

SCHEDULE 1
FORM 4
REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO .2/2008 OF 18TH JANUARY, 2008

BETWEEN

METRO CONSULTANTS & GUARDIAN LIMITED..... (APPLICANT)

AND

CHEMELIL SUGAR COMPANY LIMITED..... (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Chemelil Sugar Company Limited (Procuring Entity) dated the 13th day of December, 2007 in the matter of Tender No. CSC/T2007 - 08/17 - 001 for the Provision of Security Services.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Ms. Loise Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Mr. S. K. Munguti	-	Member
Ms. J. A. Guserwa	-	Member
Amb. C. M. Amira	-	Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Ms. P. K. Ouma - Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 2/2008

Applicant, Metro Consultants & Guardian Limited

Mr. Amos Wandago - Advocate, Eboso & Wandago Co. Advocates
Mr. S.K. Ngii - Advocate, Eboso & Wandago Co. Advocates
Ms. Mary Owuor - Managing Director,
Mr. L. O. Saika - Area Manager,

Procuring Entity, Chemelil Sugar Company Ltd

Mr. Migos Ogamba - Advocate, Migos Ogamba & Co. Advocates
Mr. David Mutunga - Advocate, Migos Ogamba & Co. Advocates
Mr. Tobias Oloo - Procurement Manager

Interested Candidates

Mr. T. Ngoye - Advocate, Bedrock Holdings Ltd.
Mr. Fred Obola - Administrative Officer, Riley Falcon Security
Ltd.

BOARD'S DECISION

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

BACKGROUND

The Procuring Entity, Chemelil Sugar Company Ltd advertised for the Prequalification of Suppliers for Provision of Security Services and the closing/opening date was 3rd May, 2007. Nine firms responded and four firms, Bedrock Security Limited; Riley-Falcon Security Limited; Total Security Surveillance Limited and Metro Consultants & Guardian Limited were pre-qualified and invited to submit bids on 14th November, 2007. The tender was opened on 29th November, 2007.

The evaluation was carried out on the prequalification documents. The Procuring Entity used the pre-qualification marks as the technical score for the tender under review. The Procuring Entity then evaluated the prices using the following formulae to get the winning bid.

$$SF = 100 \times FM/F$$

Where:

- FS - Financial Score
- FM - Lowest priced financial proposal
- F - Financial proposal of the bidder being evaluated

The "technical" and financial scores were then combined and divided by two to get the following scores:-

Bedrock Holdings	-	93%
Total Security	-	85%
Metro Consultant	-	87%

The evaluation committee recommended the tender to be awarded to M/s Bedrock Holdings. The Procuring Entity's Tender Committee in its meeting held on 13th December, 2007 awarded the tender to M/s Bedrock Holdings Limited at Kshs. 21,905,304.00.

PRELIMINARY OBJECTION

The Procuring Entity filed a Preliminary Objection on 4th February, 2008 contending that the Board had no Jurisdiction to hear the Appeal as it had signed a contract with the successful tenderer. It argued that the contract with the successful tenderer was signed on 22nd January, 2008. Therefore in view of the provisions of Section 93 (2) (c) the Board had no Jurisdiction to hear the Appeal.

It further submitted that the Request for Review was filed on 18th January 2008 but received by the Procuring Entity on 23rd January 2008. It averred that Section 68 (2) of the Act stated that a written contract between the winning tenderer and the Procuring Entity could be signed at any time after the expiry of fourteen (14) days from the date of notification. The notification to the tenderer was made on 7th January 2008. Therefore, the fourteen (14) days appeal window expired on 21st January, 2008.

In Response, the Applicant stated that the Request for Review was filed within time. It submitted that the notification was done by a letter dated 7th January 2008 which was received on 8th January 2008. It urged that the 14 days started running on 9th January, 2008 and the last day for filing was 22nd, January, 2008. It argued that it filed the Request for Review on 18th January, 2008 which was within the stipulated time.

It further submitted that the Contract was entered into before the 14 days period had lapsed as provided by Section 68 (2) of the Act. It averred that the earliest day that any contract would have been signed would have been 23rd January, 2008. Therefore the Board had Jurisdiction to hear and determine the Appeal as the Contract was not signed in accordance with Section 68 (2).

In reply, the Procuring Entity reiterated that the notification was effected on the 8th January, 2008 and therefore it complied with the provisions of Section 68 of the Act by signing the contract on 22nd January, 2008

BOARDS RULING ON THE PRELIMINARY OBJECTION

After considering the submissions of the parties and the documents submitted, the Board decides as follows:

It is clear that under Section 93 (2) (c) of the Act, the Board has no jurisdiction in cases where a contract is signed in accordance of Section 68 of the Act. Section 68 (2) provides that a Procuring Entity shall not sign a contract until at least 14 days have lapsed from the date of notification. Therefore, the issue to be determined is when the Applicant was notified and the earliest day when the Procuring Entity could lawfully enter into a contract.

The Board has held severally that counting of days begin from the following day, from the date of notification. There is no evidence from the Procuring Entity, to counter the argument by the Applicant that they were notified on 8th January, 2008. Section 67 of the Act places the burden of notifying the parties on the Procuring Entity. There is no evidence that the Applicant was notified on 7th January 2008 as argued by the Procuring Entity. Indeed, the

delivery book from the Procuring Entity was not clear as the date had been altered.

The Board holds that the Applicant was notified on 8th January 2008 and counting the 14 days from 9th January, 2008, the 14 days appeal window expired on 22nd January 2008. Accordingly, in terms of Section 68 (2), the first day that the Contract could be signed was 23rd January, 2008.

In the circumstances, as the Contract was not signed in accordance with Section 68 of the Act, the Board has jurisdiction to hear the Appeal. Therefore, the Preliminary Objection fails.

THE APPEAL

The Applicant, Metro Consultants & Guardian Limited filed the Request for Review on 18th January, 2008. The Applicant was represented by Mr. Amos O. Wandago, advocate while the Procuring Entity was represented by Mr. Migos Ogamba, Advocate and Mr. Tobias Oloo the Procurement Manager. The interested candidates present included Bedrock Holdings Ltd and Riley Falcon Security Ltd which were represented by Mr. T. Ngoye, advocate and Mr. Fred Obola respectively.

The Request for Review raised three grounds which we deal with as follows:

Grounds 1 and 2

These grounds have been combined as they raise similar issues.

The Applicant submitted that the Procuring Entity breached Section 66 of the Act and Regulation 50 by awarding the tender to Bedrock Holdings Limited

which was the second lowest evaluated bidder. It argued that it was pre-qualified and passed the technical evaluation stage and it had the lowest price. It stated that if evaluation was done properly it would have been the lowest evaluated bidder.

In response, the Procuring Entity stated that it awarded the tender to the bidder which had the highest combined score of both financial and technical scores in accordance with Section 66 (1) and Regulation 50 (1). Further, that it was not obligated to award the tender to the bidder with the lowest price.

It further submitted that it advertised for pre-qualification of the bidders and evaluated the bids technically. It then did a commercial evaluation and combined it with technical results of the prequalification. After evaluation, Bedrock Holdings Ltd scored 93%, Metro Consultants and Guardian Ltd scored 87% and Total Security Surveillance Ltd scored 85%. It then awarded the tender to Bedrock which had the highest score. It stated that it was not true that Metro Consultants was the lowest bidder in terms of the evaluated price as stipulated in Regulation 50.

The Board has carefully considered the representations of the parties, and examined the documents submitted before it and finds as follows:

The Board has noted that there was no technical evaluation of the tender as specified in Section 22 and 23 of the tender document. The Procuring Entity used the technical scores of the pre-qualification exercise in awarding the tender. The Board notes that Pre-qualification of bidders is a non-priced exercise which facilitates maintaining of a list of firms which are qualified and subsequently issued with tender documents for competitive bidding.

However, upon tendering, the bids are to be evaluated based on predetermined criteria in the tender documents.

The Board holds that in the absence of a technical evaluation, the tender was not awarded to the lowest evaluated bidder in terms of Section 66 (4).

In view of the foregoing these grounds succeeds.

Ground 3

In this ground, the Applicant alleged that the Procuring Entity breached Section 66 (2) of the Act. It submitted that the Procuring Entity did not evaluate the tenders using the procedure and criteria which was set out in the tender document. As a result the tender was awarded to a bidder who had a price which was higher than that of the Applicant. It argued that the Procuring Entity would have saved a sum of Kshs. 2 million if it had awarded the tender to the Applicant.

In response, the Procuring entity submitted that it used the criteria stipulated in its prequalification documents. It argued that the technical requirements that were in the pre-qualification documents were similar and hence it used the scores of the pre-qualification to form the technical scores. It then used a formula indicated in the evaluation report to ascertain the financial score of the bidders and awarded the tender to the bidder with the highest combined score.

Upon considering the representations and the documents submitted, the Board notes that Section 66(2) states that;

"the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used".

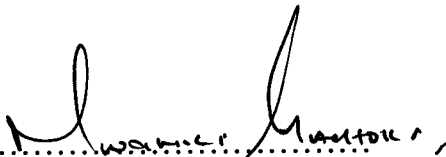
The Board has further noted that the tender document in Section E contained technical specifications that enumerated ten parameters which tenderers were to adhere to. However, these parameters were not evaluated and only the prices quoted in the tenders were considered. In addition, the Procuring Entity used a formula that was not included in the tender documents in its calculation of the financial scores. This was contrary to Section 66 (2) of the Act.

The Board further finds that the use of the prequalification scores to form the technical scores of the tender was irregular and amounted to introduction of a new criteria contrary to Section 66 (2) of the Act.

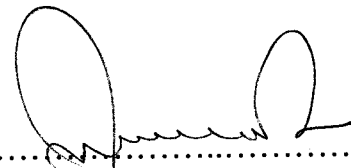
Accordingly this ground also succeeds.

In view of the foregoing, the appeal succeeds and the award is hereby annulled. The Procuring Entity may re-tender.

Dated at Nairobi on this 12th day of February, 2008


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Signed Chairman


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Signed Secretary

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