

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 40/2012 OF 14TH AUGUST, 2012

BETWEEN

HATARI SECURITY GUARDS LIMITED.....APPLICANT

AND

KENYA MEDICAL TRAINING

COLLEGE.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Medical Training College in the matter of Tender No. KMTC/HQRS/3/2012-2013 for Provision of Security Services.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Mr. Akich Okola	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Sospeter Kioko	-	Member
Amb. Charles Amira	-	Member

IN ATTENDANCE

Mr. Nathan Soita	-	Holding brief for Secretary
Ms. Judy Maina	-	Secretariat
Ms. Elizabeth Maeke	-	Secretariat

PRESENT BY INVITATION

Applicant – M/s Hatari Security Guards Limited

Mr. Mike Chebii	-	Advocate, Githinji Mwangi Associate
Mr. Daniel Kurui	-	Associate
Mr. Rahab Mbuchucha	-	Manager
Mr. Silas Riungu	-	Manager

Procuring Entity – Kenya Medical Training College

Mr. T.T. Tiego	-	Advocate, Onsando Ogonji & Tiego
Mr. P.K. Kariuki	-	HOD, Medical Lab Sciences
Mr. John Mwangi	-	Chief Procurement Officer

Interested Party – M/s Captain and Captain Security Ltd

Mr. Paul Kieti	-	Manager
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BOARD’S DECISION

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

BACKGROUND OF AWARD

Invitation of Quotation

The Procuring Entity invited ten bidders to submit their quotations under Quotation No. KMTC/HQRS/3/2012-2013 dated 4th July, 2012 for provision of security services to Nairobi, Karen, Karuri and Mathare KMTCs for a duration of 1 year. The quotation closed on 11th July, 2012.

Closing/Opening:

The bids closed/opened on 11th July, 2012 with the following six (6) firms responding:

1. Radar Security Ltd
2. Hatari Security Guards Ltd
3. Total Security Surveillance Ltd
4. Captain and Captain Security
5. P.G. Security Ltd
6. B.M. Security Ltd

EVALUATION

Evaluation was carried out in two stages namely; Technical Evaluation and Financial Evaluation. Each evaluation was conducted by different Evaluation Committee members.

Technical Evaluation:

The quotations were evaluated based on the following twenty parameters with each parameter allocated a maximum score of 5 marks:

1. Unit price
2. Guard salary per month
3. Guarded property amount insured
4. Guarded property insured per case
5. Guarded property insured per year
6. Insurance firm
7. Insurance for guard PINCOIT
8. Cash Escort price
9. Transit case insurance

10. Guard Educational level
11. Training period
12. Client in government & parastatal
13. Emergency Telephone No.
14. Vehicles
15. Communication Radios
16. Firms service in years
17. Supervision checks
18. Dogs
19. KSIA Reg. No.
20. CCK Licenses

Table 1 below provides the results of the Technical Evaluation.

Table 1: Technical Evaluation Results

SN	Firm	Guarded property insured per case	Guarded property insured per year	Insurance firm	Insurance for Guard PINCOIT	Cash Escort price	Transit case insurance	Guard Educational level	Training module	Training period	Client in government &
1	Radar security Ltd	20,000	50,000,000	Kenindia	Kenindia	7,000	7,000	D+	Submitted	6 weeks	2
2	Hatari security guards Ltd	20,000,000	50,000,000	Corporate	Madison	Not indicated	Not indicated	D+	Submitted	4 weeks	10
3	Total Security Surveillance Ltd	1,000,000	10,000,000	CIC	CIC	20,880	10,000,000	D+	Submitted	6 weeks	9
4	Captain and Captain Security	1,650,000	1,650,000	Harbinga	Fidelity	9,000	25% of cash escorted	C-	Submitted	12 weeks	10
5	P.G. Security Ltd	10,000	4,000,000	G.A	Not indicated	8,100	Not indicated	O level	Submitted	3 weeks	1
6	B.M. Security Ltd	3,000,000	Not indicated	Heritage	Not indicated	3,712	Nil	D+	Not submitted	4 weeks	5

Table 1 cont'

SN	Firm	Guard salary per month	Emergency Te. No.	Vehicles	Communication Radios	Firms service in years	Signing of 2 nd schedule	Supervision checks	Dogs	KSIA Reg. No.	CCK Licenses
1	Radar security Ltd	23,000	072894222/032	15	50	15	Signed	3	Many	Not indicated	2
2	Hatari security guards Ltd	13,340	Not indicated	60	18	20	Signed	3	Many	349	1
3	Total Security Surveillance Ltd	13,920	0717595751 0733740000	45	84	11	Signed	3	Many	015	4
4	Captain and Captain Security	13,800	0731824747	20	62	15	Signed	5	Many	C4560	1
5	P.G. Security Ltd	28,000	020-3520337	3	3	6	Signed	2-3	Not indicated	369	1
6	B.M. Security Ltd	33,060	0722330330	40	140	28	Signed	2	Not indicated	Not indicated	1

Table 2 below provides a summary of the Technical Evaluation results.

Table 2: Summary of Evaluation results

SN	FIRM	ITEMS	UNIT OF ACCT	QUANTITY	UNIT PRICE	TOTAL COST PER MONTH	GUARD SALARY PER MONTH	GUARDED PROPERTY AMOUNT	TOTAL MARKS %	REMARKS
1	Radar security Ltd	Security Guard	Each	28	23,000	644,000	12,246	20,000 (P1)	95	2 nd highest technically
2	Hatari security guards Ltd	Security Guard	Each	28	13,340	373,520	Not indicated	20,000,000 (P1)	80	4 th highest technically
3	Total Security Surveillance Ltd	Security Guard	Each	28	13,920	389,760	8,835	1,000,000 (P1)	100	1 st highest technically
4	Captain and Captain Security	Security Guard	Each	28	13,800	386,400	8,500	1,650,000 (P1)	100	1 st highest technically
5	P.G. Security Ltd	Security Guard	Each	28	28,000	784,000	10,500	10,000 (P1)	85	3 rd highest technically
6	B.M. Security Ltd	Security Guard	Each	28	33,060	925,680	14,843	3,000,000 (P1)	75	5 th highest technically

Financial Evaluation:

All the bidders were subjected to Financial Evaluation where their quoted prices were compared and ranked as indicated in table 3 below.

Table 3: Financial Evaluation results

SN	Firm	Guard salary per month	Ranking
1	Radar security Ltd	23,000	4
2	Hatari security guards Ltd	13,340	1
3	Total Security Surveillance Ltd	13,920	3
4	Captain and Captain Security	13,800	2
5	P.G. Security Ltd	28,000	5
6	B.M. Security Ltd	33,060	6

RECOMMENDATIONS

The Technical Evaluation Committee recommended the following two firms that scored 100% for consideration by the Tender Committee:

1. Total Security Surveillance Ltd
2. Captain and Captain Security Ltd

THE TENDER COMMITTEE DECISION

The College Tender Committee at meeting No. 2/2012 held on 1st August, 2012 awarded the tender for provision of Security Services to M/s Captain and Captain Security Ltd at a monthly price of Ksh. 13,800 per guard amounting to Ksh. 165,600 per one guard per year for being the lowest among the two firms recommended by the Technical Evaluation Committee.

THE REVIEW

The Request for Review was lodged by M/s Hatari Security Guards Limited on 14th August, 2012 in the matter of Quotation No: KMTC/HQRS/3/2012-2013 for provision of security services.

The Applicant was represented by Mr. Mike Chebii, Advocate while the Procuring Entity was represented by Mr. T.T. Tiego, Advocate. The Interested Candidate present M/s Captain and Captain Security Ltd was represented by Mr. Paul Kieti.

The Applicant requested the Board for the following orders:

1. *The Board be pleased to annul the procurement proceedings of QUOTATION NO.KMT/HQRS/3/2012-2013 in their entirety as undertaken by the Respondent.*
2. *The Board be pleased to cancel and nullify the award of the QUOTATION NO.KMT/HQRS/3/2012-2013 to any successful party.*
3. *The Board be pleased to give directions to the Respondent directing the Respondent to utilize procurement procedure of open tendering under part V of the Public Procurement and Disposal Act, 2005.*
4. *Such further and/or other relief that the Board may deem fit and grant.*

The Applicant raises seven grounds of review which the Board deals with as follows:

Grounds 1, 2 and 5: Breach of Sections 26(3) (b), 29(2), 88 (a) & ((b), 89 (5) of the Act and Regulation 59(1).

The three grounds have been consolidated as they raise issues related to the manner in which the Procurement process was carried out.

The Applicant submitted that the Procuring Entity used an alternative procurement procedure of Request for Quotations for provision of security services in breach of the provisions of Sections 29(2) and 88(a) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act"). It argued that the Request for Quotation procurement method restricts a request for quotation to procurement for goods that are readily available and for which there is an established market. It stated that the Procuring Entity used an alternative procurement procedure which resulted in invitation of quotations that exceeded the prescribed threshold matrix in contravention of Sections 26(3)(b) and 88(b) of the Act and Regulation 59(1) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Regulations").

The Applicant further submitted that the Procuring Entity used an alternative procurement procedure of Request for Quotation for provision of security services in breach of Section 89(5) of the Act. It argued that a Purchase Order is required to be placed for procurement of goods and not services, pursuant to Section 89(5) of the Act. It stated that the Procurement method used is not the suitable one because the

tender was for services. It submitted that, use of the quotations method was not suitable because for services, bidders capacity should be evaluated which does not apply in the case of quotations.

In response, the Procuring Entity submitted that it used an alternative procurement procedure since there was an urgent need to replace the current security services provider, namely Hatari Security Guards Ltd, who is the Applicant in this matter. It stated that the main reason for the urgency was that, Hatari Security Guards had been involved in theft of curtains and computers at Nairobi KMTC and also theft of computers at Karen KMTC. It stated that the two theft cases made the Procuring Entity to use the quickest method of procurement of security services. It stated that the KMTC Tender Committee gave approval for use of the 'Request for Quotation' method against Open Tender which would have taken long while the services would have continued to suffer under the current service provider.

With regard to the threshold, the Procuring Entity submitted that it came to know the exact amount of the contract sum after the bids were opened and analyzed. It stated class A, where KMTC falls is limited to Ksh 3 Million. It argued that since the College did not want to continue with a service provider who was doing a lot of disservice to it, the KMTC Tender Committee approved the Tender of Ksh 5 Million although the amount was more than Ksh. 3 Million threshold.

The Procuring Entity therefore opposed the review, arguing that it was frivolous and should be dismissed pursuant to Section 93(2) (d) of the Act. It stated that under Section 93(2) (a) of the Act, the Board is

estopped from reviewing the choice of the procurement procedure under part (iv) of the Act. It argued that, to the extent that the Applicant is appealing against the method of procurement used, this Request for Review should have been filed by 18th July 2012, pursuant to Regulation 73(2) (c). It argued that, the Applicant was time barred, having failed to file its Request for Review by 18th July 2012 when 14 days lapsed after the Procuring Entity released the tender documents to the bidders.

On the Procurement method used, the Procuring Entity stated that although the Tender Committee approved use of Request for Quotations, it used a Request for Provision of services under the Request for Proposals (RFP) method, pursuant to Section 76 of the Act. The Procuring Entity stated that it invited 10 bidders to participate in the tender process and after technical evaluation, the Applicant was ranked fourth.

The Procuring Entity further stated that, the Applicant in its current contract with the Procuring Entity, had used the same method to procure its services, and therefore it was not appropriate for the Applicant to attack the process in this Tender while similar method and documents had been used in the previous Tender in which it was the successful bidder. It argued that this amounted to blowing “hot and cold” at the same time. It argued that, the Applicant had not suffered any prejudice, as it had been invited to submit its bid, which was evaluated along with others and found to be less competitive. It urged the Board to find no merit on the Request for Review by the Applicant.

An interested party, Captain and Captain Security Ltd, stated that it submitted its bid, following an invitation by the Procuring Entity and complied with all the requirements, following which it was awarded the Tender.

The Board has considered the submissions by the parties and has perused the documents presented before it. The Board notes that the Applicant under these grounds is seeking a review on the manner in which the procurement was carried out and awarded. The Board is alive to the provisions of Sections 29(2) and 88(a) of the Act which provide as follows:

Section 29 (2): *"A procuring entity may use an alternative procurement procedure only if that procedure is allowed under Part VI".*

Section 88: *"A procuring entity may use a request for quotations for procurement if -*

(a)The procurement is for goods that are readily available and for which there is an established market;"

The Board notes that the choice of a procurement procedure is not subject to review as provided by Section 93 (2) (a) of the Act which states as follows:

"The following matters shall not be subject to the review under subsection (1) -

(a)The choice of a procurement procedure pursuant to Part IV;"

The Board notes that the Procuring Entity used the Request for Quotation method in the procurement of security services under

dispute. In this regard, the Board can only review and determine whether the process used was applied in line with the Law. In this Tender process, the Procuring Entity invited quotations for provision of security services under quotation No. KMTC/HQRS/3/2012-2013 dated 4th July, 2012 from ten firms out of which six responded by the opening date, 11th July, 2012 at 10.00 am. The Board notes that this method had been approved by the College Tender Committee at its meeting No. 15/2011-2012 held on 26th June, 2012.

The method used by the Procuring Entity is provided for under section 88, which provides as follows:-

Section 88: *"A procuring entity may use a request for quotation for procurement if -*

(a)

(b) The estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations."

The Board is alive to the provisions of Section 89 (4) of the Act which states as follows; *"The successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotations."*

Regarding the prescribed threshold for quotations, the Board notes that the total amount as approved by the Tender Committee under this procurement was Ksh.4,636,800. The Board notes that the Procuring Entity is in Class B and in line with the prescribed matrix, the maximum threshold for use of quotations is Kshs. 1,000,000. In this regard, the

Board finds that the Procuring Entity exceeded the maximum threshold allowed for quotations under its class. Thus the Procuring Entity breached Sections 26(3)(b) and 88(b) of the Act and Regulation 59(1) which provides as follows:

Section 26(3): *"All procurement shall be -*

(a)

(b) Undertaken by a procuring entity as per the threshold matrix as set out in the regulations"

Section 88: *"A procuring entity may use a request for quotation for procurement if -*

(a)

(b) The estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations."

Reg. 59(1): *"A procuring entity that conducts procurement using the request for quotations method pursuant to section 88 of the Act shall be subject to the procurement thresholds set out in the First Schedule."*

The Board notes that in its written response the Procuring Entity states that it used a Request for Quotation. However, during the hearing, it submitted that it had used a Request For Proposal. As already noted earlier, the Board cannot review the choice of a Procurement Procedure adopted by a Procuring Entity. In this regard, the issue that arises for determination is whether the Tender documents issued by the Procuring Entity had clear and objective evaluation criteria.

In this regard, the Board noted that the Procuring Entity:-

- (i) Invited ten bidders to submit Quotations by 4th July 2012 for provision of security services.
- (ii) Received 6 bids from various bidders.
- (iii) Evaluated the bids in two stages, namely Technical Evaluation and Financial Evaluation.
- (iv) Evaluated the 6 bids using a 20 parameter technical evaluation criteria and ranked the bids.
- (v) Financially evaluated the 6 bids and ranked them accordingly.

The Board notes that after the Financial Evaluation, the Technical Evaluation Committee recommended two firms that scored 100% under technical evaluation for consideration and award of the tender by the Tender Committee.

The two firms recommended had quoted as follows:-

Total Security Surveillance Ltd Kshs. 13,920 per guard per month.

Captain and Captain Security Ltd Kshs. 13,800 per guard per month.

The Tender Committee awarded the tender to Captain and Captain Security Ltd being the lowest between the two firms recommended by the Technical Evaluation Committee.

From the Procuring Entity's arguments, the Procuring Entity claims to have used an RFP method of Procurement. The Board notes that a Technical Evaluation was carried out and the bidders ranked accordingly. The Applicant scored 80% and was ranked 4th, while the

Successful Bidder and another bidder were both ranked 1st after scoring 100%. In the Financial Evaluation, the Applicant was ranked 1st, while the Successful Bidder was ranked 2nd. From the foregoing, the Board finds that it is clear that there was no objectivity in the manner in which the Evaluation was carried out as the Tender Documents did not provide on how the Procuring Entity was to combine the Technical and Financial scores as required, to arrive at the lowest bidder.

To the above end, the Board finds that the Procuring Entity acted unprocedurally in the way it evaluated the tender. Consequently, these grounds succeed.

Ground 3:

The Applicant submitted that the Procuring Entity issued two requests for quotations to the Applicant; the first one dated 6th June, 2012 and the second one dated 4th July, 2012, to which two requests for quotations, the Applicant returned to the Procuring Entity. It stated that the Procuring Entity failed to communicate to the Applicant on the result of the request for the quotation dated 6th June, 2012.

In response, the Procuring Entity stated that the quotation dated 6th June 2012 which was issued to bidders, was cancelled and bidders were informed that the same had to be repeated. It stated that Communication was done through telephone and not in writing and that is the reason why the Applicant and the others came to know about the repeat of the quotations, therefore participating a fresh.

The Board has perused the documents presented before it and established that the Procuring Entity invited two sets of quotations for provision of the same Security Services. The first quotation was No. KMTC/HQRS/174/2011-2012 dated 6th June, 2012 which was discussed and rejected by the Tender Committee at a meeting held on 26th June, 2012 due to lack of detailed Technical Evaluation report. The Board further notes that, it was after the rejection of those quotations that fresh quotations were invited from the same firms that had participated in the earlier quotations but now under quotation No. KMTC/HQRS/3/2012-2013 dated 4th July, 2012 which is the subject matter under review now. The Board notes that bidders were notified of the award of the latest quotation through Notification Letters dated 6th August, 2012.

The Board notes that the Applicant did not state the breach committed by the Procuring Entity by not notifying it of the outcome of the first quotation sought. Further, the Board notes that the Applicant has not come out clearly on when it became aware of the alleged breach, to enable the Board determine if the request for review on this particular ground is being raised with the Board within time as prescribed under Regulation 73 (2) (c). At least, the Board would have expected the Applicant to seek for review of the earlier quotations within 14 days after noting the breach; which it did not. Instead, the Applicant has now chosen to amalgamate issues of an earlier Tender with the current Tender, lapse of time notwithstanding as per Regulation 73 (2) (c) .

To the above end, the Board finds no merit on this ground.

Grounds 4, 6 and 7: Breach of Sections 2 and 89(3) (c) of the Act

The three grounds have been consolidated as they raise similar issues related to the evaluation process of the tender.

The Applicant alleged that the Procuring Entity failed to award the quotation to the person who had submitted the quotation with the lowest price that met the requirements set out in the request for quotation contrary to the provisions of Section 89(3)(c) of the Act. It alleged that the Procuring Entity handled the Applicant's request for quotation irregularly and unlawfully, which resulted in the rejection of the Applicant's quotation unfairly and on flimsy grounds.

The Applicant stated that the Procuring Entity's decision to reject its request for quotation offended the spirit of the Act, which requires public entities to establish practices and achieve standards which inter-alia;-

- a) Maximize economy and efficiency;
- b) Promote competition and ensure that competitors are treated fairly;
- c) Promote the integrity and fairness of those procedures;
- d) Increase transparency and accountability in those procedures;
and
- e) Increase public confidence in those procedures.

In response, the Procuring Entity stated that the Regulations require that the lowest technically evaluated bidder be considered for the award. It stated that although the Applicant was the lowest priced, it was not the

lowest technically evaluated bidder. Other bidders were more technically qualified than the Applicant. It stated that, the Tender Committee awarded the tender to the lowest evaluated bidder. The Procuring Entity averred that it did not handle the Applicant's quotation irregularly and unlawfully as alleged, arguing that the Applicant failed the Technical Evaluation and therefore could not be awarded the tender.

The Procuring Entity further submitted that it followed the Act with the sole purpose of achieving the five standard objectives of the Act and if only the Applicant qualified through the technical evaluation exercise, it could have been awarded the tender.

The Board has considered the submissions of the parties and perused the documents presented before it.

The Board notes the following:-

- (i) That the received quotations were subjected to Technical and Financial evaluations where the two highest technically responsive bidders namely; Total Security Surveillance Ltd and Captain and Captain Security Ltd with a score of 100% each were recommended to the Tender Committee for consideration and award of the Tender.
- (ii) That the bidder with the lowest price between the two first ranked bidders, namely, Captain and Captain Security Ltd, was awarded the contract at a unit price of Ksh.13, 800 per guard per month.

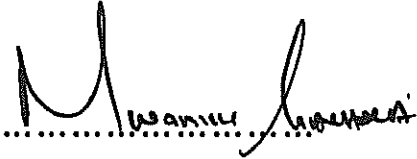
- (iii) That on the other hand, although the Applicant had quoted the lowest price of Ksh.13, 340 per guard per month, it was not recommended for award of the tender, having been ranked 4th technically with a score of 80%.
- (iv) That the Applicant failed to provide the required information on guard salary per month, cash escort price, transit case insurance and emergency telephone number(s) and hence could not score as high as the two other bidders who scored 100% and who were recommended for Award at the respective rates they had quoted for the services.

This issue is rotating on the evaluation and award of the Tender, which the Board has earlier in this decision ruled on under Grounds 1, 2 and 5. In this regard, the Board, as earlier held finds that the procedure adopted by the Procuring Entity under the RFP procedure, that the Procuring Entity claims to have used, was not applied in accordance with the requirements of the Act, with regard to setting of an evaluation criteria, using a formula to combine the Technical and Financial scores in order to arrive at the lowest evaluated bidder. To the above end, this ground also succeeds.

Taking into account all the above, the Request for Review succeeds and pursuant to Section 98 of the Act, the Board hereby nullifies the Tender award. The Procuring Entity may repeat the tender process and ensure to observe the requirements of the Act and the Regulations.

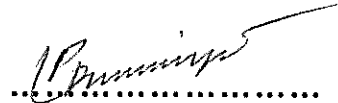
There are no orders as to costs.

Dated at Nairobi on this 11th day of September, 2012.



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CHAIRMAN
PPARB



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AG. SECRETARY
PPARB