

REPUBLIC OF KENYA

REUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 43/ 2013 OF 31ST OCTOBER, 2013

BETWEEN

TOTAL SECURITY SURVEILANCE LTD..... APPLICANT

AND

**KENYA NATIONAL
HIGHWAYS AUTHORITY.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Kenya National Highways Authority dated 4th October, 2013 in the matter of **Tender No. KeNHA/749/2013 for Provision of Private Security Services for KENHA Offices and Sites**

BOARD MEMBERS PRESENT

Mrs. Josephine W. Mongare - Member (in the chair)
Mr. Hussein Were - Member
Mr. Nelson Orgut - Member

IN ATTENDANCE

Ms. Pauline Opiyo - Secretary

PRESENT BY INVITATION

Applicant - M/s Total Security Surveillance Ltd

Mr. Stephen Bundotich - Advocate

Mr. James Cheruiyot - Business Development Manager

Mr. Frankline Shikanda - Chief of operations

Mr. Samson Sang - Business Manager

Procuring Entity -Kenya National Highways Authority

Mr. Charles Dulo - Advocate

Ms. Jessica Mbae - Legal Officer

Ms. Norah Odingo-Kajwang' - Head of Legal & Corporate Affairs

Mr. Dan O. Were - Corporate Services Officer

Ms. Levina Wanyonyi - Manager Procurement

Ms. Catherine Kimani - Snr. Admin. Officer

Mr. George Ng'inja - Procurement Officer

Ms. Caroline J. Kiplagat - Administrative Officer

Mr. John Chebor - Procurement Assistant

Ms. Anne Juma - Procurement Assistant

Interested Parties:

Mr. Akich Okola - Advocate, Babs Security

Mr. Isaac Macharia - Director, Babs Security

Mr. Samuel Mureithi	- Accountant, Babs Security
Mr. Victor Omwebu	- Advocate, Bedrock Security
Mr. Henry Faraji	- Legal Assistant, Bedrock 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 OF THE AWARD

Advertisement

Tender No. KeNHA/749/2013 for Provision of Private Security Services for KeNHA Offices at Headquarter and ten (10) Regional Offices was advertised in the Daily Nation of 1st August 2013 and The Standard of 2nd August 2013.

Closing/Opening:

Tender closing / opening was conducted on 15th August, 2013 at 12.00 noon. Nineteen (19) bids were received from the following firms:

Table 1 - Bids received

No	Name of Bidder
1	Vickers Security Services
2	Goldengate Security Services Ltd
3	Runda Security Services Ltd
4	Cobra Security Co. Ltd
5	Svensson & Iyansson Agencies Ltd
6	Redstar Security (K) Ltd
7	Babs Security Services Ltd
8	Apex Security

9	Lamu Security Gaurds
10	Total Security Surveillance Ltd
11	Wakobe Security Company Ltd
12	Mocam Security
13	Lavington Security Ltd
14	Bedrock Security Services Ltd
15	Cornerstone Security Services Ltd
16	Hatari Security Gaurds Ltd
17	Gaurdforce Group Ltd
18	Idar Group Security Services Ltd
19	El-Bari Security Services Co. Ltd

EVALUATION OF BIDS

Tender evaluation was conducted in three stages namely preliminary evaluation (mandatory), technical evaluation and financial evaluation.

Preliminary Evaluation (Mandatory)

Prior to detailed Technical and Financial evaluation, the bids were checked for responsiveness and completeness.

The conditions laid down in the invitation to Tender required that a bidder must provide the information below in order to be considered responsive:

- a) Tender Security of Kshs 230,000.00 in form of unconditional bank guarantee from a reputable bank in Kenya and valid for a period of (120) days from the date of tender opening.
- b) Certified copy of Certificate of Incorporation/ Registration
- c) Copy of valid tax compliance certificate

- d) Certified copy of certificate of registration as member of Kenya Security Industry Association (KSIA)
- e) Experience of at least 10 years in provision of private security services in Kenya
- f) Valid frequency license (not payment receipts) from CCK
- g) Certified copy of valid city, municipal or county council license.
- h) Proof of compliance with prevailing labour Laws in respect to minimum wage. Attach Compliance Letter from the Labour Office.
- i) Proof of remittance of statutory NHIF and NSSF contributions. Attach current compliance certificate.
- j) Valid work injury benefits policy or group personal accident policy or employer's liability policy.
- k) Contractual liability insurance policy cover of not less than 10,000,000/- per event per year. Attach a valid copy of contractual liability policy document.
- l) Copy of the official receipt from KeNHA on proof of payment for the tender document.
- m) Site visits forms duly filled and signed by the appointed KeNHA representative.
- n) Duly filled form of tender
- o) Duly filled confidential business questionnaire
- p) Tender validity Period of 90 days.

N/B: The tender processing committee realized that there were two parallel Private Security Associations in the industry. With a view to avoid discriminating any association, the committee pursuant to Section 64(2)(a-b) of the Public Procurement and Disposal Act, 2005, amended requirement (d) above to cover registration / membership under Kenya Security Industry Association (KSIA) or Private Security Industry Association (PSIA).

Table 2 - Results of Preliminary Evaluation

No	Documents to be submitted	Bidder 1- Vickers	Bidder 2- Golden	Bidder 3- Runda	Bidder 4- Cobra	Bidder 5- Svensson	Bidder 6- Red	Bidder 7- Babs	Bidder 8 - Apex	Bidder 9 - Lamu	Bidder 10 -Total	Bidder 11 - Wakobe	Bidder 12 - Mocam	Bidder 13- Lavington	Bidder 14 - Bedrock	Bidder 15 - Cornerstone	Bidder 16 - Hatari	Bidder 17 - Guard	Bidder 18 - Idar	Bidder 19- El-Bari
1.	Tender security of Kshs 230,000.00 in form of unconditional bank guarantee from a reputable bank in Kenya and shall be valid for a period of (120) days from the date of tender opening.	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
2.	Certified copy of Certificate of Incorporation registration	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
3.	Copy of Valid Tax Compliance Certificate	Y	Y	Y	Y	X	Y	Y	Y	X	Y	Y	Y	X	Y	Y	Y	X	X	X

Out of the nineteen (19) bidders, seventeen (17), including the Applicant, did not qualify to proceed to detailed technical evaluation for failure to meet various mandatory requirements as shown in table 2.

The Applicant did not qualify to proceed to detailed technical evaluation for the following reasons:

1. The firm submitted a Bid Bond that has omitted one of the Conditions that will make the Bidder forfeit the Bond to the Procurement Entity, in case of failure by the Bidder to accept correction of errors.
2. Did not Provide Copy of Contract of Either Valid work injury benefits policy or group personal accident policy or employer's liability
3. Did not Provide Copy of Contract for Contractual liability insurance policy cover of Kshs. 10,000,000/- per event, per year.

The following two bidders passed the Preliminary Evaluation and proceeded to Technical Evaluation:-

- i. Bidder Number 7 - M/s Babs Security Services Ltd
- ii. Bidder Number 16 - M/s Hatari Security Gaurds Ltd.

Technical Evaluation

The above bidders were responsive to the preliminary requirements of the Tender and were subjected to detailed Technical Evaluation.

The results were as tabulated in table 3

Table 3 – Results of Technical Evaluation

No	Criteria	Method of Evaluation	Maximum Points	Bidder No 7 - M/s Babs security services ltd	Bidder No 16 - M/s Hatari security gaurds ltd
1	Firm Experience as shown by the number of years in the Provision of Private Security Services	One(1) Point for every year's Experience	5	4.7	5
2	References	No of Contracts handled in the last three Years(Attach Copy of the Contract) Two(2) Points for each -Maximum Six(6) Points No of Contracts with Public Entities (Attach Copy of the Contract) Two(2) Points for each -Maximum Six(6) Points Recommendation Letters from three Clients - Two(2) Points for every letter -Maximum Six(6) Points	6	6	6
3	Professional Qualification and Experience of three	Security Qualifications-Two (2) Points for Each -Maximum Six(6) Points	6	5.3	5.3

Table 3 - Results of Technical Evaluation

No	Criteria	Method of Evaluation	Maximum Points	Bidder No 7 - M/s Babs security services ltd	Bidder No 16 - M/s Hatari security gaurds ltd
4	Technical Personnel (Documentary Evidence is Mandatory)	Relevant Educational Qualification - Two (2) Points for Each -Maximum Six(6) Points	6	5.7	5.3
		Relevant Experience - One (1) Point for Every year's experience after qualification -Maximum Five (5) Points	5	5	5
4	Technical Capability (Documentary Evidence is Mandatory)	No of Operational Vehicles /Motor Cycles Two(2) Points for each Maximum Six(6) Points	6	6	6
		No of Operational Vehicles Mounted with Mobile Communication Equipment Two(2) Points for each Maximum Ten (10) Points	10	6.3	6.7
		VHF/Radio Communication Equipment Connected to police Network -Nine(9) Points	9	5	8.3

Table 3 – Results of Technical Evaluation

No	Criteria	Method of Evaluation	Maximum Points	Bidder No 7 - M/s Babs security services ltd	Bidder No 16 - M/s Hatari security gaurds ltd
		Control Room Manned by Competent Controllers able to communicate Competently in English and Kiswahili, Four(4) Points	4	2.3	3.3
		No of Trained Dogs with Medical attention and treatment records ,Two(2) Points for Each maximum Six(6) Points	6	6	5.3
		Availability of Dog Carrier Six (6) Points	6	6	6
		Availability of Trained Dog Master, Four (4) Points	4	3.3	2.7
	Insurance	Insurance with Policy for Employees (Attach a copy)	5	5	5
6	Guards Strength	No of Guards (Attach Copies of NSSF and NHIF Contribution Certificates)	5	4.3	5
7		Cash and Cash Equivalent: Total Assets(Attach Documentary Evidence) Two Points	2	1.7	2

Table 3 - Results of Technical Evaluation

No	Criteria	Method of Evaluation	Maximum Points	Bidder No 7 - M/s Babs security services ltd	Bidder No 16 - M/s Hatari security gaurds ltd
	Financial Capability	Current Assets: Current Liabilities (Attach Evidence) Two(2) Points	2	1.7	2
		Proof of ability to pay salaries in Advance without depending on Procurement Entity's Payment -Working Capital One(1) Point	1	1	1
			100	87.3	92
	Responsive / Non-Responsive			Responsive	Responsive

Financial Evaluation

All the Bidders who were subjected to Technical Evaluation Scored above 70 Marks and below is the Comparison of their Financial Bids

Table 4 - Comparison of Financial Bids

S/No	Region/Office	No of Guards	Bidder No 7- M/s Babs Security Services Ltd		Bidder No 16 M/s Hatari Security Gaurds Ltd	
			Cost Per Guard	Monthly Cost	Cost Per Guard	Monthly Cost
1	Headquarters	18	14,600.00	262,800.00	16,008.00	288,144.00
2	Nairobi Region	6	14,600.00	87,600.00	16,008.00	96,048.00
3	Upper Eastern	8	13,000.00	104,000.00	16,008.00	128,064.00
4	Lower Eastern	8	13,000.00	104,000.00	16,008.00	128,064.00
5	Central	8	13,000.00	104,000.00	16,008.00	128,064.00
6	North Eastern	3	13,000.00	39,000.00	16,008.00	48,024.00
7	Coast	24	13,000.00	312,000.00	16,008.00	384,192.00
8	North Rift	16	13,000.00	208,000.00	16,008.00	256,128.00
9	South Rift	12	13,000.00	156,000.00	16,008.00	192,096.00
10	Nyanza	24	13,000.00	312,000.00	16,008.00	384,192.00
11	Western	14	13,000.00	182,000.00	16,008.00	224,112.00
	Total Monthly Cost in Kshs			1,871,400.00		2,257,128.00
	Total Annual Cost in Kshs			22,456,800.00		27,085,536.00

Conclusion

Out of Nineteen (19) bidders who bid for the provision of private security services for KeNHA offices **Tender No KeNHA/749/2013** only two (2) met mandatory, technical and financial evaluation criteria.

Recommendation

The Tender Processing Committee recommends that **Tender No KeNHA/749/2013** for Provision Of Private Security Services for KeNHA Offices and Sites **be awarded M/s Babs Security Services Ltd of P.O. Box 4380 -00200 Nairobi being the Lowest Evaluated Bidder at their Annual Bid Price of Kshs 22,456,800.00 (Twenty-two Million Four Hundred and Fifty-six Thousand Eight Hundred only)**

The contract cost per month per region is as shown in the table below:

Table 5 = Contract cost per month per region

S/No	Region/Office	No of Guards	Bidder No 7- M/s Babs Security Services Ltd	
			Cost Per Guard	Monthly Cost
1	Headquarters	18	14,600.00	262,800.00
2	Nairobi Region	6	14,600.00	87,600.00
3	Upper Eastern	8	13,000.00	104,000.00
4	Lower Eastern	8	13,000.00	104,000.00
5	Central	8	13,000.00	104,000.00
6	North Eastern	3	13,000.00	39,000.00
7	Coast	24	13,000.00	312,000.00
8	North Rift	16	13,000.00	208,000.00
9	South Rift	12	13,000.00	156,000.00
10	Nyanza	24	13,000.00	312,000.00
11	Western	14	13,000.00	182,000.00
Total Monthly Cost in Kshs				1,871,400.00
Total Annual Cost in Kshs				22,456,800.00

TENDER COMMITTEE DECISION

The Tender Committee at its Meeting No 114 held on 19th September, 2013 adjudicated and awarded Tender No. KeNHA /749/2013 for **Provision of Private Security Services** for KeNHA Offices at Headquarters and Ten (10) Regional Offices and Sites for a period of 1 year from 1st November, 2013 to **M/s Babs Security Services Ltd** of P.O. Box 4380-00200 at their bid price of **Kshs.22,456,800.00** (Twenty-two Million Four Hundred and Fifty-six Thousand Eight Hundred Only) as per the recommendation of the Tender Processing Committee.

The Letters of Notification to the Successful Bidder and unsuccessful bidders, including the Applicant are dated 4th October, 2013.

THE REVIEW

The Applicant M/s Total Security Surveillance Ltd lodged this Request for Review on 31st October 2013 against the decision of the Tender Committee of the Kenya National Highways Authority (KeNHA) in the matter of Tender No. KeNHA/749/2013 for Provision of Private Security Services to KeNHA Offices at Headquarters and Ten (10) Regional Offices and Sites.

The request emanated from the Procuring Entity's letter of Notification to the Applicant dated 4th October 2013 (posted to the Applicant on 25th October 2013 and received by the Applicant on 28th October 2013) advising it of the reasons as to why its bid was adjudged unsuccessful. The reasons given by the Procuring Entity for rejecting the Applicant's bid were:

- a) **Submitting a Bid Bond that omitted one of the salient conditions of a valid bid security**
- b) **Failure to provide either valid work injury benefits policy or group personal accident policy or employer's liability policy**
- c) **Failure to provide copy of Contract for contractual liability insurance policy cover for Kshs. 10,000,000 per event per year**

At the hearing, the Applicant was represented by Mr. Stephen Bundotich, Advocate while the Procuring Entity was represented by Mr. Charles Dulo, Advocate. The Successful Bidder, M/s Babs Security Services Ltd was represented by Mr. Akich Okola, Legal Consultant while another interested party, M/s Bedrock Security Services Limited was represented by Mr. Victor Omwebu, Advocate.

The Applicant requested the Board for the following orders:-

- 1. That tender No. KeNHA/749/2013 for provision of Private Security Services for KeNHA Offices at Headquarters and Ten (10) Regional Offices be nullified.**
- 2. That the purported notification of award of contract for provision of Private Security Services by the said Procuring Entity, under Tender No. KeNHA/749/2013 be cancelled forthwith.**
- 3. That the Procuring Entity, be ordered to re - tender for Provision for Private Security Services.**

The Applicant's Request for Review raised ten (10) grounds which the Board has condensed into seven main issues for determination by the Board as canvassed by the parties in their submissions. The Board deals with the issues as follows:

Issue No. 1 - General statement about the Tender Notice

The Applicant had stated that the Procuring Entity published a notice in the Daily Nation Newspaper of 6th August 2013 inviting suitably qualified firms to submit tenders for provision of Private Security Services for KeNHA Headquarters Offices and Ten Regional Offices and Sites. This being a general statement that did not canvass any breach of the Act or the Regulations, the Procuring Entity stated that the advertisement for the Tender was on 1st & 2nd of August, 2013 in the Daily Nation and The Standard newspapers respectively and the matter, by concurrence of the parties, was put to rest at that point.

Issue No. 2- Whether the Successful Bidder qualified for contract award under Section 66 of the Act and Clauses 1.1 & 2.3.2 of the Tender Document and whether there was due diligence in the evaluation (Grounds 2,3,5 & 6)

The Applicant averred that the Successful Bidder M/s Babs Security Services Ltd is not a member of Kenya Security Industry Association (KSIA) as required by Clause 1.1 of the Tender Document hence did not meet Mandatory requirements set out by the Procuring Entity and as such its bid should have been found non responsive. This averment was supported by an Interested Party, M/s Bedrock Security. Counsel for M/S Bedrock Security Services Ltd submitted a list of members of KSIA from official KSIA website that showed that only three of the Tenderers namely M/s Total Security Limited, M/s Cobra Security Limited and M/s Bedrock Security Limited appeared on that list. It submitted that the Successful Bidder - M/s Babs Security limited is not on that list. It further submitted that the Tender Document at Clause 2.3.2 requires tenderers to fully comply with all the conditions set out in the Tender Document, failure to which they risk rejection of their bids.

The Applicant further averred that the Procuring Entity failed to adhere to / comply with the evaluation criteria set out in the Tender Document and failed to carry out the evaluation with all due diligence.

The Procuring Entity denied that it awarded the tender to a tenderer who is not a member of a security association. The Procuring Entity avers that it awarded the tender to a qualified candidate who emerged the lowest evaluated bidder in accordance with Section 66(1)(2) and (4) of the Public Procurement and Disposal Act 2005. It also averred that it fully complied with Section 64(2) (b) of the Act in reaching its decision. The Procuring Entity

initially denied that it failed to adhere to the evaluation criteria as was set out in the Tender Document. It however admitted that the evaluation criterion was expanded in order to include members of Protective Security Industry Association (PSIA) which is another association of security companies in order to widen competition. It submitted that it strictly followed the evaluation criteria as set out in the Tender Document and the law as no candidate was discriminated against.

The Board notes that the Procuring Entity and the Successful Bidder, in advancing their argument for acceptance of membership certificates from members of Protective Security Industry Association, cited the Board's decision in **Review Application No.37 &38 of 2012 between Valley Auctioneers and Galaxy Auctioneers versus Kenya Ports Authority**. The gist of the said decision was that the Board found that the Procuring Entity did not violate its own tender document by allowing members of a different body of Auctioneers to participate in a tender when the tender document had not included them in the criteria. The Board notes that in the referenced case the Procuring Entity did issue an addendum before the close of the tender period to allow members of the other Association of Auctioneers to participate in the tender. However this was not done in the current matter. The Board notes that the Procuring Entity without notice to any of the bidders unilaterally changed its own evaluation criteria and proceeded to award the tender to a bidder whose bid clearly was non-responsive as it did not conform to a mandatory condition set out by the Procuring Entity. The Board holds that this case therefore does not assist the Procuring Entity or the Successful Bidder.

The Board finds that since the KSIA membership was a mandatory requirement, the Procuring Entity ought to have rejected tenderers that did not have the KSIA membership certificate and declared their bids non-responsive. The Board finds that the admission for further evaluation of bids that did not meet a mandatory requirement was therefore erroneous on the part of the Procuring Entity. The Board holds that the Procuring Entity cannot set its own rules for procuring services and then go ahead to breach the same to the prejudice of the bidders. Under Section 53(1) of the Public Procurement and Disposal Act, 2005 (hereafter referred to as "the Act"), any material change in the tender requirements that has the potential to affect the results of tender evaluation can only be effected before the bids are opened and not after. The net effect is that these Grounds of Appeal succeed.

Issue No. 3 - Whether the Procuring Entity defied the Board's directive by entering into a contract with the "Successful Bidder" (Ground 2)

The Applicant alleged that the Procuring Entity, having been notified of the filing of the Request for Review, went ahead and evicted it from its premises and proceeded to enter into contract for provision of services with the Successful Bidder in violation of the directions from the Board. The Applicant submitted that the Procuring Entity went ahead and notified the Landlord that the Applicant was persona non grata on the premises and indeed filed a civil suit No. 492 of 2013 wherein it obtained eviction orders and an order barring the Applicant from its premises. The Applicant submitted that by so doing the Procuring Entity acted contemptuously to the directions of the Board and in contravention of the Act and the Procuring Entity's action should be punishable under Section 137 of the Act.

In its response the Procuring Entity submitted that it is not in contempt as the contract for provision of services by the Applicant to it had expired and that the current arrangement with M/s Babs Security Limited is of temporary nature and was not done pursuant to the tender subject matter of this Review but was through direct procurement as provided for under Section 64 of the Act because of the urgency therein.

The Board notes that no document has been produced by the Procuring Entity to show compliance with Section 64 of the Act in the purported Direct Procurement of services from M/s Babs Security Services Ltd. The law requires that where direct procurement is to be used the Tender Committee must approve the use of that method and this could only be proved by minute of the Tender Committee that authorized the method of procurement and the reasons justifying the same. Further, the Procuring Entity is by law obligated to communicate with the Director General, Public Procurement Authority once it elects to use that Direct Procurement and provide reasons there under. The Board also takes issue with the Procuring Entity's treatment of its directive and would like to caution the Procuring Entity that future violation of the Board's directives will be dealt with firmly and with dire consequences as that amounts to a mockery of the law and is a contravention of the purpose for which the Board has been established. The Board therefore agrees with the Applicant that the Procuring Entity acted without proper authority and justifiable cause when it entered into a contract for provision of security services, albeit temporary, with a party which had participated in this tender when the Board had notified it of the pending Request for Review. This Ground for Review therefore succeeds.

Issue No. 4 – Whether the Tender evaluation beyond the 15 days provided under Regulation 46(1) was irregular (Ground 4)

The Applicant averred that the Procuring Entity evaluated the tenders outside the mandatory period of 15 days after the opening of bids contrary to Legal Notice No. 106 of 18th June 2013 and specifically Regulation 46(1) of the Public Procurement and Disposal Regulations as amended. It submitted that according to Regulation 46(1), *“a procuring entity shall, for purposes of section 66(6) of the Act, evaluate the tenders within a period of fifteen days after the opening of the tenders.”*

The Procuring Entity denied that it evaluated the tender outside the mandatory period as stipulated by the Law. It submitted that it followed the Law to the letter in evaluating the tenders. It averred that it complied with the requirements of Legal Notice No. 106 of 18th June 2013 specifically Regulations 46(2) of the amended Regulations since it obtained the Accounting Officer’s approval to extend the evaluation period. It provided a copy of an approved memo through which the extension of time was granted pursuant to Regulation 46(2).

The Board notes that the bids were opened on 15th August, 2013 and evaluation was completed on 5th September, five days later than the mandatory period. The Board further notes that the Procuring Entity has provided a copy of a memo dated 23rd August, 2013 in which the Director General of KeNHA approved the extension of the evaluation period by a further 30 days upon request by the Procurement Manager. The Board notes that upon obtaining approval for extension of the evaluation period in accordance with Regulation 46(2), the Procuring Entity completed the

evaluation process within the validity period of the tender. The Board is satisfied that the extension of the evaluation period was legally correct and no prejudice was suffered by the Applicant by that extension. Consequently this Ground of Appeal fails.

Issue No. 5 - Whether the notification of the Applicant was properly done in accordance to Section 67 of the Act and Regulation 66(2) (Ground 7)

The Applicant submitted that the late notification of the results of the tender was a scheme by the Procuring Entity to cause prejudice to the Applicant. The Applicant submitted that the notification was calculated to coincide with the expiry of its contract with the Procuring Entity as it had an ongoing contract for provisions of security services to the Procuring Entity.

The Procuring Entity denied that it notified the Applicant late and/or with the intention of prejudicing the Applicant's rights. The Procuring Entity submitted that it notified the Successful Bidder and all other bidders on 25th October 2013 in accordance with Section 67 of the Act.

The Procuring Entity alluded that the inordinate delay between the date the letters were prepared and the actual postage date was occasioned by the bureaucratic procedures at the Procuring Entity.

The Board notes that the Procuring Entity concluded the evaluation of the tenders on 5th September, 2013 and made the award of the Tender on 19th September 2013. The Board further notes that letters of notification to bidders were written and dated 4th October, 2013 but these were not posted to bidders until 25th October and the Applicant received its letter on 28th

October 2013. Under Regulation 66(2) of the Public Procurement and Disposal Regulations as amended, *"a procuring Entity shall immediately after tender award notify the unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful"*

The Board notes that even after such a long delay, the letters to the Bidders did not appear to have been sent simultaneously as required by Section 67(2) of the Act: for instance, M/s Bedrock Security Limited, an Interested Party, stated that it only learnt of the outcome of the tender through the notification of Appeal received from the Board. As a matter of fact, M/s Bedrock Security only acknowledged receiving their letter of notification on the day of the hearing of this Request for Review.

The Board finds it hard to believe that the Procuring Entity can be so inefficient in dealing with this part of their obligation to Bidders or accept their reasons as stated. Indeed in today's digital era most businesses have addresses that include email addresses, and it should not have been difficult for the Procuring Entity to use email to reach bidders fast and efficiently as an alternative to ordinary postal correspondence. The Board therefore concurs with the Applicant that this delay was calculated and had an ulterior motive. The Board notes that the existing contract between the Applicant and the Procuring Entity came to an end on 1st October 2013 and notification letters to Bidders were written on 4th October 2013. The Board is persuaded that the most likely reason for delaying the notification to bidders was calculated to allow the Applicant's existing contract to lapse. This is further confirmed by the action of the Procuring Entity in following through with a determined action to hound the Applicant out of its premises using every

available means, including seeking court orders. The Board holds that this is the prejudice the Applicant has suffered. Consequently this Ground of Appeal succeeds.

Issue No. 6 - Whether the Applicant met all Tender Requirements (Ground 8)

This ground emanates from the reasons adduced by the Procuring Entity in rejecting the Applicant's bid. The reasons adduced were as follows;

- a) *Submitting a Bid Bond that omitted one of the salient conditions of a valid bid security*
- b) *Failure to provide either valid work injury benefits policy or group personal accident policy or employer's liability*
- c) *Failure to provide copy of Contract for Contractual Liability Insurance Policy cover of Kshs 10,000,000 per event per annum*

The Applicant stated that the Procuring Entity erred in rejecting its Bid. It alleged that it had conformed to all material requirements in the Tender Document.

The Procuring Entity submitted that it indeed provided a standard form which the bidders were to use in providing a bid bond from the bank. It averred that the bid bond provided by the Applicant left out a salient condition in a bid bond which is the very essence of providing the bid security namely the condition that will make the bidder forfeit the bid bond if the bidder fails to accept the correction of errors. It submitted that the

Applicant's bid bond was therefore non compliant with the specimen provided in the Tender Document, hence the rejection of the Applicant's bid.

The Procuring Entity submitted that instead of providing a copy of the policy document or a cover note from the insurance company for work injury benefits policy or group personal accident policy or employer's liability policy, the Applicant provided a general letter addressed to **whoever it may concern**. The Procuring Entity averred that this was material deviation from its mandatory requirement and hence the rejection of the Applicant's bid.

The Board finds that the conditions regarding bid bond and copies of the required insurance policies are well spelt out in the tender document and the Applicant was supposed to comply in full. The Board notes that the Applicant's bid document has a copy of a letter from AMACO Insurance Company Limited stating that AMACO has issued to M/S Total Security Surveillance Ltd with insurance covers for Public Liability, Contractual Legal Liability, Work Injury Benefit Act (WIBA) and Group Personal Accident from 1/7/2013 to 30/6/2014. The Board notes that the limit for Contractual liability in the letter is Kshs 3,000, 000 per event and Kshs 10,000,000 per year and no copy of policy document is attached to that letter. The Board further notes that the Applicant's bid document has a copy of a letter from CIC Life confirming that CFC Life Assurance Co. is currently insuring Total Security Surveillance for the Group Life insurance cover for their guards for the period *1/12/2012 to 30/11/2013 subject to premium payments.*

The Board therefore finds that the Applicant indeed failed to comply with mandatory requirements as stated under Clause 1.1 of the Tender Document, bullets 9, 10 and 16. This Ground for Review therefore fails.

Issue No. 7 – Statement of Loss by the Applicant (Grounds 9 and 10)

The Applicant alleged that negative evaluation and rejection of its bid by the Procuring Entity has **caused its company bad reputation and loss of business** - in this instance the tender in question.

The Board's view is that when a bidder takes part in a tendering process, it takes a commercial risk with no guarantee that it will win the contract. Subsequently no bidder can claim for compensation from a procuring entity when it is not awarded the contract. Each party should therefore bear its own risks and costs. Furthermore, the Applicant has not demonstrated how losing in a competitive bidding process is linked to loss of reputation.

In conclusion therefore the Board, having considered all the foregoing, finds that the conduct of the Procuring Entity in evaluating this tender brings out certain anomalies that need to be remedied, namely:

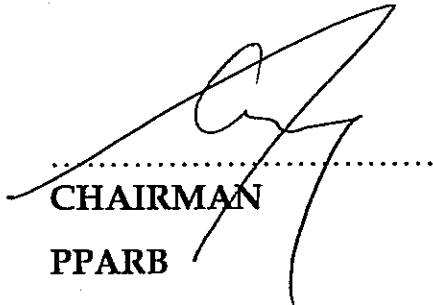
- a) In selecting M/s Babs Security Limited as the winner of the tender the Procuring Entity changed sections of its own mandatory requirements in the Tender Document purposely to accommodate a bidder that had not qualified.
- b) The Board, having given orders that no contract should be issued to the winner pending the Board's decision on the Request for Review, the Procuring Entity went ahead and acted in bad faith and in breach of the law, to employ M/s Babs Security Services Limited, albeit on temporary basis.
- c) Notification to Bidders was inordinately delayed and in some instances not served to some of the participating bidders in the manner required.

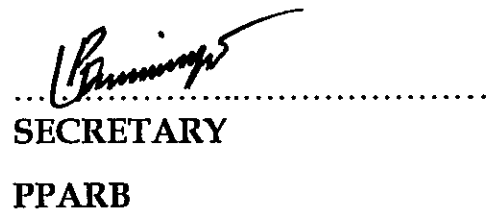
Taking into account all the above, the Request for Review succeeds.

Further, the Board hereby issues the following orders:

1. *The Tender award to M/s Babs Security Services Ltd is hereby annulled.*
2. *The Board directs the Procuring Entity to do the following:*
 - (a) *Amend the Tender Document accordingly to allow and encourage competition.*
 - (b) *Not to advertise the Tender afresh but to issue Tender Documents to the 19 bidders that participated in the Tender process subject matter of this Review.*
3. *The Procuring Entity shall complete the new tender process within 45 days from the date of this ruling.*
4. *The Board gives no orders as to costs.*

Dated at Nairobi on this 25th day of November, 2013.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

