

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 27/2008 OF 5th AUGUST 2008

BETWEEN

RILEY FALCON SECURITY LTD (APPLICANT)

AND

**NATIONAL CEREALS AND PRODUCE BOARD (PROCURING
ENTITY)**

Appeal against the decision of the Tender Committee of **NATIONAL CEREALS AND PRODUCE BOARD** (Procuring Entity) dated the 10th Day of July 2008 in the matter of Tender No. NCPB/SEC/01/2008-2010 for **Provision of Security Services and Alarm System.**

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Ms. Pamela Ouma	-	Holding Brief for the Secretary
-----------------	---	---------------------------------

PRESENT BY INVITATION

Applicant, Riley Falcon Security Ltd.

- Mr. Duncan Anzala - Advocate, Agimba & Associates
Mr. T. O. See - Director
Mr. J. N. Musomba - Director

Procuring Entity, National Cereals and Produce Board

- Mr. Patrick Lutta - Advocate, Lutta & Co. Advocates
Mr. Bernard Chege - Advocate, Lutta & Co. Advocates

Interested Candidates

- Mr. Njuguna C M - Advocate, Lavington Security Ltd
Mr. Thuku J. K. - Advocate, Lavington Security Ltd
Mr. Kennedy Mose - Operations Manager, Lavington Security Ltd
Mr. B. K. Munyasya - Administration Manager, Cavalier Security Ltd
Mr. Moses K. Kamau - Director, Kenya Shield
Mr. Bill Okwirey - Director, Inter Security
Ms. Diana Mburu - Sales Executives, Radar Ltd
Ms. Jane Mburu - Sales Executives, Radar Ltd
Mr. Joseph Musyoka - Operations Manager, Brinks Security Services
Ms. Caroline Serem - Legal Officer, Patriotic Guards Ltd.
Mr. Paul Ndolo - Manager, Race guards
Mr. Jackson Ogembo - Manager, Hatari Security Guards Ltd.
Mr. Fredrick Kamongo - Sunrise Security Services
Mr. Abel Mosoti - Director, Eversafe Security

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 Tender for the provision of Security Services and Alarm Services was advertised in the local newspapers and closed/opened on 6th June, 2008 before the presence of the tenderers who chose to attend. Thirty bid documents were opened from the following firms.

- | | |
|---|------------------------------------|
| 1) Milimani Security Guards | 15) G4S Security Services |
| 2) Accenture Africa Security Services Ltd | 16) Lavington Security Services |
| 3) Mt. Kenya Day & Night Security Services | 17) Guardforce Security (K) Ltd |
| 4) Skylark Security | 18) Red ants Guards Ltd |
| 5) Gillys Security and Investigation Services | 19) Cavalier Security Services |
| 6) Kisii Security Guards | 20) Robinson Investment Ltd |
| 7) Patriotic Guards | 21) Riley Falcon Security Services |
| 8) Dynasty Security Services Ltd | 22) Race Guards Ltd |
| 9) Delta Guards Ltd | 23) Wells Fargo |
| 10) Radar Ltd | 24) Eversafe Security Services |
| 11) Intersecurity Services | 25) Kenya Shield |
| 12) Hatari Security Services Ltd | 26) Private Eye (K) Ltd |
| 13) Bedrock Security | 27) Sunrise Security Services |
| 14) Riley Services | 28) Sentry and Patrols Ltd |
| 30) Total Security Surveillance Ltd | 29) Brinks Security |

EVALUATION

The evaluation was carried out in three stages namely, the Mandatory Requirements, Technical Evaluation and Financial Evaluation

Mandatory Requirements Evaluation:

The Evaluation Committee found six bids that had no bid bonds. These were declared non responsive. They were from the following firms:-

- i. Milimani Security Guards
- ii. Accenture Africa Security Services Ltd
- iii. Mt. Kenya Day and Night Security Services
- iv. Red Ants Guards Ltd
- v. Private Eye (K) Ltd

The committee further checked the remaining bids for responsiveness in the provision of the following documents:-

- Certificate of Incorporation
- PIN Certificate
- Tax compliance Certificate
- A list of Directors
- The original tender document purchase receipt issued by the Procuring Entity
- Evidence of Insurance against burglary and theft from a reputable insurance firms in a form of certified copy of insurance certificate
- The latest audited accounts - 200 or thereabouts, audited or unaudited

The following firms were found to be non- responsive at this stage of evaluation and were disqualified.

- i. Skylark Security
- ii. Dynasty Security Services Ltd
- iii. Delta Guards Ltd
- iv. Hatari Security Services Ltd
- v. Guard Force Security (K)
- vi. Cavalier Security Services
- vii. Race Guards Ltd
- viii. Total Security Surveillance Ltd

Technical Evaluation

The criteria for the technical evaluation was as follows:-

Track Record	-	15 marks
Staff	-	10 marks
Relevant Assets	-	10 marks
Other (Training)	-	15 marks
Financial stability	-	10 marks
Total Scores	-	60 marks

The results of the technical evaluation was as tabulated below

	Bid No.	Name of Firm	Average score	%age score 60/100	Rank
1.	15	G4S Security Services	56.08	93.47	1
2.	16	Lavington Security Ltd	51.50	85.83	2
3.	24	Eversafe Security Services	50.13	83.54	3
4.	29	Brinks Security	47.33	78.89	4
5.	11	Inter security Services	47.33	78.89	5
6.	25	Kenya Shield Security	46.67	77.78	6
7.	21	Riley Falcon Security	43.42	72.36	7
8.	13	Bedrock Security Services	42.25	70.42	8
9.	20	Robinson Security Services	41.58	69.31	9
10.	5	Gilly's Security/Investment	41.46	69.10	10

11.	7	Patriotic Guards	40.83	68.06	11
12.	14	Rileys Services	37.00	61.67	12
13.	10	Radar Services	35.08	58.47	13
14.	28	Sentry and Patrols Ltd	34.42	57.36	14
15.	6	Kisii Security Guards	33.46	55.76	15
16.	27	Sunrise Security Services	32.58	54.31	16

The bids that scored 70% and above qualified for the next stage of evaluation therefore eight bids qualified for the financial evaluation. One bidder M/s Brinks Security Services was disqualified from proceeding to the next stage as its past performance was wanting.

The seven bids that proceeded to the financial evaluation were from the following firms:-

- G4S Security Services
- Eversafe Security
- Inter Security
- Kenya Shield
- Riley Falcon Security Services
- Bedrock Security
- Lavington Security Ltd

Financial Evaluation

The Financial bids of the bidders who passed the technical evaluation were opened on 4th July, 2008. The firm with the lowest bid per cluster was awarded a score of 40 marks while the other bids prorated from the lowest to the highest. The scores were then combined with the technical scores to get a total score of 100 percent. The combined scores of the various clusters were as tabulated below:-

a) NAIROBI & ITS ENVIRONS CLUSTER

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
25	Kenya Shield	40	46.67	86.67	1
16	Lavington Security ltd	32.85	51.50	84.40	2
11	Inter Security	29.94	47.33	77.23	3
15	G4S Security Services Ltd	19.37	56.08	75.48	4

b) EASTERN (a)

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
24	Eversafe Security	37.00	50.13	87.13	1
16	Lavington Security Services Ltd	35.20	51.50	86.70	2
25	Kenya Shield	40.00	46.67	86.67	3
11	Inter Security	35.40	47.33	82.73	4
15	G4S Security Services Ltd	19.30	56.08	75.38	5

c) EASTERN (b)

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
16	Lavington Security Services Ltd	35.20	51.50	86.70	1
25	Kenya Shield	40.00	46.67	86.67	2
11	Inter Security	35.40	47.33	82.73	3
15	G4S Security Services	19.30	56.08	75.38	4

d) SOUTH RIFT (a)

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
25	Kenya Shield	40	46.67	86.67	1
16	Lavington Security ltd	34.55	51.50	86.00	2
11	Inter Security	35.40	47.33	82.73	3
15	G4S Security Services Ltd	19.30	56.08	75.38	4
21	Riley Falcon Security	26.00	43.42	70.02	4

e) SOUTH RIFT (b)

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
16	Lavington Security Services Ltd	35.22	51.50	86.70	1
25	Kenya Shield	46.67	40.00	86.67	2
11	Inter Security	35.40	47.33	82.73	3
15	G4 S security services	19.30	56.08	75.38	4

f) WESTERN

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
16	Lavington Security	39.81	51.50	91.31	1
11	Inter Security	42.30	47.33	89.63	2
13	Bedrock Security	36.06	42.25	78.31	3
15	G4S Security	21.91	56.08	77.99	4
25	Kenya Shield	NIL	46.67	46.67	5

g) NYANZA

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
11	Inter Security	40.00	47.33	87.33	1
16	Lavington Security	35.50	51.50	87.33	2
13	Bedrock Security	36.10	42.25	78.35	3
15	G4S Security	21.90	56.08	77.98	4
21	Riley Falcon Security	30.10	43.42	73.52	5
25	Kenya Shield	-	46.67	46.67	6

h) NORTH RIFT (a)

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
16	Lavington Security	35.20	51.50	86.70	1
25	Kenya Shield Security	40.00	46.67	86.67	2
11	Inter Security	35.40	47.33	82.73	3
15	G4S Security	19.30	56.08	75.38	4
13	Bedrock Security	31.90	42.25	74.15	5

i) NORTH RIFT (b)

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
25	Kenya Shield Security	40	46.67	86.67	1
16	Lavington Security	34.30	51.50	85.80	2
11	Inter Security	35.30	47.33	82.63	3
15	G4S Security	19.40	56.08	75.48	4
13	Bedrock Security	31.80	42.25	74.05	5
21	Riley Falcon Security	26.70	43.42	70.12	6

j) NORTH EASTERN

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
25	Kenya Shield Security	40.00	46.67	86.67	1
16	Lavington Security	31.80	51.50	83.30	2
15	G4S Security	24.60	56.08	80.68	3
11	Inter Security	35.40	47.33	82.73	4

k) COAST

Bid No.	Firm	Financial Score	Technical Score	Combined Score	Rank
16	Lavington Security	36.50	51.50	88.00	1
25	Kenya Shield Security	40.00	46.67	86.67	2
11	Inter Security	36.90	47.33	84.23	3
15	G4S Security	20.10	56.08	76.18	4

The Evaluation Committee recommended the following firms to provide security services and alarm systems:-

1. G4S Security Services for the cluster of Nairobi and its environs though it was not the highest ranked bidder in this cluster. The committee stated that since M/s G4S Security Services had scored highly technically and had no incidences in its past performance it should be

recommended for the award as Nairobi was a high risk region and other firms contracted for the cluster led to increased incidences of theft as a result of laxity and inefficiency on the contractor's part.

2. Kenya Shield be awarded for the clusters of South Rift (a), North Rift (b) and Northern Eastern.
3. Lavington Security Ltd - the clusters of Eastern (b), South Rift (b), Western, North Rift (a) and Coast.
4. Eversafe Security Services - cluster of Eastern (a)
5. Inter Security - the cluster of Nyanza

THE TENDER COMMITTEE DECISION

The Tender Committee in its meeting held on 21st July, 2008 deliberated on the Evaluation Report and resolved that the Evaluation Committee recommendations must be within the legal framework. It declined to award the Nairobi Cluster to G4S Security as recommended.

The Tender Committee then awarded the other clusters as follows:-

Firm		Cluster
Inter Security	-	Nyanza
Eversafe Security Services	-	Eastern
Lavington Security	-	South Rift, Western, North Rift, Eastern and Coast
Kenya Shield Security	-	South Rift, North Rift and North Eastern

THE REQUEST FOR REVIEW

The Request for Review was lodged by Riley Falcon Security Limited on 5th August, 2008 against the decision of the Tender Committee of National Cereals and Produce Board, of 10th July 2008 in the matter of Tender number NCPB/SEC/01/2008-2010 for Provision of Security Services and Alarm Systems.

Preliminary Objection

At the hearing, the Board noted that there was a preliminary objection filed by the Interested Parties namely, Lavington Security Guards, Eversafe Security Co. Ltd and Kenya Shield Security Limited. The Preliminary Objection was based on the following two Grounds.

Ground 1- Breach or an accessory to breach of Sections 41 and 44 of the Public Procurement and Disposal Act, 2005.

Ground 2- That the Applicant's Request for Review be struck out in so far as it relies on documents and information obtained in breach of Section 44 of the Act.

Counsel for the Interested Parties urged the Board to make a determination prior to the Hearing as to whether the documents i.e. Report on Financial evaluation, as well as letter of notification to the successful bidder which had been annexed to the Applicants Request for Review was a breach of Section 44(c). Counsel further submitted that an offence had been committed under Section 41 and Section 44 of the Act and urged the Board to give direction on how to proceed. In conclusion, Counsel submitted that the Applicant should inform the Board how it got possession of the two documents which were confidential, more so since it had access to the information while the evaluation process was ongoing.

In its response, Counsel for the Applicant submitted that the evaluation report was indeed admissible under Section 44 (2) (c) which allowed disclosure of such information for the purposes of review. Counsel further contended that there was no provision in the Act which obligates the Applicant to disclose the source of information.

RULING OF PRELIMINARY OBJECTION

The Board has considered the submissions of the parties and the documents submitted. The Board notes that the provisions of Section 44 (3) which states as follows:-

Notwithstanding the provisions of Subsection (2), the disclosure to an applicant seeking a review under part V11 shall constitute only a summary referred to in Section 45 (2)(e) of the Act.

The Board notes that the documents annexed to the Request for Review were not a summary but the whole evaluation report. Further, the said evaluation reports were not signed or dated. The Board therefore finds that the documents are inadmissible and hereby directs that the same be expunged from the records.

In the circumstances, the Preliminary Objection is sustained and the purported evaluation report annexed to the Request for Review shall be expunged from the records.

THE REVIEW

The Applicant, in its request for review raised 7 (Seven) grounds of Appeal, which the Board deals with as follows:-

Ground 1- Breach of Section 39 of the Act

The Applicant submitted that the Procuring Entity breached the provisions of Section 39 of the Act as it was discriminatory to the applicant. It submitted that the Procuring Entity did not invite the applicant to attend the pre-tendering meeting and that the applicant only came to know about it through a third party. Further, it submitted that it was clear that the Procuring Entity was discriminatory when it wrote a letter on 22nd July 2008, to the Applicant, requesting it to collect its bid bond together with the unopened financial bid yet the Applicant had succeeded at technical evaluation. Therefore, its financial bid ought to have been considered.

In response, the Procuring Entity denied that it acted in a discriminatory manner in awarding the tender. It stated that the Applicant failed to be awarded the tender as it was not responsive. It further contended that paragraph 17.0 of Instructions to Tenderers was specific that the pre-tender meeting was to be held 20th May 2008. Hence all Tenderers were invited to attend the pre-tender meeting as this fact was clearly set out in the tender documents.

It further submitted that the statement in the letter dated 22nd July 2008 requiring the Applicant to collect its "financial bid unopened" was a typographical error. It referred the Board to the minutes of the meeting on 4th July, 2008 for the opening of the Financial Bids in which the Applicant's representative, a Mr. D.B. Ringera is recorded to have attended.

Finally, the Procuring Entity submitted that it did not receive any correspondence from the Applicant seeking any clarification on the tender.

The Interested Parties namely, Lavington Security Guards, Eversafe Security Co. Ltd and Kenya Shield Security Limited submitted that Section 39 did not apply as the Applicant fully participated in the tender and was evaluated.

Upon evaluation, its bid was determined as non responsive and therefore there was no discrimination.

The Board has considered the submissions by the Parties and examined the tender documents submitted before it.

The Board has noted that the Applicant was evaluated on the same criteria as the other bidders. The Board further notes that, out of the thirty bids submitted, the Applicant's bid was amongst the seven that proceeded to the financial evaluation stage. It is therefore clear that there was no discrimination as all bidders were evaluated on the same Criteria as set out in the Tender Documents. The Board finds that the Procuring Entity's letter Dated 22nd July, 2008 to the Applicant requiring the Applicant to collect its bid bond and financial bid unopened was erroneous since the Applicants bid was evaluated financially. Finally, the Board finds the Applicant's bid did not attain the highest combined score in the three clusters it had tendered and therefore it could not have been the lowest evaluated as alleged.

Accordingly, this ground of appeal fails

Grounds 2 and 3 - Breach of Section 52 and 66 of the Act and Regulations 38 and Regulations 38, 46, 47 & 50.

The above grounds have been combined as they raise similar issues on evaluation criteria used by the Procuring Entity.

The Applicant submitted that the tender document did not satisfy requirements set out in Section 52 of the Public Procurement and Disposal Act and regulation 38. It further submitted that the criteria and procedure used to evaluate and compare the tenders was not satisfactory as it did not allow fair and objective competition amongst the Bidders. Further, it argued

that the tender document did not have adequate information to allow fair and objective competition amongst the Bidders.

Finally, it submitted that the Procuring Entity breached Section 66 of the Act and Regulations 46, 47 and 50 in its evaluation by applying evaluation criteria that was not set out in the tender documents.

In response, the Procuring Entity submitted that the Tender Documents contained enough information to allow fair competition among the bidders in line with the requirements of Section 52 of the Act and Regulation 38. It further submitted that all Tenderers were invited to a pre tender meeting on the 20th of May 2008 as set out in Clause 17 of the Instructions to Tenderers.

Finally, it submitted that all additional information's on evaluation criteria was available as it was clearly set out in Clause 16 of the Instructions to Tenders.

On their part, the Interested Parties namely, Lavington Security Guards, Eversafe Security Co. Ltd and Kenya Shield Security Limited submitted that there was no breach of Section 52 of the Act as the Tender Documents had enough information to allow fair competition between the bidders. They further submitted that Clause 15 of the Tender Document provided for clarification and the Applicant did not seek any clarification. Therefore, the Request for Review was an afterthought. Finally, with regard to Section 66 of the Act, they submitted that the Applicant did not demonstrate that there was any criterion used which was not set out in the Tender documents.

The Board has considered the submissions of the Parties and the documents before it.

The Board has examined the Tender Documents and noted that Clause 16 of the Instructions to Tenderers contained the evaluation criteria. This criteria was used to evaluate all the bidders including the Applicant.

The Board further notes that, under Clause 17 of the Tender Documents, bidders were invited to a pre bid meeting on the 20th May, 2008.

With regards to breach of Regulation 46, the Board notes that the tenders were opened on 6th June, 2008 in the presence of bidders' representatives. The financial report is dated 4th July, 2008. It is therefore apparent that the evaluation was conducted within 30 days from the date of tender opening as required by Regulation 46.

With regard to breach of Regulation 47, the Board notes that Clause 16 of the Instructions to Tenderers provided the evaluation criteria which was to be done in three stages namely preliminary, technical and financial. The Board finds that Applicant did not attain the highest combined score in the 3 clusters in which it had tendered after the technical and financial evaluation.

In the circumstances, the Board holds that the evaluation was properly done in accordance with the provisions of the Act and in line with the criteria

Consequently, these grounds of appeal also fail.

Ground 4- Breach of Section 66 (4) of the Act.

During the hearing, Counsel for the Applicant withdrew this ground. Therefore the Board need not make any finding as the ground stands withdrawn.

Ground 5 - Breach of Section 67(2) of the Act.

The Applicant submitted that Procuring Entity breached section 67(2) of the Act by failing to notify it of the results of the tender simultaneously with the successful bidders. It submitted that the letter from the Procuring Entity to the Applicant was dated 22nd July 2008 while the letter to Lavington Security Ltd, one of the Successful Bidders was dated July 10th 2008. Therefore, there was no simultaneous communication in accordance with Section 67 (2) of the Act.

In response, the Procuring Entity submitted that the letter dated 10th of July 2008 to Lavington Security Guards Ltd contained a typographical error in that it should have read 22nd of July 2008. Further it submitted that the Tender Committee met on 21st July 2008 to award the Tender after which all the letters of notifications were sent out to all bidders on 22nd July 2008. It submitted that when the mistake was realised, the Managing Director of the Procuring Entity wrote to all the parties informing them that the date was wrong.

Finally, the Procuring Entity urged the board to consider whether any prejudice was suffered by the Applicant. Further, it argued that it would not be in the public interest to set aside the entire Procurement process because of a mistake that was not fundamental to the tendering process particularly so when the lowest bidders were awarded the Tenders.

On their part, the Interested Candidates, Lavington Security Guards, Eversafe Security Co. Ltd and Kenya Shield Security Limited concurred with the Procuring Entity that the notification letter to Lavington Security Guards Ltd, one of the successful bidders, though dated 10th July 2008 was actually dispatched on 25th July 2008 and that it was clearly wrongly dated. Further, they averred that Applicant did not suffer any loss or prejudice as it had managed to file the Request for Review in time. Finally, they urged the board

to award costs to the Interested Parties and the Procuring Entity as the request was frivolous.

The Board has considered the submissions of the Parties and the documents before it. The Board has noted that the Letters of notifications to the successful and unsuccessful Bidders had different dates. However, it is clear that the letter dated 10th July, 2008 to Lavington Security Guards Ltd was erroneously dated. From the documents submitted, it is evident that the notification letters to the successful and the unsuccessful candidates were dispatched on 25th July, 2008. Further, the dates in the letters did not prejudice the Applicant in any way as it was able to lodge its Request for Review in time.

The Board therefore holds that the Applicant did not suffer any loss and or prejudice as a result of the errors on the notification letters to the Bidders.

Ground 6- Section 44 (2) (c) of the Act

The Board in its ruling on the Preliminary Objection held that the applicant could not rely on minutes of the tender Evaluation Committee.

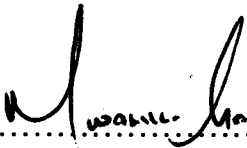
Consequently, Counsel for the Applicant withdrew this ground. Therefore, the Board need not make any finding as the ground stands withdrawn.

Ground 7

This is not a ground but the Applicant's statement of loss. The tendering process is a business risk. Further, 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 costs associated with the tendering process, which resulted in the award of the tender to another bidder.

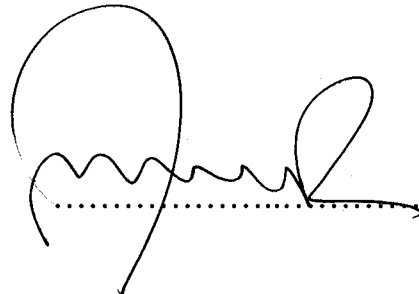
In view of the foregoing, the Request for Review fails and is hereby dismissed. The Procuring Entity may proceed with the tendering process.

Dated at Nairobi on this 2nd day of September, 2008.



.....

Signed Chairman
PPARB



.....

Signed Secretary
PPARB

