

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 33/2008 OF 13<sup>th</sup> OCTOBER, 2008**

**BETWEEN**

**RACE GUARDS LTD..... APPLICANT**

**AND**

**NATIONAL SOCIAL**

**SECURITY FUND..... PROCURING ENTITY**

Review against the decision of the Tender Committee of the National Social Security Fund dated the 24<sup>th</sup> September, 2008 in the matter of Tender No.AFC/6/2008 for Provision of Security Services.

**BOARD MEMBERS PRESENT**

Ms. J. A. Guserwa - Ag. Chairperson  
Ms. Loise Ruhiu - Member  
Eng. C. A. Ogut - Member  
Amb. C. M. Amira - Member  
Mr. Akich Okola - Member

**IN ATTENDANCE**

Mr. C. R. Amoth - Board Secretary  
Mr. P. M. Wangai - Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Race Guards Ltd**

- Mr. C.M. Njuguna - Advocate, Njuguna & Partners
- Mr. J. Thuku - Advocate, Njuguna & Partners
- Mr. Paul Ndoto - Marketing Manager

### **Procuring Entity, National Social Security Fund**

- Ms. Gloria Masika - Advocate, Kipkenda, Lilan & Koech Advocates
- Mr. Austine Odoyo - Advocate, Kipkenda, Lilan & Koech Advocates
- Mr. Micky Matheka - Advocate, Kipkenda, Lilan & Koech Advocates
- Ms. A. W. Mbogo - Deputy Manager, Procurement
- Mr. G. M. Mwandembo - Assistant Manager, Procurement
- Mr. A. Ombado - Manager, Record Management
- Mr. H. Koech - Legal Officer

### **Interested Candidates**

- Ms. Caroline Nganga - Legal Officer, Factory Guards
- Mr. B. K. Munyasya - Administration Manager, Cavalier Security

## **BOARD'S DECISION**

Upon hearing the representations of the parties appearing before the Board and upon considering the information in all the documents placed before it the Board decides as follows:-

## **BACKGROUND**

The tender for the provision of Guarding Services was advertised by the National Social Security on the 23<sup>rd</sup> May, 2008. The tender was for provision of Security guarding services to View Park and Hazina Towers - Nairobi.

The tenders were closed/opened on 18<sup>th</sup> June, 2008. Thirteen bidders returned their bids and their respective tender bids were considered at the Preliminary Evaluation Stage. This was done to determine the responsiveness to the instructions of the tender and the mandatory requirements of the same.

The Applicant was one of the six tenderers who was disqualified at this Preliminary Evaluation Stage for the reason that its bid was non-responsive.

## **EVALUATION**

The Evaluation of the subject tender was carried out in three stages namely the Preliminary, Technical and Financial stages. At the time of lodging the Request for Review the tender had already been awarded to M/S Lavington Security Guards Ltd and Gillys Security & Investigation Services who were found to be the lowest and second lowest evaluated bidders respectively.

At the Preliminary Evaluation Stage the criteria for evaluation was the provision of:-

- i.) NSSF Compliance
- ii.) Tax compliance
- iii.) Directors details
- iv.) Audited Account - for 2 years
- v.) Legal status of Company for at least 3 years.

Six bidders namely, Race Guards Ltd, Riley Services Ltd, Akshar Team Security Ltd, Riley Falcon Security Services Ltd, Spur Security Services Ltd and G4S Security Services (K) Ltd were found to be non-responsive on the preliminaries and their bids were declared non-responsive.

The remaining seven bidders proceeded to the Technical Evaluation stage which stage the Applicant could not proceed to as it was found to be non-responsive.

The Evaluation and the Tender Committees completed their evaluation work and awarded the tender to the lowest and second lowest evaluated bidders as aforesaid on the 30<sup>th</sup> September 2008.

## **THE REVIEW**

The Applicant lodged the Request for Review on 13<sup>th</sup> October, 2008 after being notified that its bid was found to be non-responsive and therefore could not proceed further in the evaluation process.

The Applicant was represented by Mr. C. M. Njuguna and Mr. J. Thuku, Advocate of Njuguna & Partners Advocates while the Procuring Entity was represented by Ms. Gloria Masika, Advocate. The Interested parties present at the hearing of the Request for Review included Factory Guards Ltd represented by Ms. Caroline Nganga and Cavalier Security represented by Mr. B. K. Munyasya.

The Applicant in its request for review raised Seven (7) grounds of review.

This Review came up for hearing on 7<sup>th</sup> November, 2008. At the instance of the Applicant the hearing was adjourned to 10<sup>th</sup> November, 2008.

On the 10<sup>th</sup> day of November, 2008 at 2.30pm when the Board re-convened its sitting the Applicant confirmed that the Procuring Entity had served it with a letter dated 7<sup>th</sup> of November, 2008 stating the reasons for the Applicant's disqualification in the tender.

● Counsel for the Applicant then proceeded to argue the grounds of the Request for Review as follows:

**GROUND 1, 3, 5, AND 6. Breach Of Section 52, 66 of The Act And Regulations 46, 47, 49 & 50.**

● These grounds were adopted by the Applicant as filed in the Request for Review. Counsel for the Applicant stated that he relied wholly on the written memorandum filed under the aforesaid grounds.

The Applicant cited breach of Sections 52, 66 (4) of the Act and Regulations 46, 47, 49 and 50 of the Regulations 2006 by the Procuring Entity in the evaluation process of the subject tender.

In response, the Procuring Entity argued that the Applicant was disqualified at the Preliminary Stage as it did not meet the mandatory requirements of the tender and more specifically the requirements set out at paragraph 4.3.2 which provided for the supply of audited accounts for the last two years. It

stated that the set of Accounts submitted by the Applicant were not signed by the Auditor who allegedly prepared them and therefore not qualified in law to be referred to as duly Audited Accounts of the Applicant.

The Procuring Entity therefore contended that it had not breached Regulation 46, 47, 49, 50 and Sections 52 and 66 of the Act as alleged by the Applicant. It urged the Board to dismiss the Request for Review.

It made reference to the finding in High Court Misc. Case No. 50 of 2004 - The Republic and the Public Procurement Complaints Review and Appeal Board - (KENATCO case) in which the High Court held that a party who relies on a document that has not been certified nor signed by the Author will not be allowed by law to rely on such documents which do not comply with the relevant legal requirements in that regard.

Further reference was made to Application No. 53 of 2007 Pioneer Plumbers Ltd. Vs NSSF wherein the Board held that a letter supplied by a bidder which led to its disqualification did not contain the appropriate registration certificate. It urged the Board to find that no prejudice was occasioned to the Applicant by the delay in the supply of reasons for disqualification of their tender as requested. Further the Procuring Entity urged the board to find that it had already determined this issue and the Applicant should not be allowed to go back to it.

The Board has considered the submissions of the parties and all the documents that were presented before it.

The Board has noted that the letter dated 30<sup>th</sup> September, 2008 from the Procuring Entity notified the Applicant that it's bid was on-responsive at the Preliminary Stage. Section 66(2) of the Act read together with Regulation 49 provide the manner in which the evaluation of a tender should be done. The Board has further noted that Clauses 4.3.1, 4.3.2, 4.3.3 and 4.3.4 of the tender documents clearly stated the documents to be submitted by the bidders.

The Applicant was disqualified at the Preliminary stage in accordance to Section 66(2) read together with Regulation 47 for failure to supply signed Audited Accounts. The Board is satisfied that the Applicant did not supply signed Audited Accounts which was a mandatory requirement as per Clause 4.3.2 of the Tender Documents. In this regard, the Board finds that the grounds of review by the Applicant alleging breach of Sections 66 (4) and 52 of the Act and Regulations 46, 47 and 50 have no merit.

Accordingly these grounds of review fail.

## **GROUND NO. 2 - BREACH OF SECTION 64 (2)**

The Applicant submitted that the Procuring Entity breached Section 64 of the Act in rejecting the Applicant's tender notwithstanding that the same had substantially satisfied the requirements of the tender and the deviation, if any was minor and excusable under Section 64 (2) of the Act.

The Applicant argued that the Procuring Entity breached Section 66 of the Act in rejecting its tender on the grounds that it failed to substantially meet the requirements of Section 64 (2). It further argued that its bid had a minor deviation that would not affect the substance of the tender. It stated that

although it had supplied the Audited Accounts for the year 2006/7 as required in the tender documents the same did not have the Auditor's certificate which was an oversight on the part of the Applicant. It urged the Board to find that this oversight was an excusable error as envisaged under Section 64 (2)(b) of the Act. It further submitted that such an error would have been corrected through a clarification by the Procuring Entity.

It urged the Board to find that the failure to annex the Auditor's Certificate was an oversight not affecting the substance of the tender.

In response, the Procuring Entity stated that the disqualification of the Applicant at the Preliminary Evaluation Stage was on account of its failure to comply with the mandatory requirements on the supply of the duly signed Audited Accounts as per the Tender Notice and Tender Documents.

The Procuring Entity argued that it had not breached Section 64 and 66 of the Act as alleged by the Applicant and therefore the Request for Review should be rejected.

The Board has carefully considered the submissions by the parties and all the documents presented before it.

The Board has noted that the Applicant failed to supply the duly signed Audited Accounts as required by Clause 4.3.2 of the tender document which provided as follows:

***"4.3.2 statutory/mandatory requirements***

1. ....



2. ....
3. ....
4. *Audited accounts for the last two years (i.e. between the year 2005 and 2008)*
5. ....
6. ....”

As already held the failure to comply with the mandatory requirement made the Applicant’s bid non-responsive. The omission to provide Audited Accounts was not a minor deviation as argued by the Applicant in Clause 4.3.2 which was framed in mandatory terms.

Accordingly, the ground of review also fails.

**GROUND 4 - breach of Section 45 (2) -(3) and Regulations 66 (2)**

The Applicant argued that since it had not been given the reasons as to why it was not successful in its bid, the supply of the written reasons by the Procuring Entity on the directions of the Board was too late in the day and hence prejudicial to its Request for Review. However it acknowledged reasons that it had now been given to by the Procuring Entity for the disqualification of its bid.

In response, the Procuring Entity stated that the Applicant had raised the issue of reasons for disqualification when the Request for Review first came up for hearing and the issue had been adequately addressed by the Board. The Procuring Entity argued that it had complied with the Board’s directive and supplied the Applicant with the written reasons for its disqualification.

The Board has considered the parties' submissions on this ground and the document availed to it and finds that this issue was addressed by the parties when the Request for Review came up for hearing. The Board further observes that the Applicant was served with the reasons for its disqualification and was able to comment on issues during the hearing of the Request for Review. Consequently, no prejudice has been suffered by the Applicant as alleged.

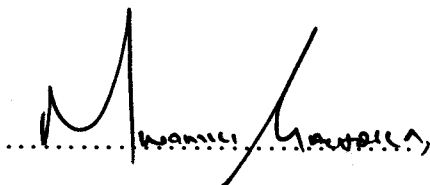
Therefore, this ground lacks merit and also fails.

#### **GROUND 7**

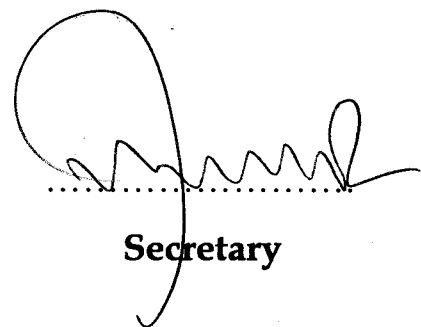
This is not a ground of appeal but a general statement that the Applicant's bid was not subjected to a fair and objective evaluation as per its expectations. This statement is not supported by any breach of the Act or Regulations as required under Regulation 73(2) (a).

Taking all the above matters into consideration, this Request for Review fails and is hereby dismissed. The procurement process may proceed.

**Dated at Nairobi on this 12<sup>th</sup> day of November, 2008**



**Chairman**



**Secretary**