

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 46/2009 OF 30TH OCTOBER, 2009

BETWEEN

CAVALIER SECURITY LIMITED.....APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LTD.....PROCURING ENTITY

Review of the tendering process of Kenya Power & Lighting Company Limited in the matter of Tender No. KPLC/9A/PT/20/08/09 for Provision of Guarding Services 2009 - 2011.

BOARD MEMBERS PRESENT

Ms. Judith Guserwa	-	in the Chair
Mr. Joshua W. Wambua	-	Member
Mr. Akich Okola	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Pamela K. Ouma	-	Secretariat
Ms. Kerina A. Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, Cavalier Security Ltd

- Mr. Morris Kimuli - Advocate, B. M. Musau & Co. Advocates
Mr. Felix Kioko - Advocate, B. M. Musau & Co. Advocates
Col(RTD) R. J. Kiluta - Managing Director

Procuring Entity, Kenya Power & Lighting Company Ltd

- Mr. Joseph Munyithia - Advocate, Joseph Munyithia & Co.
Advocates
Mr. Owiti Awuor - Legal Officer
Mr. A. M. Gekura - Security Manager
Mr. S. P. Njue - Chief Security Officer

Interested Candidates

- Mr. J. N. Musomba - Director, Riley Services
Mr. Fredrick Obola - General Manager, Hatari Security Guards
Limited
Mr. Jackson Ogembo - Manager, Hatari Security Guards Limited
Mr. Stanley Okanga - District Manager, Guardforce Security (K)
Limited
Mr. Moses Kaniaru - Director, Kenya Shield
Mr. A. M. Sheikh - Director, Basein Security Ltd
Ms. Victoria Awiti - Finance/Administration, Gilly's Security
Mr. Mungai - Managing Director, Delta Guards
Mr. Paul Ndolo - Manager, Race Guards Ltd
Mr. Cherutich James - Marketing Manager, Total Security
Surveillance

Mr. Martin Manywanda-	Accountant, Metro Consultants & Guardian
Mr. A. A. Kana	- Managing Director, Protective Custody Ltd
Mr. David Kigen	- PA to Managing Director, Lavington Security Ltd
Ms. Nancy Kimunya	- Administrator, Protective Custody
Mr. Elijah Waiyaki	- Marketing Manager, Spur Security Ltd
Mr. Amos Yator	- Sales Executive, Spur Security Services 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 Tender for the provision of guarding services was re-tendered on 17th June, 2009 after an order from the Review Board to re-tender in Review No. 2/2009 of 21st January, 2009.

Closing/Opening:

The tenders closed/opened on 21st July, 2009 and thirty bidders out of the thirty nine potential bidders who had bought the tender documents submitted bids.

They were as follows:

- | | |
|------------------------------|--------------------------------|
| 1. G4S | 8. Apex Security Services |
| 2. Inter Security | 9. Total Security Surveillance |
| 3. Tangle Security Ltd | 10. Bob Morgan Services |
| 4. Real Estate Security | 11. Robinson Investments |
| 5. Bedrock Holding Ltd | 12. Race Guards Ltd |
| 6. Lavington Security | 13. Cavalier Security Services |
| 7. Riley Services | 14. Metro Consultants |
| 15. Hatari Security Services | 16. Gilly's Security |

17. Brinks Security Services
18. Kenya Shield Security
19. Private Eye (K)
20. Radar Security
21. Riley Falcon Services
22. Protective Custody
23. Delta Guards Ltd
24. Spur Security

25. Cornerstone Security Services
26. Basein Security Services
27. Race Guards
28. Kenya Shield Security
29. Cornerstone Security Services
30. Pada Security

EVALUATION

Preliminary Evaluation

The Preliminary Evaluation was conducted and fourteen bids were found responsive in the mandatory criteria and preceded to the detailed evaluation of the technical stage. The criteria for evaluation at the preliminary stage was as follows:-

1. Tender Security Issuing Bank
2. Bid Bond Format
3. Bid Bond Sufficiency (Kshs. 100,000)
4. Confidential Business Questionnaire fully filled
5. Fully Completed Tender Form
6. Tender Validity
7. Company Registration Certificate
8. No. of Sets Technical Documents

The bidders who did not pass the preliminary evaluation stage and the reasons for failure are as listed.

1.	Cavalier Security	- bid bond format
2.	Riley Falcon Services Ltd	- Bid bond format - Bid bond valid for 103 days instead of 120 days
3.	Delta Guards	- Bid bond format
4.	Race Guards	- Bid bond format
5.	Budget	- Bid bond format
6.	Brinks	- Bid bond format
7.	Bob Morgan	- Bid bond format
8.	Gilly's Security	- Bid bond format
9.	Pada Security	- Bid bond format - Bid Bond valid for 93 days
10.	Kenya Shield	- Bid bond format
11.	Metro Consultants	- Bid bond format - Valid for 93 days
12.	Tangle	- Bid bond format - Valid for 93 days
13.	Apex Security	- Bid bond format
14.	Riley Services	- Bid bond format
15.	Bedrock	- Bid bond format
16.	Private Eye	- Bid bond format

It was noted during the Preliminary Evaluation that some bidders had not received in their bid documents the page containing the Tender Form. It was noted that this was a mistake of the Procuring Entity and the committee waived the requirement for the Tender form as a mandatory condition.

Detailed Technical Evaluation

The successful bidders at the Preliminary Evaluation Stage were evaluated further on the following major parameters:-

1. Company Profile
2. Staff Competences Profile
3. Financial Resources
4. Physical Facilities

5. Reputation
6. Social obligations
7. Other services

The summary results were as follows:-

Bidder	Score	Class
1. Secure Homes	- 40	Non responsive
2. Radar	- 89	A
3. Guard Force	- 79	C
4. Robinson	- 62	Non Responsive
5. InterSecurity	- 94	A
6. Basein	- 78	C
7. Total	- 86	B
8. Lavington Security	- 86	B
9. Hatari	- 85	B
10. Protective Custody	- 97	A
11. Cornerstone	- 82	B
12. Spur Security	- 62	Non Responsive
13. G4S	- 95	A
14. Real Estate	- 29	Non Responsive

The Evaluation Committee recommended the ten bidders who had attained a score of 70% and above for their financial bids be opened.

TENDER COMMITTEE DECISION

The tender committee in its meeting of 21st August, 2009, when presented with the list of qualified bidders and requested to approve for the opening of the financial bids noted that the minor issue of the bid bond format caused disqualification of majority of bidders. The bids determined responsive were

too few to offer services and competition in the tender was subsequently curtailed

2nd TECHNICAL EVALUATION

The Evaluation Committee reviewed the technical documents and recommended the following (8) bidders be approved for the financial evaluation having met the minimum required marks for technical evaluations:-

1. Bob Morgan	-	87
2. Gillys	-	86
3. Riley Services	-	83
4. Delta	-	83
5. Race	-	81
6. Brinks	-	80
7. Kenya Shield	-	79
8. Apex	-	78

The following firms' (8) bids did not proceed to the financial bids opening for the following reasons.

1. Riley Falcon Services	-	Bid bond valid for 103 days
2. Pada Security Ltd	-	bid bond valid for 93 days
3. Metro Consultants	-	Bid bond valid for 93 days
4. Tangle Ltd	-	Bid bond valid for 93 days
5. Cavalier	-	66 points
6. Budget	-	57 points
7. Bedrock	-	68 points
8. Private Eye	-	42 points

The Evaluation Committee then recommended the opening of the financial bids of the eighteen qualified bids.

The Tender Committee in its meeting held on 25th September, 2009 approved the financial opening and evaluation of the eighteen bids recommended. The Financial bids were opened on 1st October, 2009.

Financial Evaluation

The following financial bids were opened

Bidder	Scores		Class
1. Protective Custody	97	-	A
2. G4S	95	-	A
3. Inter Security	94	-	A
4. Radar	89	-	A
5. Bob Morgan	87	-	A
6. Lavington Security	86	-	B
7. Total Security	86	-	B
8. Gillys Security	86	-	B
9. Hatari Security	85	-	B
10. Delta Guards	83	-	B
11. Riley Services	83	-	B
12. Cornerstone	82	-	B
13. Race Guards	81	-	B
14. Brinks	80	-	B
15. Kenya Shield	79	-	C
16. Guard Force	79	-	C
17. Apex Ltd	78	-	C
18. Basein	78	-	C

The tenders were analyzed and recommended for award as follows:

No.	Bidder	Regions awarded	Guards/supervisor & Dog handlers	Total contract price per month in Kshs. VAT Exclusive
1.	G4S	Coast, Nairobi, West Kenya	101	1,934,500.00
2.	Bob Morgan	Nairobi	119	2,052,000.00
3.	Radar Ltd	Coast, Nairobi	70	1,010,000.00
4.	Protective Custody	Mt. Kenya North, Nairobi, North Rift	73	755,000.0000
5.	Inter Security	West Kenya South, West Kenya	70	791,600.00
6.	Lavington Security	Mt. Kenya South, West Kenya	58	584,000.00
7.	Total Security	Coast, West Kenya	72	855,500.00
8.	Gilly's	West Kenya	59	573,100
9.	Hatari Security	North Rift	68	719,000.00
10.	Delta Guards	Central Rift, North Rift	74	741,000.00
11.	Riley Services	Nairobi, West Kenya	71	1,121,350.00
12.	Cornerstone	Nairobi, West Kenya	68	736,883.00
13.	Race Guards	Mt. Kenya South, Nairobi, Central Rift	61	582,450.00
14.	Brinks	Mt. Kenya North	78	809,300.00
15.	Kenya Shield	Central Rift, North Rift	75	712,500.00
16.	Guardforce	Coast	47	423,000.00
17.	Apex Security	Mt. Kenya North	64	640,000.00
18.	Basein	Mt. Kenya North, Coast, Nairobi	94	799,000.00
			Total Kshs.	15,840,183.00

THE TENDER COMMITTEE DECISION

The Company Tender Committee in its meeting held on 29th October, 2009 awarded the bids as recommended by the Evaluation Committee at a total annual cost of Kshs. 190,082,196.00

Unsuccessful bidders were requested to pick their bid bonds and Financial Evaluation vide letters dated 16th October, 2009. On the same day the successful bidders were issued with a letter from the Procuring Entity titled "Addendum No. 2 to the tender No. KPLC/1C/9A/PT/20/08/09 for Provision of Security Guarding Services. The letter requested the bidders to extend the tender validity from 20th October, 2009 to 19th November, 2009 and further extension of the tender security to be valid up to 19th December, 2009.

THE REVIEW

The Applicant, M/s Cavalier Security Ltd lodged the Request for Review on 30th October, 2009 against the decision of the Tender Committee of the Kenya Power and Lighting Company Ltd in the matter of tender No. KPLC/9a/pt/20/08/09 for the Provision of Guarding Services 2009 - 2011.

At the hearing, the Applicant was represented by Mr. Morris Kimuli, Advocate while the Procuring Entity was presented by Mr. Joseph Munyithia, Advocate and Mr. Owiti Awuor its legal officer.

The Applicant raised seven grounds of Review and urged the Board to make the following orders:-

1. The procurement process be terminated.

2. The Board be pleased to substitute its decision with that of the Procuring Entity as justice demands.
3. The decision of the Procuring Entity to disqualify and reject the Applicant's Technical Proposal be annulled in whole.
4. A declaration that the Procuring Entity was not fair and took into account extraneous and irrelevant considerations in disqualifying and rejecting the Applicant's Technical Proposal.
5. The costs of this review be awarded to the Applicant

PRELIMINARY ISSUE

At the commencement of the hearing the Board noted that the Procuring Entity had raised two preliminary issues though they had not been formally filed as Preliminary Objection in accordance to Regulation 77. The Board enquired from the Procuring Entity whether it could argue the preliminary issues as part of its response to the Request for Review.

In reply the Procuring Entity indicated that it wished to argue the preliminary issues first and added that it also wished to raise another objection based on Regulation 73 (2) (c) that the Request for Review was time bared.

On its part, the Applicant objected to the application and stated that Regulation 77(1) was clear that a party who had been duly notified may file a preliminary objection and that preliminary objection must be served upon the Board within five (5) days from the date of notification. It added that the Preliminary Objection must set out the grounds upon which it was based and must be served upon the Applicant, at least a day before the hearing to allow it time to put a response to the objection.

The Applicant further stated that Regulation 77 (6) stated that the fees chargeable for filing a Preliminary Objection shall be as set out in Part II of the Fourth Schedule. This it added, presupposes a written notice that is filed with the Secretary of the Board duly assessed for the fees payable and properly served. It argued that the regulations do not give an opportunity for any oral application or for any preliminary point to be raised outside the time limits provided by the law. It further stated that a preliminary objection must be separately filed and paid for and that any preliminary objection that is filed without having been paid for separately would be contrary to Regulation 77 (6). It concluded by applying that the Request for Review be heard on its merits.

Ruling of the Board on the Preliminary Issue:

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

The Board finds that the Request for Review was filed on 30th October, 2009 and was served to the Procuring Entity by the Secretary of the Board on 2nd November, 2009. The Board notes that the Procuring Entity filed its response on 13th November, 2009 and the response raises the preliminary matters on the issue of time limitation and the jurisdiction of the Board. The Board further notes that Regulation 77 (1) requires a party to file a Preliminary Objection at least five (5) days from the date of being notified. The Applicant did not comply with the provisions of Regulation 77 (1) and if the Procuring Entity is allowed to raise the preliminary objections at this stage, this would amount to an ambush on the Applicant.

Consequently, the Board disallows the application by the Procuring Entity and directs that the Request for Review to proceed to hearing as the

Procuring Entity will have the opportunity to address the issues raised in its response at the time of responding to the Request for Review.

The matter will therefore proceed to hearing forthwith.

The Applicant in its Request for Review raised seven (7) grounds of review and the Board deals with them as follows:-

Grounds 1, 2 & 5 - Breach of Sections 31 and 66(2)

These grounds have been consolidated because they raise similar issues on evaluation of the tenders and subsequent disqualification of the Applicant.

The Applicant alleged that it was qualified as per the provisions set out in Section 31 of the Public Procurement and Disposal Act, 2005 (herein after referred to as the 'Act') to be awarded the tender, but that the Procuring Entity wrongfully disqualified it by employing extraneous requirements not expressly set out in the Tender Document. It stated that this was contrary to Section 66(2) of the Act; Regulation 49(1) of the Public Procurement Regulations, 2006 herein after referred to as the 'Regulations'; and the requirements set out in the Tender Document. It concluded by explaining that it had provided all the necessary documentation required in its Bid to prove its qualifications to be awarded the tender.

In its response, the Procuring Entity stated that the Applicant had been evaluated in accordance with the criteria set out in the Tender Document and in particular Clauses 3.12 and 6.3 which indicated the criteria that were to be used in the determination of bidders' eligibility and qualifications. It further stated that the Applicant, together with fifteen other bidders, had been declared non-responsive at the preliminary stage of the first technical

evaluation completed on 31st July, 2009. It explained that in its review of the first Evaluation Report, the Tender Committee noted that the issue of bid format had caused disqualification of a majority of bidders and as a result the remaining firms determined to be responsive were too few to offer the required services and this curtailed competition. The Tender Committee then approved and allowed bidders who had been disqualified due to bid bond format only to proceed to technical evaluation. The Procuring Entity stated that the Applicant was one of the bidders who had been reinstated for technical evaluation. It further stated that the Applicant's bid was then evaluated in accordance with Clause 6.3.2 of the Tender Document and it scored 66 marks in the technical evaluation and was hence disqualified from proceeding to financial evaluation for failing to attain the cut off mark of 70. It concluded by explaining that the Applicant had not submitted the required evidence in its Bid to prove its claims that it was qualified to be awarded the tender.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes the provisions of Section 66(2) of the Act which state 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 also notes that Regulation 49(1) states that upon completion of the preliminary evaluation, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document.

The Board observes that the Tender Document set out the procedures and criteria for evaluation in the following relevant clauses:

- i) Clause 3.12 set out the Tenderer's Eligibility and Qualifications;
- ii) Clause 3.29.1 (Evaluation and Comparison of Tenders) stated that the tenders which have been determined to be substantially responsive will be evaluated in compliance to the Details of Services set out in the Tender Document and as per the Evaluation Criteria prescribed in the Summary of Evaluation Process;
- iii) Section VI of the Tender Document contains the Summary of Evaluation Process. Clause 6.3 of this Section contained the Technical Responsiveness criteria under which Clause 6.3.2 contained the Detailed Technical Evaluation with a list of criteria set out with scores to be awarded for attaining the criteria.

The Board has reviewed the Procuring Entity's letter to the Applicant's advocate, M/s B. M. Musau and Company, dated 28th October, 2009, Ref: KPLC/1C/9A/PT/20/08/09/JNM which gave nine (9) reasons why the Applicant failed to qualify in the technical evaluation.

The Board has examined each of these reasons against the technical evaluation criteria set out in the Tender Document Clause 6.3.2 and finds as follows:

Reason 1

There was no evidence to show that the Applicant has ISO Certification or is in the process of certification.

The Board notes that the requirement in *Tender Clause 6.3.2(2d)* was for a bidder to provide evidence of Quality Management Standards e.g. copy of ISO compliance certificate or documents to prove that the bidder is in the process of obtaining certification.

The Board observes that the evidence provided by the Applicant, in support of this requirement, was a letter from KEBS dated 25 June, 2008 with a heading *ISO 9001:2000 Training* informing the Applicant that it had chosen Riccati College to train the Applicant's staff on ISO 9001 Quality Management Systems. The letter advised the Applicant that the College would give the Applicant its quotation for the training and proceed to provide training as per the Applicant's requirements. The letter concluded by requesting the Applicant to contact the Principal of the College on the matter.

The Board finds that from the contents of this letter alone, written over a year before the tender under review was called, it is not evident that the Applicant was in the process of obtaining ISO certification at the time the tenders were called. What is clear is that Riccati College had been chosen by KEBS to provide training but not whether a quotation was given to the Applicant by the College; or whether the Applicant accepted the quotation; or whether the College provided the necessary training; or whether this training was indeed for ISO certification, and if it was, whether the certification was in process or had been abandoned at the time tenders were called.

From the foregoing, the Board finds that the Applicant did not provide the evidence required to score marks in this criteria.

Reason 2

List of Guards submitted was 162 in number and hence did not meet the minimum requirement of 200.

The Board notes that at the hearing, the Applicant conceded that the list it provided was for 162 guards and not the 487 stated in its Bid. Accordingly,

the Board finds that the Applicant did not provide the evidence required to score marks in this criteria.

Reason 3

Payslips submitted was one for May 2009 and hence did not submit the required three for past three months.

The Board notes that the requirement in *Tender Clause 6.3.2(2h)* was for a bidder to provide certified copies of its guard's payslip for the past three months. The Board observes that the evidence provided by the Applicant, in support of this requirement, were three payslips for three different employees for the month of May 2008; plus one payslip for an employee for the month of May 2009.

The Board finds that the payslips that were submitted for May 2008 did not qualify to be payslips for the past three months at the time the tender was called, and that the payslip submitted for May 2009 was only one of the three payslips required to have been submitted.

Accordingly, the Board finds that the Applicant did not provide the evidence required to score marks in this criteria.

Reason 4

There was no evidence of training on threat identification, antiterrorism, emergency, distress investigation and queue management as modules or certificates not attached.

The Board notes that the requirement in *Tender Clause 6.3.2(3d)* was for a bidder to provide evidence of guards' training e.g. trainees' certificates or reference letters of the trainers. The Board observes that the evidence provided by the Applicant, in support of this requirement, was a training

manual. The Applicant did not provide trainees' certificates or reference letters from/of trainers.

The Board therefore finds that the Applicant did not provide the evidence required to score marks in this criteria.

Reason 5

Guards are only checked once contrary to the requirement of minimum two times a day.

The Board notes that the requirement in *Tender Clause 6.3.2(3g)* was for a bidder to state with relevant documented records the frequency of supervision per 12 hour shift with a minimum requirement of two times.

The Board observes that the evidence provided by the Applicant, in support of this requirement, was a *Spot Check Report for 18 and 19 June, 2009* carried out by a Charles Mboya. The Board further observes that the Spot Check records show that on 18 June 2009, the check on the guards at CBK started at 6am and finished at 7am; thereafter, the supervisor carried out a check at Deliverance House from 7.30am to 7.45am, with no further spot checks recorded that day. The records for 19 June 2009, show that a spot check was carried out at Loita House starting at 6am and ending at 7.30am with no further spot checks recorded on that day. From the evidence presented by the Applicant, the Board finds that the frequency of spot checks was once daily.

The Board therefore finds that the Applicant did not provide the evidence required to score marks in this criteria.

Reason 6

No evidence of other services like backup systems, ICT etc.

The Board notes that the requirement in *Tender Clause 6.3.2(9)* was for a bidder to indicate whether they provided intruder alarm services, backup services CIT and give evidence of clientele complete with relevant licence from licensing authority.

The Board observes that the evidence provided by the Applicant, in support of this requirement, were a copy of a receipt from CCK for frequency; a copy of a licence from CCK to establish a radio communication station; and a letter from CCK informing the Applicant that it has been assigned a frequency for its VHF Alarm radio network of 5 alarm units and requiring the Applicant to complete and return form RF6 to facilitate the issuance of the license. The Applicant did not provide evidence of clientele for these services.

The Board therefore finds that the Applicant did not provide the evidence required to score marks in this criteria.

Reason 7

No evidence of payment through banks, though there is evidence of payment using other modes i.e. Postal Corporation of Kenya.

The Board notes that the Applicant conceded at the hearing that it did not make payment through banks but through the Postal Corporation. From the technical evaluation scoresheet, the Board finds that the Applicant had been awarded the score that was allocated for any other acceptable mode of salary payment.

Reason 8

No evidence of payment before 5th of the following month.

The Board notes that the requirement in *Tender Clause 6.3.2(2k)* was for a bidder to show evidence of salary payment to guards - latest date should be 5th of the following month.

The Board observes that the evidence provided by the Applicant in its submitted Bid, in support of this requirement, was a payslip for the month of May 2009 for which the payee signed as having received payment on 30 June 2009. The Board further observes that in its Request for Review, the Applicant had included a payslip which was not in its original submitted Bid, and that this payslip showed payment as having been received on the 5th of the following month.

From the evidence presented by the Applicant in its original submitted Bid, the Board finds that there was no evidence to show that salary payments were done before the 5th of the following month as required in the criteria. The Board therefore finds that the Applicant did not provide the evidence required to score marks in this criteria.

Reason 9

No evidence of Trade Union membership.

The Board notes that the requirement in *Tender Clause 6.3.2(2l)* was for a bidder to provide evidence on whether its guards are members of a trade union indicating the name of the union.

The Board observes that the evidence provided by the Applicant, in support of this requirement, was its letter to the Procuring Entity stating that it is a member of Protective Security Industry Association (PSIA) which it stated was a member of the Federation of Kenyan Employees (FKE). From the letter presented by the Applicant, the Board finds no evidence as to whether the Applicant's guards were members of any trade union.

The Board therefore finds that the Applicant did not provide the evidence required to score marks in this criteria.

Reason 10

No reference letters from corporations,....., as evidence of clients currently serving.

The Board notes that the hearing the Applicant conceded that it only provided a list of clients and not reference letters.

Accordingly, the Board finds that the Applicant did not provide the evidence required to score marks in this criteria.

Reason 11

No evidence of three motor cycle log book/leases.

The Board notes that the Applicant had ticked in its Bid as having not provided this evidence.

Accordingly, the Board finds that the Applicant did not provide the evidence required to score marks in this criteria.

Reason 12

No evidence of welfare programmes for the guards.

The Board notes that the requirement in *Tender Clause 6.3.2(8d)* was for a bidder to provide evidence of welfare programmes for the guards. The Board observes that the evidence provided by the Applicant, in support of this requirement, was a list of six (6) types of welfare programmes for guards.

From the list presented by the Applicant, the Board finds no evidence as to whether the welfare programmes existed or were in operation.

The Board therefore finds that the Applicant did not provide the evidence required to score marks in this criteria.

From the foregoing, the Board finds that the Applicant's bid was evaluated using the procedures and criteria set out in the tender documents and finds no evidence that any other criteria was used.

Accordingly, these grounds of appeal fail.

Grounds 3, 4 & 6 - Breach of Section 66(3)

The Applicant alleged that the evaluation criteria adopted by the Procuring Entity was not objective and quantifiable which was contrary to Section 66(3) of the Act. It added that the criteria adopted was not clearly expressed so as to be applied fairly and in accordance with procedures taking into account price, quality and service contrary to the provisions of Section 66(3)(b) of the Act.

In its response, the Procuring Entity stated that the evaluation criteria stated in the Tender Document was clearly expressed and was applied fairly. It further stated that during the pre-bid meeting the bidders were advised to pay attention to Clause 3.4.2 of the tender document which instructed bidders to examine all instructions, forms, provisions, terms and specifications in the Tender Document and that failure to furnish all information required would be at the bidders' risk. It concluded by declaring that the Applicant had not sought any clarification on the tender documents as allowed under clause 3.5.1 of the Tender Document.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes the provisions of Section 66(3) of the Act which state that the criteria used in evaluation and comparison of tenders must, to the extent possible, be objective and quantifiable; and that each criterion must be expressed so that it is applied in accordance with the procedures taking into consideration price, quality and service for the purpose of evaluation.

From the Board's findings under grounds 1, 2 & 5 of the appeal, it is clear that the criteria set out in the Tender Document was objective and quantifiable in that the Applicant's Bid, containing documentation presented as evidence by the Applicant in support of its claim that it was qualified to be awarded the tender, could be evaluated against each of the set criteria with marks awarded where they were due and no marks awarded where they were not due.

Accordingly, these grounds of appeal fail.

Ground 7 – Breach of Section 66(6) and Regulation 46

The Applicant alleged that the Procuring Entity breached the said Section and Regulation by failing to evaluate the tenders within a period of 30 days after opening of the tenders. It submitted that the stipulated 30 day period was mandatory. It cited the High Court decision in a Judicial Review Civil Application No. 540 of 2008 Republic versus The Public Procurement Administrative Review Board and Kenya Revenue Authority in support of this ground of appeal.

In its response, the Procuring Entity explained that it had carried out two technical evaluations and conceded that the whole process took more than

the mandatory 30 days provided for in the Regulations. It argued that it was not barred by the Act or the Regulations from using a three tier evaluation as long as the process was set out in the tender document. It further argued that because it had the power to extend the Tender Validity Period, amend the Tender Document and cancel the entire process, then, it could extend the time for evaluation beyond the mandatory period stipulated in the Regulations. It averred that the Regulations provide for the process and procedure thus any failure to follow the Regulations but to substantially comply with Section 66(6) as read with Section 2 of the Act was not fatal to the tender evaluation. It concluded that there was no prejudice suffered by the Applicant.

The Board has carefully examined the documents submitted before it and the parties' submissions and notes the following relevant dates/events in this matter:

- i) Tenders were closed/opened on 21st July, 2009;
- ii) Section 66(6) and Regulation 46 requires that the tenders be evaluated within a period of 30 days after opening of the tenders, therefore evaluation should have been concluded by 20th August, 2009;
- iii) The Procuring Entity carried out two technical evaluations;
- iv) The first technical evaluation was concluded on 31st July, 2009;
- v) The results of this evaluation were presented to the Tender Committee who on 21 August, 2009, approved and required the inclusion of bidders who had been disqualified for bid bond format only in the technical evaluation;

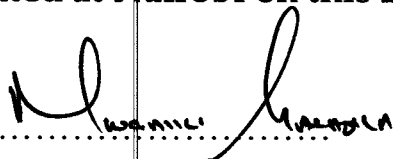
- vi) The evaluation committee proceeded to re-evaluate the bids as per the Tender Committee's instructions and the second technical evaluation was concluded on 8th September, 2009;
- vii) The Tender Committee on 25th September, 2009, approved the financial opening of the technically responsive bids;
- viii) Financial proposals were opened on 1st October, 2009.

From the foregoing, the Board finds that the first technical evaluation of the bids having been concluded on 31st July, 2009, was done within the mandatory period of 30 days from the opening of the tenders which would have lapsed on 20th August, 2009.

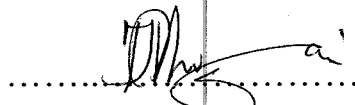
Accordingly, this ground of appeal fails.

The Board therefore orders, pursuant to Section 98 of the Act, that the appeal is hereby dismissed and that the procurement process may continue.

Dated at Nairobi on this 27th day of November, 2009



Signed Chairman



for Signed Secretary

