network
  
2. Availability of equipments/ motor vehicles (25 marks)
  - (i) geographical distributions of the equipments and motor vehicles
  - (ii) Key personnel
  
3. Current sites/ past AFC supplier's performance (marks)
  - (i) sites listed by bidders
  - (ii) recommendation letters

The technical evaluation accounted for 75%. The results were as indicated in the next page.

<b>FIRM</b>	<b>Company Profile</b>	<b>Availability of equipments/motors</b>	<b>Current sites/past AFC supplies</b>	<b>Total score (Out of 75%)</b>
Cornerstone Security Services	25	25	5	55
Wells Fargo Ltd	20	20	15	55
Sunrise Security Services Ltd	20	20	15	55
Total Security Surveillance Ltd	25	20	20	65
Hatari Security Services	20	20	25	65
Lavington Security Guards Ltd	20	25	5	50
Cavalier Security Ltd	20	10	10	40
Kenya Shield Security Ltd	20	15	20	55
Brinks Security Services Ltd	20	20	20	60
Inter Security Services Ltd	20	15	20	55
Sentry & Patrols Ltd	15	0	0	15

## Financial Evaluation

This accounted for 25 % of the total score. The financial scores were as follows:

NO	FIRM	Total Evaluated Price	Total out of 25%
1	Cornerstone Security Services	431,280.00	24.4
2	Wells Fargo Ltd	819,656.00	12.8
3	Winstar Security Guards Ltd	0	0
4	Sunrise Security Services Ltd	452,500.00	23.2
5	Total Security Surveillance Ltd	473,600.00	22.1
6	Hatari Security Services	561,440.00	18.7
7	Lavington Security Guards Ltd	433,640.00	24.2
8	Cavalier Security Ltd	451,640.00	23.3
9	Kenya Shield Security Ltd	420,268.00	25
10	Brinks Security Services Ltd	520,722.00	20.2
11	Inter Security Services Ltd	487,200.00	21.6
12	Sentry & Patrols Ltd	556,680.00	18.9

The technical and financial score were combined and the results were as indicated in the table in the next page.

Combined technical and financial scores

NO	FIRM	TECHNICAL SCORE (%)	FINANCIAL SCORE (%)	COMBINED SCORE %
1	Cornerstone Security Services	55	24.4	79.4%
2	Wells Fargo Ltd	55	12.8	67.8%
3	Brinks Security Services	60	20.2	80.2%
4	Sunrise Security Services Ltd	55	23.2	78.2%
5	Total Security Surveillance Ltd	65	22.1	87.1%
6	Hatari Security Services	65	18.7	73.7%
7	Lavington Security Guards Ltd	50	24.2	74.2%
8	Cavalier Security Ltd	40	23.3	63.3%
9	Kenya Shield Security Ltd	55	25	80%
10	Inter Security Services Ltd	55	21.6	76.6%
11	Sentry & Patrols Ltd	15	18.9	33.9%

Based on the above information, the evaluation committee recommended the award of the tender to Total Security Surveillance Ltd.

At its meeting held on 18<sup>th</sup> July, 2008, the Tender Committee concurred with the recommendations of the Evaluation Committee and awarded the tender to Total Security Surveillance at its tender price of Kshs. 473, 600.00 per month.

Letters of notification of award to the successful and the unsuccessful bidders were dated 11<sup>th</sup> August, 2008.

## **THE REVIEW**

This Request for Review was lodged by Lavington Security Ltd, the Applicant on September 10<sup>th</sup>, 2008 against the decision of the Tender Committee of Agricultural Finance Corporation, the Procuring Entity in the matter of Tender No.AFC/6/2008 for Provision of Security - Guarding Services.

The Applicant was represented by Mr. C. M. Njuguna while the Procuring Entity was represented by Mr. Rashid Ngaira, both Advocates. Total Security Surveillance Ltd, an interested candidate, was represented by Mr. S. K. Bundotich, Advocate.

## **PRELIMINARY ISSUE ON BOARD'S JURISDICTION**

At the commencement of the hearing, the Board observed that the notification to the parties appears to have been done on August 11<sup>th</sup> 2008 while the request for review was not filed until September 10<sup>th</sup> 2008. On the face of it, the appeal would therefore appear to have been filed outside the statutory period of fourteen days. This was brought to the attention of the Applicant before filing the request for review vide letter Ref Case File No.31/2008 (5) of 10<sup>th</sup> September 2008. In the circumstances, the Board requested the parties to address it on the question of jurisdiction to determine whether it has jurisdiction on the matter before dealing with the merits.

The parties agreed to deal with the issue of jurisdiction as a preliminary issue and made the following submissions.



The Applicant argued that the notification, dated August 11<sup>th</sup>, 2008, which was sent to it, and to the other tenderers, including the successful tenderer, was a nullity. It based its argument on the claim that, at the time that the notifications were sent out, the tender validity period had expired. In this respect, it cited section 2.15.1 of the tender document which states that "...tenders shall remain valid for 90 days or as shall be specified in the invitation to tender after the date of tender opening described by the Procuring Entity pursuant to paragraph 1.18. A tender valid for a shorter period shall be rejected by the procuring entity as non-responsive." In its view the tender validity expired on July 30<sup>th</sup>, 2008 and any notification after this date was void and a nullity. It supported its argument by citing Section 67 of the Act which provides that:

67(1) *"Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.*

(2) *At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.*

(3) *For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security."*

The Applicant further cited Request for Review No. 23 of 2008 between Brinks Security Services Ltd, Applicant and Egerton University, Procuring Entity as authority for the proposition that once the tender validity period has expired no proper notification to the successful tenderer and the unsuccessful tenderer can be issued since the subject tender no longer existed.

The Applicant further submitted that Regulation 73 (2) (c) (ii) which requires that a request for review be made within fourteen days only applies when notification is issued in accordance with Section 67 of the Act. In this case, such notification could only have been issued before tender validity period had expired, which was not the case. In

its view, if the Board finds that there was no proper notification in accordance with Section 67, then it will follow that it has jurisdiction to entertain the appeal. However, if the Board were to find that notification was in accordance with Section 67 then it would have no alternative but to dismiss the appeal.

The Applicant further argued that under section 93 (2) (c) of the Act the only instance when the Board is estopped from entertaining a review, among others, is when the contract has been signed in accordance with Section 68 of the Act. In its view, there is no other provision under the Act or the Regulations, other than Section 93 (2), which ousts the jurisdiction of the Board to entertain a request for review.

On the question as to the effective date of the notification dated August 11<sup>th</sup> 2008, the Applicant stated that the notice was not mailed until August 20<sup>th</sup> 2008 as evidenced by the postal mark on the envelope containing it. According to the Applicant, it received the notification on August 21<sup>st</sup>, 2008. It submitted that the letter was ambiguous as to which tender the Procuring Entity was referring to, having regard to the fact that the advertisement carried out in the "Daily Nation" of April 8<sup>th</sup> 2008 contained several tenders. This was why it wrote to the Procuring Entity on August 21<sup>st</sup> 2008 seeking for a clarification. Response to its letter was received on August 27<sup>th</sup>, 2008.

In the circumstances, the Applicant therefore prayed that its request for review be heard on its merits.

On its part, the Procuring Entity submitted that contrary to the claim by the Applicant, the notification was done on August 11<sup>th</sup>, 2008 and not the August 27<sup>th</sup>, 2008. In support of this position, the Procuring Entity pointed to the fact that all letters to the parties who participated in the tender were dated August 11<sup>th</sup>, 2008. The Procuring Entity further submitted that the Application having been made out of time was in breach of the provisions of Regulation 73 (2) (c) (ii) and should not therefore be entertained by the Board.

The Procuring Entity further argued that the Applicant could not have been unaware of which tender it had participated in as there was only one tender advertised by the Procuring Entity relating to provision of security services. Accordingly, it urged the Board to dismiss the Application.

On its part, the Successful Tenderer submitted that procedure set out under Regulation 73(2) (c) (ii) was mandatory and therefore could not be ignored, as implied by the Applicant. As to the claim by the Applicant that the notification was ambiguous, it asserted that it was clear that the applicant participated in only one tender that was advertised by the Procuring Entity. On the submission by the Applicant that the only provision which estoppes the Board from entertaining a request for review is Section 93 (2)(c ) of the Act it submitted that this Application was frivolous because it was filed out of time. Accordingly, it urged the Board to dismiss the Application.

The Board has considered the submissions by the parties and the documents presented before it and finds as follows:

The issue for determination by the Board is whether or not it has jurisdiction to deal with the request for review by the Applicant on merits of the case. The issue was raised by the Board on its own motion after examination of the documents presented to it by the parties which disclosed that, the application for review was filed by the Applicant on September 10<sup>th</sup>, 2008, whereas the notification to the Successful Tenderer, and other tenderers, is dated August 11, 2008.

The High court has held that the question of jurisdiction is a primary one and must be dealt with at the outset, *whether raised by the parties or not*. [D. CHANDULAL K. VORA & COMPANY LTD. versus PUBLIC PROCUREMENT COMPLAINTS REVIEW BOARD, (MISC. APP. NO. 1160 OF 2004)]. In that case, the learned Judge quotes the late Justice of Appeal, Nyarangi, in the case of "Lillian S" vs. Caltex Oil (Kenya) Ltd (1989) as follows:

**“Jurisdiction is everything. Without it a court has no juris power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”**

In his ruling in the case of D. CHANDULAL K. VORA & COMPANY LTD. cited above, Justice Mohammed Ibrahim pointed out that this principle applies equally to tribunals and other bodies, such as the Public Procurement Complaints, Review and Appeals Board (the predecessor of this Board), that discharge quasi-judicial functions. Accordingly, in this application, the Board was entitled to determine the question of its jurisdiction first before deciding whether to deal with the application on its merits.

In their submissions, the parties have raised issues which touch on both the merit of the application and the question of jurisdiction. In the view of the Board, such matters as the validity of the tender period, and whether or not any notification effected, or purported to have been effected, after expiry of the tender validity period, constitute proper notification go to the merit of the application. In so far as the question for determination is that of jurisdiction, the Board will not deal with such issues in this decision.

On the question of jurisdiction, the arguments by the Applicant rest on two planks. First it claims that the notification dated August 11<sup>th</sup> 2008 was ambiguous in that it did not specify the tender number so as to enable the Applicant to know which tender it was being notified about. It further avers on this limb of its argument that this communication did not reach it until August 21<sup>st</sup>, 2008 whereupon it wrote to the Procuring Entity to seek clarification as to the tender number in question. It received the clarification on August 27<sup>th</sup> 2008. Following receipt of this clarification, the Applicant then proceeded to file its request for review on September 10<sup>th</sup>, 2008.

The first question to determine on this limb of the submission is when the clock started running for the Applicant as far as Regulation 73 (2) (c) (i) is concerned. Did it start running on August 21<sup>st</sup>, 2008 or did it start on August 27<sup>th</sup> 2008? In this determination, there are five critical dates in this chain of events to be considered. These are: the date of the letter of notification (August 11<sup>th</sup>, 2008); the date of dispatch of the letter of notification (August 20<sup>th</sup>, 2008); the date of receipt of the notification letter (August 21<sup>st</sup> 2008); the date of receipt of the letter of response from the Procuring Entity to the Applicant (August 27<sup>th</sup> 2008); and the date of filing of the request for review (September 10<sup>th</sup>, 2008)

As far as the first date, August 11<sup>th</sup> 2008 is concerned, the Applicant has argued that the clock does not begin to run from the date of the letter of notification but rather, from the date of receipt of the notification letter. The Board had consistently held that the appeal window period opens a day after the dispatch of the letter. However, in the event that the Procuring Entity is unable to prove the date of dispatch of the letter, then the Board has held that the appeal window period opens a day after the receipt of the letter of notification by the Applicant.

In the result, and consistent with previous decisions by the Board, in this case the clock should start ticking from August 21<sup>st</sup> 2008. However, it has disputed this date as the point of departure on the ground that the notification was ambiguous for lack of clarity as to which tender the Procuring Entity was referring to. It has submitted that therefore, for purposes of Regulation 73, computation of the days within which a request for review should be filed, should begin from August 27<sup>th</sup> 2008.

It is neither in dispute that the letters of notification sent to all tenderers were dated August 11<sup>th</sup>, 2008 nor has the Procuring Entity challenged the claim by the Applicant that the letter of notification is post-marked August 20<sup>th</sup>, 2008 and was received by the Applicant on August 21<sup>st</sup>, 2008. There is further no dispute as to the date on which the Procuring Entity wrote to the Applicant indicating that the tender

in question was that relating to provision of security services. The letter is dated August 27<sup>th</sup>, 2008. It is not in dispute either as to when this Application was filed. What is in dispute is whether or not this Application was filed within the period of fourteen days as stipulated in Regulation 73 (2) (c) (ii), so as to enclath the Board with jurisdiction to hear the application on its merit.

The Board finds that the explanation by the Applicant that the letter of notification to it by the Procuring Entity was ambiguous is not tenable. In the view of the Board the letter of notification is clear as to the tender in question. Whereas it is true, as claimed by the Applicant, that the Procuring Entity had advertised many tenders, including one for provision of security services, the only one in which the Applicant had participated was the one relating to provision of security services. Therefore, there was no ambiguity as to which tender the Procuring Entity was referring to in the letter of notification, to justify any clarification such as that which the Applicant sought.

The Board therefore finds that the computation of the days under Regulation 73 commenced on August 21<sup>st</sup> 2008 as the letter of notification to the Applicant was dispatched on August 20<sup>th</sup> 2008. This was evidenced by the envelop containing the Applicant's letter which was stamped to have been posted on August 20<sup>th</sup> 2008. In the circumstance, the request for review is clearly outside the appeals window in terms of Regulation 73 (2) (c) (ii).

The second plank on which the Applicant rests its claim is that under Section 93 (2) (c), the only instance in which the Board is estopped from entertaining a review, among others, is where a contract has been signed in accordance with Section 68. Thus, a contract that is not signed in accordance with Section 68 is not excluded from review by the Board. In short, the Applicant sought to persuade the Board that there is a parallel between Sections 67 and 68, according to which, a notification that is not done in accordance with Section 67 is also not excluded from review. In the

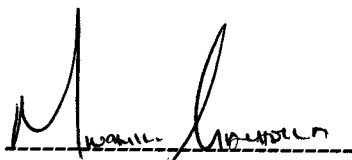
circumstance, the Board should not engage in any inquiry regarding its jurisdiction on this application since it does not fall within the purview of Section 93 (2) (c).

This line of reasoning ignores other provisions of the Act where the application of the Act, and by extension, the jurisdiction of the Board, is ousted. Examples of this are Sections 6 (1) - [Conflict with international agreements]; and 7 (1) - [Conflicts with conditions on donated funds], respectively. In short, there are other provisions in the Act and Regulation which oust the jurisdiction of the Board, apart from Section 93 of the Act.

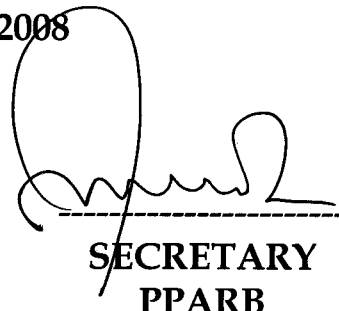
Furthermore, by this reasoning, the Applicant is inviting the Board to determine the matter on its merits, and thus ignore the mandatory language of Regulation 73 (2) (c) (ii), which requires an application for review to be lodged within a specified time frame.

Taking into account all these circumstances the Board finds that this request for review was filed out of time and therefore the Board has no jurisdiction in the matter. Accordingly, the appeal fails and is hereby dismissed. The procurement process may proceed.

Dated at Nairobi on this 7<sup>th</sup> Day of October, 2008

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**CHAIRMAN  
PPARB**

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**SECRETARY  
PPARB**

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