

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 23/2013 OF 19TH JULY 2013

BETWEEN

BEDROCK HOLDINGS LTDAPPLICANT

AND

**MASINDE MULIRO UNIVERSITY OF
SCIENCE AND TECHNOLOGY.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Masinde Muliro University of Science and Technology dated 28th June, 2013 in the matter of Tender No. MMUST/30/13-14 for Provision of Security Services.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	- Chairman
Ms. Judith Guserwa	- Member
Mr. Sospeter Kioko	- Member
Mrs. Loise Ruhiu	- Member
Mr. Akich Okola	- Member

IN ATTENDANCE

Mr. Philemon Chemoiywo	- Holding Brief for Secretary
Ms. Shelmith Miano	- Secretariat
Ms. Susan Chesang	- Secretariat

PRESENT BY INVITATION

Applicant- Bedrock Holdings Ltd

Mr. Muthomi Thiankolu - Advocate
Mr. Samuel Karanja - Advocate
Mr. William Ololo - Director

Procuring Entity - Masinde Muliro University of Science & Tech

Mr. C. M. Wekesa - Advocate
Mr. Richard Malebe - Advocate
Ms. R. O Mombu - Procurement Officer
Eng. M. K. Makangula - SEO
Mr. Amukanga Michael - SSA
Ms. Jacqueline Wanjala - Legal Officer
Prof. A. M. Simiyu - Associate Professor

Interested Parties -

Mr. Thomas Agimba - Advocate, Samo Security
Mr. Philip Lumuli - Director Samo Security
Ms. Jackline Tindi - Advocate, Clean Homes Security
Mr. Pasiliano Olunga - Director, Blue Rock Security

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

Invitation to tender

The Procuring Entity advertised Tender No. MMUST/30/13-14 for Provision of Security Services in the Standard and Daily Nation Newspapers of 22nd April, 2013

Closing/Opening:

At the time of tender closing/opening, seven firms responded as follows:

Table 1 – Tender Opening

S/N	Name Of Bidder	Tender Amount	Provided Bid Security	Issuing Bank/ Insurance Company
1.	Kleen Homes Security Services Limited	19,500,000	400,000.00	Equity Bank
2.	Cornerstone Security Services Limited	20,328,768	170,000.00	Family Bank
3.	Robinson Investment Limited	17,712,000	354,240.00	Chase Bank
4.	Samo Security	18,756,000	380,000.00	Equity Bank
5.	Blue Rock Security Limited	31,740,000	550,000.00	Kenya Orient Assurance Ltd.,
6.	Riley Falcon Security Limited	27,547,680	547,334.40	Kenya Commercial Bank
7.	Bedrock Holdings Limited	19,710,720	393,101.00	First Assurance Co.Ltd.,

EVALUATION

Evaluation of the received bids was carried out by an Evaluation Committee of sixteen members under the Chairmanship of Prof.A.M.

Simiyu. The evaluation was carried out in three stages namely; Preliminary, Technical and Financial evaluation stages.

Mandatory requirements

The evaluation for mandatory requirements was carried out as provided section 47 (1) (a) - (g) of the Public Procurement and Disposal regulation, 2006.

These included the following:-

1. Provision of a Bid Bond of at least 2% of the tender sum in the format provided
2. Filling Of Form Of Tender
3. The Required Number Of Copies (Two)
4. The Tender Validity Period Is Per As The Tender Document

The Results of Bid Bond of at least 2% of the tender sum is as tabulated in below:-

Table 2 - Bid Bond Requirement

S/N	Name Of Bidder	Tender Amount	Provided Bid Security	Bid Bond Calculated at 2%	Remarks
1.	Kleen Homes Security Services Ltd	19,500,000	400,000.00	390,000	Responsive
2.	Cornerstone Security Services Limited	20,328,768	170,000.00	406,575.36	Less than 2% Non-Responsive
3.	Robinson	17,712,000	354,240.00	354,240	Responsive

	Investment Limited				
4.	Samo Security	18,756,000	380,000.00	375,120	Responsive
5.	Blue Rock Security Limited	31,740,000	550,000.00	634,800	Less than 2% Non-Responsive
6.	Rilley Falcon Security Limited	27,547,680	547,334.40	550,953.60	Less than 2% Non-Responsive
7.	Bedrock Holdings Limited	19,710,720	393,101.00	394,214.40	Less than 2% Non-Responsive

From the above the following bidders were deemed non-responsive for having provided a bid security that was less than 2% of the tender sum, hence they were not considered for further evaluation.

1. Cornerstone Security Services Limited
2. Blue Rock Security Limited
3. Rilley Falcon Security Limited
4. Bedrock Holdings Limited

The following bidders were considered for further evaluation as they had fulfilled the mandatory requirements above:-

1. Robinson Investment Limited
2. Samo Security
3. Kleen Homes Security Limited

Preliminary Evaluation

The tenders were examined against the following parameters as indicated in table 3.

Table 3 - Preliminary Evaluation

S/N	Item Description	Weighting (Points)	Robinson Investment Limited	Samo Security	Kleen Homes Security Services
I.	Completeness of filling the document	5	5	5	5
II.	Copy of valid Business Permit	10	10	10	10
III.	Certificate of incorporation/registration	10	10	10	10
IV.	TAX compliance Certificate (PIN, VAT etc.) In the applicants' name (attached)	10	0	10	10
V.	Evidence of NSSF remittance for staff between June 2012 and January 2013 issued by NSSF Office	10	0	10	10
VI.	Evidence of NHIF remittance for staff between June 2012 & Jan 2013 issued by NHIF office	10	0	10	10

VII.	Evidence of Membership to Kenya Security Industry Association or similar duly incorporated security service providers association	5	5	0	5
VIII.	Evidence of Workman's Injury Benefit cover for guards & other staff	10	10	10	10
IX.	Evidence of compliance to government wage guidelines and all labour requirements e.g. timely payment of basic pay and allowances among others (attach letter from ministry of labour, signed, stamped and approved)	10	10	10	10
X.	Audited financial statements for the last two years. approved signed and stamped by the auditor attached	5	5	5	5
XI.	References from three main current clients other than MMUST (attach reference letters) 0 client.....0	0			

	2 client.....3	3			
	3 clients..... 5	5	5	5	5
XII.	Orderliness of the document, do not rearrange these documents instead attach your supporting documents behind and well labeled	5	5	5	5
XIII.	Bankers approval on the applicants liquidity, suitability and credit limitation (approved, signed, stamped by the bank & attached)	5	5	5	5
	TOTAL	100%	70	95	100

Tenderers who scored 60% and above proceeded to Technical Evaluation. From the above, ALL the three firms qualified for further evaluation

4.3. TECHNICAL EVALUATION

Technical Evaluation was carried out against the following parameters as indicated in table 4.

Table 4 - Technical Evaluation

S/N	Item Description	Weighting (Points)	Robinson Investment Limited	Samo Security	Kleen Homes Security Services
I.	Copies (attach) of Curriculum Vitae and Certificates for professional training in relevant fields of top management, i.e. Directors, General Manager etc Degree and above. Diploma Certificate None	20 15 10 0	0	20	10
II.	Ability to cry out forensic investigation. (Attach staff certificates to prove training in forensic investigation with at least 2 years working experience).	15	0	10	10
III.	Evidence of company's policy on continuous training of guards with evidence of its implementation.(Attach certificates of the same)	5	5	5	5
IV.	Evidence of the company's technical capacity in terms of equipment including among others; radio communication, alarms back-up system (CCK licenses are required as evidence)	10	10	10	10
V.	Ownership of a dog unit with at least 10 trained and duly vaccinated dogs on standby on site. (Attach evidence of licensing and vaccination documents. There will be site visit for demonstration on training and approval)	10	10	09	07

VI.	Evidence of ownership and licensed operation of firefighting services for at least the last two and half years	20	0	0	0
VII.	Evidence of ownership and use of Patrol Monitor by supervisors(copy of print out for the last one year)	5	0	5	5
VIII.	Evidence Technical ability to install service, maintain s, and operate Closed Circuit Television (CCTV) system. (attach reference from current client)	10	0	10	10
IX.	Ownership and licensed ambulance services for at least the last two years for rapid response should need arise	10	0	10	10
X.	Ownership of security escort services should there be need	5	5	5	5
	TOTAL	100%	30	84	72

Bidders who scored 70% and above proceeded to the Financial Evaluation stage. From table 4 above **Robinson Investment Ltd** was non-responsive. Two (2) bidders **Samo Security Limited** and **Kleen Homes Security Services Limited** qualified for Financial Evaluation.

FINANCIAL EVALUATION

The arithmetic error correction was carried on the documents of the 2 bidders and the bid amount for **Kleen Homes Security Limited** adjusted from the quoted 19,500,000 to Kshs. 19,704,000/=(Kenya Shillings Nineteen Million Seven Hundred Four Thousands) only.

The weighted average is 80% allocated for technical score and 20% for bid amount.

The technical score of each bidder are:

$$(i) \text{ Samo Security Limited } \frac{80 \times 84}{100} = 67.2$$

$$(ii) \text{ Kleen Homes Security Services Ltd. } \frac{80 \times 72}{100} = 57.6$$

Financial score was computed using the following formula:

$$FS = 20 \times FM / F$$

Where: FM is the lowest evaluated priced responsive bid

F is the price of the bid under consideration

(i). the financial Score for each firm is as follows:-

$$(a). \text{ Kleen Homes Security Services Ltd. } 20 \times \frac{18,756,000}{19,704,000} = 19.0$$

$$(b). \text{ Samo Security Limited } 20 \times \frac{18,756,000}{18,756,000} = 20$$

TOTAL SCORE

The total score for each bidder is as shown in table 5 hereafter.

Table 5 - Financial Evaluation

S/N	Bidder	Financial Score	Technical Score	Total Score	Ranking
1.	Kleen Homes Security Ltd.	19.0	57.6	76.6	2
2.	Samo Security Limited	20	67.2	87.2	1

Observation

Both the firms, SAMO SECURITY LIMITED, Tender sum Kshs. 18,756,000/= (Eighteen Million Seven Hundred Fifty Six Thousand) only, and KLEEN HOMES SECURITY LTD., Tender sum Kshs. 19,704,000/= (Nineteen Thousand Seven Hundred Four Thousands) only, met the minimum requirements and ranked number 1 and number 2 respectively.

Recommendation

A Due diligence team was appointed to visit the two firms, Samo Security Ltd., of P.O. Box 60682, Nairobi and Kleen Homes Security Ltd., of P.O. Box 1208 - 00200, Nairobi, to ascertain the facts provided in the tender documents before the award.

TENDER COMMITTEE DECISION

The Masinde Muliro University of Science and Technology (MMUST) Tender Committee at its 24th meeting held on 28th June, 2013 discussed and adopted the Evaluation Report presented before it and made the award of contract for Provision of Security Services to M/s Samo Security at a total sum of Ksh.18,756,000.

THE REVIEW

The Request for Review was lodged by Bedrock Holdings Limited on 19th July, 2013 in the matter of Tender No: MMUST/30/13-14 for Provision of Security Services.

The Applicant was represented by Mr. Muthomi Thiankolu, Advocate, while the Procuring Entity was represented by Mr. C. M. Wekesa, Advocate. The interested candidates present were M/s Samo Security represented by Thomas Agimba, Advocate, M/s Kleen Homes Security represented by Ms. Jackline Tindi, Advocate and Blue Rock Security represented by Mr. Pasiliano Olunga, Director.

The Applicant requested the Board for the following orders:

1. *The Procuring Entity's Decision and tender proceedings are hereby annulled; or*
2. *Alternatively, the Procuring Entity is hereby ordered to review and revise the evaluation criteria in strict compliance with the Constitution, the Act and the Regulations and thereafter re-advertise the tender; and*
3. *The Procuring Entity is hereby ordered to pay the Applicant the costs of and incidental to this Request for Review; and*
4. *Such other, additional, further, incidental and/or alternative orders as the Honorable Board may deem just and expedient.*

The Applicant in its Request for Review raised four(4) grounds of review and the Board deals with them as follows:-

Grounds 1, 2, 3 and 4

The four grounds have been argued together as they all revolve around the issue of specifications in the tender document, the manner the evaluation process was conducted and whether the Successful Bidder met the specifications that were set out in the tender documents.

The Applicant in support of the Request for Review made the following submissions:

1. The tender proceedings offended Sections 2, 31, 34, 64 and 66 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act) as read together with Articles 227 of the Constitution.

It argued that the Procuring Entity had set out specifications and evaluation criteria that had no bearing to the services being procured contrary to the provisions of Sections 34 and 66 of the Act.

The main objection by the Applicant was that the tender advertisement notice also included another tender for firefighting. Therefore, it stated that since there was another tender for firefighting it was improper to include a condition in this tender that required bidders to have owned firefighting equipment and ambulance services equipment for at least a period of two and half years. The Applicant complained that firefighting and ambulance services are not relevant in a tender for security services and yet they had been allocated a total of 30 marks out of 100.

The Applicant argued that the equipment on firefighting and ambulance services had no functional, regulatory, logical or indeed any connection between the requirements and the evaluation criteria of firefighting and ambulance services.

The Applicant stated that it had written a letter seeking clarification on this issue but the Procuring Entity wrote back and stated that bidders had to comply with the requirements set out in the tender document;

2. The Successful Bidder was not a member of Kenya Security Industry Association or a similar body which was a mandatory requirement in the tender document. It provided the Board with a list of the members of the two Security Associations that are registered in Kenya and pointed out that the Successful Bidder was not a member of any of the two. It stated that this averment had not been denied by the Procuring Entity and the Successful Bidder; and
3. The evaluation criteria was not objective and quantifiable as envisaged by Section 66 of the Act. It argued that the evaluation process was not conducted in accordance with the Act and Regulations 47 and 48 of the Public Procurement and Disposal Regulations, 2006 (hereinafter the Regulations).

It argued that since the Successful Bidder was not qualified, it should have been disqualified from the tender process. It urged the board to nullify the entire tender process as it offends the provisions of Section 31, 34 and 66 of the Act and Regulations 47 & 48.

An interested candidate, Kleen Homes Security Ltd supported the submissions of the Applicant and stated that the criteria on firefighting and ambulance services had no relation at all to the provision of security services.

It stated that the evaluation process was flawed and urged the Board to annul the tender process.

In its response, the Procuring Entity submitted as follows:

1. It stated that the tender document clearly provided that for a bidder to proceed from the Preliminary Evaluation stage to the technical stage, a bidder had to score a minimum of 60%. It further stated that the membership Kenya Security Industry Association was one of the items under preliminary evaluation and it attracted five marks. It stated that this was not a mandatory requirement for disqualification as argued by the Applicant. It pointed that the Successful Bidder was scored zero on this item but overall it scored above the pass mark of 60%;
2. It stated that the Applicant failed at the initial stage of the evaluation as it failed to provide a bid bond equivalent to 2% of its tender sum. Therefore, the Applicant was properly disqualified and the issues raised in the ground for review were afterthought;
3. The Procuring Entity is an institution with many buildings, students, staff members and visitors and therefore it must be safe and secure. It stated the requirement on firefighting and ambulance services falls squarely on the tender for security services. It stated that these two items are components of security services and there was no contravention of the Act and Regulations;

4. It stated that the Board has held decisions that a Procuring Entity has the right to determine the requirements and define specifications of a tender. It stated that this was clearly provided in Section 34 of the Act. It also cited *Application No. 20 of 2013 - Magal Security Services Vs Kenya Airports Authority* where the Board held that a Procuring Entity has the right to determine the requirements and define the specifications of a tender.

It stated that once a tender has been floated, bidders have a right to participate or refrain from participating. It stated that it was wrong for a bidder to participate and later complain after it is declared unsuccessful; and

5. It stated that the tender was suitable to the requirements of the Procuring Entity and that the evaluation process was carried out fairly and urged the Board to dismiss the Request for Review.

On its part, the Successful Bidder associated itself with the submissions of the Procuring Entity. It stated that it was qualified to be awarded the tender. It stated that although it is not yet a member of security association, it had already applied for membership and in any event it had attained the pass mark set out in preliminary evaluation stage.

The Board has considered the submissions of the parties and the documents that were submitted before it.

The Board notes that the three grounds that were raised by the Applicant revolve around the specifications set out in the tender document; the manner the evaluation process was conducted and the qualifications of the Successful Bidder.

The Board deals with the issues raised as follows;

(i) Whether the criteria on the supply, delivery and servicing of firefighting equipment and ambulance services are objective and quantifiable and whether they have a functional, regulatory or logical connection to the tender.

The Board notes that the Public Procurement and Disposal Act sets out the duties and obligations of a Procuring Entity. Amongst the duties that have to be performed by a Procuring Entity is the preparation of the tender documents which must have clear specifications and objective evaluation criteria. The Act also sets out that Procuring Entities should use the standard tender documents as set out in Regulation 29.

Regarding this issue, the Board observes that there is nothing wrong if a Procuring Entity deems fit to include firefighting services and ambulance services in a tender for security services. This is more so in an institution like the Procuring Entity herein which has a huge population of students and workers.

The only caveat that a Procuring Entity must observe is that the specifications and the criteria for evaluation must be objective and quantifiable as provided by Section 34 (1) of the Act which provides as follows:

“The Procuring Entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings”

The Board notes that the complaint by the Applicant is that the requirement for firefighting equipment and ambulance services are in contravention of the specifications of the Act and Section 227 of the Constitution as it does not promote competition and fairness in the tender process. As the Board has already observed, it is upon a Procuring Entity to decide what it needs and therefore prepare a tender document that has clear specifications and which allow the bidders to participate in a fair open and competitive manner.

Having made the above observations, the Board has to answer the question whether the evaluation on these two items were set out in a manner that allowed fair competition and whether the evaluation on the two items was carried out in a fair manner.

To this end, the Board notes that the Technical Evaluation had ten items that were marked out of 100 marks. Item number six and nine stated as follows;

vi) Evidence of ownership and licensed operation of firefighting services for at least the last two and half years.20 marks

ix) Ownership and licensed ambulance services for at least the last two years for rapid response should need arise. 10 marks

The Board has perused the evaluation report and notes that the Successful Bidder did not provide any evidence that it owned firefighting equipment. It provided a letter showing it was to engage in a joint venture with another Security Company known as KK Security. On this item, it was awarded zero marks.

The Board notes that the Successful Bidder did not provide any evidence that it owned an ambulance, or that it was licensed to offer ambulance services. However, it provided a letter that it had entered into an arrangement with St. John Ambulance to provide those services. On the strength of the letter from St. John Ambulance it was awarded 10 marks.

The Board notes that the way the two items were specified in the tender documents was not objective and did not promote fair competition. If the Procuring Entity was ready to accommodate a bidder who had an arrangement with the service providers for firefighting and ambulance services, this should have been clearly stated in the tender document.

The Board finds that by awarding the marks to the Successful Bidder on the criterion on ambulance services on the strength of a letter from St. John Ambulance Services, the Successful Bidder was treated in preferential manner. To ensure that there was an open and fair competition the tender documents should have provided that a bidder was free to enter into a joint venture with other service providers.

(ii) Regarding the manner in which the evaluation was done the Board notes as follows:

- a) The Applicant was disqualified at the preliminary stage for failure to provide a bid bond of equivalent to 2% of the tender sum.
- b) The Applicant provided a bid bond of KShs 393,101 against the expected KShs 394,214 and thus had a shortfall of KShs 1,113.40. the Board has held severally that bidders who fail to meet the mandatory criteria ought to be disqualified at the

Preliminary Evaluation stage in accordance with Regulations 47 which provides as follows:

Regulation 47 (1)

“ Upon opening of tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether-

- (a) The tender has been submitted in the required format;*
- (b) Any tender security submitted is in the required form, amount and validity period;*
- (c) The tender has been signed by the person lawfully authorized to do so;*
- (d) The required number of copies of the tender have been submitted;*
- (e) The tender is valid for the period required;*
- (f) All required documents and information have been submitted and;*
- (g) Any required samples have been submitted.”*

Regulation 47 (2)

“The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1)”

The Board notes that although the Applicant was disqualified at the preliminary evaluation stage, the tender document did not comply with the requirements of Regulations 47. The Board observes with concern that the Tender Document at page 20 provided the manner the preliminary

evaluation was to be done. It provided a number of items which were to be marked out of 100 marks.

At the outset the Board states that preliminary evaluation ought to have been done on a yes/no basis. In this tender the Procuring Entity prepared a marking scheme for the preliminary items save for the bid bond. If that was what it intended to do, the bid bond should also have been included in the marking scheme but not as a disqualifying criterion as this was discriminatory.

But as the Board has already observed, preliminary evaluation cannot be done on a scoring basis as it may allow bidders who are not qualified in accordance with Section 34 of the Act to participate in a tender.

To demonstrate why the Procuring Entity was clearly wrong on this issue, it is important to note how it conducted the preliminary evaluation. The

Board notes that the Procuring Entity was to award marks as follows:

- (i) Copy of valid business permit (10 marks)
- (ii) Certificate of Incorporation (10 marks)
- (iii) Tax Compliance Certificate (10 marks)
- (iv) NSSF Compliance (10 Marks)
- (v) NHIF Compliance (10 Marks)

The Board has highlighted a few of those items to demonstrate that mandatory criteria cannot be evaluated on a scoring basis.

Most the items to be evaluated at this stage are statutory requirements and a bidder who fails to meet any requirement must be disqualified. As an example, a bidder who has no Tax Compliance certificate cannot be allowed to participate even if it attained the 60 marks set out by the Procuring Entity.

In this tender the Board notes that the Successful Bidder was not a member of Kenya Security Industry Association or a similar body but was scored zero whereas the proper thing to have been done was a disqualification.

In view of the foregoing, the way the evaluation was done was contrary to Regulation 47 and it was not fair.

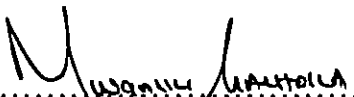
- (iii) The Procuring Entity detected arithmetic errors in the Tender Document of a bidder Kleen Homes Security Ltd. It adjusted the tender amount from Kshs 19,500,000 to 19,704,000. A Procuring Entity is entitled to adjust arithmetic errors but it has not communicated to the affected bidders in accordance to Section 63 (2) of the Act. The Procuring Entity admitted that it did not notify the bidder on the correction of the arithmetic errors. In view of the foregoing, it is clear that the evaluation was not carried out in an objective and fair manner.

In view of the foregoing the grounds of review succeed.

Accordingly, the Board orders pursuant to Section 98 of the Act that;

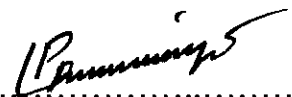
- i) The award to the Successful Bidder, Samo Limited be and is hereby annulled;
- ii) The Procuring Entity shall retender using the relevant standard tender documents as provided in Regulations 29;
- iii) There shall be no orders as to cost.

Dated at Nairobi on this 13th day of August, 2013.


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CHAIRMAN

PPARB


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SECRETARY

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