

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 72/2012 OF 20TH DECEMBER, 2012

BETWEEN

BABS SECURITY SERVICE LIMITEDAPPLICANT

AND

COUNTY COUNCIL OF MURANGA.....PROCURING ENTITY

Review against the decision of the Tender Committee of the County Council of Muranga dated 20th December, 2012 in the matter of Tender No. MCC/2012/2013-1 for the Provision of Security Services.

BOARD MEMBERS PRESENT

- Ms. Judith Guserwa
- Ms. Natasha Mutai
- Eng. Christine Ogut
- Amb. Charles Amira
- Mrs. Loise Ruhiu
- Member (In the Chair)
- Member
- Member
- Member
- Member

IN ATTENDANCE

Mr. Philemon Chemoiwo - Secretariat
Ms. Shelmith Miano - Secretariat

PRESENT BY INVITATION:

Procurring Entity - County Council Of Murang'a
Mr. P. M. Warima - Advocate

Mr. Jacob Muthamia - Clerk,

Mr. B. Nkondo - Treasurer,

Mr. Kenneth Wahome - Procurement Officer

Mr. P. Wambiri - Security Officer

Applicant - Babs Security Services Limited

Mr. C. N. Njuguna - Advocate, C. N. Njuguna & P

Interested Party

Mr. Joshua Mwaura

- General Manager, Internal Security Services
Mr. Joseph Mwangi - Director, Internal Security Services

BOARD'S DECISION

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

BACKGROUND

The tender was for procurement of Security Services for County Council of Muranga.

Closing/Opening:

The bids closed/opened on 29th November, 2012. The bidders who submitted bids as at opening were as follows:

Firm	Cost in Ksh
1. Babs Security Service	11,000
2. Internal Security Service limited	11,800

EVALUATION

The evaluation was carried out by a committee chaired by Mr.S.M. Maina. The evaluation involved checking the bid documents against the requirement listed in the Tender documents the results are summarised hereafter:-

Charges
Day
Night

Internal Security services Ltd
Babs Security

11,000=
11,800=
11,000=
11,800=

Firms

SPECIFIC CONDITIONS		COMPANIES	
		Internal Security	Babs Security
a)	Bidbond Ksh50,000=	√	√
b)	Registration certificate	√	√
c)	N.S.S.F Compliance	√	√
d)	N.H.I.F Returns & Compliance Certificate	√	√
e)	KRA Compliance Certificate	√	√
f)	Employees Group Personal Accident	√	√
g)	Ministry of Labour Compliance Certificate	√	√
h)	Training Policy	√	√
i)	Company organ. structures	x	√
j)	Office in Murang'a with VHF Radio	x	√
k)	Audited A/C. for the previous year	√	√
l)	Term of credit at least 60 days	x	√
m)	Management Personnel qualification	x	√
n)	Directors certificate of good conduct	√	√
o)	At least 5 clients with over Ksh.200,000 p.m.	x	√
p)	Membership with PSIA/KSIA	√	√
q)	Valid C.C.K Licence	x	√

RECOMMENDATION

Based on the specific condition set out M/s Internal Security Services missed six items while M/s Babs Security Services fully met all the conditions as indicated in the table above. Financially M/s Internal Security Services were cheaper. The evaluation committee considered the sensitivity of the security matters and regarded items like VHF Radio critical and thus recommended the award to be given to Babs Security Services.

THE TENDER COMMITTEE DECISION

The Tender Committee deliberated the evaluation report for the provision of security services were they (evaluation Committee) recommended award of the tender to Babs Security.

After lengthy deliberation over the matter, the members resolved to award the tender to M/s Internal security on the basis that they were the lowest bidders.

Secondly the members felt that the tenders requirement that a firm must have a CCK certificate which goes hand in hand with VHF use do not hold much weight as they have been overtaken by events especially by use of mobile phone. As it was reported that none of the two tenderers use VHF Radio for communication purposes.

THE REVIEW

This Request for Review was lodged on 20th December, 2012 by Babs Security Services Ltd against the decision of the Tender Committee of County Council of Muranga in the matter of tender No. MCC/2012/2013-1 for the Provision of Security Services.

The Applicant was represented by Mr. C. M. Njuguna, and Advocate while the Procuring Entity was represented by Mr P.M Warina, Advocate while the interested party was represented by Joshua Mwaura, General Manager and Joseph Mwangi, Director, both of Internal Security Services.

The Applicant seeks for the following orders:

- (a) *The Procuring Entity award be set aside.*
- (b) *The tender be awarded to the applicant.*
- (c) *Any further order or direction the Board may deem appropriate in the circumstances.*

The Applicant raised five (5) grounds of review which the Board deals with as follows:-

Grounds 1, 2 and 3 - Breach of Sections 64 of the Act, and Regulations 10, 11, 47, 48 and 49 of the Regulations;

The above grounds have been consolidated as they raise similar issues on the evaluation of the tender and qualification for the award of contract. The Applicant stated as follows:

1. That The Procuring Entity breached Section 64 of the Public Procurement and Disposal Act 2005 (hereinafter referred to as "The Act" and Regulations 47, 48 49, 10 and 11 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "The Regulation" by failing to reject the tender which had not satisfied the mandatory and or technical requirements set out in the tender document.
 2. That the Procuring Entity used an evaluation criterion that is in breach of Section 66 of the Act, to the effect that it did not apply the criteria and evaluation set out in the tender document.
 3. That the Procuring Entity breached Regulations 10 and 11 of the Regulations failing to the award the contract to the Applicant.
 4. That the Procuring Entity breached Section 67 of the Act by failing to notify the Applicant of the results of the tender simultaneously with the notification to the Successful Bidder.
- In response, the Procuring Entity stated that:
1. Ground 1 of the Requested for Review is unfounded in that the requirement were "merely permissive and mandatory" and was bound to reject the tender on the basis of failing to meet all the requirements but was guided by the competitiveness of the tender.
 2. Ground 2 is equally not well founded as amply demonstrated at page of document No 9 of the Procuring Entity's response earlier submitted and in any event it has to be noted that the applicant was not using VHF and it could not be heard to complain in that respect.

not necessary.

7. The Board also notes that the Tender Committee felt that the requirements in the Tender Document that a firm must have a valid CCK Certificate which goes hand in hand with VHF radio use, was than that of Babs Security Services Limited.

6. The Board also notes that the Tender Committee in its meeting of 10th December, 2012 overturned the recommendation of the Evaluation Committee to award the tender to Applicant M/s Babs Security and instead awarded the tender to the Successful Bidder Internal Security Services for the reason that its price was cheaper licence as critical.

5. The Board further notes that the Evaluation Committee, in its report to the Tender Committee, recommended the award of tender to the Successful Bidder M/s Babs Security Services based on the technical evaluation as outlined in the evaluation report. The Evaluation Committee further stated that owing to the sensitivity of the security, it (committee) regarded items like VHF communication and CCK

CHARGES	Internal Security Ltd	11,000/=	11,800/=
	Babs Security	11,000/=	11,800/=
COMPANIES			
		Day	Night

4. The Board also notes that the Evaluation Committee carried out hereafter:-
evaluation of the Financial Bids whose results were as set out

requirements in the tender documents."

"A tender is responsive if it conforms to all the mandatory

Section 64 (1):-

criteria were mandatory or not as envisaged by section 64(1) which states:
seventeen. The Tender Document did not specify whether the listed tender
while the Successful Bidder did not meet six of the requirements out of the
From the marking the Applicant met all the Seventeen tender requirements
marked responsiveness by ticking whether a bidder had complied or not.
contain mandatory and technical criteria and the Evaluation Committee.
The Board further notes that the Seventeen Tender requirements appear to
specific conditions against which it evaluated the bids.

observes that the Procuring Entity set out seventeen (17) requirements or
the evaluation using the criteria set out in the Tender Document, the Board
On, the first issuing touching on whether the Procuring Entity carried out
tender process.

- ii. Whether the Applicant was unfairly disqualified from the
 - i. Whether the Procuring Entity carried out the evaluation
- determination.

revolves around two (2) issues which require the Boards interpretation and
From the above, the Board notes that the thrust of this Request for Review
to changing the substance of Tender requirement in the Tender Document.
The Board therefore finds that the Tender Committee's decision amounted

As noted by the Board earlier in these decision that even though the Evaluation Committee had recommended the Applicant to be awarded the tender because it met all the requirements, the Tender Committee

the Applicant. Committee decided to award the tender to the Successful Bidder instead of eleven (11) of the Tender requirements, the Procuring Entity's Tender demanded by the Procuring Entity while the Successful Bidder only met all the Seventeen (17) Specific Conditions of Tender requirements from the tender process, the Board notes that although the Applicant met Regarding the issue as to whether the Applicant was unfairly disqualified

Regarding the issue as to whether the Applicant was unfairly disqualified from the tender process, the Board notes that although the Applicant met all the Seventeen (17) Specific Conditions of Tender requirements demanded by the Procuring Entity while the Successful Bidder only met eleven (11) of the Tender requirements, the Procuring Entity's Tender Committee decided to award the tender to the Successful Bidder instead of the Applicant.

It is clear to the Board that it was the Procuring Entity's erroneous belief that the tender requirements are "merely permissive and mandatory" that made the Tender Committee to feel, wrongly though, that the requirement in the tender document that the firm must have CCK license and VHF Communication equipment was not necessary. The Board finds that by taking this decision, the Procuring Entity breached Section 66(2) the Act which states that "*The procuring entity shall not attempt to have the substance of a tender changed*". Therefore this limb of the review Succeed.

The Board notes, with surprise, that the Procuring Entity in its response stated that the listed requirements are "merely permissive and mandatory" which implies that the Procuring Entity could opt to make the tender criteria discretionary or mandatory. The Board finds this statement to be against the provision and spirit of the Act.

overturned the recommendation of the Evaluation Committee to award the tender to the Applicant M/s Babs Security Services and instead awarded the tender to the Successful Bidder M/s Internal Security Services, contrary to Regulation 11 as doing so the tender Committee breached the provision of Regulation 10 and 11 which defines the distinct mandate of the Evaluation and the Tender Committee respectively. The powers of the Tender Committee are set out in the Regulations 10 to 12 wherein the Evaluation Committee and the Tender Committee should work within the confines of their respective mandate.

The Board therefore finds that by ignoring a number of the tender requirements or the Specific Conditions, namely, the provision VHF Radio and Valid CCK licence the Tender Committee had not only changed the substance of the tender contrary to Section 59(3) of the Act as stated before but also introduced a new evaluation criteria contrary to Section 66 (2) of the Act which state as follows:

Section 66 (2):-

"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 further finds that if the Tender Committee did not agree with the recommendation of the Evaluation committee to award the tender to Babs Security, the Tender Committee should have returned the report back to the Evaluation Committee as provided by in Regulation 10 and 11 which states:

Regulation 10(2) (a) specifically states that the functions of the tender Committee shall be to "Review, verify and ascertain that all procurement and disposal has been undertaken in accordance with the Act, these Regulations and the terms set out in the tender documents."

Regulation 11 (1):-

"In considering submissions made by the procurement

a) Approve a submission; or

b) Reject a submission with reasons; or

c) Approve a submission, subject to winner clarifications by the

procurement unit or Evaluation Committee."

Regulation 11 (2):-

"The Tender Committee shall not -

a) Modify any submission with respect to the recommendations

for a contract award or in any other respect.

b) Reject any submission without justifiable and objective

reason."

Indeed the Board is alive to the requirement of Regulation 10 which sets out the functions of the Tender Committee that must be strictly complied with by the Procuring Entity.

In view of the above, this limb of the grounds of review also succeeds.

The Applicant alleged that it stands to suffer loss and prejudice for failure by Procuring Entity to follow the law relating the evaluation of the subject tender which led to the rejection of its bid price of Kshs. 11,800 per month per guard. It further argued that the action of the Procuring Entity unlawful and ought to be set aside.

In its response the Procuring Entity stated that the award of the subject tender was informed by the Tender requirement of the tendering process.

Ground 5 - Loss

ground fails

The Board has perused the documents presented submitted to it and from the evidence submitted by the Procuring Entity s that the Applicant as well as the Successful Bidder were notified of the award of tender on the same day being 11th December, 2012. And indeed the Board notes that the Applicant was able to lodge its Request for Review in time. Therefore this ground fails

Application.

In response, the Procuring Entity stated that this ground of the request for review is mischievous in view of Procuring entity response to the simultaneously with notification to the Successful bidder.

The Applicant submitted that the Procuring Entity breached Section 67 of the Act by failing to notify the Applicant of the results of the tender

Ground 4 - Breach of Section 67 of the Act

The Board has held severally, that, tendering is a commercial business risk taken by the parties, and as such each party that participates in tender should bear its own costs.

Taking into account all the above matters, this Request for Review Succeeds.

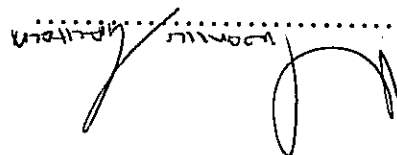
The Board orders, pursuant to Section 98 (b) of the Act that:

- (1) The tender award made on the 20th December, 2012 to the Successful Bidder M/s Internal Security Services, be and is hereby annulled.

- (2) The Procuring Entity is hereby ordered to substitute and to award the Tender to the Applicant Babs Security Services as per the recommendation of the tender Evaluation Committee.

- (3) There is no order as to costs.

Dated at Nairobi on this 21st day of January, 2013

CHAIRMAN
PPARB
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SECRETARY
PPARB
A.S.
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