

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 28/2012 OF 15TH JUNE, 2012

BETWEEN

PROTECTIVE CUSTODY LIMITED.....APPLICANT

AND

NATIONAL SOCIAL SECURITY FUND.....PROCURING ENTITY

Review against the decision of National Social Security Fund, in the matter of Restricted Tender No. 22/2011-2012 for Provision of Security Services to Social Security House (Nairobi & Mombasa) and Bruce House - Nairobi.

BOARD MEMBERS PRESENT

Mr. Akich Okola	-	Member (in the chair)
Mrs. Loise G. Ruhiu	-	Member
Eng. Christine Ogut	-	Member
Amb. Charles Amira	-	Member

IN ATTENDANCE

Mr. Nathan Soita	-	Secretariat
Ms. Judy Maina	-	Secretariat

PRESENT BY INVITATION

Applicant, Protective Custody Limited

Mr. Charles M. Njuguna - Advocate, Njuguna & Partners Advocates
Mr. Osman Wasike - B/Manager
Mr. Eugene Chisira - In-charge

Procuring Entity, National Social Security Fund

Mr. Christopher Wasike - Procurement Manager

Interested Candidate, Bob Morgan Security Services Limited

Mr. Thomas Agimba - Advocate, Agimba & Associates Advocates
Mr. Elkanah Sweta - Director

BOARD'S DECISION

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

BACKGROUND OF AWARD

Invitation

The Procuring Entity, National Social Security Fund invited Restricted Tender No. 22/2011-2012 for provision of Security Services to Social Security House (Nairobi & Mombasa) and Bruce House - Nairobi from nine firms through letters dated 7th January, 2012.

Closing/Opening:

The tender closed and opened on 24th February, 2012 with the following five (5) bidders responding:

1. G4S Kenya Ltd
2. BM Security Ltd
3. Pinkertons Professional Services
4. Radar Ltd
5. Security Group (K) Ltd

EVALUATION

The process of examination and evaluation of the tender was carried out in accordance with the evaluation criteria spelt out in the tender documents. i.e.

Stage 1: Preliminary / Mandatory Evaluation; whereby ALL preliminary / mandatory requirements set had to be met by bidders to qualify and proceed to stage two.

Stage 2: Evaluation for Technical requirements. Bidders were evaluated based on technical requirements set out in the evaluation criteria. The minimum total technical score required to pass was 75 points. Bidders scoring 75 points and above at this stage qualified to proceed to stage three, financial evaluation.

Stage 3: Financial Evaluation.

PRELIMINARY/ MANDATORY EVALUATION

The bids were examined to determine whether or not:

- a) The Bidder complied with the tender instructions
- b) The Bidder complied with the statutory requirements.

Four firms did not meet the requirements stipulated in the preliminary/ mandatory evaluation criteria. However, M/s BM Security Ltd. (bidder No.2) met all the requirements stipulated in the preliminary / mandatory evaluation criteria.

Summary of deficiencies for the bidders who failed to meet all the preliminary/mandatory requirements.

Four firms were disqualified from proceeding to stage two (Technical evaluation) after failing to comply with the following mandatory requirements:

1. G4S Security Services Ltd did not provide NSSF Compliance certificate.
2. Pinkertons Professional Services did not provide Prof. Sec. Association, 3 referees, NSSF Compliance certificate, Insurance Cover, evidence of payroll, Confidential business questionnaire, Form of tender and lacked compliance with the other mandatory stated conditions.
3. Radar Security Ltd did not have full compliance to the other mandatory stated conditions. Had less than 15 years in operation.
4. Security Group did not provide an NSSF compliance certificate, valid KRA certificate, valid membership to Kenya Security Industry Association certificate, the one provided expired in December 2011, lacked compliance with the other mandatory stated conditions i.e. less than 15 years in operation.

Only one bidder M/s BM Security Ltd met all the mandatory requirements and proceeded to Technical Evaluation.

TECHNICAL EVALUATION

This stage entailed verification of bids to ascertain compliance with technical specifications.

The only responsive bidder that qualified to this stage was evaluated and awarded points. The bidder scored 40 points on experience, 19.75 points on personnel, 12 points on Machinery, tools, equipment & dress, 8 points on business support and 5 points on referees thus managing to score a total of 84.75 points out of a maximum 100. The Bidder met the minimum required pass-mark of 75 points and thus proceeded to Financial evaluation.

FINANCIAL EVALUATION

After surpassing the minimum requirements at the technical evaluation stage i. e cut off point of seventy five percent (75%), the bidder's tender sum was checked for arithmetic errors. BM Security Ltd had a bid sum of KShs.59,382,720 with other additional charges of Kshs.1,512,480.

Therefore, BM Security got a technical score of 84.75% with a total bid sum of Kshs.60,895,200 (Inclusive of taxes).

RECOMMENDATION

The Evaluation Committee therefore recommended that M/s BM Security Ltd be awarded the contract for tender number 22/2011-2012:- Provision of Security Services to Social Security House (Nairobi and Mombasa)and Bruce House-Nairobi at their quoted sum of Kshs.60,895,200 for one year (Inclusive of taxes) subject to successful negotiations.

TENDER COMMITTEE DECISION

The Tender Committee at its meeting held on 22nd March, 2012 awarded the tender for provision of security services at Social Security House (Nairobi and Mombasa) and Bruce House to M/s BM Security Services Ltd at Ksh. 60,895,200 inclusive of all taxes per year for a contract of two (2) years.

THE REVIEW

The Request for Review was lodged by M/s Protective Custody Limited on 15th June, 2012 against the decision of the Tender Committee of National Social Security Fund in the matter of Restricted Tender No. 22/2011-2012 for provision of Security Services to Social Security House (Nairobi & Mombasa) and Bruce House Nairobi.

The Applicant was represented by Mr. Charles M. Njuguna, Advocate Njuguna & Partners Advocates while the Procuring Entity was represented by Mr. Christopher Wasike, Procurement Manager. The Interested Candidate M/s Bob Morgan Services Ltd was represented by Mr. Thomas Agimba, Advocate Agimba & Associates Advocates.

The Applicant raised four grounds of Review and requested the Board for the following orders:-

- (a) The Procuring Entity award be set aside.*
- (b) An order for the procuring entity to re-tender for the said services and comply with all provisions of Public Procurement and Disposal Act.*

(c) The Board do give any other or further orders as it deem just and expedient in the circumstances.

(d) Award the costs of the proceedings to the applicant against the procuring entity.

Preliminary Issue

At the outset of these proceedings, the Board informed the parties that after carefully reading the pleadings and examining the tender documents, the Board had formed the opinion that the major, and first issue, which it had to determine was whether it had jurisdiction to entertain the Request for Review. In the view of the Board, the issue pleaded by the Procuring Entity that a contract had already been signed between itself and the Successful Bidder pursuant to Section 68(2) of the Act, though not raised formally as a preliminary objection as required under Regulation 77, was nevertheless important enough to justify Board's inquiry as to whether it had jurisdiction to hear the matter on its merit.

Accordingly, the Board directed the parties to make submissions on the matter of jurisdiction as a preliminary issue, on the Board's own motion.

The Procuring Entity submitted that it used the restricted procurement method as set out in Section 73(2)(c) of the Act following approval given by its Tender Committee. It stated that pursuant to this approval it invited nine bidders vide letters dated 7th January, 2012, who did not include the Applicant. The Procuring Entity further stated that out of the nine bidders invited, five submitted bids which were evaluated in accordance with the criteria set out in the tender document. It averred

that following the evaluation, the tender was awarded by the Tender Committee of the Procuring Entity to the Successful Bidder, M/S BM Security Ltd, on 22nd March, 2012; and further that all the other bidders were notified of their fate by a letter of the same date. The Procuring Entity further averred that the letters of notification were picked up by the bidders from the Procuring Entity's premises on 26th March, 2012, following telephone calls to them.

It submitted that following this series of events it signed the resulting contract with the Successful Bidder on 7th May, 2012. It argued that as the contract had been signed in accordance with Section 68(2) of the Act, the Board had no jurisdiction to hear the Application.

In response, the Applicant argued that the matter should be heard on its merit and not on a mere procedural technicality. In support of this contention, the Applicant cited Article 159(2)(d) of the Constitution which states that:

"justice shall be administered without undue regard to procedural technicalities."

It submitted that the Procuring Entity had not complied with the requirements for use of the restricted tender method in that it had not carried out prequalification of the bidders as set forth in Section 73 of the Act.

The Applicant argued that in any event, without supporting documents to substantiate the claim by the Procuring Entity that it had notified the bidders as required under Section 67 of the Act, it was impossible to

compute when the time for the appeal window had started to run. It further argued that the contract attached as exhibit to the pleadings of the Successful Bidder was not dated, thereby giving rise to the question as to when it was actually entered into by the parties.

In conclusion it urged the Board to find that it had jurisdiction to hear the matter on its merits.

On its part, the Successful Bidder, M/s BM Security Ltd, associated itself with the submissions by the Procuring Entity that the contract having been signed by the parties in accordance with Section 68 of the Act, the Board had no jurisdiction to hear the Application as that jurisdiction was ousted by Section 93(c) of the Act. It pointed out that the award of the subject tender was made on 22nd March 2012, while the Application challenging the award was filed on 15th June 2012, which was after the expiry of the appeal window.

Regarding the question as to when the contract was signed, it pointed to the affidavit sworn by one Elkanah Swetah, a director of the Successful Bidder, to the effect that the contract was signed on 7th May, 2012.

The Board has carefully listened to the submissions by the parties and considered the documents before it and makes the following findings and decision.

The issues for determination by the Board are:

1. Whether it has jurisdiction to entertain the Application.

2. Whether the fact that the contract has been signed is a mere procedural technicality within the meaning of Article 159(2)(d) of the Constitution.

The High Court has ruled before that , the first thing that a court or a quasi judicial body must determine before hearing an Application is whether it has jurisdiction to hear a matter brought before it. In the case of **D. Chandulal K. Vora Company Ltd v. Public Procurement Administrative Review Board (MISC. APP. No. 1160 of 2004**, the Learned Judge quoted Justice Nyarangi in the case of **Owners of the Motor Vessel "Lillians" v. Caltex Oil (K) Ltd C.A No.50 of 1989** as follows:

“Jurisdiction is everything and without it the court has no juris power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence A court of law downs its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction”.

The Board has followed the principle enunciated in this Lillians case cited above as is evident in the case of **Gowharrud Construction Africa Limited Vs Kenya National Highways Authority Application No.2/2012**, where the Board decided that it had no jurisdiction where a contract had been signed in accordance with Section 68 of the Act.

The Board is a creature of the statute establishing it, which statute confers on it jurisdiction to hear requests for review arising from

disputed procurement decisions by procuring entities. The statute while giving powers with one hand, takes some of the powers with another. Towards this end, Section 93(2) takes away the jurisdiction of the Board in matters specified therein.

The Board notes that the award for the contract was made by the Tender Committee of the Procuring Entity on 22nd March 2012. The Board further notes that following this decision, letters dated 22nd March, 2012 were addressed to the five bidders which had responded to the letter of invitation by the Procuring Entity to submit bids for the subject tender informing them of the outcome of the process. The Board further notes that the letter addressed to the Successful Bidder informed it of its success in the competition, and those of the other bidders informed them of the fact that they were not successful.

During the hearing, the issue arose as to when the letters of notification cited above were mailed or picked up by the bidders, so as to enable determination to be made as to whether indeed they constituted notification as set forth in Section 67 of the Act. As the Procuring Entity was not able to provide evidence in this regard, the Board decided that it was in the interest of justice that the Procuring Entity be given an opportunity to produce evidence of dispatch of the letters, and for the Applicant to be served with the same. The Board notes that on 3rd July, 2012, the Procuring Entity wrote a letter to the Secretary to the Board, to which are attached photocopies of a document headed "Delivery Note." According to the said document, the names of the five bidders who participated in the tender in question are indicated and their

acknowledgment of receipt of the letter of notification is confirmed by the signature of their respective representatives, confirming that they received the letter in question on 26th March, 2012.

In light of the above, the Board is satisfied that notification to the bidders was done in accordance with Section 67 of the Act. This being the case, it follows that the 14 days appeal window started running on 27th March, 2012. Counting from that date the appeal window closed on 9th April, 2012. On this premise the Procuring Entity was at liberty to sign the contract after that date. Having signed the contract on 7th May, 2012, which was long after the appeal window had closed, the Board finds that the contract was signed in accordance with Section 68(2) of the Act. In the result, the Board finds that it has no jurisdiction to hear this instant Application, taking into account the provisions of Section 93(2)(c) of the Act.

The Board observes that the bidders who participated in this tender were all notified by the Secretariat of the filing of the instant Application. None of them has filed a complaint challenging the decision by the Procuring Entity. The inference to be drawn from this silence on their part is that they were satisfied with the process and the decision by the Procuring Entity.

Turning to the question as to whether the signing of the contract was a mere procedural technicality as claimed by the Applicant, the Board notes that a procurement process has two distinct phases, namely, the pre award phase, and the post award phase. Though these two phases

are the result of one process, they are nevertheless different in terms of the legal position of all the actors involved in them.

Whereas at the pre-award phase the Procuring Entity is fully and is alone in charge of the process in that it can, for example, it can terminate proceedings under Section 36 without any let or hindrance; it can allow the process to die without giving any explanation to those who have submitted bids and thereby incurring no liability to any of them, the situation is quite different after a contract has been concluded.

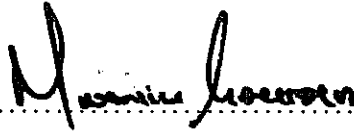
The act of signing a contract inevitably leads to loss of innocence by the Procuring Entity in that the privileged position it enjoys during the pre award phase is extinguished and it therefore stands on the same footing with the contractor. They are both equally bound by the terms and conditions they have agreed to under the contract, and neither is therefore in a superior position to the other. This situation is brought about by the fact that under our law, subject to some limitations, a contract into which parties have entered voluntarily is binding on them and the courts will enforce it.

It follows from this fact that, the act of signing a contract, and the obligations which it creates, is not a mere procedural technicality; rather it is a matter of substance which cannot be dismissed lightly. Commerce, and other aspects of life, where it is necessary to hold people to account for promises they have made, and on which others have relied to their detriment, would be seriously impaired if under the guise of our Constitution, the Board were to dismiss procurement contractual obligations as mere procedural technicalities. Accordingly the Board

finds the argument by the Applicant that the signing of the contract was a mere procedural technicality in terms of Article 159(2)(d) of the Constitution to be without merit.

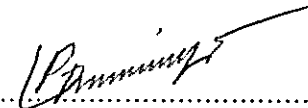
Taking all the above matters into account, the Board finds that it has no jurisdiction to hear this Application on its merits.

Dated at Nairobi on this 4th day of July, 2012



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**CHAIRMAN
PPARB**



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FOR : **SECRETARY
PPARB**