

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW**  
**BOARD**

**CONSOLIDATED APPLICATION NOS. 10 & 11/2007 OF 28<sup>TH</sup>**  
**FEBRUARY, 2007**

**BETWEEN**

**TOTAL SECURITY SURVEILLANCE LIMITED**  
**&**  
**QUICKSTAR SECURITY SERVICES LIMITED, APPLICANTS**

**AND**

**TELKOM KENYA, PROCURING ENTITY**

Appeal against the decision of the Tender Committee of Telkom Kenya dated 2<sup>nd</sup> February, 2007 in the matter of Tender No. TKL/T & C/54/2006 for the Provision of Security Services.

**BOARD MEMBERS PRESENT**

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

**IN ATTENDANCE**

Ms. C. A. Otunga	-	Holding Brief for Secretary
Mr. I. K. Kigen	-	Secretariat

**PRESENT BY INVITATION FOR APPLICATION NOS. 10 & 11/2007**

**Applicants, Total Security Surveillance Limited & Quickstar Security Services Limited**

**Total Security Surveillance Limited**

- Mr. Ruby Okoth - Advocate for the Applicant
- Mr. Wafula Mbayaki - Lawyer
- Mr. Cherutich James - Marketing Manager

**Quickstar Security Services Limited**

- Mr. K. N. Kariuki - Manager

**Procuring Entity, Telkom Kenya**

- Mr. Crispin Odhiambo - Advocate for the Procuring Entity
- Mr. A. Juma - Assistant Senior Superintendent Officer
- Mr. J. N. Mwazi - Assistant Senior Superintendent Officer
- Mr. J. R. Tuikong - Assistant Manager
- Mr. K. Mutuku - Engineer
- Mr. Felix Koskei - Manager, Tenders

**Interested Candidates**

- Mr. Odawa Owuor - Advocate for Race Guards Limited
- Mr. Kevin K. Changwony - Lawyer, Race Guards Limited
- Mr. Paul Ndolo - Manager, Race Guards Limited
- Ms. Carol Ndindi - Lawyer, Sunrise Security Services Ltd
- Mr. Benard Okeyo - Marketing Manager, Cornerstone Security Services Limited
- Mr. Kennedy K. Mose - Operations manager, lavington Security Guards Limited

## BOARD'S DECISION

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

### BACKGROUND

This was an open tender advertised in the local dailies on 16<sup>th</sup> November, 2006. The tender was TKL/T & C/54/2006 for Provision of Security Services.

The tender closing/opening date was 13<sup>th</sup> December, 2006 but was extended to 21<sup>st</sup> December, 2006. Fifty two (52) firms bought the tender documents but forty five (45) returned their duly completed bids. The tender was opened on the due date and attracted the following bidders: -

S/No	NAME OF BIDDER	TOTAL AMOUNT (KSHS)
1.	Factory Guards Limited	Kshs.6, 036,060.00
2.	Dynasty Security Services Limited	Kshs. 2,561,280.00
3.	Private Eye (K) Limited	Kshs. 16,718,140.00
4.	Basein Security Services Limited	Kshs. 1, 330, 000.00
5.	Quickstar Security Services	Kshs. 857, 000.00
6.	Lumwa Security Services Limited	Kshs. 4, 963, 200.00
7.	Amoured Security Alarm limited	-
8.	Protective Custody limited	Kshs. 16, 954, 560.00
9.	Qwao Security Services Limited	Kshs. 465, 000.00
10.	White Rose System Limited	Kshs. 9, 962, 400.00
11.	Radar Limited	Kshs. 92, 818, 560.00
12.	Relay Security Limited	Kshs. 6, 104, 500.00
13.	Blue Reef Security Services	Kshs. 445, 600.00
14.	Spur Security Services Limited	Kshs. 28, 132, 120.00
15.	Hatari Security Guards Limited	Kshs. 52, 299, 840.00
16.	First Force Security Services	Kshs. 9, 523, 440.00
17.	Modern Security Holding Limited	Kshs. 3, 972, 000.00
18.	Malindi Security Guards Limited	Kshs. 262, 200.00
19.	Marmar Ranch Company	Kshs. 105, 000 per month
20.	Sentry & Patrol Limited	Kshs. 1, 008, 272.00
21.	Longonot Security Services Limited	-

22.	Bosman Security Limited	Kshs. 558, 000.00
23.	Secure Homes	Kshs. 1, 173, 600.00
24.	Shika Shika Security Limited	Kshs. 68, 544, 000.00
25.	Cavalier Security Limited	-
26.	Race Guards Limited	Kshs. 7, 187, 952.00
27.	Trafpass Security Services	Kshs. 323, 000 per month
28.	Crush Security Services Limited	Kshs. 1, 176, 000.00
28.	Galana Security services Limited	-
29.	Strath 2000 Guards Limited	Kshs. 4, 500, 000.00
30.	Corner Stone Security Services Limited	Kshs. 3, 906, 300.00
31.	Total Security Surveillance Limited	Kshs. 4, 233, 420.00
32.	Lavington Security Guards Limited	Kshs. 63, 781,800 per annum
33.	Orient Security Services Limited	Kshs. 27, 744, 000.00
34.	Sunrise Security Services Limited	-
35.	Brinks Security Services Limited	Kshs. 9, 890, 247 per month
36.	G4s Security Services (K) Limited	Kshs. 23, 010, 760.00
37.	Kenya Shield	Kshs. 2, 347, 840.00
38.	Inter Security Services Limited	Kshs. 2, 179, 640.00
39.	Idler Security Services Limited	Kshs. 1, 355, 500.00
40.	Armor Group	Kshs. 1, 915, 392.00
41.	Pinkertons (K) Limited	Kshs. 2, 714, 400.00
42.	Garey Vigilance Security Limited	Kshs. 26, 907, 264.00
43.	Gillys Security & Investigation Services	Kshs.14, 414, 160.00
44.	Parklands security Services Limited	Kshs. 22, 132, 200.00
45.	Ash Security Services Limited	Kshs. 2, 314, 200.00

## THE EVALUATION OF THE TENDER

The evaluation process was conducted as follows: -

- i. Compliance with mandatory requirements
  - a. Tender security of 2 % as per Clause 7.1 of the tender document.
  - b. Fixed price quotation in Kenya shillings as per Clause 9.3 and 10.1
  - c. Tender validity of 120 days as per Clause 7.3 and 11.1
  - d. Registration certificates as per Section J, Clause 4

ii. Evaluation criteria

1.	Instructions to Bidders	10%
2.	Technical	70%
3.	Commercial	20%
	TOTAL	100%

Twenty eight (28) bidders failed to meet the mandatory requirements and were disqualified. These were as follows:

S/No	NAME OF BIDDER	BID PRICE (KSHS)
1.	Factory Guards Limited	Kshs.6, 036,060.00
2.	Dynasty Security Services Limited	Kshs. 2,561,280.00
3.	Private Eye (K) Limited	Kshs. 16,718,140.00
4.	Basein Security Services Limited	Kshs. 1, 330, 000.00
5.	Amoured Security Alarm limited	Kshs.
6.	Qwao Security Services Limited	Kshs. 465, 000.00
7.	White Rose System Limited	Kshs. 9, 962, 400.00
8.	Relay Security Limited	Kshs. 6, 104, 500.00
9.	Hatari Security Guards Limited	Kshs. 52, 299, 840.00
10.	First Force Security Services	Kshs. 9, 523, 440.00
11.	Modern Security Holding Limited	Kshs. 3, 972, 000.00
12.	Malindi Security Guards Limited	Kshs. 262, 200.00
13.	Longonot Security Services Limited	Kshs.
14.	Secure Homes	Kshs. 1, 173, 600.00
15.	Shika Shika Security Limited	Kshs. 68, 544, 000.00
16.	Cavalier Security Limited	Kshs.
17.	Trafpass Security Services	Kshs. 323, 000 per month
18.	Crush Security Services Limited	Kshs. 1, 176, 000.00
19.	Galana Security services Limited	Kshs.
20.	Strath 2000 Guards Limited	Kshs. 4, 500, 000.00
21.	Orient Security Services Limited	Kshs. 27, 744, 000.00
22.	Sunrise Security Services Limited	Kshs.
23.	Brinks Security Services Limited	Kshs. 9, 890, 247 per month
24.	Kenya Shield	Kshs. 2, 347, 840.00
25.	Inter Security Services Limited	Kshs. 2, 179, 640.00
26.	Armor Group	Kshs. 1, 915, 392.00
27.	Garey Vigilance Security Limited	Kshs. 26, 907, 264.00
28.	Gillys Security & Investigation Services	Kshs.14, 414, 160.00

Eighteen (18) bidders qualified and were subjected to further evaluation. These were as follows: -

S/No	NAME OF BIDDER	BID PRICE (KSHS)
1.	Quickstar Security Services	Kshs. 857, 000.00
2.	Lumwa Security Services Limited	Kshs. 4, 963, 200.00
3.	Protective Custody limited	Kshs. 16, 954, 560.00
4.	Radar Limited	Kshs. 92, 818, 560.00
5.	Blue Reef Security Services	Kshs. 445, 600.00
6.	Spur Security Services Limited	Kshs. 28, 132, 120.00
7.	Marmar Ranch Company	Kshs. 105, 000 per month
8.	Sentry & Patrol Limited	Kshs. 1, 008, 272.00
9.	Bosman Security Limited	Kshs. 558, 000.00
10.	Race Guards Limited	Kshs. 7, 187, 952.00
11.	Corner Stone Security Services Limited	Kshs. 3, 906, 300.00
12.	Total Security Surveillance Limited	Kshs. 4, 233, 420.00
13.	Lavington Security Guards Limited	Kshs. 63, 781,800 per annum
14.	G4s Security Services (K) Limited	Kshs. 23, 010, 760.00
15.	Idler Security Services Limited	Kshs. 1, 355, 500.00
16.	Pinkertons (K) Limited	Kshs. 2, 714, 400.00
17.	Parklands security Services Limited	Kshs. 22, 132, 200.00
18.	Ash Security Services Limited	Kshs. 2, 314, 200.00

The evaluation was conducted in three categories i.e. Category A, Category B and Category C. Bidders who qualified technically were subjected to further commercial evaluation.

Based on the schedule of requirements and price quotations, there were 11 successful bidders.

The Evaluation Committee recommended award to nine (9) bidders as follows: -

S/No.	Recommended Bidder	No. of stations	Total amount per month (Kshs.) - Net
1.	Cornestone Security Services Ltd	154	2, 966, 700.00
2.	Lavington Security Guards Ltd	23	1, 016, 200.00
3.	Lumwa Security Services Ltd	22	387, 200.00

4.	Pinkerton's Kenya Limited	17	428,040.00
5.	Protective Custody Limited	75	1,356,040.00
6.	Race Guards Limited	167	3,677,570.00
7.	Radar Limited	15	482,560.00
8.	Spur Security Services Limited	2	528,960.00
9.	Total Security Surveillance Limited	1	31,320.00
	<b>Totals</b>	<b>476</b>	<b>10,874,590.00</b>

The Tender Committee concurred with recommendations of the evaluation committee and awarded the tender to the 9 bidders at their respective tender prices.

### **THE APPEAL**

At the hearing, it was noted that the two Appeals arose out of one tender and involved the same parties. It was therefore agreed by consent of all the parties that the two Appeals be consolidated and heard concurrently.

After consolidation, Mr. C. M. Njuguna for Race Guards Ltd and Lavington Security Guards Ltd, the interested candidates, indicated that they had filed a notice of preliminary objection based on the following grounds: -

- “ (a) The Appeals shall stay and/or delay the instant procurement process beyond the stipulated time in breach of the word and spirit of Section 97 (2) of the Public Procurement and Disposal Act.
- (b) The Appeals have been filed out of time in breach of Regulation 73 (2) of the Public Procurement and Disposal Regulations, 2006.
- (c) The Appeals are incompetent.”

Counsel withdrew the first ground of the preliminary objection and argued the other two. After the arguments by the parties, the Board dismissed both preliminary objections and stated that due to time constraints reasons would be incorporated in this decision. We now give the reasons for the dismissal of the Preliminary Objections.

**(a) Whether the appeals were filed out of time in breach of regulation 73(2) of the public procurement and disposal regulations, 2006.**

Counsel for the interested candidates argued that under Regulation 73(2) (c) (ii), this Appeal should have been filed within Fourteen (14) days of the date of notification.

Counsel stated that the parties were notified of the award on 7<sup>th</sup> February, 2007. Therefore the last day for filing the appeal was 21<sup>st</sup> February, 2007. However, the two appeals were filed on 28<sup>th</sup> February, 2007.

The interested candidates argued that although this procurement commenced before 1<sup>st</sup> January, 2007 which was the commencement date of the Public Procurement and Disposal Act, 2005, it was governed by paragraph 12 of the Third Schedule, Transitional Provisions, which provides as follows:-

*“Proceedings before the Public Procurement Review, Complaints and Appeal Board established under the Exchequer and Audit (Public Procurement) Regulations, 2001 shall be continued before the Review Board under Part VII and the provisions of that Part shall apply, with necessary modifications”.*

Accordingly, Part VII of the Act, which provides for Administrative review is applicable to these appeals with modifications. The time for filing the appeals under the Act and Regulations had lapsed and therefore the two Appeals should be dismissed.

Counsel argued that under Paragraph 12 aforesaid, the procedural law governing the filing of appeals fell under Part VII, of the Act, which invokes the 2006 Regulations under Regulation 73 of the Regulations. The appeals were therefore filed out of time.

The two Applicants in the Appeals opposed the Preliminary objection. They stated that the procurement proceedings, the subject of the two appeals, commenced before the commencement date of the Public Procurement and Disposal Act, 2005. Accordingly, this procurement was governed by the Exchequer and Audit (Public Procurement) Regulations, 2001 as provided for in paragraph 3 of the Third Schedule in the Public Procurement and Disposal Act, 2005. They argued that the Appeal ought to have been filed within Twenty One Days of the notification. As notification was done on 7<sup>th</sup> February, 2007, the last day for filing the Appeals was on 28<sup>th</sup> February, 2007. The two Appeals were filed on 28<sup>th</sup> February, 2007 and were therefore within time.



The Procuring Entity, opposed this limb of the Preliminary objection and indicated that there was no conflict between the Public Procurement Regulations, 2001 and the Public Procurement and Disposal Act, 2005. This procurement was conducted under and governed by the Public Procurement Regulations, 2001. Accordingly, the Appeals were filed within time.

The Board has carefully considered the arguments of the parties and examined the documents submitted before it.

It is not disputed that the tender, the subject of this appeal, was advertised on 16<sup>th</sup> November, 2006. That was before the commencement of the Public Procurement and Disposal Act, 2005 which came into operation on 1<sup>st</sup> January, 2007. Under the provisions of the Third Schedule of the said Act, the procurement proceedings were to be continued under the Public Procurement Regulations, 2001.

The interested candidates argued that after the Act came into operation the substantive rights continued to be governed by the Public Procurement Regulations, 2001, and that the procedural rights were now governed by the Act. This kind of argument does not find support in the Third Schedule of the Act, which deals with Transitional provisions. This tender was governed by the Public Procurement Regulations, 2001 which were in force when the tender commenced. The bidders could file an appeal at any stage of the tender proceedings, if they were dissatisfied with any aspect of the tender. That right accrued upon commencement of the tender. Accordingly, under the 2001 Regulations, the appeals ought to have been filed within twenty one days. The Board has noted that the appeals were filed on 28<sup>th</sup> February, 2007 which was the last day for filing the appeals.

In view of the foregoing, this limb of the Preliminary Objection has no merit, and is hereby dismissed.

***(b) Whether the appeals are incompetent***

The two interested candidates argued through Counsel, that the two Appeals were incompetent as they did not indicate the loss or damage the Applicants in the Appeals had suffered or were likely to suffer.

Further, the two interested candidates argued that Section 93(2) of the Public Procurement and Disposal Act, 2005 was similar to Regulation 40

of the 2001 Regulations, and the loss and damage to be suffered had to be specified in the memoranda.

It was argued that the two Appeals were incompetent as the loss and damage suffered was not set out in the Memoranda of appeal of both Applicants. Accordingly, the two appeals should be dismissed.

In its submissions, the Procuring Entity supported this limb of the preliminary objection, and associated itself with the arguments of the interested candidates.

On their part, the Applicants in the two Appeals opposed the preliminary objection. They argued that although the loss and damage they had suffered, or were likely to suffer, was not tabulated in their Memoranda of appeal, the Applicants were naturally bound to suffer loss and damage due to the breach of the Regulations by the Procuring Entity. They further argued that it was on account of breach of the Regulations by the Procuring Entity that they were not awarded the tender, and therefore they suffered loss.

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

It is not disputed that the two Memoranda of appeal do not have a specific tabulation of damage or loss that the two Applicants had suffered or were likely to suffer. The Board has previously dealt with this question of loss and damage in the case of PRIMA PEST & BINS CONTROL CO. LTD AND INTERWASTE (PTY) LTD VS MUNICIPAL COUNCIL OF MOMBASA AND MOMBASA SOLID WASTE MANAGEMENT CO. LTD, APPLICATION NO. 6 OF 2006. In that case, the Board held as follows: -

***“It is clear that under Regulation 42(2) there is a requirement that an Applicant for administrative review should indicate the loss and damage he claims to have suffered or risk suffering ensuing from breach of the Regulations. Regulation 40(1) is worded in similar terms in that it provides that: -***

***“..... any candidate who claims to have suffered or to risk suffering loss or damage due to the breach of a duty imposed on the Procuring Entity by these Regulations may seek administrative review.....”***

*Thus reading Regulations 40 (1) and 42 (2) together, it is clear that an Applicant should indicate or show that he risks suffering loss or damage or that he has in fact suffered loss or damage occasioned by a breach of the Regulations.*

*The critical question that arises is whether there is a form in which the statement of the alleged loss must be made, and if so, whether failure to do so in such form is fatal to an application for review, the result of which would be that the application must fail and be struck out as prayed by the Procuring Entity.*

*The Regulations do not provide for the form or manner in which the statement of loss or damage should be made. Regulation 42 (2) which states the details to be included in the request for review, merely requires that the request "shall state the reasons for the complaint, including..... the ensuing loss or damage to the complainant ....." The Regulation leaves it open to the complainant to indicate how and in what manner to incorporate its allegation of loss or damage.*

*The question that arises, therefore, is what loss or damage must be stated?.*

*Black's, Law Dictionary defines "loss" as follows:-*

*"Loss is a generic and relative term. It signifies the act of losing or the thing lost; it is not a word of limited, hard and fast meaning, and has been held synonymous with or equivalent to 'damage', 'damages', 'deprivation', 'detriment', 'injury' and 'privation'".*

*Loss therefore includes detriment or deprivation and such-like prejudice suffered by the person alleging it.*

*Thus an Applicant may make any statement in its request for review that falls within the wide, generic and relative definitions of the term "loss"."*

The Board has noted that in the two Memoranda of appeal, it is stated that the Procuring Entity breached the Regulations. As a result, the two Applicants allege that the award was not fair. In Appeal No. 10/2007, the Applicant alleges that the Procuring entity acted unfairly, unjustly and discriminatively thereby violating Regulation 4. The Applicant in Appeal No. 11/2007 alleges that the Procuring Entity contravened Regulation 30 (8) by awarding the contract to a bidder who was higher priced than the Applicant. In our opinion, in these statements the Applicants are alleging

that they have suffered prejudice and deprivation by virtue of subjective treatment of their tenders. We therefore, find that the complaints of breach of the Regulations leading to failure to make an award to the two Applicants, constitute statements of loss, deprivation, injury or detriment sufficient for purposes of requests for review under the Regulations.

Accordingly, this limb of the preliminary objection also fails and is hereby dismissed.

### **DECISION ON THE MERITS OF THE APPEALS**

Having dismissed the preliminary objections, the parties proceeded to argue the two Appeals on merit and we now deal with them as follows: -

#### **APPEAL NO. 10 OF 2007**

In this Appeal the Applicant raised five grounds, which we deal with as follows: -

#### **Ground No. 1 and 2 – Breach of Regulation 32**

The Applicant alleged that, in its letter dated 7<sup>th</sup> February, 2007, the Procuring Entity stated as follows: -

**“DF: 5701/T&C/2006**

**7<sup>th</sup> February, 2007**

**M/s. Total Security Surveillance Ltd.  
P.O Box 4243-00506  
NAIROBI**

**Dear Sir,**

**RE: TENDER FOR PROCUREMENT OF SECURITY SERVICES**

**Reference is made to the above.**

**We refer to your offer for the above Tender and wish to inform you that Telkom Kenya has awarded you the Tender for provision of Security**

services in Telkom Kenya for a period of one (1) year commencing 1<sup>st</sup> March, 2007 to 28<sup>th</sup> February, 2008 at a total cost of Kshs. 31,320.00 per month as per attached schedule subject to successful negotiations.

We shall get in touch with you soon.

Yours faithfully

**ERICKSON E. BAND  
FOR MANAGING DIRECTOR”**

The Applicant argued that the phrase “subject to successful negotiations” in the letter of award, implied that the Procuring Entity was in breach of Regulation 32 which provides as follows: -

*“A tenderer shall not be required, as a condition for award, to undertake responsibilities not stipulated in the tender documents, to change its price or otherwise to modify its tender”.*

It submitted that that phrase “subject to successful negotiations” implied that the Procuring Entity intended to negotiate on price among other things. It argued that this was also in contravention of clause 22.1 of the tender document, which provided as follows: -

**“TKL reserves the right at the time of contract award to increase or decrease the quantity of services originally specified in the schedule of requirements without any change in unit price or other terms and conditions”.**

According to the Applicant, the Procuring Entity’s attempt to renegotiate the award was a breach of the Regulations.

In response, the Procuring Entity submitted that the Applicant had no complaint at all on the tender documents or the tender evaluation process. It denied breach of Regulation 32 and stated that the words “subject to negotiations” are standard terms in the tender process. It stated that the tender was clear on the price or cost of the tender and that the successful tenderer had to accept the other terms of the award. It further submitted, that it had no intention to vary the price or any other terms or introduce other conditions.

Finally, it submitted that clause 22 of the tender document gave the Procuring Entity the right to vary quantities, but it was clear that there would be no change in unit price or other terms and conditions.

The successful candidates also opposed this ground and stated that there was no breach of Regulation 32. They stated that if the phrase “subject to negotiations” in the letter of award was in breach of the Regulations, the Board could remedy the position by ordering the deletion of that clause from the letter of award.

The Board has carefully considered the arguments of the parties and the documents submitted before it.

It is clear that the Applicant was awarded a tender for provision of security services for Gigiri Station in Nairobi North. The letter also clearly states the price per month to be Kshs. 31,320. The schedule to the letter of award stipulates the number of guards as three at a price of Kshs. 10,440 per guard per month.

No evidence was provided by that the Procuring Entity has negotiated or varied that price as alleged by the Applicant. The arguments by the Applicant are speculative and not backed by any evidence. Further, the argument that the Procuring Entity breached clause 22 of the tender document has no merit. That clause only reserves the right of the Procuring Entity to vary the quantities, and not price.

Accordingly, this ground of Appeal fails. However, for avoidance of any doubt and to avoid confusion, the Board hereby orders that the phrase “subject to successful negotiations” be and is hereby deleted from the letter of notification.

### **Ground No. 3 - Breach of Regulation 4**

The Applicant submitted that it was a previous supplier of security services to the Procuring Entity and that it had performed satisfactorily. However, when this tender was awarded, the Applicant was awarded a tender to supply only 3 guards out of the total number of 1,193. To the Applicant, this showed that the Procuring Entity had acted unfairly, unjustly and discriminatively.

The Applicant further submitted, that the number of guards should have been distributed equally to all the nine responsive bidders. By failing to do so, the Procuring Entity breached Regulation 4.

In response, the Procuring Entity stated that the evaluation process was done in three stages. Firstly, the bidders were evaluated on responsiveness and were checked for mandatory requirements. The bidders who failed to meet mandatory requirements were disqualified. Secondly, the responsive bidders were subjected to technical responsiveness. After the technical evaluation, nine bidders, who included the Applicant, were subjected to commercial evaluation.

The Procuring Entity submitted that at the commercial evaluation stage, the bidder with the lowest price per station was awarded the tender, and it would have been improper and in breach of the Regulations to use the principle of equal distribution.

The Board has carefully scrutinized the technical evaluation and commercial evaluation reports. The Board has noted that the Applicant quoted the lowest price in only one station, that is Gigiri Station, in Nairobi North. It was awarded the tender in that station. The Board has further noted that in all the other stations, the successful bidders had the lowest prices, and that all of them had passed the first two stages of responsiveness and technical evaluation. Therefore, those bidders were the lowest evaluated bidders and the award to them was in accordance with Regulation 30(8).

Finally, it is clear from the grounds of Appeal and the submissions that the Applicant was not attacking the way in which the tender process and evaluation were conducted. Its only concern was that the guards should have been distributed equally. The Board agrees with the arguments of the Procuring Entity that the tender ought to, and was awarded to the lowest evaluated bidders.

Accordingly, this ground of Appeal also fails.

#### **Ground 4 – Breach of existing contract**

The Applicant argued that the Procuring Entity was purporting to terminate the existing contract without issuing sufficient notice. It therefore prayed

that the Board declare that such action was in breach of the contract and prayed that the Procuring Entity be ordered to give a thirty-day notice of termination.

In response, the Procuring Entity and the interested candidates stated that this ground was misconceived as the Board was dealing with issues arising from the tender only. The previous contract was not an issue within the jurisdiction of the Board.

The Board agrees with the submission of the Procuring Entity and the interested candidates.

Under Regulation 40(1) administrative review is available to a candidate who has submitted a tender and has suffered or risks suffering loss or damage due to a breach of a duty imposed on the Procuring Entity by the Regulations. Any issue arising from the previous contract is therefore outside the jurisdiction of the Board.

The ground therefore lacks merit and, accordingly, it also fails.

### **Ground 5**

This is not a ground of appeal but a statement that the Procuring Entity's award was irregular. As we have already stated, the award by the Procuring Entity was made in accordance with the Regulations.

### **APPEAL NO. 11 OF 2007**

This appeal raised only one ground, that is breach of Regulation 30(8) (a).

The Applicant argued that it had the lowest price in the categories in which it tendered. It stated that in central region it quoted Kshs. 9,106 per guard per month whereas the successful candidate, Race Guards Limited, had quoted Kshs. 10,400 per guard per month. In Eastern Region it had quoted Kshs. 8,120 per guard per month, whereas the successful candidate, Race Guards Limited, had quoted Kshs. 10,400 per guard per month.

In view of the prices quoted, the Applicant argued that since it had the lowest price it should have been awarded the tender.



In response, the Procuring Entity submitted that the Applicant's tender was disqualified at the technical evaluation stage. It stated that the Applicant failed in three key parameters namely: -

- a. Professional Association Membership.
- b. NSSF/NHIF contribution.
- c. UHF/Radio communication equipment.

Further, it submitted that it was a tender requirement that a bidder had to show evidence of ownership of at least six vehicles. The Applicant, produced only two log books where it was the registered owner. The other logbooks did not bear its names.

The bid by the Applicant was therefore declared technically unresponsive and was disqualified.

The Board has noted that the Applicant failed to meet key requirements of the technical evaluation. Firstly, it did not provide a certificate of membership to a professional association. It admitted that it did not attach any certificate in its tender. Secondly, the Applicant conceded that it was a requirement of the tender that a bidder had to show evidence of NSSF/NHIF contribution for at least 100 employees. The Applicant admitted that it had not provided evidence of NSSF contribution in its tender. As for NHIF contribution, it had a letter which did not show the number of employees whose contributions were being made.

Thirdly, the Applicant conceded that it did not have UHF/Radio communication or equipment. It argued that it used mobile phones instead.

Lastly, the Applicant conceded that it had only two log books where its names appeared as the registered owner.

The Board has scrutinized the tenders of all the successful candidates. It noted that all of them met the technical requirements stipulated in the tender. As the Applicant, failed to meet these technical requirements, its bid was properly disqualified. The Board has stated severally that price alone is not the only consideration in a tender. For a tender to be the lowest evaluated it has to meet all the evaluation criteria.

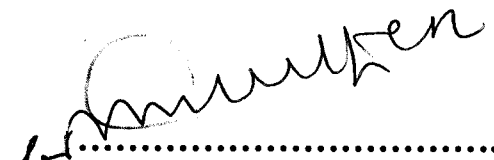
Accordingly, this ground of Appeal lacks merit, and it fails.

Taking all the above matters into consideration, all the grounds of Appeal in the two consolidated appeals fail.

Accordingly, we hereby dismiss the two Appeals and order that the procurement process may proceed. As earlier determined, the phrase "subject to successful negotiations" in the Procuring Entity's letter of award dated 7<sup>th</sup> February, 2007, is hereby ordered expunged.

**Dated at Nairobi on this 26<sup>th</sup> day of March, 2007**

  
.....  
**CHAIRMAN**  
**PPCRAB**

  
.....  
**SECRETARY**  
**PPCRAB**