

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 03/2013 OF 22ND JANUARY, 2013.

BETWEEN

LAVINGTON SECURITY LTD.....APPLICANT

AND

**MUHORONI SUGAR COMPANY
LTD (IN RECEIVERSHIP)PROCURING ENTITY**

Review against the decision of Muhoroni Sugar Company Ltd (In Receivership) in the matter of Tender No. MUSCO/TSS/2012-2013 for Provision of Security Services.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Ms. Pauline Opiyo - Ag. Secretary
Ms. Shelmith Miano - Secretariat.

PRESENT BY INVITATION

Applicant - Lavington Security Ltd

Mr. Charles Njuguna - Advocate
Ms. Janet Ogata - Advocate
Mr. George Onyango - General Manager

Procuring Entity - Muhoroni Sugar Company Ltd

Mr. Thomas Makeni - Joint Receiver Manager
Mr. Asa Okoth - Joint Receiver Manager
Mr. John Odhiambo - Buyer

BOARD'S DECISION

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

BACKGROUND OF AWARD

Prequalification of Suppliers

Tender for Prequalification of Suppliers for Provision of Security Services, Tender MUSCO/B17/11-12, was advertised in the Daily Nation on the 25th March 2011.

Eleven (11) firms were prequalified namely;

1. Metro Consultants
2. Inter Security
3. Total Security (K) Ltd
4. Bedrock Holding
5. Bedrock Security Services
6. Lavington Security Ltd
7. Kamaliza Security
8. Senaca East Africa.
9. Luanda Security Services
10. Riley Falcon
11. Guard Force Security

Invitation to Bid

On 24th August, 2012, the Procuring Entity invited quotations / tenders for provision of security services from a selected group of ten (10) security services providers with a view to outsource the services from a competent provider.

Bidders were instructed to submit their technical and commercial bids in separate sealed envelopes sealed together in an outer envelope.

Closing/Opening

Tenders were closed / opened on 14th September, 2012. The following eight of the ten firms that were invited to bid submitted their bids:

S/No.	Bidder Name	Bid Bond	Bid Bond Amount (Kshs)
1.	Guard Force Security	Concord Insurance Co. Ltd	10, 000
2.	Lavington Security Ltd	Co-operative Bank of Kenya	10, 000
3.	Inter-Security Services	Kenya Commercial Bank	10, 000
4.	Riley Falcon	National Bank of Kenya	10, 000
5.	Seneca East Africa	-	-
6.	Total Security Surveillance	-	-
7.	Patriotic Group	-	-
8.	Bedrock Security	-	-

Bid documents for four firms namely: Seneca East Africa, Total Security Surveillance, Patriotic Group and Bedrock Security were opened but were not signed since the tender documents were not separated into technical and commercial as required.

EVALUATION

The Evaluation Committee convened their first meeting on 24th September, 2012 at Company's Boardroom to receive bids to be evaluated and the guidelines for the evaluation exercise. The second meeting took place on 25th

September, 2012 during which the evaluation criteria was appropriately reviewed and score sheets developed in readiness for the evaluation exercise.

Technical Evaluation Criteria:

The technical evaluation was scored out of 60 marks.

During the technical evaluation exercise, the Committee laid emphasis in the following fifteen key factors:

I. Business Registration Certificate.	VIII. Risk Insurance Cover.
II. Availability of Patrol Vehicles.	IX. Provision of Certificates of Good Conduct.
III. Manpower Capacity.	X. Period of Business.
IV. Communication License.	XI. Audited Financial Statements.
V. Kenya Security Industry Association Membership.	XII. Referees.
VI. Government Minimum Wage Compliance.	XIII. Tax Compliance.
VII. Key Personnel (CVs).	XIV. NSSF Contributions.
	XV. NHIF Contributions.

The technical pass mark was deliberately set high at 55 marks out of the possible 60 marks and its attainment made a precondition in qualifying for the commercial evaluation stage citing the sensitivity of Security Services. The committee emphasized on the importance of technical specifications in determining the quality, reliability and safety of the security services sought for.

Received and Opened Bids:

Information given to the Evaluation Committee indicated that a total of eight technical bids were received and opened, namely:

- i. Lavington Security Limited.
- ii. Riley-Falcon Security Services Limited.
- iii. Guard Force Security (K) Limited.
- iv. Inter Security Service Limited.
- v. Senaca East Africa
- vi. Bedrock Security
- vii. Total Security
- viii. Patriotic Group.

Evaluated Bids:

Out of the listed eight technical bids, only four were submitted to the committee for evaluation as detailed here under:

- i. Lavington Security Limited.
- ii. Riley-Falcon Security Services Limited.
- iii. Guard Force Security (K) Limited.
- iv. Inter Security Service Limited.

Evaluation Results & Recommendations:

Having reviewed and established the technical evaluation criteria, the committee held two other successive meetings on the 26th and 27th September 2012 during which the evaluation exercise was concluded.

Technical Evaluation Results

All the four bids presented to the committee were evaluated and the results obtained summarized as detailed in the table here under.

MUSCO/TSS/2012-13 - Technical Evaluation Results:

S/No.	Bidding Company	Technical Scores	Rank
1.	Lavington Security Services Limited	60	1
2.	Riley - Falcon Security Services Ltd	60	1
3.	Guard Force Security (K) Ltd	47	3
4.	Inter Security Services Ltd	43	4

Findings and Recommendations

On the basis of the above results, M/S Guard Force Security Ltd and M/s Inter Security Ltd were eliminated at this stage having failed to attain the set technical evaluation pass mark of 55 marks out of the possible 60 marks. The two firms also failed the integrity test by providing falsified information on key personnel.

Consequently, only the first two ranked bidding firms qualified to proceed to commercial tender evaluation stage each having attained the set minimum technical pass mark.

These were:

1. M/s Lavington Security Services Ltd.
2. M/s Riley-Falcon Security Services Ltd.

However, the committee noted that forwarding only two qualified bidding firms to the commercial evaluation stage would not give a representative spread to provide value for money to Muhoroni. The committee is of the opinion that at least three bids should go to commercial analysis stage.

In view of the above therefore, the committee recommended a refloat.

Tender Committee Decision

The Tender Committee at its meeting of 10th October, 2012 went through the Evaluation Report and observed the following:

- i) Two security firms i.e. Guard force and inter Security had some integrity issues despite having scored pass mark points.
- ii) Two bidders i.e. Riley Falcon and Lavington Security Ltd had scored highly.
- iii) The Evaluation Committee's recommendation of refloat was not justifiable since the threshold had been met - during the opening.

Resolutions

- i) Two security firms i.e. Guard force and inter Security were disqualified from moving to the second stage of commercial opening due to ethical issues mentioned in the evaluation report.
- ii) The two bidders i.e. M/s Riley-Falcon and M/s Lavington Security Ltd qualified to move to the second stage of commercial opening.

Commercial Evaluation

The financial bids of the two firms were given to the Evaluation Committee on 11th October 2012 and the bids were opened the same day. The following were the results:

S/No.	Bidder	Commercial Bid (Kshs)
1	Lavington Security Ltd	1,196,500 per month
2	Riley Falcon Security Services	1,272,520 per month
The quoted price is per month against the budget of Kshs (980,000 + VAT) 1,136,800		

The Evaluation Committee recommended that M/s Lavington Security Ltd who quoted the lowest among the two be considered for the tender.

AWARD OF CONTRACT BY THE TENDER COMMITTEE

At its meeting of 11th October 2012 the Tender Committee looked into the Evaluation Committee recommendation and awarded the Tender to the lowest bidder i.e. M/s Lavington Security Ltd at their quoted price of Kenya Kshs 1, 196, 500. The user department was tasked to move ahead with the negotiations to further reduce the cost.

M/s Lavington Security Ltd (the Successful Bidder) as well as the unsuccessful bidders were notified of the outcome of the tender vide letters dated 29th October, 2012. In the letter of notification of award to M/s Lavington Security Ltd it is also stated that *the tender commencement date will be communicated later.*

THE REVIEW

The Applicant, M/s Lavington Security Ltd lodged this Request for Review on 22nd January, 2013 against the decision of Muhoroni Sugar Company Ltd (In Receivership) in the matter of Tender No. MUSCO/TSS/2012-2013 for Provision of Security Services.

The Applicant was represented by Mr. Charles Njuguna, Advocate, while the Procuring Entity was represented by Mr. Asa Okoth and Mr. Thomas Makeni, Joint Receiver Managers.

The Applicant requests the Board for the following orders: -

- i) That the Board annuls the decision of the Procuring Entity in respect to tender No. MUSCO/TSS/2012-2013 for provision of security services.*
- ii) That the Board orders the Procuring Entity to execute the contract with the applicant for security services as awarded within 14 days of the order and further direct immediate deployment.*
- iii) That the Board restrains the Procuring Entity from procuring security services from other suppliers otherwise than as provide in tender No. MUSC/TSS/2012-2013*
- iv) That the Board to order the Procuring Entity to pay the applicant the cost of instant proceedings.*
- v) That the Board to issue further orders as it may deem just.*

The matter first came to the Board on 13th February, 2013 during which time the Procuring Entity asked the Board to allow it time to finalize the impending matter with regard to the signing of the contract. The Board then granted the parties leave and resumed on 19th February, 2013 for a full hearing.

Preliminary Issue

During the hearing, the Procuring Entity requested the Board to give it access to a computer for the purposes of retrieving a letter it had written to the Applicant and which letter had not been received by both the Applicant and the Board. After retrieving the letter dated 18th February, 2013 and serving both the Applicant and the Board, the Board noted that the said letter was in effect advising the Applicant to consider its earlier letter of award as cancelled. The Board therefore conceived the implication of the letter to mean that indeed the subject tender was cancelled and therefore the issue of jurisdiction of the Board came in play. The Board resolved to address this issue together with the other issues.

The Applicant raised four grounds of review which the Board deals with as follows:

Grounds 1, 2 and 3 - Breach of Sections 2 and 68 of the Public Procurement and Disposal Act, 2005 (herein referred to as "the Act") and Clauses 2.26 and 2.27 of the Tender Document

The above grounds for review have been consolidated as they raise similar issues relating to the failure by the Procuring Entity to execute the Contract after award.

The Applicant submitted as follows:-

1. That the Procuring Entity's refusal to execute the contract after it had made an award to it was in breach of Sections 2 and 68 of the Act read together with Clauses 2.26 and 2.27 of the tender document.
2. That in refusing to execute the contract, the Procuring Entity was acting in bad faith and therefore undermining the integrity and fairness of the procurement process in breach of the spirit and letter of the law and objectives of the Act as set out in Section 2 of the Act.
3. That the decision by the Procuring Entity not to execute the contract is in breach of the Applicant's legitimate expectations as guaranteed by the provisions of the Act and Article 227 of the Constitution. It stated that the reasons advanced by the Procuring Entity for not executing the Contract are not justifiable considering the provisions of Sections 93 to 100 of the Act.
4. That indeed the Request for Review is unique in that the Procuring Entity has not disputed any of its grounds for review and that the Procuring Entity had admitted the following:-

- a) That it had commenced the procurement process and proceeded to make an award to it on 29th October 2012.
- b) That it had dully accepted the award vide its letter dated 2nd November 2012.
- c) That on 2nd January 2013, after a meeting held at the Procuring Entity's premises between the parties, the Procuring Entity requested the Applicant to allow it seven days to revert back to it on the issue of provision of security services.
- d) That on 15th January 2013, the Applicant, through its lawyers wrote to the Procuring Entity asking it to comply with the requirements of the law by forwarding to it a contract for execution and allowing it to take over the security operations failure to which it would proceed with legal action against the Procuring Entity.
- e) That on 16th January, 2013, vide its letter to the Applicant, the Procuring Entity responded and gave the reasons as to why it was not keen to execute the contract with the Applicant. The Procuring Entity undertook to resolve the dispute and revert back by 28th February 2013.

The said reasons are:

- (i) *There was no contract at the time and indeed upto now, to provide the framework for your company to render security services. Such contract is mandatory in all contractual assignments as it spells out the terms of service, and identify*

key deliverables, obligations and responsibilities of contracting entities.

(ii) Secondly the offer communicated to you was erroneous as it excluded your invitation to a contract negotiation meeting after acceptance of our offer. The price was also not time bound. Furthermore the tender process has been contested by one of the bidders (please see copy of a self explanatory letter from the aggrieved bidder) which must be resolved first.

- f) That under the provisions of the Tender Document at Clauses 2.26, it was clear that the Procuring Entity was required to execute the contract with the successful bidder within 30 days after award.
- g) That after the tender award, none of the participating bidders had lodged any complaint on the process and indeed the Procuring Entity had advised Applicant to prepare for deployment as of 1st January, 2013.
- h) That during the hearing, the Applicant was surprised to receive a letter from the Procuring Entity indicating that the procurement process was terminated for reasons that the financial status of the company could not meet the obligations of the contract as it could not afford to pay for the services.

On matters of law, the Applicant argued as follows:-

1. That under Section 26(6) of the Act, a Procuring Entity is prohibited from commencing procurement proceedings without setting aside in its budget sufficient funds to meet the obligations of the resulting

contract. It therefore argued that it was too late in the day for the Procuring Entity to now talk of cancellation of the Contract due to lack of sufficient funds.

2. That the above position was taken after the subject Request for Review was filed and even after both the Procuring Entity and the Applicant had been to the Board for the hearing over the matter and in which appearance the issue of funds was never advanced.
3. That the procurement law is crafted in a manner which appreciates that tendering process has timelines which must be observed in order to enhance the integrity of the procurement process. To this end, the Applicant urged the Board to consider the flip side of the matter whereby a successful bidder refuses to sign a contract. It submitted that under Section 57(3) (c) of the Act, the successful bidder would lose the Tender Security if it refuses to sign the contract and that for fairness, there should be some compensation in the case where it is the Procuring Entity which refuses to enter into a contract with a successful bidder.
4. That the effect of having an offer and same having been accepted as was the case here is an indication that a contract arises between the parties as envisaged by Section 68 of the Act. In particular, it argued that under Section 68(2) of the Act, a Procuring Entity is obligated to enter into a contract within the period specified in the notification. It argued that in the instant case, the contract ought to have been entered into within 30 days after notification of award.
5. That there was no provision under the Act which a Procuring Entity could invoke to withdraw a letter of award once issued. It stated that it

was only the Public Procurement Oversight Authority or the Review Board which could nullify a letter of award.

6. That Section 94 of the Act makes it illegal for a procuring entity to purport to act on anything touching on a procurement process under which an appeal has been lodged. It stated that once an appeal is lodged, the procurement process is suspended and the Procuring Entity cannot purport to be cancelling the award at that stage.

Finally, the Applicant argued that it was clear that the actions by the Procuring Entity were made in bad faith and that there were no consistent reason as to why the contract cannot be entered into. It submitted that all the reasons advanced were not bona fide and therefore not justifiable. It urged the Board to find that it had jurisdiction to hear the matter, find that the Application is meritorious, allow the Request for Review and order the Procuring Entity to execute the Contract.

In response, the Procuring Entity associated itself with its written response to the Request for Review. It submitted that it had resolved to terminate the offer due to matters of economic importance. It stated that it was technically bankrupt and after the current Receiver Managers had taken over the management of the company, it was evident that it could not execute the contract due to its current cash flow situation which could not allow it to meet its financial obligations under the Contract.

The Procuring Entity submitted that the time lapse in communicating the decision to withdraw the letter of offer was not in bad faith and that the same was occasioned by the change in receiver managers. It stated that the tender

was first initiated by their predecessors i.e. the receiver managers before them and that it was only after the current receiver managers took office on or around the 6th of December, 2012 that it carried out due diligence on the operations of the company. It submitted that the due diligence revealed that it could not sustain the security contract due to financial difficulties.

The Procuring Entity submitted that, after discovering that it was in a financial crisis, it decided to use alternative security arrangements which include the deployment of its own staff and the use of provincial administration which was cheaper than the costs that would be associated with a contract with the Applicant.

It further submitted that it had attempted to hold several meetings with the Applicant to explain the same but the Applicant could not cooperate on the matter hence opted to come to the Board.

Finally, the Procuring Entity restated its position that it had no financial capacity to enter into contract with the Applicant and urged the Board to find that the actions it had taken were all in good faith.

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

Preliminary Issue

Before considering the matter on its merits, it is important that the Board addresses the preliminary issue which touches on the jurisdiction of the Board to hear and determine this matter.

The Board takes note of the Procuring Entities letter to the Applicant dated 18th February 2013. The said letter stated as follows:-

"RE OFFER FOR PROVISION OF SECURITY SERVICES

We refer to our letter of offer for provision of security services Ref. REC/TENDERS/SB/04/2012 dated 29th October, 2012.

The current Joint Receiver Managers of Muhoroni Sugar Company Ltd (In Receivership) after carrying out due diligence of the financial status of the company wishes to state that it cannot afford outsourced security services at the moment. The management has therefore decided to use its internal security personnel who are permanent employees.

This position has been informed by the weak financial status of the company which has led to inability to meet financial obligations as they fall due. The company is currently indebted heavily to Kenya Revenue Authority in unpaid taxes which are already attracting interest and penalties. The company has also not paid other creditors including the suppliers of factory spares for a long time and this is threatening the continued running of the factory. The priority is in clearing these debts. It is therefore not possible to enter into any new contractual obligation including provision of security services at the moment.

In this regard, the company is advising you to consider the said letter of offer cancelled. We request for your understanding at the moment. Your services shall be considered in future when the financial status of the company improves.

Thanking you in advance.

.....”

From the above, it is clear to the Board that the Procuring Entity purports to have cancelled its earlier letter of award to the Applicant. This in effect means that the tendering process is cancelled and therefore there is no tender to adjudicate on. The issue which arise from the foregoing is whether the Board has jurisdiction to hear and determine a tender that has been cancelled by a Procuring Entity.

To answer this, the Board takes cognisance of Sections 36 and 94 of the Act which provide as below:-

Section 36 of the Act:-

“(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

2.26.3 The parties to the contract shall have it signed within 30 days from the date of notification of contract award unless there is an administrative review request."

Clause 2.27:-

"2.27.1 Within thirty (30) days of the receipt of notification of award from the Procuring Entity, the successful tenderer shall furnish the performance security in accordance with the Conditions of Contract, in the Performance Security Form provided in the tender documents, or in another form acceptable to the Procuring entity.

2.27.2 Failure of the successful tenderer to comply with the requirement of paragraph 2.29 or paragraph 2.30.1 shall constitute sufficient grounds for the annulment of the award and forfeiture of the tender security, in which event the Procuring entity may make the award to the next lowest evaluated or call for new tenders."

The Board also notes the provisions of Sections 2 and 68 of the Act which state as follow;

Section 2 of the Act:-

"The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives –

(a) to maximize economy and efficiency;

(b) to promote competition and ensure that competitors are treated fairly;

(c) to promote the integrity and fairness of those procedures;

- (d) to increase transparency and accountability in those procedures;
and
(e) to increase public confidence in those procedures.
(f) to facilitate the promotion of local industry and economic
development."*

Section 68 of the Act:-

- "(1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under Section 62 and any corrections under section 63.
(2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.
(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into."*

From the foregoing, the Board observes that on the basis of the contents of the letter of notification, the provisions of the Act and the provisions of Tender Document cited herein, the Applicant had a legitimate expectation that the Procuring Entity would prepare the necessary contract documentation within the time limits provided for in the Act and the Tender Documents, and forward the same to the Applicant to facilitate the signing of the contract.

On the issue advanced by the Procuring Entity on its inability to meet the financial obligation envisaged in the contract for the security services, the Board notes as below:-

1. When the matter first came to the Board on 13th February 2013, the Procuring Entity asked for more time to decide on the matter and did not state that it was not financially sound to service the contract. The letter of termination is dated 18th February, 2013.
2. During the hearing, the Procuring Entity failed to back up its allegation on its financial situation with any documentary evidence in support of the same.
3. That the subject tender was commenced by the then Joint Receiver Managers. The notification of award was also done by the then Joint Receiver Managers.
4. The Evaluation Report by the Procuring Entity also shows that there was a budgetary allocation set aside for the tender.
5. The current Receiver Managers are attempting to reverse by their predecessors and have not provided any documentary evidence to sustain the argument on lack of funds for this procurement. Therefore the letter of termination dated 18th February, 2013 is an afterthought.

Taking all the above into consideration, these grounds of appeal succeed.

Ground 4 - Statement of Loss

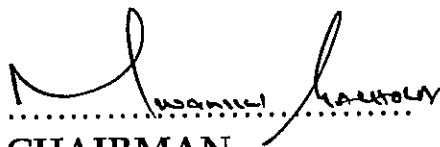
The Applicant states that the action of Procuring Entity is causing it loss and damage as:-

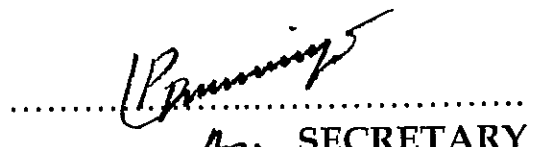
- i. The award requires a total workforce of 76 people as follows: - 68 guards, 2 supervisors, 2 patrol vehicles (4WD) with crew.
- ii. The Applicant has set aside the said staff to serve the contract from 1st January, 2013.
- iii. The Applicant is liable to meet the costs of the said staff and equipment notwithstanding that they have not been deployed to serve in the instant assignment.
- iv. The Applicant legitimate expectations are being frustrated by the conduct of the Procuring Entity.

With regard to the Applicant's prayers to be awarded damages and the costs of the instant Request for Review, the Board has held severally that tendering costs are commercial business risks taken by the parties in the course of doing business and as such, each party should bear its own costs.

Taking all the above into consideration, the Request for Review Succeeds. The Board orders, Pursuant to Section 98(b) of the Act, that the Procuring Entity to finalize the Procurement Process within 30 days.

Dated at Nairobi on this 21st day of February, 2013.


.....
CHAIRMAN
PPARB


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Ag. SECRETARY
PPARB

